

DECISION



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

Northrop
PL-I
29237

FILE: B-213882; B-213882.2 DATE: September 5, 1984

MATTER OF: Western Division Investments; Columbia
Investment Group

DIGEST:

1. Protest against methods provided in solicitation for evaluating energy consumption and comparing prices is complaint against solicitation. Such protest must be filed prior to the closing date for receipt of proposals. Since this protest was filed after award of the contract, it is untimely.
2. Letter detailing protester's disagreement with agency's evaluation of proposals and asking for corrective action, which was received by agency within 10 working days of knowledge of basis for protest, is a timely protest to the agency.
3. Agency rejected protester's proposed site for an office building because it was more than 1 mile from the agency's existing warehouse, and the solicitation required proposed sites to be within 1 mile. Protester argued that other solicitation language required agency to consider its proposed site. Protest is denied because that other language applies only to proposals which offer both an office and a warehouse on separate sites.
4. Protest that agency is estopped from rejecting proposal as unacceptable because protester was misled by oral advice of agency employees is denied because solicitation required written explanation of solicitation provisions and because estoppel may not be used to require agency to consider a proposal for award which does not meet agency's minimum needs.
5. Protester's proposal was rejected because its proposed building site was in a base flood plain. Protester contends that, because its

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site is only partly in a flood plain and building itself can be located on part of site that is not in flood plain, applicable regulations require agency to accept its proposed site. Regulations, however, do not permit acquisition of property in a flood plain unless there are no practicable alternatives. Here, there were alternate sites outside flood plain. Additionally, solicitation clearly stated that no award would be made for a property in a flood plain.

Western Division Investments, Inc. (WDI), and Columbia Investment Corp. (Columbia) protest the award of a lease for an office facility to Howard and Webster, Inc. (H&W), under solicitation for offers R6-83-53P issued by the Department of Agriculture, Forest Service (Forest Service).

We dismiss Columbia's protest in part as untimely and deny it in part. We deny WDI's protest.

Background

The solicitation advised offerors that the Forest Service was interested in leasing approximately 28,500 square feet of office and related space in Corvallis, Oregon, for a 5-year initial term and three 5-year renewal options. The solicitation permitted offerors to propose leases on three alternate bases: (A) office, parking and warehouse on one site of approximately three acres; (B) office and parking located within 1 mile of the present warehouse (two acres will be needed); or (C) office and parking at one site (two acres) and warehouse at a separate site (one acre).

Offers were to be evaluated on the basis of technical and price factors. Technical factors could total a maximum of 250 points (200 for the office and 50 for the warehouse). Price could total a maximum of 350 points (300 for the office and 50 for the warehouse). Based on formulas contained in the solicitation, prices were to be reduced to a single figure representing the present value cost per square foot. If the government was to be responsible for direct payment of utilities, an estimated energy cost was

added to the overall cost. Offerors were advised to include in their proposals a statement of estimated energy usage, which would be used in the calculation. The solicitation stated that the total numerical scores of proposals would be used as a guideline to assist the contracting office in awarding to the proposal most advantageous to the government. The solicitation also provided that "[a]n award of a contract will not be made for a property located within a base flood plain."

After best and final offers, the standings based on evaluation of the office portion of the acceptable proposals of the parties to this protest were as follows:

	<u>Technical Points</u>	<u>Price Per Square Foot</u>	<u>Price Points</u>	<u>Total Points</u>
H&W (option "A")	169	\$66.45	300	469
Columbia (option "A")	148	69.00	289	437
WDI (option "B")	161	74.19	269	430

The Forest Service awarded the lease to H&W on November 18, 1983. Columbia was notified orally on November 18; WDI learned of the award on November 23. The Forest Service, WDI, and Columbia met on November 25 to review the basis for the award. At that time, both Columbia and WDI pointed out errors in the Forest Service present value cost calculations. The Forest Service agreed to recalculate the costs in light of those errors. The new calculations showed the following order among the three parties:

