

McArthur



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Landsing Pacific Fund

File: B-237495

Date: February 22, 1990

Donald G. Featherstun, Esq., Pettit & Martin, for the protester.

David P. Miller, Esq., Stoel, Rives, Boley, Jones & Grey for Melvin Mark, Jr.; Stephen M. Biagiotti, for SDA Inc.; and Earl Wilson, for Greenville Storage & Investment, interested parties.

S. Lane Tucker, Esq., General Services Administration, for the agency.

C. Douglas McArthur, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency failed to apply solicitation preference for historic buildings is denied since preference did not apply where agency reasonably concluded that the proposed awardee's offer was superior to protester's offer.

2. Contention that agency cannot award contract because disclosure of name of proposed awardee and estimate of the cost of the project in local newspapers after best and final offers precludes execution of Certificate of Procurement Integrity is denied where statutory requirement for submission of Certificate has been suspended and where record contains no evidence that release prejudiced the protester.

DECISION

Landsing Pacific Fund protests the award of a contract under solicitation for offers (SFO) No. MOR80344, issued by the General Services Administration for lease of office and general purpose space for the U.S. Forest Service and U.S. Army Corps of Engineers in the Portland, Oregon area. The protester contends principally that the agency has not applied a preference for historic buildings promised by the solicitation.

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The agency issued the solicitation on February 3, 1989, for lease of approximately 280,000 square feet of space in a quality building of sound construction with "a potential for efficient layout" and on-site parking for 78 motor vehicles. This lease is to replace the current lease for the Multnomah building owned by the protester which expires in April 1990. The solicitation as amended provided for award of a 10-year firm, fixed-price contract with two 5-year options to that offeror whose proposal was most advantageous to the government, price and other factors considered; cost was weighted equally with the other factors, which included location relative to public transportation, services and amenities, architecture/aesthetics relating to building design and efficiency of layout, building systems (flexibility and capacity of electrical, mechanical, and communications system and building security) and capability of offerors.

Section 11 of the solicitation provided for a preference for proposals offering space in historic buildings. (The Multnomah Building, where the affected agencies are currently located, is such a building.) That section provided that the preference would result in award if:

"(1) THE OFFER FOR SPACE MEETS THE TERMS AND CONDITIONS OF THIS SOLICITATION AS WELL AS ANY OTHER OFFER RECEIVED . . . AND

(2) THE RENTAL IS NO MORE THAN 10 PERCENT HIGHER, ON A TOTAL ANNUAL SQUARE FOOT (NET USABLE AREA) COST TO THE GOVERNMENT, THAN THE LOWEST OTHERWISE ACCEPTABLE OFFER."

The agency received initial proposals on March 17, modified proposals on May 25 and best and final offers (BAFOs) on August 11. On October 13, a local newspaper published an article declaring that agency real estate specialists had recommended award of a contract to Melvin Mark, Jr. for lease of space in a new building built by Mark specifically for government tenants and stating an estimated cost for the project. Mark has submitted the lowest-cost, highest-rated offer and is in line for award.

On October 17, Landsing Pacific Fund filed this protest, alleging that the agency had failed to apply the historic preference and contending that the newspaper story constituted clear evidence of a violation of recent procurement integrity legislation, precluding the contracting officer from executing the Certificate of Procurement Integrity necessary for award of a contract.

The protester initially premised its argument that the agency did not apply the historic preference on its belief that its proposal was technically equivalent to that of Mark. Upon learning that Mark's proposal received a significantly higher technical rating than its proposal, the protester challenged the evaluation as erroneous, arguing that there is no evidence that its proposal did not meet the solicitation specifications and criteria. The protester believes that the two buildings, which are close to each other, have equal access to transportation and amenities; the protester does not believe that Mark has greater financial capability than Landsing.

We note first that the agency interprets the historic preference clause to provide that two proposals must be essentially equal in merit before the agency would apply the 10 percent differential to its evaluation. The protester has not challenged this interpretation, but essentially argues that any evaluation that would give Mark a higher technical score than the protester is irrational; in this respect, the protester argues that since the agency has identified no deficiencies in its proposal and its proposal meets the solicitation requirements as well as Mark's offer, it should receive the award.

