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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Great South Bay Marina, Inc.

File: B-296335

Date: July 13, 2005

Dominic S. Rizzo, Esq., for the protester.

Anthony R. Conte, Esq., Department of the Interior, for the agency.

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DIGEST

1. Government Accountability Office (GAO) has jurisdiction over protest of award of National Park Service concession contract where prospectus, in addition to authorizing contractor to furnish concession services, requires contractor to furnish construction and rehabilitation services valued at over \$1 million to the government.

2. Where agency refuses to furnish an agency report responding to a protest, GAO will decide protest on the basis of the documents available, even if that record is limited to documents submitted by protester.

3. Protest challenging agency's conclusion that awardee's proposal represented the best value to the government is denied where protester generally asserts that its offer is superior to awardee's but offers no specific or detailed argument, beyond a description of its proposal in one area (financial capability), to establish that the agency unreasonably concluded that its proposal did not represent the best value.

DECISION

Great South Bay Marina, Inc. protests the National Park Service's (NPS) award of a concession contract to Fire Island Concessions, LLC under prospectus No. CC-FIIS007-05, for concession services at Fire Island National Seashore.

We deny the protest.

JURISDICTION

The Department of the Interior notified our Office 1 day prior to the due date for submission of the agency's report on Great South Bay Marina's protest that it is the agency's position that NPS "concession contracts are not procurement contracts for goods or services," and, as such, are outside the scope of our bid protest jurisdiction under the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. §§ 3551-3556 (2000), amended by the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 326, 118 Stat. 1811 (2004). Letter from the Department of the Interior to GAO, May 26, 2005, at 1. The agency, relying on its analysis of our Office's jurisdiction, therefore declined to submit a report responding to the protest, a matter that we address separately below. For the reasons set out here, we disagree with the agency regarding our jurisdiction over the protest.

In support of its position that we lack jurisdiction, the agency asserts that concession contracts do not procure goods or services for the benefit of the government, as required for exercise of our jurisdiction pursuant to CICA, but rather authorize third parties to provide services to park visitors. We agree that our Office lacks jurisdiction to consider a protest challenging the award of a "pure" concession contract—that is, one that merely authorizes a concessionaire to provide services to park visitors. We have long recognized, however, that some NPS "concession" contracts are hybrids, and require the delivery of goods and/or services to the government, in addition to authorizing the contractor to provide services to park visitors. See, e.g., Shields & Dean Concessions, Inc., B-292901.2, B-292901.3, Feb. 23, 2004, 2004 CPD ¶ 42, recon. denied, B-292901.4, Mar. 19, 2004, 2004 CPD ¶ 71 (concessionaire required to provide maintenance, repair and other services for government facility as well as facility improvement valued at over \$800,000); Starfleet Marine Transp., Inc., B-290181, July 5, 2002, 2002 CPD ¶ 113 (concessionaire for ferryboat services required to provide janitorial services for agency's docks and piers, equip ferries with public address systems for use by Park Ranger, and provide transportation for Park Ranger). It has consistently been our Office's view that a mixed transaction that includes the delivery of goods or services of more than de minimis value to the government is a contract for the procurement of property or services within the meaning of CICA. Starfleet Marine Transp., Inc., supra, at 6.

In arguing that we lack jurisdiction, the agency relies on the House and Senate committee reports that accompanied the NPS Concessions Management Improvement Act of 1998, Pub. L. No. 105-391, §§ 401-419, 112 Stat. 3503-18 (1998), which expressed the view that concession contracts do not constitute "contracts for the procurement of goods and services for the benefit of the government or otherwise." S. Rep. No. 105-202, at 39 (1998); H. R. Rep. No. 105-767, at 43 (1998). As we noted in Starfleet Marine Transp., Inc., supra, at 7, however, committee report language is not binding legal authority. Further, it is not clear that in stating that concession contracts are not contracts for the procurement of goods or services for the government, the committees envisioned the sort of "concession-plus" contract at

issue here, i.e., mixed transactions that include the delivery of goods or services to the government.

