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Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: RKR, Inc.

File: B-247619.2

Date: October 28, 1992

Diana C. Fields, Esq., for the protester.
Gary A. Clark, for Clark Real Estate, an interested party.
Sherry K. Kaswell, Esq., and Justin P. Patterson, Esq., Department of the Interior, for the agency.
David Hasfurther, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Contracting officer's determination that a small business offer did not meet the solicitation requirement for evidence that local zoning laws permit the type of facility proposed concerns the ability of an offeror to meet its performance obligations under the lease and thus constitutes a finding that the offeror was nonresponsible, which should have been referred to the Small Business Administration for a certificate of competency.

DECISION

RKR, Inc. a small business, protests the rejection of its offer and the award of a lease to Clark Real Estate under solicitation for offers (SFO) No. 90-N-651-L-92-71, issued by the Bureau of Land Management (BLM), Department of the Interior, for the lease of office and storage/warehouse space in Pocatello, Idaho.

The agency rejected as nonresponsive RKR's proposal to construct an office building which it would then lease to BLM because RKR had not obtained permission from the city as of award to construct its commercial building on the residential zoned site it was proposing. RKR contends that the zoning issue concerns a matter of RKR's responsibility which should have been referred to the Small Business Administration (SBA) for a certificate of competency (COC).

We sustain the protest.

The SFO, issued on November 27, 1991, established minimum and maximum amounts of space required and requested the submission of yearly unit and total prices based on the usable square feet of office and storage/warehouse space being offered. The lease was for 10 years with the government having the right to cancel the lease after 5 years. Offerors were also to submit with their initial offers, among other items, "evidence that local zoning laws will permit the type of facility proposed." Negotiations were to be conducted with all offerors submitting initial offers that were determined to be within the competitive range. The SFO also provided that offers which did not comply with all SFO requirements could be rejected.

Initial offers were to be submitted to BLM by December 20 and were to remain open for acceptance until March 15, 1992. Five offers were received. BLM conducted negotiations with all five of the offerors and then requested revised offers consistent with the results of the negotiations. After revised offers had been received and evaluated, each offeror was requested to submit a best and final offer (BAFO) by February 3. The agency rejected RKR's BAFO because it determined that RKR had failed to comply with the local zoning laws requirement.

Specifically, the agency rejected RKR's offer because RKR had not obtained commercial zoning for its proposed site. RKR submitted with its revised offer a purchase option for its proposed site which showed RKR's purchase of the property to be contingent upon the property's being rezoned from residential to commercial use. BLM's letter to RKR requesting a BAFO reminded RKR of the solicitation requirement that offerors provide evidence that local zoning laws would permit the type of facility proposed. RKR's BAFO contained a letter from the city attorney stating that in his opinion "current local zoning laws could permit the type of facility proposed," that he could "foresee no reason why" RKR would not be able to obtain the rezoning, and that all members of the city council were in favor of RKR's proposed project. To obtain further clarification on this matter, the contracting officer telephoned the principal city planner on February 4. The city planner advised that the site RKR was proposing was zoned residential, that RKR had applied for rezoning, and that the Community Development Commission had recommended that the City Council approve the rezoning request at its next public hearing, which was to take place on February 13.

The contracting officer concluded that it would not be appropriate to delay award simply to await the results of the February 13 public hearing because it was possible that objections to the rezoning request would delay City Council approval. He also concluded that a delay in award would be

unfair to the three offerors who had submitted evidence of having commercial zoning and would not be in the government's best interests, since occupancy of the leased premises was required by October 1, 1992.

The lease was awarded to Clark on February 5, and RKR was informed by letter of the same date of its rejection. On February 13, the city council approved the zoning request. This approval became final on February 20. Performance has been suspended pending resolution of RKR's protest to our Office filed on February 14.

The agency contends that the rejection of RKR's proposal and the award to Clark were proper. First, it argues that compliance with a zoning requirement should not be considered an issue of an offeror's responsibility since responsibility concerns the status of the offeror and zoning does not pertain to the status of the offeror itself, but to what the offeror has proposed. In other words, the agency argues that the failure to propose a property zoned properly concerns the technical acceptability of the offeror's proposal, rather than the offeror's ability to perform. Second, even assuming the issue of zoning compliance involves an offeror's responsibility, the agency argues that the matter should not be subject to SBA jurisdiction. According to the agency, SBA has no particular expertise to determine whether the local zoning authority would approve or reject the zoning request. Moreover, the agency argues, referral to SBA in these circumstances would be prejudicial to the other offerors whose offers were based on sites already properly zoned because it would afford the nonconforming offeror additional time to obtain the zoning while the COC application is pending. (In this respect, the awardee states that it could have submitted its offer on the basis of residential property it owned at lower prices, but it did not do so because it knew that commercial rezoning could not be obtained in time to meet the SFO's timeframe.)

