S. Riback

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Victorio Investment Company, Ltd.

File: B-236024

Date: November 1, 1989

DIGEST

1. Protest that agency improperly canceled a negotiated solicitation is denied where the agency offers a reasonable basis for its decision to cancel the solicitation.

2. Protest that agency improperly made award of a contract during the pendency of a protest is denied where award was made under another contract for a different requirement than as stated in the solicitation.

DECISION

Victorio Investment Company, Ltd. (VIC), protests the cancellation of solicitation for offers (SFO) No. 88-01 by the General Services Administration (GSA). The SFO had been issued for the lease of office space in Golden, Colorado, for the Department of Energy's Western Area Power Administration (WAPA). VIC also argues that GSA has violated the stay provisions of the Competition in Contracting Act (CICA), 31 U.S.C. § 3553(c) (Supp. IV 1986), by awarding a 1-year extension lease to the current incumbent lessor to WAPA.

We deny the protest.

The SFO was originally issued by WAPA for the lease of approximately 90,000 net usable square feet of office space in the Golden, Colorado area. The contemplated lease term was 5-years with two 5-year renewal options. At the time of the solicitation's issuance, WAPA believed that it was operating under a valid delegation of procurement authority (DPA) from GSA. Subsequent correspondence between GSA and WAPA, however, established to the satisfaction of WAPA that, in fact, it had no authority to enter into a valid lease

agreement on its own behalf.1/ Accordingly, by amendment No. 0004 to the subject SFO, dated December 20, 1988, WAPA transferred to GSA the authority to conduct all business pertaining to the current solicitation, including the making of an award under the SFO.

Prior to the issuance of amendment No. 0004 to the SFO, however, WAPA had conducted an extensive portion of the acquisition process, including advertising for the acquisition, issuing the SFO, and receiving and evaluating initial and best and final offers.

After GSA had taken over the procurement package, it became aware of various infirmities in the SFO and the acquisition process and also became aware of another Department of Energy (DOE) requirement in the geographic area.2/ As to the problems associated with the subject SFO, GSA found that there existed a discrepancy between the delineated area stated in the original advertisement and the delineated area stated in the SFO, with the latter being significantly larger than the former. GSA also found that WAPA had conducted the required market survey after the receipt of initial offers rather than before and that the SFO contained an award factor of an additional 50,000 square feet of expansion space which had not been used as an evaluation factor by WAPA in its evaluation of offers but, rather, as a minimum requirement. In addition, GSA found that the SFO provided for the evaluation of offers exclusive of all lease renewal options, contrary to GSA regulations, and that the SFO did not contain an explicit statement regarding government termination rights. Also, GSA found that the SFO did not contain a significant number of legally required clauses. Finally, GSA found that WAPA had stated its requirement as 90,000 net usable square feet rather than

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1/ WAPA had been given a DPA by GSA in 1981 to lease its current office space. That lease contained two 5-year options at the end of the initial term which expired in 1985. WAPA had exercised the first of those two options in 1985 but, rather than exercise the second option, had initiated its own leasehold acquisition action by issuing the current SFO.

2/ As to the additional DOE requirement, GSA became aware that DOE's Denver Regional Office (DRO) had a requirement for approximately 7,500 square feet within the delineated area of the subject SFO. The delineated area is the geographic area within which a firm's property must lie in order to be considered for the award of a lease.

90,000 gross square feet, and that the WAPA contracting officer had apparently improperly evaluated the offers by misapplying the "moving cost" evaluation factor.

GSA accordingly began discussions with DOE regarding the appropriate course of action under the circumstances. The two agencies agreed that either the current SFO would be amended to correct the various problems found by GSA and to include the DRO requirement, or that the SFO would be canceled and a new, properly executed SFO, containing the additional DRO requirement, would be issued. During these discussions, GSA, on May 19, 1989, placed an advertisement containing a proper statement of the delineated area under consideration. Thereafter, however, GSA determined that the most efficient course of action would be to cancel the subject SFO and issue a new one. Accordingly, on June 26, GSA's contracting officer issued a letter to all firms remaining in the competitive range notifying them that SFO No. 88-01 was canceled. This letter stated that the cancellation was because DOE had identified additional requirements in the area and that a new consolidated SFO would be issued. In addition, GSA executed a 1-year lease extension with the firm which currently provides WAPA with its space on a sole-source basis, commencing May 1, 1990. This protest followed.

