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Prose II

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

7836

FILE: B-190730

DATE: September 26, 1978

MATTER OF: Dr. Edward Weiner

DIGEST:

1. Protest originally filed with contracting agency alleging that "delineated area," within which leased outpatient clinic must be located, was arbitrarily drawn is untimely, since it was filed in GAO more than 10 working days after protester knew of "initial adverse agency action." Protester also filed suit in court on same matter and court has asked for GAO views. Therefore, as matter of policy, untimely protest will be considered on merits.
2. Regulations governing location of Government-leased space require selection of location within central business district (CBD) or its fringes so long as competition is adequate and location is compatible with mission of agency to be housed. Protest that delineated area excluding protester's site was arbitrarily drawn is sustained, since delineated area included suburban locations and site selected was equally as suburban as protester's and was similar to protester's site in terms of compatibility to agency mission.

Dr. Edward Weiner has protested the award of a contract for the lease of space in Allentown, Pennsylvania, for a regional Veterans Administration (VA) outpatient clinic, under solicitation for offers (SFO) No. 771, issued by the General Services Administration (GSA). Dr. Weiner's bid was rejected as nonresponsive because the location he proposed did not fall within the geographical "delineated area" specified in the SFO. Dr. Weiner alleges that the delineated area was unreasonably small in relation to the region to be served by the clinic, was not selected in accordance with applicable regulations, and was unreasonably restrictive of competition.

I. Chronology

On May 14, 1976, GSA received a request from VA for 28,000 square feet of space to establish an out-patient clinic in Allentown, Pennsylvania. VA stated, in its request, that the clinic must be located in the area of Allentown bounded by Tilghman Road on the north, Hamilton Road on the south, Front Street on the east, and Cedar Crest Boulevard on the west. GSA reviewed the request and advised VA that the rather small delineated area might eliminate receipt of any offers. VA's response was that the delineated area would "best serve the greatest number of our veteran patients."

Some time in August 1976, the southern boundary of the delineated area was shifted to a direct line from Front Street at Walnut to the intersection of Route 222 and Cedar Crest Boulevard. This increased the area by approximately 50 percent. GSA's stated reason for this change is that the original southern boundary did not intersect the western boundary in a clear manner and the new southern boundary does.

GSA advertised the space requirements in two newspapers. On August 27, 1976, representatives of GSA and VA examined the properties of those owners who had responded to the advertisements. GSA determined that four proposed sites met the expressed requirements and that two, including Dr. Weiner's, did not. Dr. Weiner's proposed site was determined to be outside the delineated area.

SFO 771 was issued on December 21, 1976, to five prospective offerors. The closing date for receipt of proposals was February 7, 1977. Initially, SFO 771 was not issued to Dr. Weiner because his proposed site was determined to be outside the delineated area. According to Dr. Weiner, he initiated several oral protests concerning the restrictiveness of the delineated area, which GSA did not resolve. Finally, Dr. Weiner was provided a copy of the solicitation. He submitted a proposal on April 25, 1977, and modified it on May 2.

By letter of May 5, 1977, GSA notified Dr. Weiner of the rejection of his proposal, as follows:

"In your previous conversations with personnel of the General Services Administration and the Veterans Administration, you were informed that your building was located outside the area delineated for consideration. In subsequent conversations with Mr. Benson, of my staff, you strongly requested that you be given a copy of the above-referenced SFO. This request was complied with. You have submitted an offer of space in response to the SFO. However, as you have previously been informed, your building is not located within the area delineated by the SFO. Consequently, your offer is not responsive and cannot be considered for the procurement."

Negotiations with responsive offerors were originally terminated on May 12, 1977, but were reopened on October 31, 1977. GSA states that the reopening was necessitated by the time lapse which was the result of zoning questions. On November 7, 1977, negotiations were terminated. Award was made to Boyd Wagner, the lower of the two acceptable offerors, on November 11, 1977.

Dr. Weiner, by letter of November 18, 1977, filed this protest. On February 9, 1978, Dr. Weiner initiated a civil action in the United States District Court for the Eastern District of Pennsylvania (Docket No. 78-420). The court referred the case to this Office for review by order entered June 13, 1978.

II. Dr. Weiner's Allegations

Dr. Weiner alleges that the delineated area was chosen arbitrarily and irrationally and that his rejected proposal offers a superior location at a lower price than the successful offer. Dr. Weiner contends that the delineated area does not conform to any Government policy favoring location of such facilities in the central business district (CBD) or its fringes because:

1. most of the area falls outside the CBD and fringes;

2. the selected location is suburban, and not within the CBD or fringes; and
3. Dr. Weiner's site is equally suburban and provides better facilities at a lower price.

The protester also contends that the size of the delineated area unduly restrains competition.

Finally, Dr. Weiner states that he submitted several oral protests concerning the delineated area in which GSA violated the requirements of 41 C.F.R. § 1-2.408-8 (1977) by never advising him to submit a written confirmation of the protest. According to Dr. Weiner, GSA never "resolved" his protests. Finally, Dr. Weiner states that GSA never advised him of the award of the lease, which he contends is required by 41 C.F.R. § 1-2.408 (1977).

