

DECISION**THE COMPTROLLER GENERAL
OF THE UNITED STATES**

WASHINGTON, D. C. 20548

FILE: B-183637

DATE: July 23, 1975

MATTER OF: Huntsville Associates

50939

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DIGEST:

1. Contention that lease awarded by GSA is nullity because evaluation of offers was contrary to principles inherent in competitive procurement system and stated evaluation criteria is not supportable even though certain errors occurred as relative price position of protester and low offeror was not thereby affected. Moreover, failure to evaluate protester's alternate offer of additional space at reduced rate was not improper where such space may never be used.
2. Failure to evaluate factors other than price per square foot for lease of building was not contrary to stated evaluation criteria as words "cost to the Government" in context used merely meant that for purposes of evaluation the annual rental charge was to be reduced to a per square foot basis.
3. Agency regulatory requirement that certain leases be approved by officials above level of contracting officer does not require cancellation of lease where such approval did not include an in-depth analysis of leasing procedures and review of conclusion of subordinates as such requirement is intended to protect Government and not offerors of space.
4. Lease of space in other than protester's building currently leased by GSA is not invalid since regulation limiting leasing authority to situations where needs cannot be satisfactorily met in Government-controlled space does not apply where, as here, it is reasonably determined that other space is more appropriate.

In July of 1974, the Civil Service Commission (CSC) requested the General Services Administration (GSA) to acquire leased space in Macon, Georgia, for a computer center which would handle retiree benefit and employee application records for the Southeast region of the United States. CSC representatives explained that it was imperative that site selection be effected by March 2, 1975, so that the center might be in operation by July 1975 when a large amount of computer hardware was to be purchased. CSC and GSA determined that 60,000 net usable square feet were required to fulfill CSC's needs.

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Solicitation for Offers AT-5-47 was issued by GSA on November 18, 1974, to all persons expressing an interest in the offering. The only response to the solicitation was from Charles Jones (Jones) of Macon who offered a building known locally as the BP building which had previously been built to house the British Petroleum Corporation's credit card computer operation, but had never actually been occupied. GSA budget restrictions, however, precluded an award to Jones.

While the GSA budget restrictions were in force, GSA learned that Department of the Army personnel occupying the Safeguard Main Building and Annex in Huntsville, Alabama, might be relocated due to a possible nationwide Army reduction in force. GSA representatives contacted Huntsville Associates who leased the Safeguard complex to GSA to determine whether the facility could be used to house the CSC computer facility. The idea of utilizing space in the Safeguard Main Building was dismissed because CSC indicated that its security regulations required an entire building. Army representatives indicated, however, that their Safeguard Annex operation could be transferred to the main building. The 70,585 square foot Annex is under lease to GSA at \$3.23 per square foot until April 30, 1979. GSA representatives informed Huntsville Associates that extensive alterations would be needed to render the Annex suitable for use as a computer facility. Accordingly, GSA asked Huntsville Associates to compete for a new lease with Huntsville Associates undertaking the required alterations and amortizing the cost thereof over the lease period. In order to give Huntsville Associates an opportunity to make the offer, CSC revised its target date for being in place at a site with the initial increment of personnel and equipment to a time 9 weeks from the date of award.

Solicitation AT-5-47 as issued called for 60,000 net usable square feet of space. The solicitation was amended on December 26, 1974, to require that offerors:

"Provide an emergency electrical power building located near island in parking lot in front of building."

GSA personnel concluded that 3,200 net usable square feet would be required to contain such a facility; however, such requirement was not included in that or subsequent amendments. In addition to requiring the requisite square footage the solicitation states in Schedule D, Section 14 (a):

"Offers are requested (or shall be reduced to) an annual square foot rate for the amount of space offered and not on an overall yearly or monthly rate, since price evaluation will be made on the basis of the lowest annual per square foot cost to the Government for the amount of space offered and not on the basis of the lowest overall annual rental."

Subparagraph (c) of the same section provides:

"The total annual rental will be determined by multiplying the square foot rates per year * * * times the actual field measurements of the space as prescribed in Schedule D of this solicitation."

