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The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: W.D.C. Realty Corporation

File: B-225468

Date: March 4, 1987

DIGEST

1. Where solicitation for construction and lease of off-post military family housing requires that offerors submit evidence of site ownership or access to site ownership through held options, contracting agency improperly relaxed its requirements by accepting from an offeror a "letter of intent" to acquire property in the future as evidence of legal access to real property.

2. Protester is entitled to recover the cost of filing and pursuing its protest, including reasonable attorney's fees, as well as its proposal preparation costs, where the protester was improperly denied fair and equal opportunity to compete but corrective action is not appropriate under the circumstances.

DECISION

W.D.C. Realty Corporation (WDC) protests the award of a contract to Gates-Rainaldi Real Estate, Inc. (Gates) under request for proposals (RFP) No. DACA65-9-86-0001, issued by the Department of the Army, Corps of Engineers, Norfolk, Virginia. The procurement is for the construction and lease of off-post military family housing units in the Fort Drum, New York area. WDC complains that the Gates proposal failed to comply with a minimum mandatory requirement of the solicitation and that therefore the award was improper and represented a waiver by the government of the minimum mandatory requirement solely for the benefit of one offeror and without notice to other offerors.

We sustain the protest.

BACKGROUND

The procurement is pursuant to 10 U.S.C. § 2828(g) (Supp. III 1985), as added by section 801 of the Military Construction Authorization Act of 1984, which provides that the Secretary of a military department may enter into a contract for the

lease of family housing units to be constructed on or near a military installation within the United States under the Secretary's jurisdiction at which there is a validated deficit in family housing. 10 U.S.C. § 2828(g)(1). The RFP contemplated the award of a contract for the construction of 300 family housing units which the contractor would then lease to the government at a fixed annual rate for a 20-year period, with the maintenance and management of the units during the life of the contract provided by the contractor. The RFP stated that award would be made to the responsible offeror whose proposal conformed to the RFP and was the most advantageous to the government, cost and quality and other factors considered. Generally, the RFP called for a technical evaluation of the offeror's design, construction, site location, and maintenance plans. Further, the RFP stated that a cost/quality ratio for ranking purposes would be established by dividing the total of the government's rent payments by the quality points scored under technical evaluation. For evaluation purposes, certain technical data were "required as a minimum submission for consideration" from offerors, including "evidence of site ownership or access to ownership through held options," and a narrative proposal for provision of maintenance, repair and operational services.

Six proposals were received on June 5, 1986, the closing date for receipt of initial proposals; the proposals from Gates and WDC were subsequently found to be within the competitive range. Results of initial evaluations were as follows:

Firm	20-year cost	Technical Points	Cost per Quality Point
WDC	$61,744,859	745	$82,879
Gates	$61,543,747	753	$81,731

However, as "evidence of site ownership or access to ownership through held options," the Gates proposal contained only the following letter, entitled "Letter of Intent to Purchase Real Property," dated May 29, 1986, and addressed to the owner of a farm in the vicinity:

> "This will serve as a letter of intent to enter into a contract to purchase property from you (or the legal owner) consisting of approximately 197 acres situated at the intersection of Routes 11 and 342, Town of Leray, Jefferson County, New York, (see attached map), for the sum of $2,500,000 subject to terms, conditions and contingencies as set forth in the Purchase and Sale Contract.

"This will also confirm that thirty (30) days from the execution of the contract, we, the Buyer or Agent for the buyer will deposit $10,000 with you to be held in escrow and applied toward the purchase price. The deposit will be forfeited if the sale is not consummated through the fault of the Purchaser as more specifically set forth in the Purchase and Sale Contract.

"This letter of intent is being prepared specifically to provide evidence that the Buyer has specific contractual rights to purchase the property described herein."

The letter was signed by Gates and the apparent owner of the farm. A subsequent letter from Gates to the owner, dated August 8, 1986, confirmed Gates' "understanding" that it was "prepared to purchase" the property under its "existing contract, dated May 29, 1986," upon obtaining the Section 801 lease or, at the option of the owner, upon entering into a new contract with Section 801 contingencies. The letter concluded that "[i]n either event, upon your request, we will deposit ten thousand dollars ($10,000) with you, which shall be nonrefundable so long as you perform." There is no evidence in the record that the $10,000 was ever deposited with the owner. In fact, the owner, on July 1, 1986, prior to the second letter from Gates, entered into a real estate purchase agreement for the same property with an unrelated third party. For reasons not explained in the record, the third party purchaser did not complete the purchase. Thus, it was not until October 20, 1986, 3 weeks after the award of the contract by the Army to Gates, that Gates entered into a "real estate purchase agreement" with the owner of the farm for the site.