	<u>Technical Points</u>	<u>Price Per Square Foot</u>	<u>Price Points</u>	<u>Total Points</u>
WDI	161	\$66.26	300	461
H&W	169	71.47	278	447
Columbia	148	72.32	274	422

By telephone conversation of November 29, the Forest Service advised Columbia that it would probably cancel the award to H&W and award to WDI, based on its lower present value cost and overall rating. On that date, the Forest Service also notified H&W to stop work on the project, because the Forest Service had "become aware of errors in evaluating and awarding" the project. Also, by letter dated November 29, WDI protested to GAO that it should receive the lease based on its lower present value cost.

On November 30, Columbia met with the Forest Service and raised the following points. Columbia advised the Forest Service that Columbia's "office only (option B)" proposal was lower in price than WDI's "office only" proposal and that the award should be made to it on that basis. Columbia also pointed out that WDI's site was in a base flood plain and that the government could not lease a building in a base flood plain so long as other alternatives were available. The Forest Service responded that Columbia's "office only" proposal was not acceptable because it was located more than 1 mile from the existing Forest Service warehouse in violation of the solicitation's requirement. However, the Forest Service did decide to examine the base flood plain issue.

By two separate letters of December 2, received by the Forest Service on December 6, Columbia set forth the reasons it believed required award of the lease to it. In one letter, Columbia argued that its rejected "office only" option should be selected for award because it offered the lowest present value cost. Columbia argued that the language of the solicitation required the Forest Service to evaluate the office facility prior to selecting a warehouse and then to evaluate the warehouse based upon its distance from the selected office. Columbia contends that, consequently, finding an "office only" proposal unacceptable due to its distance from the existing warehouse was improper. In that letter, Columbia also argued that WDI's site was unacceptable because it was in a base flood plain. Columbia further complained that WDI's claimed energy use figure was unrealistically low, which lowered its present value cost.

In the other letter, Columbia attacked H&W's energy use figure as unrealistically low. Columbia recalculated H&W's present value cost based on what it considered to be more

realistic figures. Columbia's recalculations showed that its cost was lower than H&W's when the "realistic" energy use figure was used. Columbia also argued that, while H&W's present value cost was lower, if the two proposals are compared on a real dollar value over a 20-year lease period, Columbia offers the lower price.

On December 8, the contracting officer determined that WDI's offer could not be accepted because it was located in a base flood plain. The contracting officer determined that regulations and the solicitation prohibited the lease of an office site located in a base flood plain unless there were no practicable alternatives. Since other proposals, not in a base flood plain, were received, there were other alternatives. This determination was approved by the Department of Agriculture's regional office of General Counsel on January 9, 1984, and was issued on January 16, 1984.

WDI protested that determination to GAO on January 30, 1984, arguing that the Forest Service representatives had advised WDI during the procurement that the base flood plain regulations did not apply to its site, and that, in any event, the building could be relocated on the same site, but outside the base flood plain.

On February 8, 1984, Columbia protested to GAO, basically raising the same issues that it had previously raised in its letters to the Forest Service.

On February 24, 1984, the Forest Service notified H&W that it should proceed with construction of the facility.

Columbia Protest

The Forest Service argues that Columbia's protest is untimely in its entirety. The agency states that Columbia was notified of the award to H&W on November 18, 1983, yet did not protest until February 8, 1984, over 2 months later. The Forest Service contends that Columbia's two December 2, 1983, letters to it were not protests because Columbia stated in a letter of January 20, 1984, commenting on WDI's protest, that "... at this point in time, we have not protested the award of the lease contract to Howard and Webster." The Forest Service notes that, in any event, it did not receive the December 2 letters until December 6, 11 working days after Columbia was notified of the award to H&W.

