Lieberman

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Peter N.G. Schwartz Companies Judiciary Square Limited Partnership

File: B-239007.3

Date: October 31, 1990

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David P. Forbes, Esq., for the National Aeronautics and Space Administration, an interested party.
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DIGEST

1. Allegation that agency awarded lease at a rental in excess of the estimate in a statutorily required prospectus approved by a congressional committee is denied where the actual rental amount under the award is within prospectus ceiling, as escalated by statutorily permitted inflation factor.

2. Specific and deliberate agency advice to protester during negotiations that award ceiling would include "specials," where agency intended to and did exclude such specials in order to determine that the awardee's offer was within the ceiling, was misleading and improper.

3. Agency unreasonably downgraded protester under offeror qualifications criterion, the most important technical evaluation factor, where the protester was evaluated as marginal substantially on the basis of a financial report concerning an entity which was not a part of the offeror's limited partnership or of its proposed team.

4. Where contracting agency improperly awarded a lease, but cancellation is not possible during the base period because the lease does not contain a termination for convenience

clause, the protester is entitled to the costs of proposal preparation and of filing and pursuing its protest.

DECISION

Peter N.G. Schwartz Companies Judiciary Square Limited Partnership (Schwartz) protests the award to Southwest Market Limited Partnership c/o Boston Properties (Boston Properties), of a lease under solicitation for offers (SFO) No. 89-047, issued by the General Services Administration (GSA). The award is for a 20-year lease with a 10-year renewal option for 488,374 net usable square feet of office and related space to be used by the National Aeronautics and Space Administration (NASA) as its headquarters facility. Schwartz has made numerous protest allegations including, generally: (1) that the award was made for an amount in excess of the award ceiling as established by a required, congressionally approved prospectus for the building; (2) that the agency conducted misleading and improper discussions with Schwartz with respect to the amount of the award ceiling and the manner in which the ceiling would be calculated, and with respect to Schwartz's technical qualifications; (3) that GSA misevaluated Schwartz's proposal with respect to the offeror's qualifications; (4) that GSA improperly evaluated the proposals on the basis of the present value of a 30-year lease rather than a 20-year lease; and (5) that GSA made an improper cost-technical tradeoff in determining that award to Boston Properties was most advantageous to the government.

We sustain the protest.

BACKGROUND

In September 1988, GSA transmitted a prospectus to the House Committee on Public Works and Transportation regarding the anticipated NASA building lease, estimating that the lease's fully serviced average annual rental would be $17,550,000 for fiscal year 1989, which could be escalated by an inflation factor of 3 percent annually to the effective date of the lease.1/ While a lease-purchase option was originally

1/ The prospectus was transmitted in accordance with 40 U.S.C. § 606(a) (1988), which requires submission of such a prospectus where GSA is contemplating award of a lease with average annual rental in excess of $1,500,000. The provision provides that: "No appropriation shall be made to lease any space at an average annual rental in excess of $1,500,000 for use for public purposes if such lease has not been approved by resolutions adopted by the Committee on Public Works of the Senate and House of Representatives, respectively." (The

(continued...)

considered, this option was rejected when GSA determined that no offerors were interested in the lease-purchase alternative. Thereafter, by resolution of October 12, 1989, the House Committee provided final prospectus approval.

The SFO was initially issued on February 15, 1989, and was substantially clarified and modified by 12 amendments during the course of the procurement. The SFO, which does not contain any reference to the prospectus, requested offers for between 486,000 and 504,000 net usable square feet for a 20-year lease term with a 10-year renewal option. Offerors were required to submit proposals in three sequenced phases, consisting of general information, an analysis of features offered, and cost proposals. Award was to be made to the offeror whose proposal was most advantageous to the government, based on price and technical factors. Technical quality was stated to be more important than price, but as proposals became more equal technically, price became more important. Under the SFO schedule, lease commencement is contemplated in September 1992.

