

July 9, 1993

P.S. Protest No. 93-02

FEDERAL PROPERTIES OF R.I., INC.

Advertisement for Space, Braintree, MA

DIGEST

Request for reconsideration is denied where protester does not present newly-discovered evidence and does not demonstrate errors of law or failures to consider essential information previously provided.

ON RECONSIDERATION

Federal Properties of R.I., Inc. ("Federal Properties") has timely requested reconsideration of our May 20, 1993, decision dismissing in part and denying in part its protest against award of a lease agreement to Pearl Plaza Realty Trust ("Pearl") for a new retail postal facility for the Braintree, MA, post office.

Federal Properties currently leases to the Postal Service space that includes the retail function. Its protest contended that the Postal Service improperly predetermined the site for the new retail facility, failed to furnish information and specifications to the protester which had been furnished to Pearl, failed to follow procedures set forth in Handbook 191, Investment Policies and Procedures, and arbitrarily and capriciously evaluated the protester's cost proposals in order to eliminate the protester from consideration for award.

The decision held that the protester failed to show that the evaluation of its proposal to keep the retail post office at its current site on Washington Street was arbitrary, unreasonable or in violation of procurement regulations. It pointed out that no regulation required the contracting officer to negotiate with all potential offerors, and that both the advertisement for space and the Procurement Manual ("PM") allowed the contracting officer to "negotiate with any or all offerors" or "reject any and all offers" (quoting PM 11.4.1 c. and the advertisement for space). It also found that the protester's argument that it was entitled

to all of the information that was furnished to Pearl was incorrect, because the protester's proposal had been found technically unacceptable and outside of the competitive range due to traffic and access safety problems at its site and the prohibitive cost of attempting to remedy them. It further found that the discussions with Pearl--before, during and after the published solicitation period--were not improper, and any lack of similar discussions with the protester also was not improper.

Reviewing the protester's complaints that its cost proposals were improperly evaluated, the decision declined to substitute our business judgment for that of the contracting officer. While the protester had demonstrated that it disagreed with the contracting officials' cost analyses, it had failed to present evidence of abuse of the contracting officer's discretion that transcended statements of the protester's own opinions. *Rickenbacker Port Authority and The Turner Corporation*, P.S. Protest No. 91-78, February 10, 1992; *Georgia Power Company*, P.S. Protest No. 90-01, February 14, 1990. Regarding Handbook 191, the decision applied the well-settled principle that an agency's internal instructional handbooks which lack the force of law cannot provide the basis to sustain any protest or judicial complaint.

Federal Properties' request for reconsideration takes issue with the protest decision with the following contentions:

1. Once the advertisement for space was issued, and the solicitation thereby was made public, the Postal Service "was required to treat all offerors fairly and equally." The protester complains that Pearl had an unfair competitive advantage because it received information that was not made available to Federal Properties.¹ The protester asserts that because it was not furnished this information, it was prevented from making "an offer as economically attractive as possible." The protester now cites several Comptroller General decisions in support of this contention, and also cites documents and memoranda from the protest record to establish that the award to Pearl was improperly predetermined before and during the published solicitation period.
2. The protester reasserts its claim that the land exchange originally contemplated with Pearl (see footnote 1) was an unstated evaluation criterion that should have been the subject of an amendment to the solicitation, so that all offerors could compete and be evaluated on an equal and consistent basis.
3. The protester states that it met its burden of proving that the postal officials' cost

¹ Specifically, the protester complains about not receiving information about:

1. The specifications for a "Store of the Future," the form of facility planned for Pearl's site.
2. A proposal to exchange surplus postal land with Pearl in consideration for improvements on the Pearl-owned retail site. (The Postal Service owned surplus land abutting Pearl's site, and the contracting officer originally thought that he could negotiate better terms with Pearl if that land was offered in exchange for the construction of improvements on Pearl's site. The land exchange was abandoned when it was determined that a cash transaction with Pearl would be more advantageous to the Postal Service.)

analyses which compared the protester's site with Pearl's relied on "unrealistic cost assumption[s]" and that "grossly obvious error is apparent in this case." As examples of error which the protester claims that this office overlooked it states that its facility "has no basement or mezzanine," rebutting a comment by the contracting officer to the effect that Federal Properties' cost proposal was inaccurately low because "it ignores the fact that about one quarter of the facility is mezzanine and basement space, and it ignores costs for design and other associated work"; and that the decision overlooked a Postal Service spreadsheet attached to the protester's response to the contracting officer's statement showing that the contracting officer erred in attributing a \$618,449 cost to the protester's offer.

Also, according to the protester, the contracting officer's determination that alleviating the traffic problems at the protester's site would be too costly was based on "mere guesses" and that "[t]here was no traffic study or cost estimates derived from that study."

