



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

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B-156007

APR 19 1965

Maxwell Brokerage Co., Inc.
9 Hightop Lane
Jericho, New York

Attention: Mr. Maxwell M. Sacks, President

Gentlemen:

Further reference is made to your telegram of January 26, 1965, as supplemented by your letter of February 10, 1965, protesting against the award of a contract for a new post office facility at Mastic Beach, New York, to another concern by the Post Office Department.

By Advertisement for Bids to Lease (Construction), dated August 25, 1964, bids, to be opened October 14, 1964, were solicited by the Post Office Department for construction and lease to the Government of a post office to be located on the west side of Mastic Road, approximately 117 feet south of President Street, in Mastic Beach, New York. Bids to be submitted were to set forth the annual rental proposed to be charged for a basic lease term of 10 years, with 4 five-year renewal options. The advertisement stated that any award thereunder would be made to that responsible bidder whose bid was most advantageous to the Government, price and other factors considered; that in making its determination, the Government would give greater weight to the rental specified for the basic lease term; and that the right was reserved to the Post Office Department to negotiate as to price with the bidder it considered low, or to reject any or all bids. The advertisement also provided in material part as follows:

"6. Each bidder, unless a bid bond is necessary, is required to complete and submit with his bid a properly completed FOD Form 1413, entitled Lease Bidder's Qualifications. The Post Office Department may require the bidder to submit a Performance Bond and a Labor and Materials Payment Bond, both in penal sums to be specified by the Contracting Officer. Forms of such bonds will be supplied. Failure of the bidder to submit proper bonds not later than 30 days after the request will be grounds for rejecting the bid."

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The record shows that you were the low bidder for the basic lease term at an annual rental of \$5,627, the other 9 bids received in response to the advertisement ranging from \$5,880 to \$12,120 in annual rental for that term. However, the New York Regional Office of the Post Office Department advised you by letter of January 25, 1965, that your bid had been rejected.

It is stated in the letter-report dated March 19, 1965, furnished to us in this matter by the Deputy Assistant Postmaster General, a copy of which was supplied to you with our letter of March 25, 1965, that your bid was rejected because you were determined not to be a responsible bidder by reason of the following facts:

Maxwell M. Sacks and Helen Sacks, his wife, are President and Vice President, respectively, and are the principals of several small, closely held corporations including Maxwell Brokerage Co., Inc., and Sackson Construction Corporation. This latter corporation was the successful bidder on contracts awarded under 39 U.S.C. 2102 to provide new postal facilities at Duna, East Bernard, and Stafford, Texas and New Cumberland, West Virginia, consisting respectively of 2,975, 2,435, 2,968, and 3,300 square foot buildings. The contracts with the Sackson firm were all awarded in 1963. Of these four contracts, East Bernard and Stafford, Texas were ultimately completed by the contractor. However, both contracts were completed several months after the agreed completion date, and considerable difficulty was experienced in getting the lease contractor to comply with the plans and specifications. Even so, completion was only in accordance with the lowest possible minimum standards and required an exceptional amount of time and attention by the Government to assure compliance, especially in view of the relatively small size of the buildings.

As concerns the New Cumberland, West Virginia facility, the Department's contract with Sackson Construction Corporation required that Corporation to take an assignment of an assignable option to purchase land, to exercise the option and purchase the site, and to construct a postal facility thereon for lease to the Department. However, the successful bidder persuaded the owner-optionor to convey the property to it without paying any of the purchase price. Further, bidder allowed the performance time to expire and did not even start construction. Because a facility at this location was sorely needed the Department, rather than default Sackson Construction,

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allowed it to assign the contract in July 1964 to F&S Construction Company which company took title to the land and recently satisfactorily completed construction of the building. While Maxwell M. Sacks was in the office of the Assistant Director for Realty Management here in Washington, D. C., in November 1964, pressing for acceptance of his firm's bid on the Mastic Beach, New York facility, he stated that his poor financial condition was the reason for inability to perform the New Cumberland, West Virginia lease construction contract.

"With respect to the Buna, Texas award, Sackson Construction Corporation did not purchase the property after it had agreed to do so, and after it took an assignment from the Department of the option to purchase land for that purpose. Instead, it allowed the time to lapse for exercising the option to purchase, and failed to commence construction during the time required to construct and complete the facility. Therefore, on October 20, 1964, six days after the Maxwell Brokerage Co., Inc., bid on the Mastic Beach, New York facility was opened, Sackson Construction Corporation, consisting of the same principals, was declared in default of its Buna, Texas lease contract. As stated hereinbefore, the Department did not feel that Maxwell Brokerage Co., Inc., and the principals constituting that firm as well as Sackson Construction Corporation, were responsible bidders nor that the interests of the Department would be served by making an award to that firm. Therefore, its bid was rejected and an award was made to the second low bidder after negotiating the annual rent figure down to \$5,730 for the ten-year basic term and all renewal terms."

You contend, in substance, that you are responsible and that, if the contracting officer had any doubt as to your responsibility, he should at least have afforded you the opportunity of furnishing a performance bond, as provided for in the above-quoted provision of the advertisement for bids.

The experience which the Department reportedly had with respect to the contracts entered into with Sackson Construction Corporation (whose principal officers were the same as those of Maxwell Brokerage Co., Inc.), as set out above, would appear to constitute ample justification for the Department's determination that Maxwell Brokerage Co., Inc., could not be considered a responsible bidder, even under the strict rules of formally

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advertised competitive bidding. Moreover, in a case where it has been determined in advance that a bidder cannot be relied upon to perform the contract being negotiated in accordance with its terms, it would not be sound procurement practice to accept a performance bond, which could, at best, only insure that the Government would be made whole in the matter of damages in case of a breach of the contract. When the Government awards a contract it wants, and has a right to expect, performance in the manner and at the time contemplated.

There is also for consideration the fact that the transaction here involved was authorized by 39 U.S.C. 2102, which provides that notwithstanding any other provision of law, the Postmaster General may lease property on such terms as he deems appropriate. As indicated in the decisions referred to in the Deputy Assistant Postmaster General's letter, copies of which were furnished to you with our letter of March 25, 1965, we have held that statutes granting authority to negotiate contracts without advertising, such as 39 U.S.C. 2102, comprehend the lesser authority to utilize advertising to the extent administratively deemed appropriate in making contracts thereunder, without restricting final administrative determination of the bidder to whom the contract should be awarded. 20 Comp. Gen. 194. As pointed out in the cited decision, in such cases an administrative election to advertise rather than to negotiate with a single contractor does not necessarily require the making of an award to the lowest bidder regardless of any or all other considerations.

Since by the statute cited the Postmaster General is vested with broad discretionary authority to determine what action with respect to leasing of property will best serve the interests of the Government, and we find here no abuse of that discretion, your protest must be denied. The enclosures transmitted with your letter of February 10 are returned.

Very truly yours,

Joseph Campbell

Comptroller General
of the United States

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