

DECISION



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

FILE: B-218192.2 **DATE:** May 7, 1985
MATTER OF: Federal Properties of R.I., Inc.

DIGEST:

1. Rejection of a proposal because its proposed site to locate a border patrol facility poses security problems and has unsightly environs is improper where the solicitation did not list security and the sightliness of environs as evaluation criteria.
2. Recovery of proposal preparation costs is inappropriate where the remedy afforded the protester is the opportunity to compete in the procurement.
3. Recovery of the costs of filing and pursuing a protest generally is inappropriate where the procurement deficiency is not that the agency unfairly or improperly excluded the protester from an opportunity to compete for the award, but that the agency applied undisclosed evaluation criteria, and the remedy afforded the protester is an opportunity to compete under a revised solicitation.

Federal Properties of R.I., Inc., protests the rejection of its offer under request for proposals (RFP) No. DLS-30-84 to construct a facility in the vicinity of Miami, Florida, and lease it back to the Immigration and Naturalization Service, Department of Justice (Service). The RFP contemplated a negotiated lease for either an existing facility or a leaseback agreement for a newly constructed facility to serve as the United States Border Patrol Sector Headquarters and Station, Miami, Florida. Based on an RFP requirement that the space "should be remote from the general public yet accessible to major highways and thoroughfares and be able to accommodate secured and lighted parking for approximately 75 vehicles,"

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the contracting officer rejected Federal Properties' proposal basically because its proposed site allegedly posed a security problem. The contracting officer subsequently entered into discussions with other offerors and solicited best and final offers. Federal Properties contends that the contracting officer rejected Federal Properties' proposal based on unstated evaluation criteria concerning security, and that it should be given the opportunity to compete under the Service's actual requirements and evaluation criteria.

We sustain the protest.

A basic principle of federal procurement law is that the contracting agency must advise offerors of any specific major evaluation criteria and must adhere to those criteria in evaluating proposals. See Federal Acquisition Regulation (FAR), 48 C.F.R. §§ 15.605 and 15.606 (1984). The rule regarding the acquisition of leasehold interests in real property is no different; regulations specifically pertaining just to such acquisitions state that offers must be evaluated in accordance with award factors specified in the solicitation. Federal Procurement Regulations Temporary Regulation 68, 41 C.F.R. Appendix to Chap. 1 (1984), extended by 49 Fed. Reg. 12,972, 12,973 (1984).

The Service's solicitation failed to specify any evaluation criteria and, in terms of indicating concern about the area in which the facility was to be located, stated that the proposed site be situated within the boundaries of a geographic area of several square miles and included the requirement quoted above. The Service decided to reject Federal Properties' proposal offering a site within the prescribed geographic area because, in the Service's view, the location of the site was a major consideration, and Federal Properties' proposed site was unacceptable. One of the reasons the Service found the site unacceptable was that the site was in a high crime area, thus posing a security problem for employees, visitors, transported aliens, and property belonging to the government or being held after seizure. The Service was concerned that criminal activity, in addition to rendering the area unsafe, also could render it inaccessible since county police officials allegedly reported that the

major access roads leading to the area were barricaded during the 1980 Miami riots.^{1/}

In addition, the Service concluded that: 1) the area was extremely poor and, therefore, "did not reflect the dignity and standards commensurate with, and which should be accorded, a [federal] law enforcement facility"; 2) the site was a landfill, which could pose health hazards; and 3) the site was situated next to a construction company which had stored unsightly rusted equipment in prominent view. The Service apparently abandoned the reasons numbered 2) and 3) above after Federal Properties filed its protest; in particular, the protester pointed out that the landfill was for reclamation and development purposes and that the structure itself would be situated on virgin soil.

The Service's bases for rejecting Federal Properties' proposal offering a site within the RFP's prescribed geographical area clearly reflect major evaluation criteria concerning the impact of the surrounding area on the facility--that is, security and the sightliness of the environs. These factors were not disclosed in the solicitation and, therefore, the Service's rejection of Federal Properties' proposal, without giving the firm an opportunity to prepare an offer with those factors in mind, was improper. See Arltec Hotel Group, B-213788, Apr. 4, 1984, 84-1 C.P.D. ¶ 381.

