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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: RJP Limited

File: B-246678

Date: March 27, 1992

Neil I. Levy, Esq., and Pamela L. Sherman, Esq., Melrod, Redman & Gartlan, for the protester.
Gary F. Davis, Esq., and Jeffrey M. Hysen, Esq., General Services Administration, for the agency.
John Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. The General Accounting Office has jurisdiction to decide a protest concerning the acquisition of a building site by the General Services Administration under the authority of the Public Buildings Act, 40 U.S.C. § 604 (1988).

2. The competition requirements of the Federal Property and Administrative Services Act and the Federal Acquisition Regulation are not applicable to the procurement of a building site by the General Services Administration under the authority of the Public Buildings Act, 40 U.S.C. § 604 (1988).

3. A site selection and award by the General Services Administration of a building site is unobjectionable where the agency reasonably evaluated the awardee's proposed site as superior to the protester's proposed site for a number of reasons, each consistent with the site selection criteria provided to the offerors.

DECISION

RJP Limited (a limited partnership) protests the award of a contract to Vingarden Associates by the General Services Administration (GSA) for the acquisition of a building site for the Internal Revenue Service (IRS) in Prince George's County, Maryland. RJP contends that the agency acted improperly in not conducting the acquisition in accordance with the requirements of the Federal Property and Administrative Services Act of 1949 (Property Act) and the Federal Acquisition Regulation (FAR), and that the agency's evaluation of RJP's proposed building site was unreasonable.

We deny the protest.

On November 19, 1990, GSA published in The Washington Post an advertisement seeking "expressions of interest" in providing a site and design-build services for the construction of approximately 885,000 square feet of office and related space, and up to 2,600 parking spaces, for use by the IRS. The advertisement specified that title to the land and improvements thereon would vest in the government no later than the completion of construction, and that the location must be within a 2,000 foot path of travel of a Prince George's County Metrorail[1] station.

Subsequent to the publishing of the November 19 advertisement, GSA determined, upon further review of market conditions, to procure first a building site, and then to hold a separate competition for the design-build services. On May 3, 1991, GSA published in the newspaper a revision of the November 19 advertisement, this time seeking expressions of interest in providing only the building site. This advertisement specified that title to the land would vest in the government at the time of sale in fee simple, and again noted that the site must be within a 2,000 foot path of travel of a Prince George's County Metrorail station.

GSA received expressions of interest from six offerors in response to the May 3 advertisement. The offerors were provided with a summary of the site selection criteria on which the site evaluations and selection would be based. GSA reviewed the submissions and requested additional information. The agency also conducted site visits and met with the various offerors to discuss certain aspects of the sites proposed.

On October 15, the agency received final offers from the four offerors whose proposed sites remained under consideration. Vingarden had the top rated site while RJP's site was one of the two lowest rated sites. Vingarden's site price (including necessary off-site improvements) was $20,387,000, while RJP's site price was $19,250,000 plus an additional $17,912,000 for off-site improvements not included in RJP's offer. On November 1, the agency announced the award of a contract to Vingarden. This protest followed.

JURISDICTION

As a preliminary matter, GSA argues that our Office does not have jurisdiction to consider this protest. GSA contends that while the Competition in Contracting Act of 1984

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[1]Metrorail refers to the rail system which services the Washington, D.C. metropolitan area.

(CICA), 31 U.S.C. §§ 3551-3556 (1988), conferred jurisdiction upon our Office to consider bid protests filed against procurements of federal agencies, that jurisdiction is limited to consideration of whether a federal agency has violated a "procurement statute or regulation," which GSA contends includes only the Property Act, 40 U.S.C. §§ 471-474 (1988); 41 U.S.C. §§ 251 et seq. (1988), and implementing regulations. According to GSA, because the acquisition here was conducted in accordance with the authority and procedures of section 5 of the Public Buildings Act of 1959 (PBA),[2] 40 U.S.C. § 604, and not the Property Act, we may not consider the protest.

