



Comptroller General
of the United States

1232142

Washington, D.C. 20548

Decision

Matter: Jaco Management, Inc.

File: B-258799

Date: February 14, 1995

DECISION

Jaco Management, Inc. protests the award of a contract to VA Venture under solicitation for offers (SFO) No. 084B-020-94, issued by the Department of Veterans Affairs (VA) for the lease of 41,250 net usable square feet of space to house an outpatient clinic in Rochester, N.Y.

We dismiss the protest.

The SFO provided that, in order to be eligible for award, offers had to meet all technical requirements; award would be made to the offeror whose offer was most advantageous to the government, price (most important) and other factors considered. In addition to specified evaluation factors, the solicitation set forth several specific requirements. Nine offers were received. After evaluation, VA Venture's offer was determined most advantageous to the government, and the lease was awarded to VA Venture on September 30, 1994.

SOLICITATION REQUIREMENTS

Jaco principally contends that VA Venture's offer failed to meet three SFO requirements, and thus should have been rejected.¹ First, the solicitation required that the lessor provide the greater of 102 parking spaces, or "the number of parking spaces required by local building or zoning regulation." Jaco maintains that local building or zoning regulations require 123 parking spaces for the building VA Venture offered, and that VA Venture's offer of 110 spaces did not meet the requirement. This argument is without merit. The assistant planner for the cognizant municipality states that compliance with all local zoning

¹The agency maintains that the alleged deficiencies relate to responsibility matters which our Office will not consider, while the protester asserts that the deficiencies relate to definitive responsibility criteria, which we will review. Given our conclusion, discussed below, that the protest is clearly without merit, we need not resolve this issue.

requirements, whether pertaining to parking or otherwise, cannot be determined until the town's planning board completes its review process, which cannot occur until after award of the contract. Given this statement and the fact that Jaco does not explain the basis for its contention that 123 spaces are required, the only possible conclusion is that VA Venture met the only definitive requirement in the SFO--the requirement for at least 102 spaces.

Second, Jaco claims that VA Venture's proposed site is too small to be in compliance with both the SFO's space requirements and local zoning density regulations, as required by Section 3.21(c) of the solicitation. This argument is based on Jaco's assertion that VA Venture's building will sit on 4.3 acres;² according to Jaco, a 5-acre site would be required to comply with zoning density regulations. VA Venture submitted with its offer an "Option to Purchase and Purchase Agreement" to buy its proposed site, which states that the site is approximately 5 to 7 acres in size. The offer also included a site survey showing that the site is approximately 6 acres. Since the proposed site exceeds the 5 acres Jaco claims are necessary, this allegation is without merit.

Third, Jaco maintains that VA Venture did not provide adequate documentation in its proposal that it controls the proposed site, as required by the SFO. Jaco claims that the site proposed by VA Venture is in a private development, that the only access to it is by way of a private road, and that the development owner has confirmed to Jaco that VA Venture has no right of access to the property.

Under Federal Acquisition Regulation (FAR) § 9.104-3(b), acceptable evidence of a prospective contractor's ability to obtain required resources includes a commitment or explicit arrangement, that will be in existence at the time of contract award, to rent, purchase, or otherwise acquire the needed facilities, equipment, other resources, or personnel. The "Option to Purchase and Purchase Agreement" VA Venture included in its offer clearly constitutes an explicit arrangement to purchase the property. As for VA Venture's access to the property, the agreement provides that the seller warrants that at the time of closing:

". . . [t]he Property shall be free and clear of all encumbrances, easements, rights of way, restrictions, taxes . . . , building restrictions and covenants, leases, tenancies, reservations,

²Jaco states in one submission that VA Venture's proposed site measures 4.3 acres, and in another submission, 3.7 acres.

and any and all other conditions which provide for a forfeiture of the title to the Property or which prohibit or restrict the erection on the Property of Buyer's intended structure i.e. a Veterans Administration Medical Office Building."

We think this agreement provided the agency a reasonable basis to conclude that VA Venture had adequate control over the site.

FRONT-LOADED OFFER

The solicitation contained two separate pricing items-- annual rent per square foot and medical equipment to be installed by the contractor--and required two price proposals, one with an annual rental price per square foot plus a separate lump sum payment for the equipment, and the second with the cost of the medical equipment incorporated into the annual rental price. The contracting officer had the discretion to elect the price alternative deemed to be in the best interest of the agency, and determined that VA Venture's rent/lump sum proposal would result in the lowest overall cost to the government, and be most advantageous to the agency.

Jaco maintains that VA Venture's proposal includes an excessive lump sum for the medical equipment (\$1,565,700), while its lease price was the lowest received. Jaco concludes that since the medical equipment lump sum is to be paid upon completion of the construction (rather than over the course of the 15-year lease), VA Venture's cost proposal will result in an improper advance payment in violation of FAR § 15.814.

This argument is academic. The record shows that VA Venture's evaluated total price was low under either of the two pricing approaches.³ Thus, even if Jaco were correct that VA Venture's rental/lump sum price was an improper basis for award, VA Venture still would be entitled to the award based on its low combined rental price.

³Jaco's single rental price was \$23.50/square foot, compared to VA Venture's price of \$21.25/square foot; Jaco's rental/lump sum prices were \$20.32/square foot and \$1,126,064 lump sum, compared to VA Venture's prices of \$16.18 and \$1,565,700.

Jaco suggests the possibility of bad faith by contracting officials. As we have determined that the award to VA Venture was proper, there is no basis for this argument.

The protest is dismissed.

A handwritten signature in black ink, appearing to read "John M. Melody". The signature is fluid and cursive, with a prominent initial "J" and a long, sweeping underline.

John M. Melody
Assistant General Counsel