The SFO identified the technical evaluation factors as follows: (1) qualifications of offeror; (2) special facilities; (3) safety and security; (4) physical attributes; (5) energy conservation; and (6) site attributes. Factor 1 was identified as most important, factor 2 of lesser importance, factors 3 through 5 equal in importance to each other, but individually less important than factor 2, and factor 6 was least important. Five initial offers, including those of Schwartz and Boston Properties, were received by the June 15, 1989, closing date. One offer was rejected as technically unacceptable and, after protracted discussions, best and final offers (BAFOs) were submitted in February 1990.

Boston Properties' BAFO was for a stated annual base period rental of $19,736,876, including "specials," but not including cleaning services which were to be furnished by the government.2/ Schwartz's comparable annual base period BAFO rental was $16,499,700. Boston Properties' BAFO received the

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1/(...continued)
Senate Committee waived this requirement in 1980.) The prospectus is required to include "an estimate of the maximum cost to the United States of the facility to be . . . leased . . . ." Section (b) permits the Administrator of General Services to increase the amount so authorized by an amount not to exceed 10 percent of the estimated maximum cost.

2/ Specials consist of the cost of extensive tenant build out specified in the SFO, consisting primarily of non-standard requirements for special areas such as computer rooms.

highest technical score while Schwartz's BAFO was third rated with a technical score approximately 40 percent lower than that of Boston Properties. After GSA determined that Boston Properties' offer provided the greatest value to the government, award was made to Boston Properties on June 1, 1990. Thereupon, Schwartz filed this protest with our Office.

PROSPECTUS CEILING

As a threshold matter, GSA asserts that any allegation concerning the effect of the prospectus ceiling is not subject to our Office's bid protest jurisdiction because the prospectus statute pertains to appropriations and is not a procurement statute. GSA argues that under the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3552 (1988), our bid protest jurisdiction is limited to consideration of alleged violations of procurement statutes and regulations. We have previously considered and rejected that argument, holding that our jurisdiction under CICA is based on whether the protest concerns a procurement for property or services by a federal agency, and that in exercising that jurisdiction we could properly consider the requirements of non-procurement statutes and regulations when they "directly bear upon federal agency procurements." Sam Gonzales, Inc.--Recon., B-225542.2, Mar. 18, 1987, 87-1 CPD ¶ 306; Solano Garbage Co., 66 Comp. Gen. 237 (1987), 87-1 CPD ¶ 125, recon. denied, B-225397 et al., June 5, 1987, 87-1 CPD ¶ 571.3/

Nonetheless, we find that the award was within the prospectus ceiling. The annual base period rental actually awarded is $19,143,013.94. This reflects a reduction from the proposed rent because, as expressly permitted under the SFO, GSA elected to pay for "specials" on a lump sum basis using funds provided by NASA from its own appropriations. The prospectus contained an estimate of $17,550,000, and stated that this amount might increase 3 percent per year because of inflation. Under 40 U.S.C. § 606(b) the Administrator of General Services has discretion to increase the cost of any approved project by up to 10 percent of the estimated prospectus cost. Such a

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3/ GSA also argues that because the Administrator of General Services has separate authority to enter into a lease pursuant to 40 U.S.C. § 490(h), GSA, as an executive agency, is entitled to expend for the lease any funds appropriated to it without obtaining congressional prospectus approval. GSA thus raises the question of whether the requirement for congressional approval of the prospectus constitutes a legislative veto. See Immigration and Naturalization Services v. Chadha, 462 U.S. 919 (1983). In view of our conclusion, infra, that the award is within the prospectus limit, we need not address this argument.

discretionary increase here would result in a maximum permissible award amount of $19,305,000. The actual annual rental of $19,143,013.94 is well within this limit.

A question has also been raised regarding whether the prospectus ceiling included the cost of cleaning services, which will be provided separately by the government. The prospectus does not state that the estimated amount includes such services, and in fact such services will not be included within the lease payment. GSA has been equivocal in whether to reduce the prospectus ceiling by $552,418 to account for these services. The contracting officer assumed that the prospectus provided for a fully serviced rental rate. We find that the prospectus is silent with respect to cleaning costs, and service costs are only referenced in a present value analysis of the lease, construction, and no change alternatives which accompanied the prospectus. GSA has been unable to locate the backup documents relating to the data set forth in the prospectus to ascertain whether the rental rate was, in fact, intended to be fully serviced. GSA points out that the prospectus rental rate was more consistent with an unserviced lease than with a fully serviced lease, in view of the existing market conditions. Under these circumstances, we see no reason why GSA was required to reduce the prospectus ceiling by the cost of government provided cleaning services.