4. The protester asserts that Handbook 191 "is more than a handbook providing 'internal instructions.'" The protester states that postal contracting officials act under authority of Title 39 of the Code of Federal Regulations ("C.F.R.") and claims that the "issues the protest[e]r raises in regard to Publication 191 have nothing to do with 'internal instructions.'" The protester states that instead, its arguments pertain to "delegated authority, the limits of that authority, the exercise of that authority, the responsibilities that attach to that authority, and the rules of conduct used in exercising that authority." The protester reasserts claims made during the original protest regarding the alleged failure of postal officials to obtain validations, authorizations and approvals from the correct officials according to procedures delineated in Handbook 191.² The protester argues that since authority was exceeded, postal officials acted in violation of 39 C.F.R. Part 222, Delegations of Authority, and Part 447, Code of Ethical Conduct for Postal Employees.

The contracting officer has submitted comments on the request for reconsideration. He repeats his position that the award to Pearl was not "predetermined" in 1992, and cites as evidence the fact that contract award did not occur until January 8, 1993. He emphasizes that the protester's offer was never in the competitive range, and was rejected "because it was judged to be inadequate for the needs of the [Postal Service]." He also asserts that there was no need to issue an amendment to the solicitation to publicize the initially considered land exchange because the solicitation requirements did not change; that there

² For example, the protester claimed, both in the original protest and in the request for reconsideration, that the Regional Postmaster General ("RPMG") never saw the respective proposals and that as a result the division manager lacked the authority to allow the contracting officer to proceed with award. As noted in the original protest decision, the contracting officer received the required approval to proceed from the then-Acting Assistant Postmaster General, in September, 1992. *Federal Properties* at footnote 22. The authorization hierarchy which the protester repeatedly has emphasized during the protest process did not exist at the time of Pearl's award due to the 1992-93 national reorganization of the Postal Service. As the Postal Service noted in an announcement published in the *Federal Register* on October 30, 1992, the "Postal Service is replacing its former management structure at headquarters and in the field with a new organization with fewer levels of decision-making authority Internal delegations of authority, reporting relationships, and channels of communication will be modified as necessary to reflect the new organizational structure." 57 Fed. Reg. 49,200 (1992). One result of the restructuring was that there was no RPMG or regional office structure at the time of award.

was no need to provide specifications for the Store of the Future to the protester when its location was deemed unsuitable; and that the land exchange's lack of importance was shown by the fact that Pearl's site was selected without it.

The contracting officer emphasizes that while the protester's offer was not considered to be in the competitive range, the "protester was allowed to submit offers after the site selection as a courtesy and in direct response to the protester's request to try to improve its offer." The contracting officer asserts that the protester failed to meet its burden of showing that it met the solicitation requirements of "excellent access and ample customer parking."

Replying to the contracting officer's statement on its request for reconsideration, Federal Properties asserts that if its proposal was never in the competitive range, then "this determination was made prematurely" contrary to regulations and "without a rational basis."³ The protester reemphasizes its arguments from the original protest that the financial analyses were faulty, that essential information about the Store of the Future and the land exchange were not provided to it, that proper authorizations for award were not obtained, and that its proposal was eliminated prematurely without due consideration or negotiations. The protester claims that the protest decision ignored these points and issues.

Federal Properties contends that cost determined the award, contrary to the contracting officer's statement that location was the primary factor. To support that contention, the protester cites the narrative report by the contracting officer's representative, who stated that efforts to mitigate the traffic problems at the protester's site would be cost-prohibitive. See footnote 11, *Federal Properties* at 6.

In addition, the protester claims for the first time that the cost of "postalization"--converting the interior of the site to the specifications for a Store of the Future--was an unstated evaluation criterion; that the awardee's proposal should have been rejected as nonresponsive to the published advertisement's solicitation of a ten-year lease because it proposed a twenty-year lease; and that "location" was an "undefined criterion." The protester also claims that contrary to a conclusion reached in the original decision, the

³ The protester takes issue with the sentence in the protest decision which states, ". . .the record provides no basis to conclude that absent those alleged [by the protester] internal procedural deficiencies, the Postal Service would have decided not to relocate its facility." The protester states that the converse is also true, and argues that there was no rational basis to conclude "anything" because the contracting officer did not have adequate data to show that traffic problems made the protester's site unacceptable. The protester now offers its own consultant's estimates on the number of parking spaces needed to show that "the basic traffic needs of the solicitation are easily quantifiable."

These arguments are unpersuasive. In addition to making contentions which were not offered during the original protest process (see discussion in text following), the protester once again pits its opinions and business judgments against those of the contracting officer which we declined to overturn. The protester also alleges that the contracting officer's failure to address and to deny all of the allegations it made during the original protest "appears to be an acknowledgment of their truth." The protester ignores the fact that it, rather than the contracting officer, bears the burden of proving that the contracting officer's judgments were incorrect and arbitrary and that his conclusions were based on untruths. *T&S Products*, P.S. Protest No. 90-06, March 9, 1990.

costs of its traffic-improvement schemes were included in its proposal.⁴

The standard for our review of reconsideration requests is very narrow. PM 4.5.7 n. states that a "request for reconsideration must contain a detailed statement of the factual and legal grounds upon which reversal or modification is deemed warranted, specifying any errors of law made or information not considered." Further, the controlling decision on this standard of review states:

⁴ This contention is incorrect. Federal Properties' "best and final offer" of April 6 proposed to lease 6,000 square feet of the existing site for an annual rental of \$75,000.00. That letter went on to state, "The proposed [\$75,000.00 rent] does not include the cost of renovations or improvements that may be required by the Postal Service nor does it include provisions for the additional parking and roadway. . . ." *Federal Properties* at footnote 12, page 7.