A "protest" under CICA is defined as a written objection to a solicitation for bids or the proposed award or award of a contract for the procurement of "property or services". 31 U.S.C. § 3551(1); Fluid Eng'g Assocs., 68 Comp. Gen. 447 (1989), 89-1 CPD ¶ 520. Neither the language nor the history of CICA provides a basis for us to exclude a contract for the procurement of real property from this definition. The site acquisition here is clearly a procurement of property and may be protested. See Greenbaum and Rose Assocs., B-227807, Aug. 31, 1987, 87-2 CPD ¶ 212 (acquisition of real estate); Fluid Eng'g Assocs., supra. CICA provides further that the Comptroller General shall decide protests "concerning an alleged violation of a procurement statute or regulation". 31 U.S.C. § 3552. The PBA is the statute that authorizes GSA to purchase real estate and is, therefore, a "procurement statute". Thus, CICA grants us the authority to consider protests that GSA did not comply with the PBA's requirements regarding site

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[2]Section 5 of the PBA provides in pertinent part:

"The Administrator [of GSA] is authorized to acquire, by purchase, condemnation, donation, exchange, or otherwise, such lands or interests in lands as he deems necessary for use as sites, or additions to sites, for public buildings . . . .

. . . . .

"In selecting a site under this section the Administrator . . . is authorized to select such site as in his estimation is most advantageous to the United States, all factors considered, and to acquire such site without regard to title III of the Federal Property and Administrative Services Act of 1949, as amended [41 U.S.C. 251 et seq.]." (Emphasis added.)

selection. See Humco, Inc., B-244633, Nov. 6, 1991, 91-2 CPD ¶ 431 (acquisition of transportation services authorized by the Transportation Act of 1940, 49 U.S.C. § 10721 (1988), which was not subject to the Property Act).

GSA also contends that because it never issued a formal solicitation during the course of this acquisition, we should not consider this protest. GSA contends that the procurement here is analogous to the acquisition of spot movements,[3] which we have excepted from our review because such acquisitions fall outside the structure of the formal procurement process--agencies employ their own informal procedures to accomplish these one-time, usually low-cost shipments. See, e.g., Moody Bros. of Jacksonville, Inc.; Troika Int'l Ltd., 69 Comp. Gen. 524 (1990), 90-1 CPD ¶ 550; Stapp Towing Co., Inc., B-240087, July 6, 1990, 90-2 CPD ¶ 19. This procurement involves the acquisition of a building site at a cost in excess of $20 million. Proposals were solicited, offerors were provided the evaluation criteria, and their proposals were evaluated in accordance with the specified criteria by an evaluation panel, which made an award recommendation. We are unaware of any basis in statute or policy for excluding a major acquisition of real property from the oversight accorded our Office under CICA.

APPLICABILITY OF THE FAR

The protester argues that the procurement was for the acquisition of an "option" to purchase real property, rather than the acquisition of real property itself, and as such should have been conducted in accordance with the FAR. In support of its claim that this procurement was for an option to purchase real property, the protester points to clause 13 of the "Contract to Sell Real Property,"[4] executed by the awardee and the agency on November 1, 1990, which provides that:

> "The [g]overnment reserves the right to terminate this agreement at any time up to 330 days following the date that [g]overnment executes this Contract to Sell Real Property."

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[3]A "spot movement" is a one-time shipment of a commodity on one bill of lading and which requires special equipment or services not otherwise provided by tariff or special rate tenders.

[4]A draft of this document, which included clause 13, was provided to the offerors during the procurement.

The protester contends that although the contract provides elsewhere that the "[v]endor covenants and agrees to convey to the United States of America and its assigns the indefeasible fee simple title to the . . . land," the contract in actuality constitutes only an option to purchase the property by operation of clause 13, since that clause gives GSA the right to terminate the agreement prior to completing the acquisition by obtaining the title to the site.

Section 6(a) of the Office of Federal Procurement Policy (OFPP) Act, 41 U.S.C. § 405(a) (1988), provides that:

> "To the extent the Administrator [of the OFPP] considers appropriate, in carrying out the policies and functions set forth in this chapter, and with due regard for applicable laws and the program activities of the executive agencies, the Administrator may prescribe Government-wide procurement policies. These policies shall be implemented in a single Government-wide procurement regulation called the [FAR] and shall be followed by executive agencies in the procurement of-
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> (1) property other than real property in being . . . ." [Emphasis added.]

The protester, citing Foreman v. United States, 767 F.2d 875 (Fed. Cir. 1985), argues that because the procurement here resulted in the acquisition by GSA of an option to purchase real property, rather than "real property in being," GSA was required by the terms of the OFPP Act to follow the FAR in the conduct of the procurement.

