Goddard

The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: FAA Seattle Venture, Ltd.

File: B-234998.2

Date: August 9, 1989

DIGEST

Where solicitation for lease of facilities requires that offerors submit evidence of site ownership or control, agency could not accept proposal which included no evidence of control but merely a unilateral "agreement" to purchase which was not signed by the seller and a letter from a potential seller which merely indicated an intent to try to negotiate a sale.

DECISION

FAA Seattle Venture, Ltd. (FAASVL), protests the rejection of its offer and the award of a contract to the Austin Company under solicitation for offers (SFO) No. MWA-70343, issued by the General Services Administration (GSA) for the lease of a minimum of 134,800 square feet to a maximum of 138,970 square feet of office, light industrial, and warehouse space to house the Federal Aviation Administratio region 10 office.

The protest is denied.

FAASVL's offer was rejected because the documentation submitted with its offer failed to show evidence of ownership or control of the site. FAASVL contends that it had legally enforceable control of the site, that other agencies have stated they would have been satisfied with th form of evidence FAASVL submitted and that if further documentation were required it should have been requested. FAASVL asserts that GSA did not request additional site control documentation; rather, FAASVL states that GSA

indicated on the telephone that the information supplied was sufficient. FAASVL states that since its offer would have saved the government $19,000,000 over the 20-year term of the lease, compared to Austin's offer, it should have received the award.

The solicitation stated that at the time of submission of offers offerors shall submit to the contracting officer evidence of ownership or control of the proposed site. GSA states that the purpose of this requirement was to ensure that the building offered would be constructed on the site offered.

The contracting officer states that during the market phase of this procurement he informed the protester's president that FAASVL would have to submit evidence of site control with its offer. According to the contracting officer, this conversation occurred when the protester showed the contracting officer a proposed site which the contracting officer says another potential offeror alleged control of. The contracting officer states that subsequently, after initial offers were received, he again orally informed the protester that in order for an offer to be acceptable, it had to contain evidence of site control. The contracting officer categorically denies that at any time he advised the protester that the information it submitted was sufficient.

FAASVL states that the best and final offer (BAFO) request letter from GSA to it did not indicate that FAASVL had provided insufficient evidence of site control. FAASVL contends this deficiency could have been remedied had GSA alerted it to the problem. FAASVL alleges that GSA deliberately concealed this matter only to later use it as a reason to prevent FAASVL from receiving an award.

The record shows that FAASVL originally submitted to GSA as evidence of site control a document entitled "Agreement to Convey Real Property." This "agreement" stated that the undersigned seller had received a deposit from the protester for the purpose of purchasing certain parcels of land at Orillia Industrial Park. However, the seller was not identified and the seller's signature did not appear on the purported agreement. Therefore, the document in fact did not represent an agreement between the two necessary parties, the seller and the buyer, but merely represented a unilateral indication that the protester was interested in purchasing the parcels. Nowhere was any agreement actually made to sell any property. GSA, therefore, could not have accepted this document as evidence of site control and could not accept FAASVL's offer of those sites. See W.D.C. Realty Corp., B-225468, Mar. 4, 1987, 87-1 CPD ¶ 248.

In its BAFO, FAASVL offered three alternative sites, but again produced the same type of document as evidence of site control for two of the sites as it produced in its initial offer. With respect to the third site, certain parcels of land at Orillia Industrial Park, FAASVL produced a letter from the senior director of the corporate owner stating that if FAASVL were awarded the lease by GSA, the owner would enter into negotiations regarding a sale subject to continued availability of the land and corporate approval. The letter also noted that other developers had also indicated their intent to submit sites at Orillia to GSA.

Although this letter expresses an interest by the owner in selling certain parcels of land it is conditioned on the possibility of prior sale of the land and the successful outcome of contract negotiations. In fact, FAASVL acknowledges that this letter failed to provide the requisite evidence of site control by stating that the company selling the Orillia sites "was extremely hard to deal with; they would not accept our offer of an option to purchase the land - they knew there were several competitors for this project and did not wish to commit themselves in any way to a particular offeror."

