Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Gordon R. A. Fishman

File: B-257634.3

Date: November 9, 1995

Neil I. Levy, Esq., Kilpatrick & Cody, for the protester.
Debra J. Turchin, Esq., General Services Administration, for the agency.
Scott H. Riback, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest against rejection of proposal for the lease of office space as technically unacceptable is denied where record shows that the timely availability of the proposed space was contingent upon current tenant's future review and approval of a lease for space elsewhere.

DECISION

Gordon R. A. Fishman protests the award of a lease agreement to KD Development under solicitation for offers (SFO) No. GS-05B-15777, issued by the General Services Administration (GSA) for office space in Mount Clemens, Michigan, for the Internal Revenue Service (IRS). Fishman argues that the agency improperly found its offer technically unacceptable and made award to KD at a price higher than Fishman's.

We deny the protest.

The SFO requested offers to lease approximately 10,250 contiguous net usable square feet; the solicitation provided for award to the responsible firm submitting the offer that was "fully responsive to all requirements of this solicitation and is the lowest priced. . . ." GSA received two offers, one from Fishman and one from KD; both offers were included in the competitive range.

Although Fishman was the incumbent lessor for this requirement, IRS' needs had changed and the agency now required 10,250 square feet of contiguous office space. In order to meet this requirement, it was necessary for Fishman to propose that the agency move its offices from the first floor to the second floor of its building. Because GSA was aware of the presence of two tenants on the second floor of Fishman's building, it requested that Fishman provide as part of its best and final offer (BAFO) a letter from one of these tenants reflecting its commitment to vacate the second floor space so that the necessary renovations could commence. (GSA

did not require a letter from the other tenant because Fishman had represented that it was a month-to-month tenant.) Fishman furnished with its BAFO a letter from the second floor tenant which provided that: "[w]e are agreeable to re-locate to the first floor at our present location. This re-location is contingent on the review and subsequent approval of the renewed lease."

GSA determined that Fishman's offer was technically unacceptable on numerous grounds. Among the bases for GSA's determination was its finding that the space being offered was subject to an existing lease because Fishman's tenant had not provided an unequivocal commitment to move in time to implement Fishman's construction and relocation plan for the IRS.

Fishman challenges GSA's determination that its offer was technically unacceptable. Fishman notes that its proposal included a promise to comply with all of the SFO's requirements. Further, Fishman contends that the letter from its tenant showed that the tenant was willing to move, subject only to a contingency--the tenant's review and approval of a renewed lease agreement--which effectively was within Fishman's control. In addition, Fishman argues that to the extent that GSA may have had concerns in this regard, the agency should have permitted it to clarify the matter. In any case, argues Fishman, its ability to furnish the space was a matter of responsibility, rather than technical acceptability, which should have been referred to the Small Business Administration (SBA) since Fishman is a small business concern.[1]

Fishman's position is without merit. An offeror must affirmatively demonstrate by the terms of its proposal that its offered product or service meets all of a solicitation's material requirements. Alnasco, Inc., B-249863, Dec. 22, 1992, 92-2 CPD ¶ 430. An agency may not properly accept for award a proposal that fails to meet one or more material solicitation requirements. Brooks Towers, Inc., B-255944.2, Apr. 28, 1994, 94-1 CPD ¶ 289, aff'd, Brooks Towers, Inc.--Recon., B-255944.3, Dec. 29, 1994, 95-1 CPD ¶ 4.

Here, Fishman's offer specifically identified the second floor of its building as the space it was offering to meet the requirement for 10,250 square feet of contiguous office space. However, the proposal indicated that in order for Fishman to meet the SFO's contiguous space requirement, it would have to obtain an agreement from its tenant to move. When the agency requested that Fishman provide an unequivocal agreement from its tenant to move, Fishman was unable to obtain such

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[1]Fishman also maintains that the agency never actually found its offer technically unacceptable prior to making award to KD. This allegation is simply incorrect; the agency's pre-award business clearance memorandum specifically found that Fishman's offer was nonresponsive to numerous SFO rerquirements.

a commitment; instead, Fishman furnished a letter from the tenant which specifically conditioned its agreement to move on its future review and acceptance of a renewed lease agreement. Since the tenant's agreement to move was contingent, we believe that the agency reasonably found that Fishman was not offering compliant space. Moreover, while Fishman generally agreed elsewhere in its offer to meet all of the SFO's requirements, this promise was simply inconsistent with the terms of the letter from its tenant.

We also find no merit to Fishman's assertion that its failure to provide its tenant's unequivocal agreement to move was a matter of responsibility rather than technical acceptability. As noted, the SFO provided that award would be made to the firm whose proposal was fully responsive to all of the solicitation's requirements; the equivocal nature of the tenant's promise to move rendered the parcel being offered technically unacceptable because it did not meet the contiguous space requirement, and thus was a matter of the firm's acceptability. Since its proposal was properly rejected as technically unacceptable for failure to offer compliant space, there was no need to refer the matter to the SBA for consideration of Fishman's responsibility. See A&W Maintenance Servs., Inc., B-258293; B-258293.2, Jan. 6, 1995, 95-1 CPD ¶ 8 (where agency rejects proposal as technically unacceptable for reasons not related to responsibility as well as for reasons that properly would be categorized as responsibility, agency need not refer the matter to the SBA).

Although Fishman also asserts that it was not afforded adequate discussions concerning the availability of the required space, GSA, having specifically requested that the firm provide an unequivocal commitment from its tenant to move, was not required to seek further clarification of the matter when Fishman furnished something less. Hughes Training, Inc., B-256426.4, Jan. 26, 1995, 95-1 CPD ¶ 154.

Finally, Fishman contends that the GSA's treatment of it throughout the procurement evidences bad faith on the part of the agency's contracting officials. However, since the record supports the agency's determination that Fishman's

proposal was technically unacceptable, there is no basis for a finding of bad faith. See Wayne D. Josephson, B-256243, May 12, 1994, 94-1 CPD ¶ 307; George A. and Peter A Palivos, B-245878.2; B-245878.3, Mar. 16, 1992, 92-1 CPD ¶ 286.[2]

The protest is denied.

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[2]Fishman further argues that GSA improperly obtained a waiver from an agency-imposed moratorium on the award of leases based on incorrect representations concerning the state of IRS' current space. This argument concerns the implementation of executive policy, not a procurement statute or regulation, and therefore is not a matter for consideration under our bid protest process. See American Airlines, Inc., B-258271, Dec. 29, 1994, 95-1 CPD ¶ 5.