



Comptroller General  
of the United States

833139

Washington, D.C. 20548

# Decision

**Matter of:** GVC Companies  
**File:** B-254670.5  
**Date:** September 2, 1994

E. Sanderson Hoe, Esq., McKenna & Cuneo, for the protester.  
John J. McGovern, Jr., Esq., Wunder, Diefenderfer, Cannon & Thelen, for Mirabella, S.p.A., an interested party.  
Paul M. Fisher, Esq., Department of the Navy, for the agency.  
Paul E. Jordan, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

## DIGEST

Protest of agency evaluation and award determination is dismissed where factually unfounded, and the challenged matter primarily concerns the agency's affirmative determination of awardee's responsibility.

## DECISION

The GVC Companies protest the proposed award of a contract to Mirabella, S.p.A. under request for proposals (RFP) No. N62470-91-RP-00195, issued by the Department of the Navy, for a lease-construction procurement of a self-contained support complex for the Navy in Naples, Italy. GVC contends that the Navy's technical evaluation of Mirabella's proposal and the resulting cost/technical trade-off were flawed.

We dismiss the protest.

The RFP, issued on November 29, 1991, sought proposals for the first phase of the lease-construction project which consists of the support complex site, a minimum of 500 family housing units, dependants school, recreation facilities, and related-site improvements. The RFP contemplated a contract covering a base year with 9 option years. Among other matters, the RFP called for offerors to submit satisfactory evidence of either site ownership (e.g., registered deed), access to ownership (e.g., purchase option), or other sufficient control to carry out all the

terms and conditions of the leases to be awarded. On August 17, 1993, the Navy advised Mirabella that it had been awarded the contract, contingent upon the satisfaction of certain preconditions and approvals by the United States and Italian governments. GVC protested the award alleging that Mirabella had not met various RFP requirements, including those concerning site ownership or control. Subsequently, the Navy determined to amend the RFP and to conduct additional discussions, whereupon our Office dismissed GVC's protest as academic.

Amendment 13 of the RFP required that, to be considered for award, each offeror's best and final offer (BAFO) must contain a plan of action and schedule for completion which demonstrates the offeror's "ability to acquire sufficient control of the offered site(s) to allow the offeror to carry out all the terms and conditions of the leases to be executed." The plan of action had to provide for the offeror's acquisition of "sufficient control" not later than 180 days from the date revised BAFOs were due. The RFP warned that if the successful offeror failed to provide the specified "sufficient control," necessary planning, building, zoning, and land-use plan approvals, and appropriate financing and/or loan commitments within 150 days of written notice of its selection, "such failure shall constitute the Offeror's default." The Navy would then have the unilateral right to either rescind the selection, or to establish a new completion date for the offeror's required performance.

Award was to be made to the offeror whose proposal was most advantageous to the Navy, price and other factors considered. Proposals were to be evaluated on the basis of two technical factors which were of equal importance: (1) real estate and site factors; and (2) planning, design, and engineering factors. The first factor consisted of the following six subfactors, listed in descending order of importance: size of site/surrounding environment; availability of building permits/compliance with regional master plan; site location/access; site characteristics; offeror experience/qualification/financing ability; and land ownership. Amendment 13 changed the land ownership subfactor to call for an assessment of "sufficient control of offered site(s)" and reiterated the requirement for a plan to demonstrate the offeror's ability to acquire sufficient control of the property. It also explained that such control could consist of fee simple ownership, a leasehold interest, a right of superficie, or other real property interest of a minimum of 30 years duration. The RFP did not specify the relative importance of technical and cost factors; thus, they are presumed to be approximately equal. Aero Realty Co., B-250985, Mar. 2, 1993, 93-1 CPD ¶ 191.

Four proposals, including two from GVC and one from Mirabella, were included in the competitive range. Both GVC and Mirabella submitted BAFOs by the March 30, 1994, closing date. As in its original proposal, Mirabella offered property to which it was seeking a long term "right of superficiele" which property the City of Gricignano intended to expropriate (i.e., obtain by eminent domain). In its BAFO, Mirabella advised, and submitted documents to establish, that in February 1994, the City of Gricignano had approved and adopted a variance to the General Master Plan (zoning plan) to include all the facilities of the Navy support site for all increments of construction. The city also approved Mirabella's construction program (land use plan) which includes the covenant to assign the property to Mirabella. Approval of the plan included approval by the city that the planned construction was in the public interest and therefore mandated expropriation and assignment of the property to Mirabella. The Regional Control Committee approved the city's action in March 1994. Mirabella was then required to sign the Covenant of Assignment, at which time the city would take possession of the property and transfer possession to Mirabella for construction of the installation. The assignment step was expected to take 12 weeks and construction permits were expected to be approved in 4 weeks. Mirabella advised that it would delay executing the Covenant until it received notice of award. Based on this information, the evaluators determined that Mirabella's plan of action for obtaining "sufficient control" was adequate and evaluated the relevant subfactor as "acceptable." GVC owned its proposed properties and its proposals were evaluated as "excellent" under the "sufficient control" subfactor.

Overall, Mirabella's proposal was rated "acceptable" or better on all factors and subfactors and received a weighted score of 3,772 points. One of GVC's proposals received a score of 3,745 points, and the other 3,356 points. Mirabella's basic and maintenance rent price of \$13.02 million was lowest of all proposals. GVC's prices on its properties were second and third lowest at \$13.47 and \$14.82 million. Based on Mirabella's superior proposal score and its low price, the Navy determined that Mirabella's proposal was most advantageous to the government. After receiving the notice of award, GVC filed this protest.