Finally, Section 15 of Schedule D, entitled Factors of Award, states:

"In determining which offer will be most advantageous to the Government, the Contracting Officer shall consider the following factors in addition to the rental proposed and conformity of the space offered to the specific requirements.

* * * * *

b. The effect of environmental factors on the efficient and economical conduct of agency operations planned for the space."

On January 14, 1975, Jones offered the BP building at \$6.645 per square foot per annum for 75,161 square feet. On January 31, 1975, Jones amended his offer to reflect 64,500 net usable square feet at \$6.98 per square foot per annum for a total rental of \$450,210 per annum. This amendment further stated that in the event that the net usable square foot figure fluctuated either upward or downward, the per square foot shall be adjusted upward or downward to require a base rental of \$450,210 per annum. On February 11, 1975, Jones again amended his offer to show a per annum rate of \$375,000 during the term of the lease. In response to GSA's request for "best and final offers," by letter dated March 26, 1975, the offer was reduced to a rate of \$358,000 per annum. GSA states that it accepted this offer for purposes of evaluation notwithstanding the fact that it later accepted a further reduced rate of \$347,075, submitted after negotiations were closed. The final Jones offer which was evaluated by GSA was 64,500 square feet at a per annum rate of \$358,000.

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On February 28, 1975, Huntsville Associates submitted an offer of 63,200 square feet at a rate of \$6.10 per square foot. This offer included 60,000 square feet in the Annex and 3,200 square feet in the emergency power building to be constructed. A letter submitted with the offer stated:

"This rental rate is predicated on our receiving under the existing lease for the remainder of the term of the existing lease on our building \$3.25 per square foot on 10,585 square feet of leased space which exists in excess of 63,200 square feet requested in this Solicitation."

This offer was used by GSA in its evaluation. Although Huntsville Associates did amend its offer by subsequent letters prior to the closing date, GSA did not request clarification of the provision cited above or the subsequent revisions.

The offers were evaluated by the Atlanta Regional Office of GSA. This evaluation is contained in the "Findings and Determination for the Civil Service Commission's Information Technology Center" of April 7, 1975. It was concluded therein that the proposal which was submitted by Jones was the low responsive offer by \$61,026.83 per annum, or \$915,402.45 over the 15-year basis. It was recognized that the Government would incur other costs at both sites offered, and if all costs were considered the space in Huntsville would be approximately \$9,177 lower per annum or \$137,656 lower over the 15-year period. It was concluded, however, that such costs, including utilities, cleaning services, telecommunications, expansion space and delay in occupancy, were beyond the control of the offerors and subject to change each year due to the economic situation. These costs, therefore, were thought to be too speculative to be considered in the evaluation. In addition, the findings state that these factors were not considered because neither offeror was advised by the solicitation that they were to be considered. Accordingly, the contracting officer determined that the Government should accept the Jones offer. The findings and determination were later supplemented to include the determination that the Government should accept the rental of \$347,075 offered on April 7, 1975, in lieu of the \$358,000 previously offered by Jones. Since the evaluation was based upon the latter figure, no issue has been raised concerning the propriety of GSA's acceptance of the late reduction.

On April 7, 1975, GSA sent Jones the following telegram of acceptance:

"We accept your offer dated Dec. 5, 1974, as amended Jan. 31, 1975, Feb. 11, 1975, Mar. 11, 1975, and March 26, 1975, and your clarifying wire of 4-4-75 to lease the referenced property for a lease term beginning July 16, 1975, and ending July 13, 1990. The space will be occupied in increments beginning May 1, 1975, with the rent beginning July 15, 1975. Rental will accrue at the rate of \$347,075.00 per annum which includes space, facilities, parking for 278 vehicles. Space is to be partitioned in accordance with the Government's approved floor plan to be provided in accordance with solicitation No. AT-5-47, dated Dec. 26, 1974, Addendum No. 2 dated Jan. 28, 1975, and Addendum No. 3 dated March 25, 1975, which form a part of the lease contract. Lease No. GS-04B-15226 will follow."

