



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Shetland Properties of Cook County Limited  
Partnership

File: B-231909

Date: September 16, 1988

### DIGEST

Offer which took exception to a material solicitation provision which permitted the procuring activity to terminate a lease without further obligation on 120 days written notice was properly rejected as unacceptable.

### DECISION

Shetland Properties of Cook County Limited Partnership protests the rejection of its offer under solicitation for offers (SFO) No. DACA27-5-88-065, issued by the Army Corps of Engineers for the lease of space for 5 years to be used as an Army Reserve unit assembly location in Chicago, Illinois. Shetland contends that the Army improperly determined that Shetland took exception to a solicitation requirement that the government have the right to terminate the lease without further obligation by providing 120 days written notice. We deny the protest.

The SFO contained the following standard "walk-out" provision:

"The Government may terminate this lease at any time after a one-year anniversary by giving at least one hundred twenty days' notice in writing to the Lessor and no rental shall accrue after the effective date of termination. Said notice shall be computed commencing with the day after the date of mailing."

The Army received three offers, including Shetland's, by the April 15, 1988 closing date for the receipt of initial offers. Shetland took exception to the walk-out provision by requiring 180 days notice for non-renewal, and by adding an addendum to the SFO terms which provided that the Army

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could not reduce its occupancy during the lease term or terminate the agreement prior to the expiration of the 5 year lease term. The Army determined that all three offers were in the competitive range.

In discussions with Army representatives who performed an April 26 site inspection, Shetland personnel further expressed objection to the walk-out provision on the basis that it might cause Shetland to suffer a financial loss because Shetland would incur remodeling expenses to make the space offered comply with certain solicitation requirements. Shetland states that during these discussions, the Army's representatives stated that the Army would only seek to apply the walk-out provision because of budgetary restraints, or if the reserve unit was mobilized. However, the Army asserts that its representatives merely provided these reasons as examples of why the provision was normally invoked, and continued to advise Shetland that the agency required an unrestricted right to terminate.

After this site inspection, on June 6 the Army sent Shetland a letter enumerating the deficiencies in its offer and requesting a best and final offer (BAFO). The Army pointed out that Shetland had restricted the Army's right to early termination in its initial offer and stated that: "The Government must have a cancellation clause in all reserve leases; this is not a negotiable item. Are you willing to agree to the 120-day cancellation clause for the Government?"

In its BAFO, Shetland stated, in relevant part, that:

"Shetland will allow the government to terminate the lease with one hundred twenty (120) days notice (preferably one hundred eighty [180]), it being understood however, that such termination would be the result of a budgetary restriction. Furthermore, the requirement to pay for unamortized improvements in the event of such termination would be waived."

The Army determined that this qualification constituted an exception to the mandatory walk-out clause and, therefore, rejected Shetland's offer as unacceptable. Thereupon, Shetland protested to our Office.

In its protest, Shetland asserts that its statement in its best and final offer that the government's right to terminate was limited to situations arising from budgetary restrictions did not modify the solicitation requirements

because it merely incorporated an oral representation previously made by agency representatives.

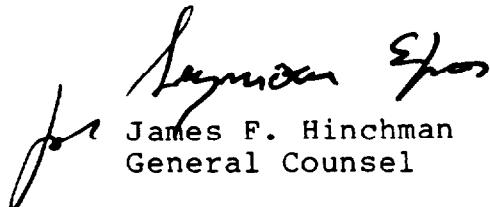
First, as indicated above, the Army disputes Shetland's version of what representations were actually made. Shetland has provided no evidence other than the allegation of its representatives that refutes the Army's account of the discussions, and thus has not shown that the Army misled it during negotiations. See SWD Associates, B-226956, July 17, 1987, 87-2 CPD ¶ 55. Moreover, the solicitation specifically states that "any prospective offeror desiring an explanation or interpretation of the solicitation should request it in writing. Oral explanations or instructions given to a prospective offeror concerning a solicitation will not be binding." Further, the Army's June 6 request for BAFOs provides that the agency requires the 120 day walk-out provision, in language making it clear that limitations on the provision are not acceptable. Thus, there is no basis for Shetland's contention that the Army either modified the walk-out provision, or misled Shetland as to the specific nature of the requirement.

In its comments on the agency report, Shetland shifted its position, now contending that the language in its best and final offer does not condition the government's unrestricted right to cancel on 120 days notice. This contention is simply contrary to the plain meaning of Shetland's BAFO. By stating that it is "understood" that termination will be the result of budgetary restriction, Shetland expressly limited the applicability of the Army's termination rights to only that situation, rather than providing an unlimited walkout provision, as required by the SFO and the request for BAFOs.

When an offeror takes exception in its BAFO to a standard solicitation term or condition, such as the termination clause here, which affects the government's rights under the resulting contract, the agency is under no obligation to discuss the exception taken and properly may exclude the proposal from further consideration. See Conrac Corp., SCD Division, B-225646, May 11, 1987, 87-1 CPD ¶ 497. Moreover, we have explicitly held that the requirement for an unlimited 120-day notice cancellation clause is a material

solicitation requirement. SWD Associates, B-226956.2, Sept. 16, 1987, 87-2 CPD ¶ 256. Accordingly, the Army had a reasonable basis to exclude Shetland's proposal from further consideration.

The protest is denied.



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General Counsel