In reaching this decision, we are mindful that the Service has attempted to relate the undisclosed evaluation criteria to the stated requirement for the site to be able to accommodate secured and lighted parking. The Service

^{1/} This Office has received a letter from the Mayor of Opa-locka, in which Federal Properties' proposed site apparently is located, taking strong exception to the Service's characterization of the area as having a high crime rate and posing security problems. The Mayor contends that the Service relied on districtwide crime statistics that derive from a much larger area than Opa-locka and are not representative of the city.

seeks to invoke the rule that aspects of a major evaluation factor need not be specifically identified if those aspects are logically and reasonably related to, or encompassed by, the stated criterion. Arltec Hotel Group, B-213788, supra. This rule reflects our recognition of the necessity for major criteria to be reasonably broad and flexible, since the agency cannot anticipate every approach to the solicitation and must have the latitude to evaluate unexpected responses with respect to the government's interests. We do not perceive any of the solicitation's requirements as being reasonably related to the undisclosed criteria, however. The language requiring the site be able to accommodate "secured" parking can only reasonably mean that the cars will be guarded and the parking area must be able to accommodate guard and security facilities. In this respect, while we also note that the solicitation, under the heading "DESIGN," also required a facility that would "effectively support the operations" of the Service and a design that would establish a "healthy work environment," these criteria, in our view, relate to the facility itself and not the greater area in which it is located.

The only concerns expressed about the location of the facility were that it be situated in a well-defined geographical area of several square miles, and that the site be remote from the general public yet accessible to major highways and thoroughfares. There was no indication in the solicitation that, assuming the site itself met these physical requirements, the Service might still reject a proposal because of the relative desirability of the general area with respect to security and visual appeal. Further, since the prescribed geographic area was only several square miles, it was reasonable to assume that the Service was familiar with the area, and would have stated any concerns it had about the desirability of some portions of the area over others. Under these circumstances, we believe that the unstated evaluation criteria were not reasonably related to any requirements stated in the solicitation.

We therefore recommend that the Service reopen discussions with all offerors, including Federal Properties, by issuing an amendment advising them of the Service's evaluation criteria and giving them an

opportunity to submit revised proposals. We understand that there is some urgency for making an award, in which case it may be appropriate to advise offerors orally of the amendment, still following up with the issuance of a formal amendment, and to use such accelerated procedures as are appropriate and fair. See Las Vegas Communications, Inc.--Reconsideration, B-195966.2, Oct. 28, 1980, 80-2 C.P.D. ¶ 323.

The protester requests reimbursement of the costs of preparing its proposal and the costs of filing and pursuing its protest, including attorney's fees. We will only allow the recovery of proposal preparation costs where the contracting agency has unreasonably excluded the protester from the competition and no other remedy as enumerated in our Bid Protest Regulations is appropriate. 4 C.F.R. § 21.6(e) (1985). One of the enumerated remedies is where we recommend that the contract be recompeted, 4 C.F.R. § 21.6(a)(3), which in effect we are doing in this case since we are recommending that discussions be reopened and Federal Properties be given an opportunity to submit a revised offer. The recovery of proposal preparation costs therefore is not appropriate here.

Regarding the recovery of the costs of filing and pursuing a protest, our Regulations limit the recovery of the costs to situations where the protester unreasonably is excluded from the procurement, except where this Office recommends that the contract be awarded to the protester and the protester receives the award. 4 C.F.R. § 21.6(e). The thrust of the Regulations thus is that the recovery of the costs of filing and pursuing a protest should be allowed only where the protester improperly did not receive the opportunity to compete for the award, and that in cases where the protester obtains an award, the award is a sufficient remedy in itself. In that same vein, we believe that where, as here, the procurement problem basically concerns the agency's use of a deficient description of what it wants, and the protester is given an opportunity to compete for the award under a corrected solicitation, the recovery of the costs of filing and pursuing the protest are generally inappropriate. We therefore also deny the protester's request for reimbursement of such costs.

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The protest is sustained, and the request for the recovery of proposal preparation costs and the costs of filing and pursuing the protest are denied.

for Milton J. Acosta
Comptroller General
of the United States

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