DISCUSSIONS

As a separate question, apart from whether Boston Properties' award is in excess of the prospectus estimate, Schwartz contends that it was misled during discussions by GSA with respect to the amount of the award ceiling. Schwartz alleges that the GSA contracting officer and his representative specifically advised Schwartz during discussions on December 11, 1989, and subsequently, that the fully serviced prospectus ceiling was $17,550,000 per year and that award could not be made in excess of that amount, when in fact GSA considered the fully serviced ceiling to be significantly higher ($19,142,161). Schwartz asserts that if it had been able to increase its price, it could have provided significantly improved building facilities which would have improved its technical score, particularly under the special facilities factor.

With respect to whether GSA personnel explicitly advised Schwartz during discussions that $17,550,000 was the prospectus ceiling above which offers would be rejected, we have conflicting versions from GSA and Schwartz personnel both in the written record and in testimony at a conference of record which was held in conjunction with this protest. Schwartz's primary negotiator contends that the exact amount of $17,550,000 was stated to be the award ceiling during

discussions between Schwartz and GSA personnel, including the contracting officer. Schwartz's negotiator also asserts that at these same discussions GSA personnel stated that this fully serviced ceiling amount would have to be reduced to $16,845,000, to reflect government-provided cleaning services.

The GSA contracting officer states that neither number was stated by him or his representative, and that all GSA references in this regard were simply to the amount determined by the guidance contained in the prospectus. Thus, while the prospectus includes the $17,550,000 reference, it also specifically provides for 3 percent escalation per year from 1989 until the lease commencement, which is not scheduled to occur until September 1992, and GSA contends that any reference its personnel made to the prospectus must be understood to encompass the clearly stated escalation factor, which amounts here to a total of 9 percent. Further, GSA contends that it calculated the deduction for cleaning services to be $552,418, an amount substantially lower than that which Schwartz alleges it was told. While GSA's calculations result in a final adjusted ceiling of $18,589,743, GSA contends that it did not make any reference during discussions with Schwartz to any specific dollar ceiling amount.

We find GSA's position more credible. In our view, the record establishes that Schwartz's personnel misconstrued GSA references to the prospectus limitation as referring to the unescalated $17,550,000 amount. Schwartz's understanding is related to an effort by Schwartz to convince GSA to allow the lease to commence significantly earlier in time--which would have negated the escalation factor. However, the record clearly reflects that while Schwartz repeatedly proposed an earlier lease commencement date, GSA consistently stated that such an acceleration was technically unacceptable, and the SFO provides a schedule which calls for lease commencement in September 1992. In view of these circumstances, in conjunction with the express language of the prospectus (a copy of which was provided to Schwartz by GSA prior to the discussions in question), we find the GSA contracting officer's statement that reference was made to the prospectus ceiling without providing the dollar figure claimed by Schwartz is more credible than the assertion by Schwartz's negotiator that an obviously inaccurate specific dollar figure was used. While Schwartz may have incorrectly made the inference that GSA's references to the prospectus constituted references to the unadjusted dollar figure contained in the prospectus, reduced by Schwartz's own cleaning costs, we find that GSA did not mislead Schwartz as to the absolute dollar amount of the award ceiling by GSA's references to the prospectus.