We do not find the agency's argument that the zoning requirement is a matter of technical acceptability rather than responsibility persuasive. The SFO basically called for award to the offeror proposing the lowest evaluated price per square foot. There were no technical evaluation factors or technical selection criteria. The technical evaluation conducted by the agency, insofar as one was performed, was used to verify, based on the information submitted, that a proposal took no exception to any material space and occupancy requirements. Since RKR did not take exception to any material solicitation requirements, including the occupancy date, it was obligated by the submission of its offer to meet these requirements. G&W Laboratories, Inc., B-234543, May 3, 1989, 89-1 CPD ¶ 424.

The SFO only required offerors to submit evidence that local zoning laws would permit the type of facility proposed. Here, in its BAFO, RKR submitted what it believed to be credible evidence that the local zoning laws would permit the facility on the site proposed. The contracting officer found this information unsatisfactory and believed that RKR could not timely meet the occupancy date if zoning approval was delayed. This finding did not alter in any way the protester's promise to perform; the evidence submitted only raised a concern that RKR would not be able to meet the required occupancy date. The contracting officer's decision to reject RKR on this basis was tantamount to a finding of nonresponsibility. NFI Mgmt. Co., 69 Comp. Gen. 515 (1990), 90-1 CPD ¶ 548; TRS Design & Consulting Servs., B-218668, Aug. 14, 1985, 85-2 CPD ¶ 168. The Small Business Act, 15 U.S.C. § 637(b)(7) (1988), provides that SBA has conclusive authority to determine the responsibility of a small business concern and that when a procuring agency finds that a small business is nonresponsible it must refer the matter to SBA for a final determination under the COC procedures. Consequently, the rejection of RKR's offer without a referral to the SBA for consideration of a COC was improper. Modern Sanitation Sys. Corp., B-245459, Jan. 2, 1992, 92-1 CPD ¶ 9.

We sustain the protest.

Since the lease does not contain a termination for convenience clause remedial action is not feasible. In the absence of a termination for convenience clause, we will not recommend termination of an awarded lease, even if we sustain the protest and find the award improper. Peter N.G. Schwartz Co. Judiciary Square Ltd. Partnership, B-239007.3, Oct. 31, 1990, 90-2 CPD ¶ 353.

RKR contends that there are legal bases for terminating BLM's lease with Clark.

RKR argues that because the SFO contained a "Protest After Award" clause which states that an award may be terminated in accordance with the SFO's termination for convenience clause or its termination for default clause Clark's lease may be terminated under the SFO's termination for default clause. Since the SFO did not contain a termination for convenience clause and Clark has done nothing which would justify termination for default, we do not think this argument has any merit. RKR also argues that the Christian doctrine (G.L. Christian & Associates v. United States, 312 F.2d 418 (Ct. Cl. 1963)) requires that the termination for convenience clause be read into the lease. The Christian doctrine operates to incorporate into a contract, as a matter of law, a clause that was required to have been included in a contract but was not. Here, however, we are

not aware of any requirement in the regulations that lease contain a termination for convenience clause. Indeed, the agency advises that a termination for convenience clauses are not required in building lease arrangements. We find no basis for reading the clause into the lease. Patio Pools of Sierra Vista, Inc.--Recon., B-288187.2; B-288188.2, Apr. 7, 1988, 88-1 CPD ¶ 345. Finally, RKR argues that remedial action may be taken because the contract was void ab initio. An awarded contract will not be treated as void, even if improperly awarded, unless the illegality of the award is plain or palpable. See John Reiner & Co. v. United States, 324 F.2d 438 (Ct. Cl. 1963), cert. denied, 377 U.S. 931 (1964). The test in determining whether an award is plainly or palpably illegal is whether the award was made contrary to statute or regulation due to improper action by the contractor, or whether the contractor was on direct notice that the procedures followed were violative of statutory or regulatory requirements. Peter N.G. Schwartz Co. Judiciary Square Ltd. Partnership, supra. There is not even an allegation that Clark engaged in any improper activity, or was aware of any impropriety, which would provide a basis to determine that the award was void ab initio.

RKR is entitled to recover its proposal preparation costs and the costs of pursuing its protest, including attorneys' fees. 4 C.F.R. § 21.6(d) (1992). By letter of today, we are advising the Secretary of the Interior of our decision.

Wilton J. Sociolan

for Comptroller General
of the United States