Nevertheless, the Army, during evaluation, accepted this Gates "letter of intent" to purchase as evidence of site ownership through held options within the meaning of the solicitation requirement. Further, the Army awarded the contract to Gates on September 29, 1986, following best and final offers and final technical and cost evaluation results which were as follows:

Firm	20-year cost	Technical Points	Cost per Quality Point
WDC	$61,340,276	745	$82,336
Gates	$61,543,747	833	$73,882

This protest followed.

TIMELINESS OF PROTEST

WDC filed its protest with our Office within 10 working days of the Army's debriefing that occurred on October 29, 1986. The Army argues that WDC's protest is untimely because "WDC was vigorously disputing [Gates'] purported lack of evidence of access to site ownership even prior to award on September 29, 1986." The record shows that WDC was approached by a real estate agent sometime in September 1986, who informed WDC that the property "previously identified" as the Gates Section 801 site was available for purchase. On September 22, WDC representatives visited the owner of the farm who informed them that he had signed a letter of intent with Gates in May 1986 and showed them the document. Prior to the September 29, 1986, award, a WDC representative talked to Army procurement officials and informed them that "there was a question of whether [Gates] had site control as required." The Army officials did not reveal to WDC what documents had been submitted by Gates as evidence of site control but informed WDC that the Army "believed [Gates] had a binding contract." On September 30, 1986, the day WDC was informed of the award, WDC immediately requested a debriefing. On October 9 and 10, 1986, approximately 1 week after the award to Gates, a WDC representative once again talked with Army procurement officials and asked how the Gates proposal could have been accepted, since based on information WDC received, Gates did not have site control. The Army informed WDC that it would investigate the matter. According to WDC, at the October 29, 1986, debriefing, it learned for the first time that Gates had submitted no other documents except the letter of intent as evidence of site control or ownership.

We think that the record reasonably shows that WDC representatives did not have actual knowledge of what documents had been submitted by Gates in its proposal until the debriefing. Further, WDC representatives did not know that the Army accepted a proposal, containing only a letter of intent, until the debriefing. By seeking an immediate debriefing upon being notified of the award, the protester diligently pursued its possible protest grounds and we conclude that the protest is timely since it was filed within 10 working days of the debriefing. See Lambda Corp., 53 Comp. Gen. 468 (1974), 74-2 CPD ¶ 312.

CONTENTION BY WDC

WDC contends that Gates failed to submit before award of the contract "evidence of site ownership or access to ownership through held options" as required by the solicitation.

According to WDC, the letter of intent submitted by Gates was neither evidence of site ownership nor an option, but was merely an unenforceable agreement to agree in the future without complete and essential conditions contained therein. WDC argues that the Army afforded Gates an unfair advantage by permitting one developer not to submit an enforceable contract showing site control and not to pay any deposit to secure the real property.[1]/

ANALYSIS

It is a fundamental principle of government procurement that competition be conducted on an equal basis, that is, offerors must be treated equally and be provided a common basis for the preparation of their proposals. CDI Corp., B-209723, May 10, 1983, 83-1 CPD ¶ 496. The Federal Acquisition Regulation (FAR), 48 C.F.R. § 15.606 (1986), requires the government to issue a written amendment whenever the scope of the work or solicitation requirements are relaxed, increased, or otherwise modified. The same principle applies where a protester was misled into believing that a solicitation required it to meet certain stated requirements, whereas the agency evaluated competitors' proposals on the basis of lesser requirements. Corbetta Construction Co. of Illinois, Inc., 55 Comp. Gen. 201 (1975), 75-2 CPD ¶ 144. Thus, contracting agencies must treat all offerors fairly and equally. Edwin G. Toomer, B-201969, Sept. 29, 1981, 81-2 CPD ¶ 262. We think the Army here failed to do so.