Schwartz also contends that GSA personnel deliberately misled Schwartz during discussions by stating that "specials" had to be included in the rental rate for purposes of determining whether an offer was within the award ceiling established by the prospectus figure. In fact, in order to determine that Boston Properties' offer did not exceed the award ceiling, GSA excluded specials, electing to treat the cost of specials on a deducted lump sum payment basis, as is permitted under the SFO. GSA then deducted the appropriate amount from Boston Properties' stated annual rental figure, reducing the rental by approximately $600,000 per year as a result. Schwartz contends that if it had been apprised that the specials could be treated as a lump sum item and excluded from the ceiling, it could have increased its yearly rental rate, without having its offer rejected as in excess of the ceiling, and been able to offer enhanced special facilities. GSA admits that it told Schwartz that specials were required to be included for purposes of determining compliance with the award ceiling but characterizes its advice as a deliberate negotiation strategy for obtaining the best possible price, which GSA describes as a "bluff," because of the SFO provision permitting lump sum payment for specials. GSA asserts that Schwartz was required to "call" GSA's bluff in this regard.

In negotiated procurements, agencies are generally required to conduct meaningful discussions with all offerors in the competitive range; thus, the agencies must furnish information to all offerors in the competitive range as to the areas in which their proposals are believed to be deficient, so that offerors may have an opportunity to revise their proposals to fully satisfy agency requirements. The government does not satisfy its obligation to conduct meaningful discussions by misleading an offeror or by conducting prejudicially unequal discussions. Lucas Place, Ltd., B-238008; B-238008.2, Apr. 18, 1990, 90-1 CPD ¶ 398, recon. denied, B-238008.3, Sept. 4, 1990, 90-2 CPD ¶ ___. Further, even where an agency inadvertently misleads a firm during discussions with the result that the firm may not have competed on an equal basis, the proper course of action is for the agency to reopen discussions with all firms. Vitro Servs. Corp., B-233040, Feb. 9, 1989, 89-1 CPD ¶ 136.

Here, GSA concedes that all offerors were told that the lease could not be awarded to an offeror proposing an annual rental above the amount established by the prospectus with cleaning service costs deducted from the prospectus' estimated annual cost. In response to its inquiry, only Schwartz was told by GSA that its rent had to include the cost of specials for the purpose of comparison with the prospectus amount. Yet, GSA's source selection plan as well as GSA's post-BAFO calculations clearly show that GSA always intended to pay for specials by

lump sum and deduct the amount from the stated annual rental if necessary in order to stay within the award ceiling.

Thus, Schwartz is correct in its assertion that GSA's discussions in this regard were misleading and improper. GSA's "strategy" was to misinform Schwartz about the treatment of specials in the ceiling calculation. GSA's action in this regard was exacerbated by its reducing the calculation of Boston Properties' annual rental by more than $1,200,000, to reflect "extraordinary services" in order to determine that Boston Properties' proposed rent was within the award ceiling. GSA explains that this term refers to services beyond the lease standards contemplated under the Federal Property Management Regulations. However, the term is not referred to in the solicitation, nor was it ever referenced during GSA's discussions with Schwartz, and GSA has provided no tenable legal basis for the application of such a reduction.

Although we find that it was fundamentally inappropriate for GSA to adopt a negotiation strategy of misrepresenting its intended award ceiling calculations in response to Schwartz's repeated inquiries in this regard, it does not appear that this tactic substantially affected the protester's competitive standing. Schwartz submitted two offers after being advised of the ceiling which were significantly in excess of the amount which Schwartz claims it understood to be the ceiling. Thus, Schwartz apparently did not feel constrained by the alleged ceiling. In addition, Schwartz eventually reduced its last BAFO rental to an amount approximately $300,000 below the amount which Schwartz claimed it believed constituted the ceiling without offering less in the way of facilities. Under these circumstances, it does not appear that Schwartz's offer was actually affected by the discussions concerning the award ceiling, or that Schwartz would have made significant technical changes had it known of the higher ceiling. Thus, it is difficult to conclude that Schwartz was prejudiced in a manner which warrants sustaining its protest on this ground. See Lucas Place, Ltd., B-238008; B-238008.2, supra. However, while this impropriety may not provide a sufficient basis by itself to sustain the protest, we believe that in combination with errors discussed below, the effect was to prejudice the evaluation of Schwartz's offer.

