



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: American Management Company

File: B-228279; B-228280

Date: January 15, 1988

DIGEST

1. Agency has reasonable basis to cancel solicitation for leased space where it becomes aware, after submitting draft lease to an offeror for execution but prior to government execution of the lease, that the offeror's building does not meet fire safety requirements that were not included in the solicitations.

2. Although agency tendered draft lease to offeror and offeror executed returned lease, agency did not enter into lease contract where it never executed the lease.

DECISION

American Management Company (AMC) protests the failure of the General Services Administration (GSA) to award it two leases pursuant to solicitation for offers (SFO) Nos. RAL-86081 and -86074. The protester contends that GSA improperly withheld the awards and that cancellation of the SFOs was a subterfuge designed to deny the firm the awards.

We deny the protests.

The SFOs requested offers for a minimum of 5,992 and 16,880 net usable square feet of office and related space in Birmingham, Alabama to house the Department of the Treasury's Bureau of Alcohol, Tobacco and Firearms (ATF) enforcement office and the Equal Employment Opportunity Commission (EEOC), respectively, for 10 years.

Two offers, including one from the protester, were received in response to the SFO RAL-86074. GSA determined that the space offered by the other firm did not meet ATF's needs and eliminated it from further consideration. GSA conducted discussions and received a best and final offer from AMC on February 18, 1987.

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In response to SFO RAL-86081, GSA received four offers following discussions; one initial offer was withdrawn and best and final offers (BAFOs) were requested from the remaining three offerors. Two firms submitted BAFOs, Metcalf Realty and the protester. Thereafter, GSA performed an analysis of the BAFOs and initially concluded that the protester had submitted the lowest price per square foot.

On June 18 and June 23 respectively, the contracting officer mailed lease packages for RAL-86074 and RAL-86081 to the protester's representative for his signature. The transmittal letter accompanying each package advised that the lease was to be executed by the protester prior to GSA's review and acceptance. The leases were signed by the protester and returned to GSA.

On August 26, an on-site fire safety inspection was conducted on the space offered by AMC under RAL-86074. GSA states that as a result of this inspection it discovered that AMC's building did not meet current fire safety requirements. According to GSA, the current fire safety requirements for leased space offered on the sixth floor or above require that the offered floor and all floors beneath have sprinklers. The agency reports that AMC proposed space on the seventh and tenth floors and that neither the offered floors nor all floors beneath them are equipped with sprinklers. Since the SFO did not contain the current fire safety requirements, the agency states that it intends to cancel the SFO, revise the requirements of the SFO to include the applicable fire safety requirements and resolicit.

GSA reports that during the review process for RAL-86081, it discovered an error in the analysis performed by the procurement personnel on the adjusted offers received from Metcalf and AMC. Specifically, the agency states that a \$2.00 per square foot moving cost was erroneously added to Metcalf's offer. The correct adjustment should have been \$0.20 per square foot. According to GSA, when the correction was made, Metcalf's offer per square foot was lower than the protester's. As a result, by letter dated September 22, GSA made an award pursuant to this SFO to Metcalf.

On September 24, AMC filed protests B-228279 and B-228280 with our Office. In its protest submission for B-228279 AMC asserts that over a period of several months it was led to believe that it would receive the award since GSA sent it a lease package for execution, which was duly executed by AMC and returned to GSA for execution by the government. Although AMC concedes that the GSA contracting officer did

not execute the lease on behalf of the government, the protester nonetheless argues that GSA cannot make award of the lease to any other offeror. Moreover, AMC asserts that cancellation of the SFO is not warranted under the circumstances here because the fire safety requirements cited by the agency are "commonly waived by GSA." Thus, AMC argues that GSA's decision to enforce these requirements under this SFO is nothing more than an attempt by GSA to avoid doing business with the firm.

In response, GSA denies that an award was made to AMC; that it acted deliberately to preclude AMC from receiving an award; that it led AMC to believe that the firm would necessarily receive the award. The agency also states that the fire safety requirements are essential and previous waivers of fire safety requirements are not dispositive since the current policy is not to waive such requirements.

In determining the propriety of the cancellation of a solicitation for leased space, an agency need only show a reasonable basis to cancel the procurement. Crow-Gottesman-Hill #8--Reconsideration, B-227809.2, Nov. 10, 1987, 87-2 CPD ¶ 471. In this case, the record shows that GSA's contracting officer became aware, after it sent the proposed lease to AMC, that AMC's building did not meet the fire safety requirement that there be sprinklers for floor space located on the sixth floor or above and all floors beneath it. We have recognized that facts justifying a cancellation action can be considered no matter when they surface. Id.

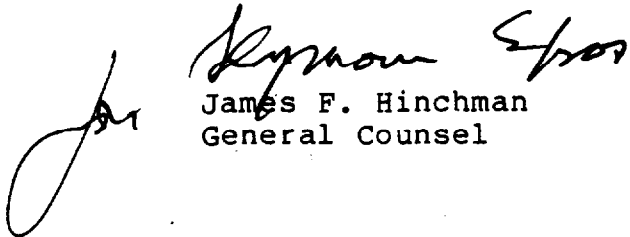
Although AMC alleges that these requirements can be waived, AMC has not shown that GSA is acting arbitrarily or in bad faith in not waiving the requirements. Accordingly, on this record we conclude that GSA has bona fide fire safety requirements which AMC's building does not meet and that were not included in the SFO. Such circumstances provide a reasonable basis for canceling the SFO.

AMC argues that it was entitled to the award of this lease because it was led to believe that it would receive the award. We find the protester's position to be without merit. It is a fundamental rule that actions necessary to bind the government to a contract is its acceptance of an offer, and the acceptance must be clear, unequivocal, and unconditional. See, e.g., Couse's Sanitation Service, B-223659, Sept. 15, 1986, 86-2 CPD ¶ 299 at 3. In this case, it is clear that GSA never entered into a lease contract with AMC. Rather, the record shows that subsequent to the issuance of the SFO and prior to acceptance of AMC's offer, the contracting officer realized that the SFO was deficient and canceled it rather than make award under it.

In its other protest, AMC challenged the award to Metcalf alleging, inter alia, that the award was improper because GSA reopened discussions, after receipt of BAFOs, with only one offeror, Metcalf. However, subsequent to the filing of this protest, GSA has terminated Metcalf's lease for default and announced its intention to revise the SFO and resolicit the space using revised specifications. Thus, AMC now protests the decision to cancel RAL-86081 and resolicit the requirements.

As we stated previously, the contracting agency need only establish a reasonable basis to support a decision to cancel an SFO. Id. Here, GSA determined that the current fire safety requirements discussed elsewhere in this decision also apply to the lease space being acquired for the EEOC. Also, GSA states, and AMC does not dispute, that the EEOC has increased its request for a minimum of 16,880 square feet for an additional 4,152 square feet. We think, GSA's decision to resolicit is reasonable under these circumstances.

The protests are denied.



James F. Hinchman
General Counsel