Lease No. GS-04B-15226 was subsequently executed with a date of April 7, 1975. It provided for a 15-year period with one 5-year renewal option at an increased rental amount. The premises were described as a total of 64,500 net usable square feet of office and related space in the BP building. In addition the offer of Charles H. Jones, dated December 5, 1974, together with the amendments and extensions thereto, was attached and made a part of the lease.

On April 11, 1975, Huntsville Associates protested the award of the lease to Jones. A ruling was requested that the award of the lease was improper and illegal on the bases that GSA had acted improperly in its evaluation of the factors for award, that GSA had erroneously calculated the prices of the two offers, that the Huntsville offer would have contained the lowest price if properly evaluated, and that GSA acted arbitrarily and capriciously in evaluating the Huntsville Associates offer. It was further alleged that the award was made in violation of applicable procurement regulations and was not in consonance with Government policy.

Moreover, on April 21, 1975, Huntsville Associates brought suit against the Administrator of GSA in the United States District Court for the Northern District of Alabama, challenging the award on similar grounds. On May 8, 1975, the Court issued a preliminary injunction enjoining GSA from continuing with or instituting any action to implement the award of the lease for the BP building. The Court further ordered:

"2. The plaintiff and defendant * * * to proceed with the protest before the General Accounting Office so that the General Accounting Office may advise this court on the propriety of the award of a lease to Charles Jones for the BP Building."

Regarding the allegation that GSA erroneously calculated the rent and other costs, Huntsville Associates raises several issues. First, it is alleged that the price evaluation which was to be made on the basis of the lowest annual per square foot cost to the Government was not and could not be made properly since GSA, as indicated by Mr. Poole's testimony in connection with the court action, did not know how many net usable square feet were included in the BP building. In this connection, it is pointed out that Jones offered the entire facility for \$358,000 per year; that the contracting officer recognized, as indicated in Jones' letter of January 31, 1975, that the rental per annum was fixed even if the number of square feet actually offered was less than that indicated in the offer, that GSA had the right under the solicitation to convert the annual rent to a per square foot rate in order to evaluate the offer; that this could have been done if GSA had required a per square foot proposal or had measured the BP building and divided the annual rental figure by the number of net square feet of usable space; that GSA failed to do this, however, and failed also to insist upon compliance with the original provision in the solicitation which allowed a rent reduction if the number of net usable square feet offered was found to be incorrect when the building was measured; and that GSA's failures in this regard constitute a clear and unjustified violation of the evaluation provisions of the solicitation.

Second, Huntsville Associates states that the gross rental calculations in the Findings and Determination indicating that its offer was high by \$510,740.75 are erroneous. Huntsville points out that the GSA findings indicate that the gross rental was calculated on the basis that the Government would have to pay rent on 10,585 square feet available in the Annex building for the entire term of the lease even though such space would not be available for use under the proposed lease. Huntsville Associates argues that the Government was under no obligation to pay any rent on this space past April 30, 1979, the expiration date under GSA's current lease for the building. Huntsville states that it included all its costs for the period May 1, 1979 through June 9, 1990, in the \$6.10 rental figure for the space covered by the lease, allowing an appropriate amount for the possibility that the Government would later rent that space pursuant to an expansion. Accordingly, Huntsville contends that including in the evaluation any lease cost on the 10,585 square feet was erroneous since the cost would be incurred whether or not the space was leased for the CSC, and evaluating the cost on the 10,585 square feet for the 15-year lease period has no arguable basis. It is contended that in effect the rental calculation was made on the entire square footage of the Annex. In this connection, it is pointed out that in a letter of March 1, 1975, Huntsville indicated that the rental rate it was offering would drop 42 cents per square foot if the entire building was taken. Huntsville concludes, then, that if an evaluation were to be made on the full amount of space in the building, the evaluation should have been made on the rate of \$5.68 per square foot, not at \$6.10 per square foot, which was not done, and that an evaluation on such basis would have been lower than a proper evaluation of Jones' square foot price.