OFFEROR QUALIFICATIONS

Schwartz contends that under offeror qualifications, which was the most important technical factor, GSA failed to give it proper credit for the financial capability and experience of A. James Clark, who was individually listed as one of the general partners, with a 50 percent interest in the company. Clark is listed in the Fortune 400 list of wealthiest Americans as having a net worth greater than $200 million, and

has substantial experience in the development of comparable government projects. In addition, Schwartz contends that Peter N.G. Schwartz, who was individually listed as the other general partner, was improperly downgraded on the basis of a Dun & Bradstreet report which pertains only to Peter N.G. Schwartz Companies, Inc., an entity which was not a part of the offeror's proposed team. Schwartz also contends that GSA failed to provide meaningful discussions with respect to this crucial perceived deficiency in its proposal.

Evaluation and award are required to be made in accordance with the terms of the solicitation. Environmental Technologies Group, Inc., B-235623, Aug. 31, 1989, 89-2 CPD ¶ 202. CICA requires that an agency evaluate proposals based solely on the factors specified in the solicitation. 41 U.S.C. § 253b(a) (1988). In reviewing protests against allegedly improper evaluations, our Office will examine the record to determine whether the agency's judgment was reasonable and in accord with the evaluation criteria listed in the solicitation. Space Applications Corp., B-233143.3, Sept. 21, 1989, 89-2 CPD ¶ 255.

We have recognized that such judgments by their nature are often subjective; nonetheless, the exercise of these judgments in the evaluation of proposals must be reasonable and must bear a rational relationship to the announced evaluation criteria upon which the competing offers are to be selected. See American President Lines, Ltd., B-236834.3, July 20, 1990, 90-2 CPD ¶ 53. Implicit in the foregoing is that these judgments must be documented in sufficient detail to show that they are not arbitrary. Where, as here, the record does not provide an adequate supporting rationale for the decision, we must conclude that the agency did not have a reasonable basis for its decision. Id.

The substantial majority of the point differential between the Schwartz offer and the Boston Properties offer resulted from the fact that Boston Properties' offer received an almost perfect score for offeror qualifications while Schwartz's offer was considered marginal and received less than one-third of the maximum possible score. The evaluation documentation, including the individual evaluations and the source selection evaluation board final recommendation report, reflects that Schwartz's offer received minimal credit for Clark, whom GSA concedes is highly qualified. While we agree that GSA properly could downgrade the team on the basis of appropriate documented evaluated weaknesses of Mr. Schwartz individually, notwithstanding Clark's strengths, the record does not provide a basis to support GSA's evaluation.

On the contrary, the record shows that the board based its negative evaluation in large measure on an unfavorable Dun &

Bradstreet financial report which it received concerning "Peter N.G. Schwartz Companies, Inc." Both the individual evaluators' remarks and the final board recommendation indicate that the negative rating of Schwartz is substantially based on a questionable financial background as evidenced by the Dun & Bradstreet report which classifies the firm as a significant financial risk.

First, we question whether GSA could reasonably consider Schwartz's financial condition in its evaluation. The subfactors listed under offeror qualifications are performance in servicing and maintaining commercial buildings, and subcontractor qualifications, including personnel directing the project, prior performance, and experience in meeting project budgets and schedules. We have expressed concern over the use of financial condition as an evaluation factor, except where it is warranted by special circumstances, and the solicitation clearly establishes that financial condition is an evaluation criterion or subfactor. Flight Int'l Group, Inc., B-238953.4, Sept. 28, 1990, 90-2 CPD ¶ ___. Here, since the RFP did not establish financial condition as an evaluation factor or subfactor, it appears that GSA improperly downgraded Schwartz's offeror qualifications, since financial condition was properly for consideration only in connection with determining the offeror's responsibility. Id.

Moreover, the Dun & Bradstreet report in question pertains only to the Peter N.G. Schwartz Companies, Inc. Our review of the Schwartz proposal discloses that the proposed team does not include this company. Mr. Schwartz was listed in the offer individually as a general partner, and there is nothing in the record which suggests that the Peter N.G. Schwartz Companies, Inc.'s negative rating reflects adversely on Mr. Schwartz's personal financial capacity. At most, GSA could have concluded that Mr. Schwartz's interest in that particular company did not enhance Mr. Schwartz's financial qualifications. Accordingly, we find it unreasonable for GSA to base its negative evaluation substantially on a financial report which does not pertain to the offeror, while declining to give the offeror more than minimal credit for the conceded financial strengths of Clark, apparently because Schwartz individually assumed the lead role during negotiations.