We disagree. Even assuming that the procurement here resulted in the acquisition of an option to purchase real property rather than the acquisition of real property itself,[5] the procurement was not subject to the competition requirements of the Property Act or the FAR. The procure-

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[5]The protester cites Dodek v. CF 16 Corp., 537 A.2d 1086 (D.C. App. 1988); Green Manor Corp. v. Tomares, 295 A.2d 212 (Md. 1972); and Dixon v. Haft, 253 A.2d 715 (Md. 1969), in support of its contention that because of GSA's right to terminate the contract pursuant to clause 13, the agency has acquired an option contract rather than real property in being. While the cited decisions suggest that the protester's contention has merit, there is other authority to the contrary. See, e.g., Cutter Dev. Corp. v. Peluso, 561 A.2d 926 (Conn. 1989). As discussed below, we need not determine whether the procurement here involved the acquisition of an option to purchase real property or the purchase of real property itself.

ment was conducted under the authority of the site acquisition provisions of the PBA, 40 U.S.C. § 604, which provide that:

> "In selecting a site under this section the Administrator [of GSA] is authorized to select such site as in his estimation is most advantageous to the United States, all factors considered, and to acquire such site without regard to title III of the [Property Act]."

We find nothing in the OFPP Act, its legislative history, or the FAR, to support the protester's argument that the exemption from the Property Act's competition requirements in the selection of building sites is inapplicable here.[6] See International Line Builders, 67 Comp. Gen. 8 (1987), 87-2 CPD ¶ 345.

EVALUATION

The issue presented here is whether GSA's determination that Vingarden's site "is most advantageous to the United States, all factors considered" under the PBA, 40 U.S.C. § 604, was reasonable. GSA determined that RJP's site was less desirable than the awardee's under the evaluation criteria provided to the offerors because, among other things, the site: (1) is further from the Capital Beltway[7] and a Metrorail station entrance than other sites; (2) has significant wetlands and floodplains which bisect it; (3) will be bisected by a four-lane boulevard because of previous obligations of the Prince George's County government; and (4) has a rolling topography, including steep slopes of 15 to 25 degrees and greater, which the

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[6]As indicated above, the protester asserts that the Foreman decision requires the FAR to apply because this acquisition is allegedly not for "real property in being." We disagree. The relevant issue before the court in Foreman was whether the Postal Service Board of Contract Appeals had jurisdiction to consider an action involving a lease under the Contract Disputes Act, 41 U.S.C. §§ 601-613 (1988), and not whether the competition requirements of the Property Act and FAR were applicable to the purchase of real property or an option in real property. While the court's decision does contain language relevant to the protester's position, it does not necessitate the application of the FAR for this acquisition conducted under the authority of the PBA, since the PBA expressly exempts acquisitions conducted thereunder from the Property Act competition requirements.

[7]Interstate 95.

agency believes will cause construction problems and will limit the site's buildable area.

The protester, in challenging GSA's determinations, first argues that "GSA is just wrong in its statement that RJP's site was further from the Beltway than any other," as its site is actually closer to the Beltway "than any other offeror, other than [the awardee]." That is, RJP admits that its site is further from the Beltway than the awardee's site.[8] It is also apparent (and not challenged by RJP) that the awardee's site is much closer to a Metrorail station than RJP's site.[9] Thus, RJP's site was inferior to the awardee's site with respect to proximity to the Beltway and Metrorail, two of the specified evaluation criteria.

The protester also contends that, according to its "conceptual site plan," the wetlands on its site do not present a problem as they "would not have to be filled." We have reviewed GSA's site evaluation, which includes a depiction of RJP's site and the location of the wetlands, and find reasonable GSA's determination that the wetlands, which effectively bisect the site, make the site less desirable because of potential permitting and construction problems. The protester also does not refute the agency's concerns that the site's rolling topography will cause construction problems, but only states that "[t]opographical variation can and frequently does significantly contribute to the aesthetics of a site." In addition, the protester does not dispute the agency's determination that the site was less desirable because of its floodplains. Nor has the protester refuted the agency's determination that the site was less desirable because it will be bisected by a four-lane boulevard, which the agency asserts will hamper occupant pedestrian travel.