Third, in accordance with Schedule D, Section 14a of the solicitation, which provides that "price evaluation will be made on the basis of the lowest annual per square foot cost to the Government for the amount of space offered and not on the basis of lowest overall annual rental," Huntsville argues that the words "cost to the Government" indicate that cost factors other than rent should be used in the evaluation. Huntsville argues that such costs include utility costs, telecommunication costs, cleaning costs, and cost to the Government for unused space in the Annex through April 30, 1979, if the award is not made to Huntsville. In this connection, Huntsville also points to language in Schedule D that the "effect of environmental factors on the efficient and economical conduct of agency operations" should be considered. In further support of its position, Huntsville cites the statement made by the GSA Regional Administrator in connection with the court action that the cost to the Government is "the lowest cost to the Government considering all factors that are worthy or pertinent of being considered."

Huntsville Associates next alleges that the award of the lease to Jones was improper because the reviewing and approving GSA officials failed to exercise discretion based on the facts in processing the lease. In this connection, it is pointed out that although the contracting officer is to make the initial recommendation as to the award of the lease, since the lease involved over \$5 million, approval of the Regional Public Building Service Commissioner was required. In addition, it is pointed out that since the lease was for more than 10 years, approval by GSA's Regional Administrator was required. Since testimony taken in connection with the litigation indicates that neither the Regional Commissioner nor the Regional Administrator made a review of the detailed exhibits attached to the Findings and Determination, nor did they give any consideration as to the merits of the award, Huntsville concludes that such actions on the part of these GSA officials constitute an abuse of the discretionary powers vested in these officials. The agency's failure to adhere to its own regulations, it is argued, renders agency action improper.

Finally, Huntsville Associates alleges that GSA's failure to observe its own regulations with respect to Government controlled space renders the GSA findings and award invalid. Huntsville notes that Federal Property Management Regulations (FPMR) § 101-18 provides:

"GSA will lease space in privately owned buildings when needs cannot be met in government controlled space * * *"

Huntsville states that Government-controlled space includes space under lease to the Government such as the space in the Annex. Accordingly, Huntsville maintains that the failure of GSA to comply with the provisions of the FPMR, which GSA promulgated, renders the GSA action invalid.

In responding to the allegations of the protester, GSA concedes that Jones should have submitted a net usable square foot rate rather than the per annum rate offered. GSA contends, however, that this deviation has not undermined the award to Jones since for evaluation purposes Jones' offer was reduced to a \$5.55 per square foot rate by dividing the \$358,000 annual figure by the offered 64,500 square feet. Furthermore, it is argued that actual measurement of the BP building on the basis of the final layout plans approved by CSC subsequent to the award confirms that Jones rate per net usable square foot is low. In this connection, GSA points out that Lockwood Greene Engineers, Inc., performed such a measurement and determined that there were 57,166.70 net usable square feet in the BP building. GSA maintains that the square footage of the emergency electrical power building, added by Amendment 1 to the solicitation, should be included in computing the 60,000 net square foot minimum. With the addition of the 3,200 square feet for the power building, Jones' offer consists, according to GSA, of 60,366.7 net usable square feet, which will product a rate per net usable square foot of \$5.93, compared to Huntsville's offer of \$6.10.

With regard to the Huntsville claim that GSA erroneously included rental costs to the Government of the remaining 10,585 square feet which was not a part of the 63,200 square foot offer, GSA admits that clarification should have been sought on the Huntsville offer. The agency notes, however, that the 10,585 square feet are not in one location. Therefore, this space might not be used even if the Government exercised its option to expand.

With regard to the Huntsville allegation that even if the per square foot rate is not lower than the Annex it is entitled to the award based on "other" cost factors, the agency states that there is no mention of "other costs" in the solicitation and, in addition, even though such factors were calculated they were not considered as they are too speculative as determinants of award. Furthermore, it is stated that the reference to Schedule D, Section 15b, to the "effect of environmental factors on the efficient and economical conduct of agency operations" has no reference to utility, telecommunications, cleaning or potential vacant space costs, but to the relationship between the function of the agency operation and the physical space in which it is located and the effect of this relationship on the health and safety of the occupants of the leased space.

