



Comptroller General
of the United States

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Washington, D.C. 20548

Decision

Matter of: Curtis Center Limited Partnership--
Reconsideration

File: B-257863.3

Date: March 20, 1995

William M. Rosen, Esq., Dickstein, Shapiro & Morin, for the protester.

Robert J. McCall, Esq., General Services Administration, for the agency.

Tania L. Calhoun, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for reconsideration is denied where the requesting party does not show that our prior decision contains either errors of fact or law or present information not previously considered that warrants reversal or modification of our decision.

DECISION

Curtis Center Limited Partnership requests that we reconsider our decision in 841 Associates, L.P.; Curtis Center Ltd. Partnership, B-257863; B-257863.2, Nov. 17, 1994, 94-2 CPD ¶ 193, denying its protest of the award of a lease to The Philadelphia Center Realty Associates under solicitation for offers (SFO) No. MPA 94008, issued by the General Services Administration (GSA) for office space in Philadelphia, Pennsylvania.

We deny the request for reconsideration.

GSA issued the SFO on November 30, 1993, seeking proposals for approximately 72,500 net usable square feet of office and related space to house the Department of Housing and Urban Development. The office space was to be located in Philadelphia's central business area, with occupancy required 120 days after receipt of approved floor plans by the lessor. The SFO contemplated award of a 10-year lease.

Paragraph 2.4 of the solicitation advised that award would be made to the offeror whose proposal was considered most advantageous to the government, price and other award factors considered, and that price would be of equal weight

to these other award factors, which were listed, in descending order of importance, as follows: fire and life safety, past performance, proximity of public transportation, and efficiency of offered space. However, paragraph 2.5 of the solicitation advised that award would be made to the offeror whose offer conformed to the solicitation's requirements and was the lowest-priced offer submitted.

The contracting officer evaluated initial proposals, conducted discussions with the offerors whose proposals were in the competitive range, and evaluated the resulting best and final offers (BAFO). Philadelphia Center received an "excellent" rating under each technical evaluation factor, and proposed a present value per square foot price of \$15.72. Curtis Center was rated "good" for safety, "fair" for past performance, "excellent" for transportation, and "poor" for efficiency. Curtis Center offered a present value per square foot price of \$14.90.¹

The contracting officer concluded that Curtis Center had poor space efficiency due to the presence of ramps and numerous columns, and doubted that it could provide the required square footage in the stated time frame due to its need to move an existing tenant. As a result, Curtis Center's proposal was determined to be the "lesser of the two responsive offers," and the lease was awarded to Philadelphia Center. Following the denial of its agency-level protest, Curtis Center filed a protest in our Office.

In its initial protest, Curtis Center stated that the solicitation's provisions concerning evaluation and award, paragraphs 2.4 and 2.5, described above, were contradictory "on their face." However, Curtis Center further asserted that, "based upon its review of the SFO and subsequent discussions with [the realty specialist], [it] understood" that the procurement was being conducted on a "price only" basis. The protester specifically stated that it was not protesting the solicitation's apparent contradiction,² but,

¹A third offeror, 841 Associates, L.P., which also protested the award to Philadelphia Center, has not requested reconsideration of our decision.

²The presence in the solicitation of both paragraphs 2.4 and 2.5, the first of which contemplates award on a best value basis, and the second of which contemplates award on a low-priced, technically acceptable basis, gave rise to a patent ambiguity. Such ambiguities constitute deficiencies on the face of a solicitation; under our Bid Protest Regulations, such a deficiency must be protested prior to the time set

(continued...)

rather, "GSA's failure to adhere to guidance it had provided to resolve the contradiction."

Given the protester's clear concession that the SFO provisions were contradictory "on their face," a point with which we agreed, the only information provided by the protester to support its assertion that the award should have been made on a "price only" basis was its statement that GSA guidance had so resolved the contradiction. Again, the protester itself specifically stated that it was protesting "GSA's failure to adhere to" such guidance. Thus, the issue raised in the initial protest was whether GSA did, in fact, provide guidance that would have led the protester to believe that these two concededly contradictory provisions could be interpreted to mandate award on a "price only" basis, as opposed to a best value basis.