III. Timeliness

GSA argues that Dr. Weiner's protest is untimely. GSA contends that Dr. Weiner's protest was resolved by the letter of May 5, 1977, quoted above. Therefore, according to GSA, Dr. Weiner was required to protest within 10 working days of that time and, since he did not, this protest is untimely.

Dr. Weiner is protesting a matter that was clear from the face of the SFO. Section 20.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. § 20.2(b)(1) (1977), requires that such protest be filed with either GAO or the contracting agency prior to the closing date for initial proposals. Also, if a protest is filed initially with the contracting agency, any later protest of the same matter to GAO must be filed within 10 working days of knowledge of "initial adverse agency action." 4 C.F.R. § 20.2(a) (1977).

It is not clear from the record whether Dr. Weiner protested orally to GSA before the closing date for initial proposals. Assuming that he did, it is not clear whether the GSA letter of May 5, 1977, was initial adverse agency action. At the latest, Dr. Weiner knew all the grounds of his protest and knew that GSA had ruled adversely on any oral protest when he received the May 5

letter regardless of whether GSA requested written confirmation of the protest. Therefore, this protest, filed over 5 months later, is clearly untimely. Where, however, a court has expressed an interest in our decision, we will consider protests that are untimely raised. Kleen-Rite Corporation, B-189458, September 28, 1977, 77-2 CPD 237; Dynalectron Corporation, et al., 54 Comp. Gen. 1009, 1011-12 (1975), 75-1 CPD 341; 4 C.F.R. § 20.10 (1977). Consequently, we will consider this protest on its merits.

IV. Justification of Delineated Area

GSA contends that the delineated area was selected in accordance with the following regulations. In acquiring space for executive agencies, GSA is guided by the requirements of Executive Order No. 11512, 3 C.F.R. § 898 (1966-1970 Compilation), reprinted at 40 U.S.C. § 490 (1970). Section 2(a)(1) of the Order provides:

"Material consideration will be given to the efficient performance of the missions and programs of the executive agencies and the nature and function of the facilities involved, with due regard for the convenience of the public served and the maintenance and improvement of safe and healthful working conditions for employees;"

Section 2(b) provides, in pertinent part:

"The Administrator shall plan, acquire, and manage space in the United States upon his determination that such actions will serve to improve the management and administration of governmental activities and services, and will foster the programs and policies of the Federal Government."

GSA regulations regarding location requirements for leasing space provide at 41 C.F.R. § 101-18.100(g) (1977) that:

"To ensure that the location of leased space is consistent with the policies in § 101-19.002 on the location of Federal buildings, the area delineated for the acquisition of space shall be restricted to the central business district and the fringe area thereof, whenever such area affords adequate competition and conforms to the missions and programs of the agencies to be housed."

According to GSA, the selection of the geographical location of a leased Federal facility is made by the agency that will occupy the space. GSA reviews the selection to assure compliance with Executive Order No. 11512 and regulations and to determine whether the area is large enough to assure "full and free" competition. It is GSA's opinion that the selection of the delineated area in this instance was accomplished in compliance with the above requirements. There has been no suggestion by GSA that any justification was submitted for locating the clinic outside the CBD and fringes.

A conference on the protest was held in GAO on June 28, 1978. At that conference, it was pointed out that while GSA had provided the legal framework for the selection of the delineated area, it had not responded to Dr. Weiner's factual allegations that most of the delineated area, including the Wagner site, was not within the CBD and fringes as required by 41 C.F.R. § 101-18.100(g) and that much of the CBD was not included in the delineated area. Since that question is at the heart of the dispute over the rationality of the delineated area, we requested that GSA respond specifically to these factual allegations.


GSA responded by letter of July 21, 1978. In that letter, GSA again did not rebut the allegations. GSA merely reiterated its original statements concerning the reason for changing the southern boundary. Since GSA has not rebutted these allegations, even though specifically requested, we are accepting Dr. Weiner's allegations as correctly representing the extent and parameters of the CBD and fringes.

Our Office has consistently held that a contracting agency has the primary responsibility for drafting specifications which reflect its minimum needs and

we will not object unless its determination lacks a reasonable basis. See, e.g., Maremont Corporation, 55 Comp. Gen. 1362 (1976), 76-2 CPD 181; Julie Research Laboratories, Inc., 55 Comp. Gen. 374 (1975), 75-2 CPD 232.

In this case, it is our opinion that the VA/GSA determination of the boundaries of the delineated area did lack a reasonable basis. GSA has set forth the requirements governing the choice of delineated area-- that it be within the CBD and fringes, so long as adequate competition is achieved and the location conforms to the mission of the agency to be housed. The record shows, however, that the delineated area was not chosen in conformance with these requirements. It appears that approximately half of the delineated area, including the selected site, is residential or suburban in character and not a part of the CBD and fringes. Of course, the suburban area could have been included to ensure adequate competition. Even if this is the case, no valid reason has been offered by GSA or VA for selecting the delineated area in such a way as to include the awardee's site and exclude the protester's. The two sites appear to be very similar in terms of suitability to the mission of the agency--establishment of an outpatient clinic to serve the veterans of the region. Competition would have been enhanced even further by drawing the delineated area to include the protester's site. In short, we see no reasonable basis supporting the selection of the delineated area to exclude the protester's site.

Accordingly, the protest is sustained. However, the matter of corrective action is left to the court in the circumstances.


Acting Comptroller General
of the United States