In responding to the Huntsville allegation that GSA reviewing officials failed to exercise discretion in approving the award to Jones, the agency maintains that the requirement that certain lease awards be approved is designed to protect the best interests of the Government by insuring that the necessary appropriations and long-term agency commitments have been obtained. GSA submits that its review was not contrary to law or regulation.

The agency contends that Huntsville Associates' final allegation--that GSA failed to comply with its own regulation regarding Government-controlled space--is without merit. FPMR § 101.18.100 states:

"(a) to the maximum extent practical, GSA will lease space in privately-owned buildings and land when needs cannot be satisfactorily met in Government-controlled space."

GSA argues that the manifest intent of this regulation is that the agency must give serious consideration to utilizing Government-controlled space, but that there is no requirement to use such space without regard to all the circumstances. The choice of which space to use, it is argued, is purely within the discretion of the agency.

The protester, in its comments on the agency report, points out that the 60,366.7 net usable square feet alleged to be contained in the BP building is based on a May 28, 1975, layout prepared by CSC and not upon the layout of the building submitted with Jones' bid. Huntsville further alleges that this reconfiguration which altered the partitioning and eliminated numerous corridors has raised the net usable square feet calculation by 3,223.13 square feet. Huntsville Associates insists that the drawings which were Exhibit E to Jones' offer of January 14, 1975, must be the plans on which space configuration and square footage measurements are to be based, and that an evaluation on such basis results in Jones' per foot rate exceeding its \$6.10 rate. To support its position, the protester notes that Jones' offer sets forth on page 10 of Exhibit C the following:

"This offer is based on plans and specifications provided by the government and offeror does not agree to consider the arrangement of partitions as tentative but bases this offer on the location of partitions as shown on the drawings furnished by GSA."

Furthermore, it is pointed out that the calculation of Lockwood Greene Engineers, Inc., of 60,366.7 square feet was, as noted above, based on the May 28, 1975, drawings. Huntsville claims that an additional 3,223.13 square feet of net usable space is artificially and improperly created in this computation through corridor elimination, the creation of bullpen areas and the use of corridor space as file rooms. Huntsville contends that the 3,223.13 square feet should be excluded, giving a figure of 57,143.57. By dividing this figure into the Jones' annual rental offer of \$358,000, a rental rate of \$6.26 per net usable square foot is produced and this figure is considerably higher than the Huntsville Associates offer of \$6.10 per net usable square foot.

Further, Huntsville points out that there are other substantial errors in the 60,366.7 square foot calculation. First, Huntsville contends that it was the clear intent of both offerors and GSA that the 3,200 square feet of the emergency power building were to be in addition to the 60,000 square feet. The protester notes that its letter of February 28, 1975, clearly indicates its understanding that the 3,200 square feet was in addition to the 60,000 square foot minimum. The letter states:

"Our per square foot rental quotation is predicated on a net usable square footage of 63,200 square feet. This figure was determined by adding the 3,200 square feet of the 40' x 80' building housing the emergency electrical equipment to the 60,000 square feet of space specified in the Solicitation. This was per verbal instructions from Mr. M. E. Poole of GSA's office in Atlanta."

It is stated that GSA never took issue with this statement. In addition, Jones' offer of 64,500 square feet, according to Huntsville, indicates that he also understood the 3,200 square feet to be in addition to the 60,000 required by the solicitation. Accordingly, Huntsville argues that even if the May 28, 1975, drawings are the appropriate ones Jones' offer does not meet the 60,000 square foot minimum since that minimum excludes the 3,200 square feet of the emergency power building, while GSA's 60,366.7 square foot measurement includes those 3,200 square feet.

