

144129



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Hogan Property Company

File: B-242795; B-242795.2

Date: June 7, 1991

Dan Hogan and Randy Hogan, for the protester.
Barry D. Segal, Esq., General Services Administration, for the agency.
Anne B. Perry, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that requirements concerning asbestos removal are overly restrictive of competition and that agency should waive the requirements for the protester is dismissed as untimely where not raised by the closing date for receipt of initial proposals or within 10 working days after agency denied protester's request for a waiver.
2. Where neither initial proposal nor best and final offer demonstrates compliance with solicitation asbestos removal and occupancy requirements after repeated and specific requests by agency for explanation, agency reasonably concluded that proposal is technically unacceptable.

DECISION

Hogan Property Company protests the award of a contract to Dominion Leasing, Inc. under solicitation for offers (SFO) No. R7-71-89, issued by the General Services Administration (GSA) for a minimum of 25,780 net-usable square feet of office and related space to house the Military Entrance Processing Station (MEPS) in Oklahoma City, Oklahoma. Hogan objects to the award on the grounds that the contracting officer improperly determined that its low-priced offer was technically unacceptable.^{1/}

^{1/} Hogan Property Company submitted two proposals, and filed separate protests on behalf of each. One protest, B-242795.2, was based solely on the protester's mistaken assumption that one of its proposals was at a lower price than the awardee's
(continued...)

We dismiss the protest in part and deny it in part.

MEPS currently occupies 20,483 net-usable square feet in the Journal Record Building under a lease with the Hogan Property Company which expires on November 30, 1991. MEPS requested GSA to provide it with additional space and, as a result, this solicitation called for a minimum of 25,780 square feet. The solicitation provided that award would be made to the offeror whose offer was most advantageous to the government, price and other factors considered, price being less important.

The solicitation indicated that occupancy was required within 180 days of receipt of approved floor plans and award. All offered space was to be contiguously located on one floor, and to be handicapped accessible.

The solicitation stated that "No asbestos-containing fireproofing or insulation on building structure, acoustical treatment, molded or wet-applied ceiling or wall finishes, decorations, or pipe and boiler insulation (including duct, tank, etc.) will be permitted." An offeror was required to certify whether its offered space contained any asbestos and, if it did, in what condition it was, namely, friable; non-friable, in good condition where it is not likely to be disturbed during the term of any lease; or in solid matrix, already in place, and in good condition. Offerors proposing to lease space in buildings built before 1978 were required to submit air-test samples.

The solicitation permitted offerors to propose space which contained asbestos, provided that it was solid matrix, already in place (e.g., vinyl asbestos floor tile, sheetrock/drywall transite paneling or fells) and it was not damaged or deteriorated, and a special operations and maintenance program was established and approved by the contracting officer prior to award of the lease. Asbestos abatement plans for unacceptable forms of asbestos were to specify the proposed procedure to be used, the proposed contractor and his qualifications and, if applicable, interim housing plans for the agency.

Hogan submitted a proposal offering space in the Journal Record Building where MEPS is currently located. The proposal

1/(...continued)
proposal. The agency report demonstrated that, in fact, Dominion's price was lower overall, which we verified by review of the cost comparison, and the protester withdrew this protest.

noted that asbestos was located in the building in all forms, but that the proposal was based on the satisfactory abatement of existing asbestos, which was to occur on the evenings and weekends, coordinated around the work schedule of MEPS. On several occasions, GSA contacted Hogan and advised it that the asbestos in its building posed a serious problem, and that GSA was concerned with the considerable time, expense and safety hazards necessary to abate the asbestos. Hogan then submitted a report from an environmental consultant which stated in general terms that Hogan's abatement plan was satisfactory, and that much of the asbestos was best left untouched.