Accordingly, this letter cannot be stated to represent the requisite site control called for in the solicitation. W.D.C. Realty Corp., B-225468, supra. FAASVL submitted, therefore, an unacceptable BAFO since GSA could not have accepted it without further modification, i.e., satisfactory evidence of site control.

With respect to whether adequate discussions were held with FAASVL, Federal Acquisition Regulation (FAR) § 15.610(b) (FAC 84-16) requires that written or oral discussions be held with all responsible offerors whose proposals are in the competitive range. This fundamental requirement includes advising offerors of deficiencies in their proposals and affording them the opportunity to satisfy the government's requirements through the submission of a revised proposal. FAR § 15.610(c)(2) and (5) (FAC 84-16); Furuno U.S.A., Inc., B-221814, Apr. 24, 1986, 86-1 CPD ¶ 400. Thus, it is well settled that for competitive range discussions to be meaningful, agencies must point out weaknesses, deficiencies, or excesses in proposals unless doing so would result in technical transfusion or technical leveling. Advanced Technology Sys., B-221068, Mar. 17, 1986, 86-1 CPD ¶ 260; Data Resources, B-228494, Feb. 1, 1988, 88-1 CPD ¶ 94.

FAASVL and GSA dispute whether any oral discussions were held regarding the need to provide adequate evidence of site control. FAASVL points to the fact that GSA's BAFO request letter made no mention of the site control issue. GSA contends that FAASVL was advised of the importance of site control evidence by the contracting officer on two occasions. First, when the contracting officer met with FAASVL's president prior to receipt of initial proposals and, secondly, when the contracting officer advised FAASVL's president over the telephone that the unilateral document submitted in its initial proposal did not demonstrate it controlled the site and that its offer was not acceptable for that reason.

As stated above, discussions with offerors may be written or oral. Here, the parties contentions are in direct conflict as to whether oral discussions on the need for evidence of site control ever occurred. While FAASVL contends it was not aware of the deficiency in its proposal, we note that in its BAFO it submitted new sites with additional documents purporting to show site control. Therefore, we find that the preponderous of the evidence supports the view that FAASVL was aware of the deficiency and took what steps it could to correct it. Coastal Elecs., Inc., B-227880.4, Feb. 8, 1988, 88-1 CPD ¶ 120.

With respect to FAASVL's allegation that the contracting officer was acting in bad faith, we have held that procurement officials are presumed to act in good faith, and in order to show otherwise a protester must meet a heavy burden of proof. William B. Hackett & Assocs., Inc., B-232799, Jan. 18, 1989, 89-1 CPD ¶ 46. To the extent that FAASVL is asking us to conduct an investigation to substantiate its allegation, the protester has the obligation of presenting its own case. We do not conduct investigations for the purpose of establishing the validity of a protester's argument. Id. We find that FAASVL has not met its burden here.

FAASVL also contends that GSA on four successive occasions requested FAASVL to extend the acceptance date of its offer and this suggests that FAASVL's offer was acceptable. GSA requested the extensions because it was still evaluating the proposals, and had not made a final selection decision. Although FAR § 15.1001(a) (FAC 84-13) requires contracting agencies to promptly notify unsuccessful offerors that their proposals have not been selected for award unless disclosure might prejudice the government's interests, FAR § 15.1001(c) (FAC 84-13) only imposes an obligation upon contracting

agencies to notify unsuccessful firms of the agency's award decision once the award has been made. We are aware of no legal authority under the circumstances here which imposes a duty upon contracting officials to notify offerors prior to making an award. Kunkel-Wiese, Inc., B-233133, Jan. 31, 1989, 89-1 CPD ¶ 98.

The protest is denied.

James F. Hinchman
General Counsel