The agency's report included an affidavit from the realty specialist in which he specifically denied having stated that the procurement would be on a "price only" basis and, in its comments on the agency report, Curtis Center did not rebut the realty specialist's statement. In fact, the protester did not further mention this GSA guidance that had "led it to believe" that the SFO's contradiction had been resolved. As a result, we found Curtis Center's argument in this regard to have been abandoned, and we did not consider it. See Datum Timing, Div. of Datum Inc., B-254493, Dec. 17, 1993, 93-2 CPD ¶ 328.

In our decision, we also stated that while Curtis Center did not pursue this initial argument--that GSA had failed to adhere to guidance it provided to resolve the contradictory SFO paragraphs--it raised a new argument which stood in stark contrast to its original position. In its comments, Curtis Center maintained that the two evaluation provisions, which had heretofore been contradictory "on their face," could reasonably be read together to require award to the low-priced, technically acceptable offeror.

Each new protest allegation must independently satisfy the timeliness requirements of our Bid Protest Regulations, which do not contemplate the piecemeal presentation or development of protest issues. See GE Gov't Servs., B-235401, Aug. 11, 1989, 89-2 CPD ¶ 128. As a general rule, the timeliness of specific bases of protest raised after the filing of a timely initial protest depends upon the

² (...continued)

for receipt of initial proposals. See 4 C.F.R. § 21.2(a)(1) (1995); General Elec. Co., 72 Comp. Gen. 519 (1992), 92-2 CPD ¶ 159; Norris Bldg. Co., Inc., B-253621, Sept. 17, 1993, 93-2 CPD ¶ 173.

relationship the later-raised bases bear to the initial protest. See Kappa Sys., Inc., 56 Comp. Gen. 675 (1977), 77-1 CPD ¶ 412. Where the later bases present new and independent grounds for protest, they must independently satisfy our timeliness requirements. Conversely, where the later contentions merely provide additional support for an earlier, timely raised objection, we consider these additional arguments. Id.; GE Gov't Servs., supra; Annapolis Tennis Ltd. Partnership, B-189571, June 5, 1978, 78-1 CPD ¶ 412, aff'd, July 11, 1978, 78-2 CPD ¶ 28.

We considered the argument raised in Curtis Center's comments to constitute a new and independent basis of protest rather than additional supporting material for its earlier, now abandoned, objection. At the core of Curtis Center's initial objection was its position that the solicitation's two evaluation provisions presented a contradiction "on their face" which had been resolved by GSA guidance. In its comments, however, rather than supporting its argument that GSA had failed to adhere to the guidance it provided to resolve the contradiction, Curtis Center argued that the two evaluation provisions could be reasonably read together to require GSA to award the lease to the low-priced, technically acceptable offeror. This latter contention in no way supported the earlier-raised objection; on the contrary, it wholly undermined that objection.

Our Bid Protest Regulations require that protests not based upon apparent solicitation improprieties be filed not later than 10 days after the basis of protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2). As we stated in our decision, the information underlying the position taken in Curtis Center's comments--the SFO's two evaluation provisions and the fact that the agency interpreted those provisions as requiring award on a best value basis--was made available to the protester in the agency's June 21 denial of its agency-level protest. Since this argument was not raised until Curtis Center filed its comments on September 12, more than 2-1/2 months later, we concluded that the argument was untimely and not for our consideration. See Annapolis Tennis Ltd. Partnership, supra.

In its request for reconsideration, Curtis Center argues that the core of its initial protest was that the SFO mandated award to the low-priced, technically acceptable offeror. However, as discussed above, the protester's argument was premised upon its plain assertion that while these SFO provisions were contradictory on their face, GSA guidance had resolved the contradiction--Curtis Center was protesting GSA's failure to adhere to that guidance. As an explanation, Curtis Center now states that, while it did

allege that the two evaluation provisions were "on their face contradictory," it did not mean that they were actually contradictory. Curtis Center contends that its statement that the two provisions were contradictory "on their face" implied they were not contradictory when properly analyzed.

The expression "on its face" (or "from the face") means "in the words of," "in the plain sense of" or "in view of what is apparent." A Dictionary of Modern Legal Usage, Oxford University Press, 1990. The protester acknowledged as much when it carefully noted, in its initial protest, that it was not protesting this "apparent contradiction" because such a protest would be untimely. See supra note 2. However, even if we were to agree that merely stating that the two provisions were contradictory "on their face" implied that they were not contradictory when properly analyzed, Curtis Center did not supply any such analysis in its initial protest. As stated above, as the information underlying such analysis was made available to the protester in the agency's June 21 denial of its agency-level protest, 2-1/2 months prior to the filing of its comments in which such analysis first appeared, Curtis Center's argument was untimely. See Annapolis Tennis Ltd. Partnership, supra.