GSA advised Hogan that this report was too general, did not specifically address locations and amounts of asbestos present in the building, nor provide a timeframe in which abatement would occur. Hogan was also asked how it planned to perform the abatement work while MEPS was occupying the premises, in view of the fact that MEPS operates the space until midnight 5 days a week, and a minimum of one Saturday a month. Shortly thereafter, GSA sent a letter to Hogan addressing other deficiencies in its proposal, namely, that the space offered was not on one floor, there were an insufficient number of bathrooms (the travel distance between them exceeded the SFO requirements), and there was no mention of whether the building could be occupied in 180 days from award.

With respect to the problem of the asbestos, GSA's letter stated:

"In order for us to evaluate the abatement plan for the asbestos in the building, please provide the following information. Testing and reporting should be conducted in accordance with the specifications attached.

1. Copies of all previous air monitoring and visual inspection records.
2. What is the frequency of air monitoring and visual inspections?
3. Provide realistic timetable for asbestos removal.
4. The environmental consultant must make an assessment using the attached forms."

In response, Hogan submitted two alternative floor plans, neither of which fulfilled the SFO requirement that all office space be on one floor. Hogan also noted that it proposed a

sufficient number of bathroom facilities, at appropriate distances, and that it would complete remodeling in a period of less than 90 days. In response to GSA's concerns regarding asbestos, Hogan submitted some of the required forms and stated that it had a 5-year timetable for asbestos abatement for the entire building.

Hogan repeatedly contacted the agency and urged it to rethink its asbestos policy, arguing that total removal of asbestos was unnecessary since the majority of the asbestos in the Journal Record Building did not pose any health risk. The agency refused to change its policy, and advised Hogan that any partial abatement of asbestos in the building, short of what was required in the SFO, would not be acceptable to the government. GSA also informed Hogan that additional and more specific information was required concerning the proposed schedules for abatement and scope of work, and how Hogan anticipated protecting MEPS' employees from asbestos during the abatement performance while the space was occupied. GSA repeated its concern that the proposed alterations of the space, especially conversion of bathrooms into office space, would disturb asbestos presently in place, and would exacerbate the asbestos problem in the building.

In response, Hogan submitted bulk samples taken June 25, 1986, and air monitoring results taken January 28, 1990. Hogan proposed conversion of restroom facilities, a mechanical closet and the east lobby into office space in order to meet the square footage requirement of the SFO, tasks which included substantial demolition work, which GSA determined could damage asbestos that would otherwise not have posed a health risk. GSA discussed these newly raised concerns with Hogan, and again reiterated its request for a more detailed abatement plan.

In its request for a best and final offer (BAFO) from Hogan, the contracting officer stated:

"After reviewing the floor plans you submitted providing 24,983 usable square feet, including Alternate A and Alternate B, it appears that you cannot provide the minimum space on one floor. As discussed, you believe that you can modify the lobbies, restrooms, and mechanical areas to provide an additional 797 square feet to meet the minimum of 25,780 on one floor. Your proposal for additional space will be considered subject to the resolution of asbestos removal and evidence that the space alterations can be completed after working hours and without interfering with the mission of the agency. Please provide a detailed scope of work and time

line bar chart which reflects proposed construction schedules."

The request for BAFOs also informed Hogan that negotiations were concluded on receipt of BAFOs, and that any modifications received or requested after the specified date would not be accepted unless requested by the government.

The BAFO submitted by Hogan included an addendum which stated:

"The Owner's [Hogan's] Proposal to Lease Space to which this Addendum 21-A is attached is subject to the Owner entering into an agreement reasonably satisfactory to the Owner with one or more responsible contractors for the removal and/or encapsulation of all or substantially all of the asbestos located in the leased space." (Emphasis added.)

The BAFO also included a revised abatement plan which decreased the schedule from 5 years to 180 days, and a bar graph depiction of a projected schedule for abatement. Hogan requested that it be given an additional 60 days to design a scope of work bid package and select an abatement contractor in the event that it was selected for award.