In addition, Huntsville contends that the employee of Lockwood Greene Engineers who made the GSA measurement admitted in a deposition taken for use at the trial of this case that the net usable square footage should be reduced by 442 square feet in light of certain adjustments. According to the protester this admission reduces the net usable square footage in the BP building to 56,724 square feet. Therefore, even the addition of the 3,200 square feet gives a total of 59,924 net square feet--below the 60,000 net square foot minimum. Huntsville argues that even if it is wrong on all other measurement issues the Jones' space is clearly below 60,000 square feet and, therefore, the lease is susceptible to cancellation under Section 10 of Schedule D of the solicitation.

In its final comments, GSA denies that the drawings which Jones provided with his offer of January 14, 1975, are to be utilized to determine the actual number of net usable square feet offered. GSA maintains that in his best and final offer of March 26, 1975, Jones amended his January 14, 1975, offer by inclusion of the following language:

"Layout of space described in paragraphs 1 and 2 above shall be in accordance with approved layout."

At this point, it should be noted that Huntsville sees the above quoted language in Jones' final offer as a reference back to the Jones' proposal of January 14 and the drawings attached to that proposal. The final lease, it is noted, contains no reference to a future floor plan and the above-quoted provision on page 10 of Exhibit C of the January 14 Jones' offer is included in the "ATTACHMENT" physically attached to the lease. The basis for evaluation, then, in Huntsville's opinion, is the configuration at the time of the best and final offers and that configuration is shown in the drawings dated January 11, 1975, which were Exhibit E to the Jones proposal.

GSA maintains that this amending offer was made in response to Addendum No. 3 to the solicitation, which specifically states that an approved layout will be provided at a future time. It is also pointed out that the solicitation in paragraph 6a, Schedule A, contained language to the same effect. In addition, it is argued that the award telegram, although not incorporated into the lease contract, is indicative of the intent to provide the successful offeror an approved layout after award. GSA concludes, therefore, that "it is patently clear that the solicitation gives notice to the offeror that his building must ultimately comply with a layout approved subsequent to the award," and that Jones accepted this term in his best and final offer.

Finally, GSA admits that it was mistaken to have accepted Jones' offer of \$358,000 per annum for 64,500 net usable square feet with the caveat that the per annum rate was firm regardless of the actual number of net usable square feet. The agency continues to maintain, however, that this error is not prejudicial when the actual net usable square footage is ultimately determined. Such a determination, it is asserted, was made by Lockwood Greene Engineers, Inc., and a figure of 57,166.7 net usable feet was found available in the BP building. GSA disputes Huntsville's position that the Lockwood Greene Engineers' employee admitted an error in his calculation by pointing to a statement at the end of his deposition to the effect that his figures were accurate. GSA also maintains that the 3,200 square feet needed to house the emergency power room were intended to be included in the 60,000 square feet and were properly added to the foregoing figure to arrive at a net usable square foot determination for the Jones offer of 60,366.7 net usable square feet.

In 51 Comp. Gen. 565 (1972), we held that GSA, in awarding a lease contract, must comply with the principles inherent in the competitive procurement system. Further, in Arealco, Inc., B-180431, May 20, 1974, we stated that:

"* * * where GSA's space requirements are competed, all responding offerors are entitled to have their offers evaluated in an impartial and equitable manner and no offeror may obtain an undue advantage not contemplated nor authorized by the solicitation or the selection procedures, to the prejudice of other offerors."

Huntsville urges that we determine the award a nullity under the principles enunciated in Arealco, supra, or that we direct cancellation on the basis of Section 10 of Schedule D of the solicitation, which reserves to the Government the right to cancel the lease without recourse by the lessor upon a determination that the leased premises contain less than 60,000 square feet. GSA, on the other hand, while admitting certain errors contends that the award should not be disturbed since it has been determined by actual measurement that the BP building contains in excess of 60,000 square feet, precluding a basis for invoking Section 10, and since the admitted errors in the evaluation were not prejudicial to Huntsville because Jones' price on the basis of 60,366.7 square feet is \$5.93 as compared to Huntsville's \$6.10.