The agency also points to the fact that NPS regulations provide that “concession contracts are not contracts within the meaning of 41 U.S.C. 601 et seq. (the Contract Disputes Act) and are not service or procurement contracts within the meaning of statutes, regulations or policies that apply only to federal service contracts or other types of federal procurement actions.” 36 C.F.R. § 51.3. Again, we have previously considered this argument, noting in Starfleet that NPS cannot by regulation limit the authority of our Office to decide protests and that it is our Office, not NPS, that has interpretive authority over the bid protest provisions of CICA. Starfleet Marine Transp., Inc., supra, at 7. Further, regarding the agency’s argument that both the U.S. District Court and the Court of Appeals upheld this regulation against a facial challenge, see Amfac Resorts, LLC v. Dept. of the Interior, 142 F. Supp. 2d 54 (D.D.C. 2001) and Amfac Resorts, LLC v. Dept. of the Interior, 282 F. 3d 818 (D.C. Cir. 2002), we note that the decision of the Court of Appeals was subsequently vacated by the Supreme Court—and that the Supreme Court pointed out that NPS was not the agency empowered to administer the procurement statute at issue in the case (the Contract Disputes Act) and that the NPS regulation was therefore “nothing more than ‘a general statemen[t] of policy’ designed to inform the public of NPS’ views on the proper application of the [Contract Disputes Act].” National Park Hospitality Ass’n v. Dept. of the Interior, 538 U.S. 803, 809 (2003).

We continue to be of the view that where a contract authorizing the provision of concession services also requires the delivery of goods or services of more than de minimis value to the government, the contract is one for the procurement of property or services within the meaning of CICA, and, as such, is encompassed within our bid protest jurisdiction. Great South Bay Marina, Inc., B-293649, May 3, 2004, 2004 CPD ¶ 108 at 2. At the same time, it has always been—and remains—our view that concession contracts that do not require the delivery of goods or services to the government (or that require the delivery of goods or services of only de minimis value to the government) are not contracts for the procurement of property or services within the meaning of CICA and do not fall within our Office’s bid protest jurisdiction. White Sands Concessions, Inc., B-295932, Mar. 18, 2005, 2005 CPD ¶ 62, recon. denied, B-295932.2, Apr. 12, 2005; Crystal Cruises, Inc., B-238347, Feb. 1, 1990, 90-1 CPD ¶ 141 at 2, aff’d, B-238347.2, June 14, 1990, 90-1 CPD ¶ 560.

In this case, in addition to authorizing the contractor to furnish concession services on Fire Island, the prospectus requires the contractor to invest not less than \$1,259,000 in building rehabilitation and improvements over the first 5 years of the contract. The scope of the required rehabilitation and improvement work and the timetable on which it is to be performed are spelled out in great detail in the prospectus; the work includes, for example, the replacement of dock sections (4,096 square feet per year for the first 5 years of the contract) at the NPS marina and the replacement of roofs, siding, and doors on concession facilities (all work to be

completed in first year of contract). Prospectus at Exhibit B, p. 16. Since the prospectus here clearly requires the concessionaire to furnish goods and services of more than de minimis value to the government in addition to authorizing it to provide concession services, we find that Great South Bay Marina's protest falls within our jurisdiction.

THE AGENCY'S FAILURE TO FURNISH A REPORT

Our authority under CICA encompasses written objections by interested parties to an award or proposed award of a contract for the procurement of property or services. 31 U.S.C. § 3551(1). CICA requires that when such a protest is filed with our Office, the contracting agency submit a complete report on the protested procurement to our Office within 30 days after receiving notice of the protest from us. 31 U.S.C. § 3553(b)(2). We find that the NPS's failure to submit a report to our Office in this matter violated CICA.

CICA requires that our Office decide protests timely filed by interested parties, so long as the protests state a valid basis and are within our Office's jurisdiction. The agency's report to our Office is a key element in our Office's resolution of bid protests. A contracting agency is free to request that our Office dismiss a protest on the basis of a lack of jurisdiction, or for failure to state a valid basis, untimeliness, or other reasons, and agencies do that regarding hundreds of protests each year.

It was improper for the agency here to refuse to provide a report to our Office. It is for our Office, not the contracting agency, to determine whether a protest is within our jurisdiction, just as it is for our Office, not the contracting agencies, to determine whether a protest is timely and states a valid basis. CICA requires contracting agencies to furnish a report to our Office, 31 U.S.C. § 3553(b)(2), and we therefore conclude that the NPS's failure to do so violates CICA. Moreover, the NPS's improper action impedes our Office's ability to fulfill the adjudicatory function mandated by CICA. For this reason, we are, by letters of today, reporting the agency's improper action to the Senate Committee on Homeland Security and Governmental Affairs, the Senate Appropriations Committee, the House Committee on Government Reform, and the House Appropriations Committee.