We find that the agency reasonably concluded that Landsing's offer for space did not meet the solicitation terms and conditions "as well as" the Mark proposal and that therefore the historical preference is not applicable. The record shows that the proposed awardee received a higher score than Landsing in every technical category and, apart from the factor for location, its technical scores were nearly double those of the protester. Landsing's significantly lower rating reflected the evaluators' concern with the inefficient use of space necessitated by the large vertical columns throughout the protester's building and its outdated heating, ventilation and air conditioning systems, and the protester's failure to adequately address the disruption attendant to its plans to renovate the Multnomah Building, which would require relocation of some government tenants. Landsing's proposal also was found generally inferior in its approach to security problems, particularly during the renovation phase; furthermore, the protester's offer of off-site parking resulted in concerns for the safety of personnel proceeding to and from the garage, particularly after hours. The protester's flat wiring system also was considered less flexible and cost efficient than the raised floor system proposed by some offerors, including Mark. The building's lack of an economizer cycle to promote energy efficiency also was a concern. We find this technical evaluation to be reasonable and consistent with the

evaluation factors. Accordingly, GSA properly could view the Mark proposal as superior to the protester's and therefore properly did not apply the historical preference.

In its initial protest, Landsing offered the newspaper article as evidence that someone had disclosed source selection and proprietary information in violation of procurement integrity legislation, 41 U.S.C.A. § 423(c) (West Supp. 1989). The protester contended that the law prohibited the award of a contract unless the contracting officer certifies that he is unaware of any violation of this law and that the contracting officer would be unable to execute any such certificate in light of this violation.^{1/} Although now aware that the certification requirement has been suspended by section 507 of the Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716, 1759 (1989), the protester points out that the implementing Federal Acquisition Circular No. 84-54 advised agencies that the suspension does not mean that conduct prohibited by the integrity legislation is now permitted. Furthermore, the protester asserts that Federal Acquisition Regulation (FAR) § 3.104-11 (FAC 84-47), which requires the contracting officer's certificate, has not been suspended^{2/} and argues generally that our Office's responsibility for the integrity of the procurement system warrants a direction that the solicitation be canceled.

Initially, we note that the article, published two months after BAFOs were submitted, does not contain any indication that the agency or proposed awardee had anything to do with the disclosure that Mark was the proposed awardee or of the project's cost. The article states that Mark representatives and government officials either "were unavailable for comment or declined to discuss the [award] recommendation." It specifically quotes the contracting officer as stating that "[f]ederal policy prohibits discussing a real estate transaction until a contract is awarded." The article indicates "three, well-placed Portland real estate sources"

^{1/} In fact, the Act does allow award under such circumstances, provided that the contracting officer makes a full disclosure to the head of the agency of the facts known to him. 41 U.S.C.A. § 423(d)(2)(B) (West Supp. 1989).

^{2/} The protester's assertion is erroneous, and the requirement for execution of the Procurement Integrity Certificate currently is not a condition of award. See Federal Acquisition Circular No. 84-54; Hampton Roads Leasing, Inc., B-236564 et al., Dec. 11, 1989, 69 Comp. Gen. ___, 89-2 CPD ¶ 537.

as the source for the disclosures in the article. Further, GSA reports that it reviewed the matter and has submitted to us a certification from the contracting officer that to the best of his knowledge no integrity violation occurred during this procurement.

GSA believes the article is based on speculation by real estate experts in the Portland area. In any event, the protester presents no evidence that the premature disclosure of the awardee's identity prejudiced Landsing in any way. Although the protester contends that the comments submitted by Mark during this proceeding evidence an "unauthorized" familiarity with the Landsing proposal, our review shows nothing in those comments that does not result from the reasonable assumption that the protester's proposal offers space in the Multnomah Building, which is where the federal agencies are now located, and the protester has not indicated any specific information in Mark's comments which support its view that Mark knows the contents of Landsing's offer. Further, the initial proposal of Mark received the highest technical rating among initial proposals, and throughout the negotiations process Mark's offer has received the highest rating. Based on this record, there is no basis for finding that there was any disclosure of sensitive information that prejudiced the protester, and no basis therefore to recommend against the agency's proceeding to award. See Dayton T. Brown, Inc.--Request for Recon., B-231579.2, Nov. 29, 1988, 88-2 CPD ¶ 525.

The protest is denied.


James F. Hinchman
General Counsel