Columbia argues that its December 2, 1983, letters were protests to the Forest Service. Also, Columbia points out that, after it sent those letters, it was notified that award to H&W had been suspended pending the Forest Service's examination of errors in the evaluation. Thus, Columbia argues the last contact it had from the Forest Service prior to filing its GAO protest was an indication that the Forest Service might well agree with its protest. Consequently, Columbia claims that it had nothing to protest to GAO until the Forest Service indicated that it did not agree with Columbia's protest.

We find Columbia's protest to be timely in part and untimely in part. We find Columbia's protest of the Forest Service's use of H&W's proposed estimated energy use figure to calculate its present value price and Columbia's protest that the Forest Service should use real dollar savings rather than a present value figure to calculate price to be untimely. The solicitation was clear in stating that price comparisons would be made on the basis of present value cost per square foot. Regarding energy use, the solicitation advised offerors that an estimated energy consumption figure for the proposed facility would be used in the calculation of present value cost. The solicitation advised offerors to provide an estimated energy consumption figure in their proposals. If they failed to include a figure, the figure representing the government's minimum requirements would be used. The solicitation provided further that an energy consumption study prepared and certified by a registered engineer must be submitted by the awardee 30 days after award of the contract. It is clear from the solicitation that offerors' estimated energy consumption figures would be accepted, without any realism analysis, for use in calculating the present value cost. Columbia's argument that the Forest Service should disregard H&W's figure and substitute a higher figure is really an argument that the solicitation should have provided for some sort of realism analysis. Our Bid Protest Procedures require protests of solicitation defects to be filed prior to the closing date for receipt of proposals. 4 C.F.R. § 21.2(b)(1) (1984). Columbia first raised this issue after award. Consequently, it is untimely.

Similarly, the solicitation clearly stated that price would be based on a single present value figure, not on "real dollar" savings over a 20-year lease period.

Columbia's argument that its proposal is lower using the real dollar method is untimely for the same reason that we found its energy consumption argument to be untimely.

We find the remainder of Columbia's protest to be timely, but without merit. Our Bid Protest Procedures require protests, other than those of solicitation defects, to be filed within 10 working days of knowledge of the grounds of the protest. While Columbia knew of the award to H&W on November 18, 1983, it did not know of the initial errors in the evaluation or of the results of the reevaluation until the meetings of November 25 and November 30, 1983. That information is the basis of the remainder of its protest. We find that the December 2, 1983, letter to the Forest Service raising these issues was a protest. A protest need not take any particular form, but is only required to set forth the party's reasons for disagreeing with agency action and the result that it would prefer. Radiation Systems, Inc., B-211732, Oct. 11, 1983, 83-2 C.P.D. ¶ 434. Not only did the letter meet those qualifications, it stated in the body of the letter "we further protest." This letter was received by the Forest Service within 10 working days of the meetings in which Columbia learned the basis of the protest.

Any subsequent protest to GAO must be filed within 10 working days of initial adverse agency action. 4 C.F.R. § 21.2(a). In this case, there was no adverse action by the Forest Service between the time that Columbia filed its agency protest and the date that it filed its GAO protest. Even though approximately 2 months had passed without an answer from the Forest Service, the information available to Columbia indicated that contract performance had been suspended and a reevaluation was taking place. In these circumstances, we find the protest timely. See, e.g., ARVCO Containers, B-208785, Jan. 18, 1983, 83-1 C.P.D. ¶ 63.

The Forest Service eliminated Columbia's "office only" proposal because its proposed site was located more than 1 mile from the existing warehouse. In this protest, Columbia argues that the Forest Service was required by the solicitation to evaluate its "office only" proposal, which had a lower present value cost than H&W's proposal, even though its proposed site was more than 1 mile from the existing warehouse. Columbia points to language in the

solicitation which states that the government will evaluate and select the office facility prior to selecting the warehouse and that 10 points would be deducted for each 0.5 mile beyond 1 mile that the warehouse is from the office facility.