GSA asserts that there was confusion concerning the role of Peter N.G. Schwartz Companies, Inc., pointing out that the company is mentioned in Schwartz correspondence, and that certain individuals listed as part of the Schwartz team are employees of the company. However, since this matter was considered to be unclear by GSA, and was clearly perceived as a deficiency since GSA viewed it as rendering Schwartz's proposal marginal, we believe that GSA was required to advise

Schwartz of its concerns, or at least seek clarification of the company's role, if any, during discussions. See Lucas Place, Ltd., B-238008; B-238008.2, supra. GSA did not discuss the perceived deficiency with Schwartz, beyond asking for additional references, which is obviously insufficient to indicate GSA's actual concern. Accordingly, we find that GSA did not have a reasonable basis for its evaluation of Schwartz.

Since the allegations which we have discussed provide a basis to sustain the protest, no useful purpose would be served by considering the remainder of Schwartz's allegations, which we have reviewed, and which we note are untimely in part and otherwise without merit.

REMEDY

While our recommendation under these circumstances normally would be for another round of properly conducted discussions and a fair evaluation of the BAFOs received, with a view to possible termination for convenience of Boston Properties' award, depending on the outcome, this remedy is not feasible in this instance because the lease does not contain a termination for convenience clause. Our Office has held that in these circumstances, absent a termination for convenience clause, we will not recommend termination of an awarded contract, even if we sustain the protest and find the contract award improper. SWD Associates--Claim for Costs, 68 Comp. Gen. 655 (1989), 89-2 CPD ¶ 206; SWD Associates, B-226956.2, Sep. 16, 1987, 87-2 CPD ¶ 256; Patio Pools of Sierra Vista, Inc.--Recon., B-228187.2; B-228288.2, Apr. 7, 1988, 88-1 CPD ¶ 345.

Schwartz has advanced various theories as to why this situation should not be controlled by the rationale set forth in the cited cases. However, the primary arguments raised by Schwartz were considered in the prior cases, and Schwartz has not provided any meaningful legal or factual difference between the current case and the situations in SWD and Patio Pools. Thus we see no reason to modify or reverse our holding in this area.

Schwartz has also opined that this case should be considered differently because the contract was void ab initio, since the award was in excess of the prospectus limitation. As discussed above, the award did not exceed the maximum permissible statutory ceiling. Further, our Office has adopted the judicially-expressed view that an awarded contract should not be treated as void, even if improperly awarded,

unless the illegality of the award is plain or palpable. See John Reiner & Co. v. United States, 324 F. 2d 438 (Ct. Cl. 1963), cert. denied, 377 U.S. 931 (1964). The test in determining whether an award is plainly or palpably illegal is whether the award was made contrary to statute or regulation due to improper action by the contractor, or whether the contractor was on direct notice that the procedures followed were violative of statutory or regulatory requirements. Southwest Marine, Inc.--Request for Recon., B-219423.2, Nov. 25, 1985, 85-2 CPD ¶ 594. On the other hand, if the contractor did not contribute to the error resulting in the award and was not on direct notice before award that the procedures followed were improper, the award should not be considered plainly or palpably illegal, and the contract may only be terminated for the convenience of the government. New England Telephone and Telegraph Co., 59 Comp. Gen. 746 (1980), 80-2 CPD ¶ 225; 52 Comp. Gen. 215 (1972). Under this standard, since there is no evidence that Boston Properties engaged in any improper activity, or was aware of any impropriety, there is no basis to determine that the award was void ab initio.

The protest is sustained.

Since there is no basis for termination of the lease, we find that Schwartz's relief is limited to recovery of its proposal preparation costs and the costs of pursuing its protest, including attorneys' fees. 4 C.F.R. § 21.6(d) (1990).

Milton J. Socolar

for Comptroller General
of the United States