Thus, we find the agency's determinations regarding the relative desirability of the sites are reasonable and relate to specified technical site selection criteria. These criteria include "environmental and physical considerations," including "wetlands" and "floodplains," and "site configuration" including "pedestrian friendliness." RJP does not contend (and the record does not show) that RJP's

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[8]RJP's site is 2.2 miles from the Beltway while the awardee's is only .7 miles away.

[9]The distance between RJP's site and a Metrorail station entrance--an entrance that apparently would have to be specially built assuming an agreement with Metrorail's governing organization--was, at best, only slightly less than 2,000 feet, while Vingarden's site was only 498 feet away from an existing Metrorail entrance.

site had significant technical advantages over Vingarden's site under the other technical site selection criteria.

The protester also objects to GSA's evaluation of its proposed price under the "cost considerations" site selection criteria. Specifically, RJP contends that the agency's addition of $17,912,000 to its proposed price of $19,250,000 for evaluation purposes, in order to account for the cost of off-site improvements that would be necessary if RJP's site were selected, was unreasonable, and that its actual price was lower than Vingarden's.

The offerors were advised that the evaluation of "cost considerations" was to include the site's purchase price, the on-site project cost, the off-site project cost, and the total project cost. With regard to RJP's site, the Maryland National Central Park and Planning Commission (MNCPPC) transportation planning staff completed a traffic study assessing the impact of the placement of the IRS facility at the RJP site, and concluded that to meet the Prince George's County Adequate Public Facilities ordinance, a number of off-site improvements to the area's infrastructure would be required. The GSA cost estimate for these infrastructure improvements, including $16,750,000 for the widening of a nearby highway, totaled $21,037,000. The study notes, however, that because the widening of the highway is not desirable due to other considerations, a fee-in-lieu of this improvement would be required to be paid to the county.

Upon review of RJP's final offer, the GSA contracting officer found that RJP explicitly included only one of the required infrastructure improvements in its final offer. For cost evaluation purposes, the contracting officer deducted the $3,125,000 cost of the improvement included in RJP's final offer from the $21,037,000 list of improvements identified as necessary by GSA's consultants and the MNCPPC transportation planning staff, and added the remaining $17,912,000 to RJP's offer.

The protester, in arguing that the cost evaluation of its proposal was unreasonable, states that its price of $19,125,000 included the cost of all necessary off-site improvements, and was based on "an independent traffic study" and "an agreement in principle with the [c]ounty on the required improvements" that it had reached after having "met with various Prince George's County staff members." The protester asserts that the results of its traffic study, and information concerning its agreement in principle, were forwarded to GSA.

In response to the protester's assertions, including RJP's asserted "agreement in principle" with the county, GSA states that the MNCPPC advised it to "disregard any traffic

data and/or letters received from [RJP]." While RJP insists that it had reached an agreement with the county, it has declined to furnish the details of the agreement.[10] Under the circumstances, the agency reasonably relied upon the cost estimate for off-site improvements prepared in conjunction with the MNCPPC, rather than the protester's price. Thus, we find the agency reasonably determined RJP's cost to be significantly higher than Vingarden's all inclusive price.

Finally, RJP complains that GSA did not conduct meaningful discussions in failing to inform RJP of the various deficiencies GSA felt were inherent in the site RJP offered. The record indicates numerous contacts between the protester and GSA during which GSA's requirements and its particular concerns with the protester's site, e.g., the bisecting boulevard, the distance to metrorail, and off-site improvements, were discussed. While there might be procurements in which determining which site is "most advantageous" would require more formal discussions, we do not believe that GSA acted unfairly or unreasonably in its communications with RJP.[11]

In sum, GSA's selection of Vingarden's site instead of RJP's site was reasonable and in accordance with the site selection criteria.

The protest is denied.

for James F. Hinchman
General Counsel

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[10]The only documentation submitted by the protester is an internal county memorandum outlining the infrastructure improvements proposed by the protester to the county; this does not evidence that any "agreement" had been reached. RJP explains that the county declined to confirm this agreement, absent a specific request by GSA, because it "did not want to appear to show favoritism to any one site."

[11]As we have determined that the Property Act and FAR competition requirements were not applicable to this procurement, we will not consider the protester's other arguments concerning the agency's alleged violation of those authorities.