Curtis Center also disputes our conclusion that it abandoned its position that guidance provided by GSA had resolved the contradiction between these two SFO provisions. The protester asserts that a hearing was required to resolve such a factual dispute, and that we denied its request for such a hearing. However, as we stated in our decision, a ruling on the hearing request was not issued prior to the filing of the protester's comments. The initial protest contained the unattributed allegation that unspecified guidance was provided to resolve the contradiction, but the realty specialist's affidavit specifically rebutted the allegation. Despite being given the opportunity in its comments, Curtis Center never provided any basis--beyond the general statement in its initial protest--for its allegation that GSA provided guidance to resolve the contradiction. Since there was no basis to question the credibility of the affidavit, we concluded that no hearing was necessary.³ Absent evidence that a protest record is questionable or incomplete, this Office will not hold a bid protest hearing merely to permit the protester to orally reiterate its protest allegations or otherwise embark on a fishing

³While the protester complains that we should not require protesters to "mimic children who argue by saying 'did too,' 'did not,' 'did too,'" we wonder who the protester would have had us call as its witness at a hearing on this matter, given the absence of anything more than the unattributed, general allegation made in the protest.

expedition for additional grounds of protest. Border Maintenance Servs., Inc.--Recon., 72 Comp. Gen. 265 (1993), 93-1 CPD ¶ 473.

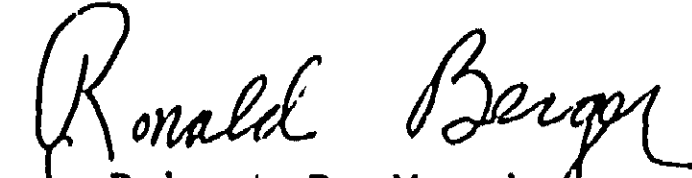
Finally, in its initial protest, Curtis Center argued that the award was made to Philadelphia Center in spite of its "uncured deficiency" as to price. Curtis Center now challenges our conclusion that the record supported GSA's claim that this use of the word "deficiency" was a simply poor word choice which did not accurately describe GSA's concern regarding the awardee's price.

As we explained in our decision, the realty specialist stated, in the price negotiation memorandum, that he met with Philadelphia Center's representatives "to discuss the following deficiencies" in its offer, one of which was that the price was "high-end and should be lowered." Philadelphia Center did not subsequently lower its price. However, the awardee explained in its BAFO that it did not lower its price because the offered space was raw, and various systems work had to be completed in addition to the build out. We also noted that the difference between the prices offered by Philadelphia Center and Curtis Center, in present value terms, was only 5 percent, or \$594,500 over the entire 10-year lease term. In light of the awardee's explanation for its slightly higher price, which was not challenged by the protester, we agreed with GSA that the use of the word "deficiency" to describe GSA's concern with the awardee's price was simply a poor choice of words. In hindsight, it is perhaps more accurate to say that the record, when read as a whole, reflects that the agency's concern about Philadelphia Center's price was alleviated. As we noted in our decision, while the agency's documentation of its price/technical tradeoff rationale was less than ideal, the record, when viewed as a whole, supported its decision. See McShade Gov't Contracting Servs., B-232977, Feb. 6, 1989, 89-1 CPD ¶ 118.

Under our Bid Protest Regulations, to obtain reconsideration, the requesting party must show that our prior decision contains either errors of fact or law or present information not previously considered that warrants reversal or modification of our decision. 4 C.F.R. § 21.12(a). Mere repetition of arguments made during our consideration of the original protest, while it demonstrates that the protester disagrees with our decision, does not

satisfy this standard, R.E. Scherrer, Inc.--Recon.,
B-231101.3, Sept. 21, 1988, 88-2 CPD ¶ 274. Curtis Center's
reconsideration request does not show that our prior
decision contains either errors of fact or law, or present
information not previously considered, that warrants
reversal or modification of our decision.

We deny the request for reconsideration.


Robert P. Murphy
General Counsel