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<sup>1</sup>Under Italian law, the "right of superficiele" is a form of real estate interest in which the owner grants the right to erect and maintain structures on the land. The Italian Civil Code and Complementary Legislation, 1991 (Oceana Publications, Dobbs Ferry, N.Y.), Vol. I, Property Rights, Title III, Superficie, Section 952.

GVC contends that the Navy failed to properly evaluate Mirabella's superficic interest in the proposed property, which was not as favorable as GVC's fee simple interest, and thus, the cost/technical trade-off based on that evaluation was flawed. Specifically, GVC argues that the Navy failed to consider three matters: Mirabella's failure to obtain control of the site in the 3 preceding years despite promises to do so; GVC's challenge to Mirabella's expropriation in the Italian courts; and statements in Mirabella's proposal which allegedly indicate that the expropriation of the proposed site will not start for 1 year or be finished for 10 years. Our review of the record discloses no basis to object to the agency's treatment of these matters.

Mirabella's failure to gain control of the property in the earlier years of this procurement has no probative value with respect to the question of whether Mirabella's BAFO presented the required plan for obtaining sufficient control within 180 days of this BAFO. As outlined above, at the time of its BAFO, Mirabella had taken all steps toward perfecting its right of superficic except for signing the Covenant with the City of Gricignano, a step which it intended to take upon receiving notice of the award, and which it anticipated would result in assignment of the property to it within 12 weeks.

Second, while GVC notified the Navy, during discussions, that it had filed a court challenge to Mirabella's attempts to gain control of its proposed property, the Navy properly advised the protester that it would only discuss GVC's proposal. In our view, an offeror's bringing to the attention of a procuring activity that offerors attempt to use court filings to undermine the proposal of a competing offeror is not necessarily an appropriate consideration in the evaluation of the other offeror's proposal. This is particularly true here where there is no evidence to indicate that the alleged court action was ever filed or that it would have any effect on Mirabella's ability to obtain sufficient control of its proposed property.

GVC's last allegation is based on the City of Gricignano's resolution approving the expropriation and assignment to Mirabella of the proposed property. The translation of the resolution states in pertinent part, "the time to start the expropriation of land is established in 1 year from the date this act becomes effect [sic], and the final time in 10 years from the beginning subject to any extension as provided by the Covenant." GVC argues that this translation indicates that the expropriation will not begin "until" one year after the date of the resolution. We disagree. The more reasonable interpretation of this provision is that the first phase of the expropriation would begin "within"

1 year. Subsequent translations submitted by GVC and Mirabella both substantiate this interpretation. While this provision may indicate that the expropriation process will not be complete immediately, there is no indication in the record that continuation of the process would interfere with Mirabella's successful performance of the RFP's requirements.

In short, this record provides no basis to conclude that the Navy's evaluation of Mirabella's proposal was flawed.<sup>2</sup> In this regard, the Navy evaluated Mirabella's "sufficiency of control" as "acceptable" and indicated it was ranked the lowest of all proposals for this subfactor. GVC's proposals were evaluated as "excellent" for this subfactor and were ranked first and second. Thus, it is plain that the agency considered the difference in the types of property interest possessed by GVC and Mirabella and scored the proposals accordingly. With regard to the cost/technical trade-off, in view, the equality of cost and technical factors, the relative unimportance of the "sufficiency of control" subfactor, and Mirabella's status as the offeror with the highest-scored proposal with the lowest price, the record provides no basis to challenge the cost/technical trade-off. A protest which fails to state a valid basis for protest is not for consideration. See James C. Bateman Petroleum Servs., Inc. dba "SEMCO", B-228252, Oct. 5, 1987, 87-2 CPD ¶ 337; 4 C.F.R. § 21.3(m) (1994).

Whether Mirabella will be successful in obtaining sufficient control through its proposed plan of action is a matter of responsibility, even though "sufficiency of control" was part of the technical evaluation. See TRS Design & Consulting Servs., B-218668, Aug. 14, 1985, 85-2 CPD ¶ 168; William A. Stiles, Jr.; Piazza Constr., Inc., B-215922; B-215922.2, Dec. 12, 1984, 84-2 CPD ¶ 658. Here, the agency has reviewed the plan of action and has determined that Mirabella is responsible. Under the circumstances presented

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<sup>2</sup>Moreover, even if the Navy had erred in its consideration of the matters raised by GVC, the outcome of the selection would not have changed. The "sufficiency of control" subfactor was the least important of six and thus, had little impact on Mirabella's proposal score. Had the Navy found that Mirabella remained "capable of being made acceptable" for this subfactor, we note that GVC's proposals had several subfactors evaluated as "capable," some of which were more important than the "control" subfactor. Since Mirabella's proposal would remain superior to GVC's proposals, GVC could not have been prejudiced. Absent prejudice, we will not disturb an agency's award. Am. Mutual Protective Bureau, Inc., B-229967, Jan. 22, 1988, 88-1 CPD ¶ 65.

here, where there has been no showing of possible fraud or bad faith on the part of procurement officials, we will not review an agency's affirmative determination of responsibility. TLC Sys., B-231969, Sept. 13, 1988, 88-2 CPD ¶ 238.

We also note that under its plan of action, Mirabella is allowed 180 days from its BAFO to obtain "sufficient control" of the property and, under the terms of the RFP, is allowed 150 days from the date of its selection to obtain control. Neither of these deadlines has passed and, if Mirabella is unsuccessful, the Navy has the option either to rescind the selection or to establish a new completion date. Where an agency does not require proof of matters such as land ownership, final zoning, and the existence of necessary permits and approvals, they are matters of contract administration, which are not for review by our Office. See North Country Assocs. II, B-231643; B-231643.2, Oct. 6, 1988, 88-2 CPD ¶ 330; William A. Stiles, III--Recon., B-215922.3, Feb. 19, 1985, 85-1 CPD ¶ 208.

The protest is dismissed.

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