VIC first argues that GSA did not have a reasonable basis to cancel the SFO. In this regard, VIC alleges that the space requirements of WAPA remain unchanged from those outlined in the original SFO and that correspondence between GSA and DOE shows that if consolidation of the WAPA and DRO requirements meant cancellation of SFO No. 88-01, DOE would not have agreed since its requirement for WAPA space is urgent. VIC therefore alleges that the "change in requirements" rationale proffered by GSA cannot serve as reasonable basis for the cancellation. As to the remaining SFO infirmities, VIC argues that the vast majority of these are minor in nature and therefore remediable by amendment rather that by cancellation and issuance of the SFO. Finally, VIC argues that the discrepancy between the delineated area in the original advertisement and the SFO has already been cured by GSA's May 19 advertisement which included the correct delineated area.

GSA responds that it has advanced adequate reasons for its decision to cancel SFO No. 88-01, including the original reason, namely, that DOE in the aggregate has had a change in its basic requirements for the Denver area. In addition, GSA asserts that, given the cumulative effect of all of the SFO's deficiencies as well as the problems associated with the procurement process, it is far more efficient for it to

cancel and resolict rather than extensively amend a solicitation with so many problems. GSA also contends that enhanced competition will result from cancellation and resolicitation.

In a negotiated procurement, the contracting officer has broad discretion in determining whether to cancel a solicitation and need only have a reasonable basis to do so. System-Analytic Group, B-233051, Jan. 23, 1989, 89-1 CPD ¶ 57. This is true regardless of whether the information which forms the basis for the cancellation comes to light after the submission and evaluation of offers. Id.

Here, we think that GSA has offered adequate justification for its decision to cancel SFO No. 88-01. First, as noted above, the space requirements for DOE in the Denver area have changed from those contemplated under the original SFO. In this regard, we think the agency has the business discretion to determine whether or not some economic benefit may inure to the government as a result of its consolidation of DOE area needs into one new solicitation. Second, the record shows that the SFO clearly contained numerous infirmities. We note, for example, that we cannot determine the effect on competition that the original SFO's request for an additional 50,000 square feet of expansion space may have had. (GSA does not anticipate including any request for expansion space in the new SFO). Third, the discrepancy between the delineated area in the original SFO and advertisement also serves to support GSA's decision. In this respect, VIC argues that the agency readvertised the requirement on May 19, 1989, and that additional offerors, if any, which responded should receive an amended SFO and be allowed to compete without canceling the SFO. According to the protester, this would permit a "prompt award." We note, however, that even if the agency had the authority to include new offerors in the competition under the SFO at this late stage (after BAFOs), submission of proposals from the new offerors would require evaluation, discussions and a new round of BAFOs--tantamount to cancellation and resolicitation. In sum, we find, in view of the cumulative defects present, that GSA had a reasonable basis for the cancellation and therefore deny this basis of VIC's protest.3/

3/ With regard to the SFO deficiencies as well as the delineated area problem, VIC argues that, even if we conclude that these are sufficient rationale for the cancellation, it should nonetheless be reimbursed its protest costs because the agency did not identify these

(continued...)

VIC also argues that GSA's sole-source award of a 1-year extension to its preexisting lease for WAPA's office space is violative of the CICA "stay" provisions, 31 U.S.C. § 3553(c). Specifically, VIC argues that GSA has violated CICA's prohibition against the awarding of a contract by making an award under another contract for the same requirement.

We disagree. CICA, by its terms, only prohibits the award of a contract during the pendency of a protest where that award is made under the particular procurement which is the subject of the protest. 31 U.S.C. § 3553(c). Here, the award in question was not made under the protested SFO and, thus, CICA's stay provision is inapplicable. Further, contrary to the protester's assertions, award was not made for the same requirement as solicited in the procurement. The SFO, with options, was for a period of 15 years. The requirement awarded was for an interim 1-year lease to permit the agency to orderly process this procurement. As such, we find nothing improper in the award.

We deny the protest.

for James F. Hinchman
General Counsel

3/(...continued)
reasons until the filing of the agency report for this protest. We disagree. As we have noted on previous occasions, an agency may cancel a solicitation, and we will not object to that cancellation even where it is based upon reasons advanced subsequent to the decision to cancel. See Crow-Gottesman-Hill #8, B-227809, Oct. 2, 1987, 87-2 CPD ¶ 323.