



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: 120 Church Street Associates
File: B-232139.5
Date: February 28, 1990

Douglas F. Mitchell, Esq., Carmen & Muss, for the protester. Willard Scolnik, for Wilvin Associates, an interested party. S. Lane Tucker, Esq., Office of the General Counsel, General Services Administration, for the agency. Linda C. Glass, Esq., Andrew T. Pogany, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. An agency may cancel a negotiated procurement based on the potential for increased competition or cost savings.
2. Solicitation for the lease of 366,700 square feet of office space may be canceled where the agency's need for space has significantly changed, even if this reason was not the original reason for canceling the procurement.
3. Claim for costs for preparing a revised offer and protest costs is denied where cancellation of solicitation was proper, and there is no indication that agency acted improperly.

DECISION

120 Church Street Associates protests the cancellation of solicitation for offers (SFO) MNY88-284, issued by the General Services Administration (GSA), for the acquisition of a leasehold interest in a minimum of 356,000 to a maximum of 385,000 square feet of office space in lower Manhattan to house the Internal Revenue Service (IRS) District Office.

We deny the protest.

On March 24, 1988, GSA issued the SFO with a closing date of April 29. Offers were requested for space located in Manhattan, south of Canal Street, in a quality building of sound and substantial construction as described in the SFO

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and having a potential for efficient layout. Award was to be made to the offer determined to be most advantageous to the government, price and other factors considered. The SFO listed the following award criteria in descending order of importance: (1) early delivery date; (2) quality of location and building; (3) expansion space and parking; and (4) location of space for taxpayer assistance office. The SFO provided that price was of less importance than the other award criteria.

Three offers were received in response to the SFO by April 29. Two offers were for the construction of new office buildings to house the IRS within the delineated area. Church Street submitted an offer which would alter the premises at 120 Church Street where the IRS is presently located. Discussions were conducted and best and final offers (BAFOs) were requested and received from Wilvin Associates and Church Street in February 1989. Another offeror, Milstein Associates, had previously failed to submit all necessary documents and information requested by the government and was subsequently rejected by letter dated January 30, 1989. Wilvin, which proposed to meet the government's requirements by constructing a new building consisting of 385,000 square feet, was the low offeror and was also rated superior to Church Street. The source selection evaluation board recommended award to Wilvin.

A lease was prepared and executed by Wilvin. However, GSA could not execute the lease without prospectus approval from the House Committee on Public Works and Transportation. The prospectus was not approved until June 22, 1989; Wilvin, however, was unable to maintain control of the property until that time. Consequently, the government was unable to execute the lease.

GSA subsequently decided to reopen negotiations and so advised all offerors (including Milstein) by letters dated July 21 and July 24. GSA then met with all the offerors and advised them that if GSA decided to continue the procurement, GSA would request new BAFOs. Wilvin affirmed its previous offer and indicated that it was attempting to lease the building site rather than to buy it. Milstein indicated that it would like to submit a revised offer and was still attempting to receive approval from the Landmarks Preservation Commission of the City of New York (Milstein's proposed location was in a historic district and required a Certificate of Appropriateness from the Landmarks Commission). Church Street in its meeting with GSA submitted questions for the IRS regarding issues which affected its price and stated that it would be submitting a

revised offer as soon as possible after receipt of the answers from IRS.

On September 29, 1989, GSA determined that it would be in the best interest of the government to cancel the SFO. GSA stated that its decision to cancel was based on several factors. First, Wilvin, the acceptable offeror, had not been able to obtain satisfactory control of the site on which it had originally offered to construct a building. Second, no award could be made to Church Street because of the unsatisfactory financial conditions of the firm, unreasonably high proposed rental rates and exceptions Church Street took to the SFO provisions and General Clauses. Finally, GSA determined that it could obtain additional competition in view of the changed market conditions and by extending the delineated area. The SFO was canceled prior to receipt of Church Street's revised offer.

In its protest filed with our Office on November 13, 1989, Church Street argues that there was no rational basis for the cancellation and that GSA acted arbitrarily and capriciously in breaching its implied contractual obligation to fairly and honestly consider the protester's offer. Church Street maintains that its offer fully met the requirements of the SFO and that the SFO was canceled with the principal objective being to avoid an award of the lease to Church Street.