Columbia has misinterpreted the relevant solicitation clauses. The solicitation provides for three optional proposals: (A) office, parking and warehouse on one site, (B) office and parking only; the office must be located within 1 mile of the present warehouse, and (C) office and parking at one site and warehouse, storage or wareyard located at a second site. Option "C" also has a note which says "see note 3 below." Under option "C" are three separate notes. Note 1 states that offers that include a warehouse must include separate cost factors for the warehouse, storage and wareyard. Note 2 states that offerors must clearly state whether they will accept a lease for only the office and warehouse together or whether they will accept an office only or warehouse only lease. Note 3 states that for each 0.5 mile beyond 1 mile that the office is from the selected office facility a deduction of 10 points will be made from the maximum of 30 points for warehouse location. It states further that negative points are possible which may affect the evaluation of the office portion in a dual-site proposal.

We find that the language referred to by Columbia regarding distances beyond 1 mile between an office and a warehouse refers only to option "C," not to option "B." This view is supported by the placement of note 3, along with the other two notes, under option "C." Also, note 3 is specifically referred to in option "C." Additionally, the other two notes obviously refer only to option "C." Finally, option "B" specifically requires the office to be located within 1 mile of the existing warehouse, which would be inconsistent with paragraph 3, if it referred to option "B." Consequently, we find that the Forest Service decision to reject all "office only" proposals with sites more than 1 mile from the existing warehouse to be reasonable and consistent with the solicitation's requirements.

The remainder of the timely portion of Columbia's protest concerns a disagreement with the Forest Service's evaluation of WDI's "office only" proposal and the contention that WDI's proposed site should be rejected

because it is in a base flood plain. The second issue is the subject of WDI's protest and is decided below. The first issue is academic because we deny WDI's protest and, therefore, it is no longer in line for award of the lease.

WDI's Protest

WDI admits that part of its proposed site is in a base flood plain, but argues that the Forest Service erroneously rejected its proposal because it improperly based its decision on information obtained after award of the contract. WDI also contends that the Forest Service is estopped from rejecting WDI's proposal because it erroneously advised WDI that the base flood plain regulations did not apply to its site. Finally, WDI claims that its building can be located on the proposed site in a way that complies with regulations concerning base flood plains.

WDI contends that it was improper for the Forest Service to consider, after an award was made and a protest filed, any information regarding the location of WDI's site in a base flood plain. WDI contends that the Administrative Procedure Act, at 5 U.S.C. § 556(e) (1982), requires an agency to base its decision solely on the record before it during the decisionmaking period--the time for evaluation of proposals.

We find no merit to this argument. Section 556(e) applies only to hearings required by sections 553 and 554 of the act. Section 553 of the act concerns rulemaking and specifically exempts contract matters, and section 554 concerns certain adjudications required by statute to be determined on the record after an agency hearing. Obviously, the evaluation of proposals for the award of a lease contract does not fall into either category. In fact, it is not uncommon for an agency to reverse a contract award decision based on information or arguments advanced in a protest of an award or proposed award.

Next, WDI argues that the Forest Service should be estopped from rejecting its proposal because the site is in a base flood plain, since Forest Service employees orally advised WDI that base flood plain regulations did not apply to its site. WDI asserts that, at the time that it was advised, it had an option on the same property on which H&W

was awarded the lease and could have offered it. Consequently, WDI contends that, because it relied to its detriment on erroneous government advice, the doctrine of equitable estoppel applies.

The Forest Service admits that its employees provided WDI erroneous advice. However, the Forest Service states that WDI was advised that the base flood plain regulations did not apply to leased facilities, not that WDI's site was outside the flood plain. The Forest Service also contends the advice was not binding because a solicitation clause states that oral advice concerning the "solicitation, drawings, specification, etc." given prior to award of the contract will not be binding and because the employees involved were a contract specialist and a volunteer, neither of whom could bind the government in this procurement.