As a "minimum submission for consideration," the RFP required all offerors to submit "evidence of site ownership or access to ownership through held options." Yet, the Army accepted from Gates for this requirement a letter of intent to enter into a contract. Obviously, the Army required offerors to submit evidence of site ownership or access to site ownership to insure that the successful contractor could and would construct the family housing units at the location set forth in its proposal. Indeed, the Army's technical evaluation of proposals for acceptability included the factor, site location. The question presented, therefore, is whether Gates submitted in its proposal evidence of legal access to

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[1]/ WDC also alleged in its initial protest that Gates failed to submit a narrative proposal for provision of maintenance, repair and operational services. WDC abandoned this protest ground in its comments on the agency report and, in any event, the record shows that Gates did in fact submit this narrative proposal.

the site, i.e. a legally enforceable right in the site that it proposed. We do not think that the contracting officer could reasonably conclude that Gates did so.

Under New York law, if a material element of a contemplated contract is left for future negotiations, there is no contract enforceable under the statute of frauds or otherwise. See Willmott v. Giarraputo, 5 N.Y. 2d 250, 157 N.E. 2d 282 (1959). Here, by the very terms of the May 29 letter of intent, the "terms, conditions, and contingencies" were left for future determination in a subsequent purchase and sale contract. Generally, a condition in a contract is an event, not certain to occur, which must occur before performance becomes due. Restatement (Second) of Contracts, § 224 (1981). Thus, a condition or contingency in a contract can determine whether a party does or does not perform. We therefore think that such "conditions" or "contingencies" are material terms of a contract; yet, the Gates agreement here left such matters for future determination. Accordingly, we think that the letter of intent was more in the nature of an agreement to enter into a contract in the future and was thus unenforceable. See generally Briefstein v. Rotondo Constr. Co., 8 A.D. 2d 349 (1959). We further think that Gates' August 8 letter was merely a unilateral "confirmation" of this prior letter of intent that did not give Gates any additional legal rights to the site.

We think that by accepting this letter of intent the Army relaxed a material requirement of the solicitation for the benefit of one offeror while the other offerors were compelled to compete with firm site control or site ownership. We note that WDC was the low offeror after best and final offers and we are left to guess how much more the price difference would have been had Gates been required to submit an enforceable (and potentially costly) option. Accordingly, we sustain the protest.

REMEDY

The only remaining issue is the appropriate remedy. The Army states that termination of the Gates contract would have an adverse impact on the national defense because the 10th Mountain Division (Light Infantry), one of five highly trained light infantry divisions, is being activated at Fort Drum as part of an overall Army modernization program. Thus, an additional 30,000 service members and dependents will be

stationed at Fort Drum and family housing is in critically short supply. Further, the construction completion schedule is very tight and is predicated upon use of the short construction season in upstate New York. According to the Army, it is imperative for the Army's mission that all family housing units be completed on schedule; any construction delays would severly exacerbate the situation and require temporary duty (TDY) of troops to Fort Drum from other locations. We think that the Army has advanced cogent reasons why termination of the Gates contract would not be in the best interests of the government and would not be appropriate under the circumstances. Accordingly, we do not recommend termination.

However, based on our conclusion that the agency unreasonably deprived WDC of fair and equal competition, we find that WDC is entitled to its costs. Our regulations, implementing the Competition in Contract Act of 1984, 31 U.S.C. § 3554(c) (Supp. III 1985), provide that the costs of filing and pursuing a protest, including attorney's fees, may be recovered where the agency has unreasonably excluded the protester from the procurement, except where our Office recommends that the contract be awarded to the protester and the protester receives the award. Further, the recovery of costs for bid or proposal preparation may be allowed where the protester has been unreasonably excluded from competition and where, as here, none of the remedies listed in § 21.6(a)(2)-(5) of our regulations, 4 C.F.R. § 21.6(a) (1986), is appropriate. EHE National Health Services, Inc., 65 Comp. Gen. 1 (1985), 85-2 CPD ¶ 362. Accordingly, by separate letter of today, we are advising the Secretary of the Army that WDC is entitled to recover its costs of filing and pursuing the protest, including reasonable attorney's fees, as well as its proposal preparation costs. WDC should submit its claims for such costs directly to the agency. 4 C.F.R. § 21.6(f).

The protest is sustained.

for Milton J. Socolar
Comptroller General
of the United States