During the pendency of this protest, the IRS, by letter dated January 4, 1990, informed GSA that its needs for space in Manhattan had significantly changed and, as a result, it canceled the request for 366,700 square feet of space. IRS indicated that it would review its space needs and prepare a new request in the near future.

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-Analytics Group, B-233051, Jan. 23, 1989, 89-1 CPD ¶ 57. This is true regardless of whether the information which provides a basis for cancellation was presented after the cancellation decision was made. See Ford Aerospace & Communications Corp., et al., B-224421.2, et al., Nov. 18, 1986, 86-2 CPD ¶ 582.

Here, we think GSA had a reasonable basis for canceling the SFO. First, GSA found that the protester's BAFO contained prices which were unreasonably high when compared with other properties in the area. In this regard, the record shows that GSA negotiates many leases in Manhattan for other

federal agencies. In fact, GSA had completed negotiations and entered into leases for three federal agencies within the same delineated area of this SFO. The protester's prices were higher than the lease rental rates for these three federal agencies in lower Manhattan in newly constructed buildings negotiated at a much later date. We also note that the protester itself has acknowledged that real estate market conditions had, in fact, significantly changed in lower Manhattan since the submission of its BAFO, and GSA believed that by increasing the delineated area under a new solicitation it could increase competition and thereby negotiate a lower rental rate. We have recognized that a procuring agency may cancel a negotiated procurement based on the potential for increased competition or cost savings. See G.K.S. Inc., 68 Comp. Gen. 589 (1989), 89-2 CPD ¶ 117.

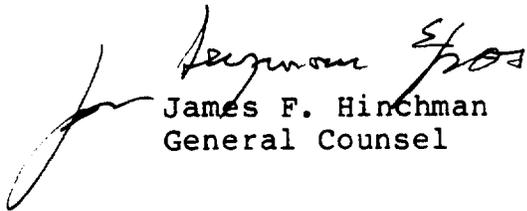
Second, the IRS has advised GSA that due to long-term budget and staff constraints, it was reconsidering its current space requirements, current open space requests and long-term requirements. Accordingly, IRS is reviewing its requirements for Manhattan with a view of reducing its total need from 385,000 square feet to under 300,000 square feet. IRS further thinks that it may split the operation in Manhattan, move some components from the city and enlarge its delineated area--all with the objective of reducing its rental costs. Thus, since the space requirements for IRS in lower Manhattan have changed from those contemplated under the original SFO, an award for 385,000 square feet under the SFO will no longer satisfy the government's requirements. See Snowbird Industries, Inc., B-226980, June 25, 1987, 87-1 CPD ¶ 630. Accordingly, we deny this basis for protest.

In its response to the agency report and informal conference held in this matter, Church Street argues that its primary basis for protesting is that GSA acted in bad faith when it requested a revised offer from the protester even though it had no intention to consider the protester for the award of the lease. Church Street maintains that the government breached its implied contractual obligation to give fair and honest consideration to each offer that it received, when it requested the revised offer knowing it would not be given any consideration. In this regard, Church Street contends that it is entitled to recover its proposal preparation costs in responding to GSA's request for a revised offer, as well as its costs in pursuing this protest.

The record does not show that GSA required Church Street or any other offeror to submit revised offers. GSA states that at a meeting of August 18, Church Street stated that it

would submit a revised offer. At that same meeting, GSA states that agency officials specifically informed the protester that it could revise its offer "at its own option." Although GSA indicated to Church Street that it would accept and evaluate a revised offer, and did not discourage Church Street, there is no evidence that GSA specifically required a revised offer from Church Street. In fact, the record is clear that had GSA decided to continue the procurement, GSA would have formally requested a new round of BAFOs. In short, Church Street simply made a business decision to submit a revised offer, prior to a formal request for BAFOs by the agency. With respect to Church Street's request for reimbursement of its cost for preparing its revised offer and pursuing this protest, there is no basis for allowing recovery of such costs, where, as here, there is no indication that the agency acted improperly. System-Analytics Group, B-233051, supra.

The protest is denied.



James F. Hinchman
General Counsel