WDI's reply to the Forest Service arguments is that the solicitation clause does not apply to this situation because this is not a matter concerning the solicitation, drawings, or specifications. Also, WDI argues that, since the employees were held out by the Forest Service as representatives, they had apparent authority to bind the government.

We have found that offerors rely on oral explanations of solicitation requirements at their own risk, even if the advice is from authorized agents, where solicitation requirements set forth specific procedures for obtaining such explanations. Eastern Marine, Inc., B-213945, Mar. 23, 1984, 84-1 C.P.D. ¶ 343. Since the solicitation clearly states that a contract would not be awarded for a property located in a base flood plain, the advice concerned a solicitation requirement. Here, the solicitation contained the same procedure for obtaining written explanations as did the solicitation in Eastern Marine.

Also, we have held that there is no basis under the doctrine of estoppel for requiring the government to consider for award a proposal which does not meet its minimum needs. Eastern Marine, Inc., B-213945, supra. Since we find below that WDI's proposal does not meet the need for a site outside a base flood plain, the doctrine of estoppel is inapplicable.

Finally, WDI argues that the Forest Service has not established that its site is within a base flood plain to an extent that federal regulations would prohibit the acquisition of the proposed facility on the site. WDI contends that the Forest Service used an outdated flood hazard map showing more of the site as within the base flood plain than current maps show. WDI points out that applicable regulations require the use of the most current maps. According to WDI, the most current maps show that two-thirds of the site is out of the flood plain.


WDI cites the regulations promulgated by the Federal Emergency Management Agency for the National Flood Insurance Program, 4 C.F.R. § 59, et seq., as the applicable regulations for determining what federal actions are prohibited in a base flood plain. According to WDI, the regulations prohibit only structures to be built in base flood plains and are not concerned with parking, landscaping or access. WDI contends that it can design the structure so that it is not within the base flood plain. WDI argues that, consequently, there is no regulatory basis for rejecting its proposed site because part of it is within the base flood plain.

WDI's interpretation of applicable regulations is incorrect. WDI is arguing essentially that a federal agency may not decide to refuse to acquire property in a base flood plain so long as structures on the site can be located outside the flood plain. Section 2(a)(2) of Executive order No. 11988, May 24, 1977, 42 Fed. Reg. 26951, states that, if an agency proposes to take any action within a flood plain, it must first consider alternatives. If it determines that no practicable alternative to siting in a flood plain exists, then it must comply with applicable regulations promulgated pursuant to the Executive order. Section 3(a) of the order requires that any regulations established pursuant to the order must "at a minimum" require federal structures and facilities to be in accordance with the standards of the National Flood Insurance Program. The General Services Administration (GSA) published order ADM 1095, 43 Fed. Reg. 22308, May 24, 1978, to implement the above Executive order and other relevant laws. This specifically pertains to GSA actions, but is used as a guideline by other government agencies in acquiring property. Paragraph 4 of the order requires the

responsible official to determine if the proposed action is in a base flood plain and to take no action in or affecting flood plains unless there is no practicable alternative. If there is no practicable alternative, then any action taken in a base flood plain must comply with the standards of the National Flood Insurance Program.

It is clear that government agencies should acquire property in flood plains only when no other alternatives are available. Only when an agency has determined that it must acquire property in a flood plain do the standards of the National Flood Insurance Program apply. Additionally, there is no prohibition of the application of stricter standards to actions taken in a flood plain; the National Flood Insurance Program standards are minimums.

Regardless of which maps are used, between one-half and one-third of WDI's proposed site is in a base flood plain. The solicitation clearly stated that an award of a contract would not be made for a property located within a base flood plain. Also, the solicitation required a two-acre site for the "office only" option and included requirements beyond the building, such as parking and landscaping. Other proposed sites outside base flood plains were available. In these circumstances, the rejection of WDI's proposed site complied with the requirement of the solicitation and with applicable regulations. Therefore, we deny its protest.

for 
Comptroller General
of the United States