On the basis of the record, we have concluded that GSA has reasonably established that the actual square footage of the BP building is approximately 60,000, thus making Jones' square foot rate less than that offered by Huntsville even if it is admitted that GSA erred in evaluating Huntsville's offer with respect to the 10,585 feet. In reaching this conclusion we accepted GSA's argument that the 3,200 feet for the building was intended to be included in the 60,000 feet as the amendment adding such requirement, as well as a subsequent amendment, continued to call for 60,000 square feet. We are mindful of Huntsville's argument that it was orally advised otherwise; however, we do not consider such argument persuasive in view of the written amendments. We also believe it was proper to base such calculations upon the final layout plans of May 28, 1975, since we believe Jones effectively agreed to be bound by such plans in his best and final offer. Furthermore, we are unable to accept Huntsville's argument that the final plans were contrived in order to increase the BP building footage rather than to conform to CSC's needs in the absence of probative evidence to this effect. Also, we are unable to reach a definitive conclusion with regard to the claimed error of 442 square feet in the final plans since the deposition on this point is inconclusive. However, establishment of such error and the consequent reduction of Jones' square footage to 59,924 would not affect the relative price position of the two offerors. Further, since GSA reports that the BP building will meet its requirements, we believe a 76 square foot deviation from the 60,000 square foot requirement may be regarded as minimal. In addition, we believe that Huntsville's offered reduction of \$.42 in its square footage charge of \$6.10, if the entire 74,000 square feet were leased, properly was not considered in the evaluation since, as GSA points out, the extra footage might never be used.

Finally, we believe that the solicitation did not call for the evaluation of other cost factors such as utilities and expansion. In our opinion the words "cost to the Government" in the context of Section 14(a) of the solicitation merely meant that for purposes of the evaluation the annual rental charge was to be reduced to a "per square foot" cost. Other factors to be considered in the evaluation were listed under Section 15, Schedule D, of the solicitation, and while "The effect of environmental factors on the efficient and economical conduct of agency operations" was listed, these other cost factors were not listed and in opinion, were not included within the factors to be considered.

Two collateral issues must be discussed. First, Huntsville Associates argues that the failure of the Regional Administrator to review the substance of the two proposals and the reliance of the Regional Administrator upon subordinates' conclusions constitutes a failure of GSA to adhere to its own regulations and renders the award invalid. GSA, on the other hand, maintains that regulations requiring the approval of officials such as the Regional Administrator are not specifically designed to protect the interest of an individual, but rather the interest of the Government.

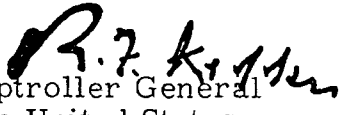
While we agree with the protester that the regulations of Government departments and agencies are binding on Government officials as well as on the public, we note that in particular circumstances courts have permitted agencies of the Government to depart from their own regulations. These courts have focused on the purpose of the regulation, distinguishing between regulations of business and regulations designed to protect the legal rights and interests of a party. American Farm Lines v. Black Ball Freight Service, 397 U.S. 532 (1970); NLRB v. Monsanto Chemical Co., 205 F. 2d 763 (8th Circ., 1953). In our view the requirement that leases such as the one in question here be approved by the Regional Commissioner of Public Buildings and the Regional Administrator is to guarantee the orderly transaction of business and to protect the interests of the United States. Accordingly, we do not feel that the failure of the GSA officials to conduct an in-depth analysis of the leasing procedures and review conclusions of their subordinates renders the award of the lease invalid.

Huntsville Associates also claims that GSA failed to comply with the provisions of the Federal Property Management Regulations which provide that GSA will lease space in privately owned buildings when needs cannot be met in Government-controlled space (FPMR § 101-18.00). However, as GSA points out, FPMR § 101-18.100, as quoted above, actually requires

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the agency to give serious consideration to utilizing Government-controlled space. There are practical judgmental factors included in this requirement so that the Government would not be bound to use Government-controlled space regardless of cost and space requirements of the user agency. Accordingly, we do not think it fatal to the award of the lease to Jones that Government-controlled space was available in Huntsville.

Accordingly, we see no basis to disturb the award of the lease.


Deputy Comptroller General
of the United States