



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Meyers Companies, Inc.

File: B-275963; B-275963.2; B-275963.3

Date: April 23, 1997

Darcy V. Hennessy, Esq., Moore, Brower, Hennessy & Freeman, P.C., for the protester.

Christopher M. Crowley, Esq., McDowell, Rice, Smith & Gaar, for Dr. William P. Schaetzel, an intervenor.

Richard A. Say, Esq., U.S. Army Corps of Engineers, for the agency.

C. Douglas McArthur, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Lease requirement that lessee erect and maintain fences to separate parcels, one from another, does not constitute a procurement of property or services sufficient to establish General Accounting Office jurisdiction over dispute concerning award of lease, since there is at best a tenuous connection between the need for fences and the agency's central mission.

DECISION

Meyers Companies, Inc. protests the award of a lease to Dr. William P. Schaetzel under notice of availability No. DACW41-97-B-RE-502, issued by the U. S. Army Corps of Engineers for the lease of land at the Sunflower Army Ammunition Plant (SAAP) near DeSoto, Kansas. Meyers contends that the awardee submitted a nonresponsive bid; and that, in any event, the agency had made an award orally to Meyers at bid opening, several days before the award to Dr. Schaetzel.

We dismiss the protests for lack of jurisdiction.¹

On November 6, 1996, the agency issued a notice that it would accept sealed bids for leases on nine parcels of land at SAAP. In addition to a cover sheet, the notice consisted of instructions to bidders; a lease form; land use regulations for SAAP and tract management plans for each parcel; and a bid form. Paragraph 5 of the instructions advised bidders to submit two signed copies of the lease form, for each

¹Meyers withdrew its second protest, which concerned the agency's failure to stay performance during the pendency of that protest, after learning that the agency had, in fact, decided to stay performance until our Office issued its decision.

parcel upon which they desired to bid, as well as a personal check or money order as a bid guarantee, with the full rental payable "within ten (10) days after notice of acceptance of the bid."² Paragraph 6b stated that bids were to be submitted in duplicate on the attached bid form, along with the two signed lease forms and the required deposit. Paragraph 6f reiterated that no bid would be considered without the deposit and that the full annual rental would be due "within ten (10) days after receipt of written notice of acceptance." Paragraph 11 provided that notice of award would be given "as soon as practicable to the successful bidder personally, to a duly authorized representative, or in writing to the bidder at the address indicated in the bid." The instructions advised bidders that the agency would award leases to the highest responsive bidders.

The lease form, in pertinent part, provided for payment of a cash rental to be "offset by the value of work items which shall be accomplished by the [l]essee for the maintenance, protection, repair, restoration, and improvement" of the parcels, as described in the SAAP land use requirements attached to the notice. These land use requirements governed various lessee activities, including, among others, provisions relating to fire safety and chemical storage, limits on the number of animals allowed to graze on the leased parcel, weed control, and land management. Paragraph 12 identified existing fence structures and advised bidders that pasture and pasture boundary fences (as opposed to the plant's security fence) would be the total responsibility of the lessee.

The tract management plan for agricultural lease number 10 (AL-10), the parcel at issue in the present protest, required the successful bidder to remove approximately 3,500 linear feet of fence and replace it with new five-strand barbed wire fence and maintain fences throughout the lease period.³ The plan also advised bidders that the agency required a letter of credit in the amount of \$4,000 to cover all related costs for replacement and repair of fence in AL-10. The work was to be completed during the initial year of the lease.

The bid form listed the nine parcels as separate line items. An asterisk preceded five of the line items, including AL-10. A note at the end of the schedule warned bidders that line items marked with an asterisk "contain[ed] exceptional tract management requirements." These were the requirements spelled out in the tract management plans, which were summarized at the bottom of the schedule.

²Paragraph 5f provided for submission of a check in the amount of the first years' rent, in the full amount up to \$1,000, and a deposit equal to 10 percent of that amount.

³The notice also included maps of the parcels, indicating those portions of fence for which each lessor was responsible, as well as minimum standards for fences.

Specifically, the schedule noted that AL-10 (as well as AL-9) required extensive fence work and a letter of credit, as stated in the tract management plan. Neither the tract management plan nor the bid schedule stated that bidders were to submit the letter of credit with the bid, and the notice of availability did not otherwise address the issue.

Two bidders submitted bids on AL-10 on December 17, 1996. Meyers, who had submitted the lower bid, immediately asserted that the high bid was nonresponsive because it did not include the letter of credit required by the tract management plan. The bid opening officer referred the issue to the contracting officer, who, according to the different versions of events, either referred the matter to her counsel or told the bid opening officer to inform Meyers that its bid was successful. The agency subsequently determined that the solicitation did not require submission of a letter of credit with the bid and that the award should go to the high bidder. Consequently, by letter of January 8, 1997, the agency awarded a lease contract to Dr. Schaetzel for parcel AL-10, and these protests followed. In addition to its contention that the high bid was nonresponsive, Meyers asserted that the agency was improperly attempting to rescind an oral award made to Meyers at bid opening.⁴