After submission of BAFOs, Hogan continued to urge the government to consider partial abatement, and requested further information from the contracting officer. GSA responded by advising Hogan that discussions and negotiations were completed.

GSA evaluated Hogan's offer and rejected it as technically unacceptable since Hogan had failed to provide a satisfactory abatement plan, scope of work, and construction schedule which demonstrated that all friable asbestos would be removed while the space is currently occupied, and because GSA concluded that the space could not be provided in 180 days after award, in view of the additional 60 days Hogan requested for developing a scope of work bid package, plus an unspecified amount of time to find a responsible abatement contractor.

Hogan protests the rejection of its Journal Record Building space on the grounds that it constitutes a more cost-efficient alternative to the newly constructed building offered by Dominion, especially in light of the extremely high vacancy rate in already built office structures in the area. Hogan argues that general GSA standards do not require total abatement of asbestos, just the removal of damaged and deteriorated asbestos, and that requiring more is overly restrictive of competition. The protester alleges that its facility meets all EPA standards for control of asbestos,

proven by its air samples, and that it submitted a perfectly acceptable abatement plan to be accomplished within 180 days. The protester also alleges that despite its repeated phone calls and letters to the agency concerning the asbestos problem, the agency never informed Hogan of its proposal's apparent deficiency concerning its abatement plan.

To the extent that Hogan is arguing that the asbestos requirements included in the SFO are unduly restrictive of competition or should be waived for the Journal Record Building, its protest is untimely. Hogan repeatedly requested the GSA to waive the SFO requirement for total asbestos abatement, and the GSA consistently denied these requests, both before and after proposals were due. The SFO clearly required total abatement, and protests based upon alleged improprieties apparent in the solicitation must be filed not later than the closing date for receipt of proposals. 4 C.F.R. § 21.2(a)(1) (1991). Further, to the extent that Hogan's repeated requests to the agency could be considered to constitute agency-level protests, Hogan was obligated to protest within 10 days after the contracting officer initially denied Hogan's request for a waiver. 4 C.F.R. § 21.2(a)(3).

With respect to Hogan's allegations that the proposed space in the Journal Record Building is technically acceptable, and that Hogan can complete the alterations within the required 180 days, the agency's conclusions to the contrary are reasonable. In reviewing protests against allegedly improper technical evaluations, we examine the record to determine whether the agency's judgment was reasonable and in accord with the listed evaluation criteria, and whether there were any violations of procurement statutes or regulations. Management Training Sys., B-238555.2, July 17, 1990, 90-2 CPD ¶ 43.

The agency's concerns about the protester's ability to provide a building fit for occupancy within 180 days after award are reasonable, since Hogan did not offer to complete the construction and abatement 180 days after award; rather, all it promised to do was complete the work 180 days after it began, with "projected" start and completion dates. Hogan further conditioned its proposal on finding an abatement contractor of its choosing, and having an additional 60 days after award in which to prepare a bid package for this contractor. Thus, in effect, Hogan did not provide any specific time limit. In addition, we see no reason why the contracting officer could not reasonably rely on the technical advisors' review which stated that the asbestos in the building posed a health risk to MEPS employees, and that the abatement plan as submitted by Hogan was insufficient to determine the health risks associated with asbestos removal while MEPS personnel occupied the space.

Hogan's final argument is that the agency never discussed these alleged deficiencies with Hogan despite Hogan's repeated requests for additional information. This position is contradicted by the record which shows that the agency advised Hogan no less than seven times during the conduct of discussions that Hogan had not provided a sufficiently detailed abatement plan, and that the asbestos in its building posed a serious concern for the agency. By so doing, the agency clearly satisfied its obligation to conduct meaningful discussions with Hogan. Further, it is evident from the position taken by Hogan in its protest, that the required total abatement is unnecessary, that further discussions would not have prompted Hogan to provide any more information or change its abatement plans.

The protest is denied in part and dismissed in part.


James F. Hinchman
General Counsel