Given the agency's refusal to submit a report in response to the protest, CICA's mandate that we resolve protests filed by interested parties means that we are deciding this case based on the documentation submitted by the protester.¹ Alliance Properties, Inc., B-217544, Oct. 16, 1985, 85-2 CPD ¶ 413 at 2. While, as explained

¹ Upon receipt of the agency's letter declining to furnish a report, we gave both parties the opportunity to supplement the record. The protester furnished us with copies of the prospectus and its proposal, as well as its comments; the agency did not furnish anything additional.

below, we are denying this protest, where a protest indicates that a contracting agency has violated procurement law to the prejudice of the protester, and the agency provides no rebuttal or documents supporting its action, our Office will sustain the protest. See, e.g., Alliance Properties, Inc., supra. Moreover, where we have sustained a protest in these circumstances, we are not inclined to reconsider the matter where the contracting agency bases a request for reconsideration on information that it could have presented during our initial consideration of the protest but chose not to do so. Department of the Navy—Recon., B-220991.2, Dec. 30, 1985, 85-2 CPD ¶ 728.

PROTEST MERITS

The protester asserts generally that rejection of its proposal was arbitrary and irrational. The protester further contends that award to Fire Island Concessions will give that firm an improper monopoly over business conducted on Fire Island since the principal of Fire Island Concessions also has the concession for ferry transportation to the island.

In its letter notifying the protester of the award to Fire Island Concessions, the agency explained the basis for its determination that Fire Island Concessions' proposal represented the best offer as follows:

[Fire Island Concessions] showed great detail in their plans to minimize the impact upon the environment, commitment to save fresh water and a more comprehensive risk management plan. Fire Island Concessions also demonstrated a more thorough understanding of the Maintenance Plan and also provided Best Management Practices for recycling, and submitted better evidence in support of their principals' credit worthiness and experience.

Letter from Agency to Protester, Apr. 18, 2005.

In support of its general assertion that the evaluation of its proposal was arbitrary and irrational, the protester states only that "[a]ll issues raised in the letter rejecting [Great South Bay Marina's] bid were not bona fide concerns as it was clear in the bid that the finances were committed by [the president of Great South Bay Marina] and that the required capital improvements were, likewise, committed to as well as the full expenditure of the required amount for capital improvements at Fire Island." Protest at 3. In its subsequent comments, the protester again discusses the financial condition of Great South Bay Marina and its principal owner, and asserts generally that it "is confident that its bid was superior to the bid submitted by Fire Island Concessions, LLC, and disclosure of the grading sheets and additional comments of

the review panel would substantiate such fact.”² Comments at 6. We recognize that Great South Bay Marina lacks access to the evaluation record here due to the agency’s failure to respond to the protest. Even under these circumstances, however, to prevail in its protest Great South Bay Marina must at a minimum offer some explanation as to why its proposal, rather than the awardee’s, represents the best value to the government. In this regard, our Bid Protest Regulations require that a protest set forth a detailed statement of the legal and factual grounds of protest. 4 C.F.R. § 21.1(c)(4) (2005). The information providing the basis for such a statement (i.e., the prospectus and its proposal) is in the protester’s possession. Nevertheless, Great South Bay Marina has offered no discussion of its proposal beyond a description of the firm’s financial condition, and has made no attempt to tie the features of its proposal to the numerous technical evaluation factors set out in the prospectus.³ Similarly, while the agency’s letter to Great South Bay Marina announcing the award decision lists a number of areas in which the awardee’s proposal was found superior to the protester’s, Great South Bay Marina has not attempted to explain why the agency’s conclusions are unreasonable. Accordingly, given the protester’s failure to address with any level of detail the merits of its proposal, there simply is no basis to conclude that the selection of the awardee’s proposal instead of Great South Bay Marina’s as the best value was improper.

Finally, as noted above, the protester asserts that the award of this concession contract gives rise to an illegal monopoly because the awardee also has the concession contract for ferry service to Fire Island. The protester does not explain the precise basis for its contention that the award of both contracts to the same firm is improper, but to the extent that Great South Bay Marina is asserting an antitrust violation, such matters are for review by the Department of Justice, not our Office pursuant to our bid protest function. The Nat’l Bank of Fort Sam Houston, B-212719, Feb. 14, 1984, 84-1 CPD ¶ 192 at 7.

The protest is denied.

Anthony H. Gamboa
General Counsel

² Great South Bay Marina also describes at length the efforts of Great South Bay Marina’s principal to provide assistance in New York City on September 11, 2001. While laudable, these efforts are not relevant to the evaluation of Great South Bay Marina’s proposal here.

³ The prospectus set out five “principal selection factors” and one “secondary selection factor.” The factors called for evaluation of proposals in many areas, including the offeror’s plans for protecting the natural resources of the park area, its maintenance plan, its risk management plan, the past performance and experience of the offeror and its personnel, and its financial capability.