As a general rule, protests concerning offers to sell or lease government-owned real property are not for consideration under our Office's bid protest function. Under the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3551 (1994), our Office is authorized to review protests concerning proposed contracts for the "procurement of property or services" by a federal agency. Transactions for the lease of federal land do not generally involve a procurement of property or services, and therefore are not encompassed by our CICA bid protest authority. Equity Fed. Sav. Bank, 64 Comp. Gen. 697 (1985), 85-2 CPD ¶ 81 at 1. Although there may be procurement aspects to a lease because it imposes certain obligations on the lessee, that does not necessarily mean that we have jurisdiction over the matter. Trimmer

⁴In subsequent protests, Meyers asserted that the award was improper because the awardee did not receive a written notice of award within the 10-day acceptance period for which the solicitation provided; and that acceptance of Dr. Schaetzel's letter of credit as evidence of responsibility constituted bad faith. We note that our Office has consistently held that a formal written extension of a bid acceptance period is not necessary where the agency can infer the bidder's intent to extend from its actions. Action Serv. Corp., B-254861, Jan. 24, 1994, 94-1 CPD ¶ 33 at 4. Further, although an allegation of bad faith provides a basis for our Office to review the agency's affirmative determination of responsibility, which we normally do not do, the protester is required to produce convincing evidence that government officials had a specific and malicious intent to injure the protester. Sanstrans, Inc., B-245701, Jan. 27, 1992, 92-1 CPD ¶ 112 at 5. There is no such evidence here.

Marina, B-223107, June 23, 1986, 86-1 CPD ¶ 578 at 1. In this regard, we have declined jurisdiction where the imposition of obligations upon a lessee were collateral to the primary purpose of the transaction--the lease of government property. See North Florida Shipyards, Inc., B-243575, May 3, 1991, 91-1 CPD ¶ 434.

In the somewhat related area of concessions, our Office has found the award of concession contracts to be subject to our bid protest jurisdiction where they result in a benefit to the government. Such benefit to the government is measured by whether the transaction in question relates to the advancement of the agency's mission, an issue that relates, in turn, to whether the agency's work load will be reduced or whether the effort is somehow rendered, either directly or indirectly, in support of the agency's mission requirements. Maritime Global Bank Group, B-272552, Aug. 13, 1996, 96-2 CPD ¶ 62 at 2. See also West Coast Copy, Inc.; Pacific Photocopy and Research Servs., B-254044; B-254044.2, Nov. 16, 1993, 93-2 CPD ¶ 283 at 5 (jurisdiction over award of photocopy concession serving the agency's mission requirement of furnishing copies of documents to the public); Gino Morena Enters., 66 Comp. Gen. 231, 234-235 (1987), 87-1 CPD ¶ 121 at 4-5, aff'd, B-224235.2, May 13, 1987, 87-1 CPD ¶ 501 at 1 (jurisdiction over award of haircut concession at Air Force basic training center, where initial haircuts were an aspect of the training experience integral to the agency's mission). Where any benefit to the government is speculative or contingent, jurisdiction is lacking, even though earmarks of a procurement are present. Maritime Global Bank Group, supra (no jurisdiction over Navy's execution of an agreement with a bank for the provision of on-base banking services).

The protester here has identified no aspect to the lease of benefit to the government or the agency's mission. The protester simply contends that there are procurement aspects to the lease in that the agency is procuring fencing to separate parcels (and herds) one from another. The protester suggests that, in a sense, the agency is paying for the fence because lessees receive a credit against rent for the fence work. The agency would not be paying for fences, Meyers argues, unless it anticipated a benefit from them. The agency, on the other hand, maintains that the fences serve no purpose of the agency's and are solely for the benefit of the lessees.

We are not persuaded, absent evidence of a direct or indirect relationship to the agency's mission, that allowing a credit for the fence work necessarily makes such work for the benefit of the government. While the fencing may allow the agency to manage the leased parcels more efficiently and ensure that a lessee's cattle do not stray onto another lessee's parcel, there is no evidence that this is work the government would otherwise be obliged to provide, and we see no more than a tenuous connection between the repair work on the fences and the Army's central

mission here, which is to maintain production facilities.⁵ The protester has simply failed to demonstrate the existence of any palpable benefit to the government from the lease agreement. Accordingly, based on the record here, we view the fencing requirement as collateral to the purpose of the lease and therefore cannot conclude that the lease transaction is within the bid protest jurisdiction of our Office.

The protests are dismissed.⁶

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⁵The land use regulations define the agency's mission as follows:

" . . . to maintain all facilities required for the production of ammunition propellants and chemicals for department of army and meet all goals of environmental compliance and remediation."

⁶We point out that, in any event, the principal protest contentions appear to be without merit. As indicated above, paragraphs 5, 6b and 6f of the solicitation instructions all list what bidders had to submit, including the required deposit, but nowhere do the instructions mention the letter of credit required by the tract management plan. The agency thus reasonably views the letter of credit as a performance requirement. With regard to the second issue, relating to the oral award, while Meyers contends that paragraph 11 of the instructions, quoted above, implies that the agency will make award orally, paragraph 6f specifically provides for written notice of award, without which the lessee is not obligated to pay rent.