Information not previously considered refers to that which a party believes may have been overlooked by our office or to information which a party did not have access to during the pendency of the original protest. Reconsideration is not appropriate where the protester simply wishes us to draw from the arguments and facts considered in the original protest conclusions different from those we reached in that decision. Reassertion of arguments previously considered and rejected by this office does not constitute a ground for reconsideration. Similarly, where information and arguments were known or available to the protester during the development of its protest but were not presented in the original proceeding, such information and arguments may not be considered in a request for reconsideration.

Fort Lincoln New Town Corporation, On Reconsideration, P.S. Protest No. 83-53, November 21, 1983 (citations omitted); *see also, Rita Dwight, On Reconsideration*, P.S. Protest No. 92-15, October 21, 1992; *F.R. and Lee MacKercher, On Reconsideration*, P.S. Protest No. 85-45, October 7, 1985.

The arguments made by the protester are largely restatements of those made in its original protest, especially with respect to its contentions that award to Pearl was "predetermined," that the lack of equal negotiations was improper, that postal officials' cost analyses were flawed, and that the contracting officer's conclusions about the traffic hazards at the protester's site were arbitrary and unsupported. The protester claims that the decision on the protest "ignored" those issues. On the contrary, the decision considered each argument and the protester's characterization of the facts and interpretation of the law on which the argument was based, but it did not agree with the protester's conclusions. It held that Federal Properties failed to present evidence sufficient to overcome either the presumption of correctness which attaches to the contracting officer's statements or the presumption that the contracting officer has acted in good faith. *B&S Transport, Inc.*, P.S. Protest No. 92-69, October 30, 1992. Federal Properties' request for reconsideration presents no grounds for modifying or reversing our prior decision based on a restatement of the original opinions and arguments.

With respect to those specific issues above in which the protester alleges errors of law made or information not considered, we note briefly:

1. The Comptroller General decisions now cited by the protester in support of its contention that it should have received all of the information furnished to Pearl do not involve the leasing of space. The initial decision discussed the PM's recognition of leasing of space as a specialized type of acquisition, distinct from other procurements and not subject to all of the procedural requirements of them. *See* PM 11.4.1 b; *cf. Delbe Real Estate Company*, P.S. Protest No. 91-76, April 3, 1992 (statutory authority and case law pertinent to emergency mail transportation contracts not applicable to the lease of space for postal facilities).

In addition, the decisions cited are dependent on statutes and regulations that do not apply to the Postal Service. *See, e.g., EMS Development Corporation*, 70 Comp. Gen. 459 (1991), 91-1 CPD 427 (protest against an award of naval facility equipment sustained under Federal Acquisition Regulation ("FAR") 15.410 (c), which requires that information

given to one prospective offeror in a negotiated procurement be furnished to other offerors). Neither the FAR nor the Competition in Contracting Act of 1984 ("CICA"), under which other cases cited by the protester were decided,⁵ are applicable to the Postal Service. *Haworth, Inc.*, P.S. Protest No. 92-22, June 4, 1992; *International Technology Corporation*, P.S. Protest No. 89-21, May 8, 1989. While PM 4.1.2 k.2.(b) contains language similar to that of FAR 15.410 (c), the protest decision pointed out that the section is applicable only to those offerors who were within the competitive range.⁶ PM 4.1.2 i.3.(c); see *Federal Properties* at 14. In *EMS, supra*, (as well as in the other decisions cited⁷) the protester was in the competitive range. Further, the decision noted that the PM requirements for competition in a lease procurement are flexible "because the needs of customers often dictate the location of postal facilities." PM 11.4.1 c.; *Federal Properties* at footnote 9. Finally, decisions of the Comptroller General, while not binding on the Postal Service (see *International Business Machines Corporation, On Reconsideration*, P.S. Protest No. 90-66, February 22, 1991), are nonetheless in accord with the general principle that a request for reconsideration cannot be based on arguments and information that could have been presented during the original protest. See, e.g., *Earle Palmer Brown Companies, Inc.*, Second Reconsideration, Comp. Gen. Dec. B-243544.4, 92-2 CPD 77, August 6, 1992.

2. The land exchange idea was never a "criterion," published or otherwise. Federal Properties' complaint that it was placed at a disadvantage by a transaction that never occurred is unpersuasive. (See footnote 1.)

3. Even though a protest decision does not specifically address every allegation made by a protester (or a contracting officer), the complete record, including all arguments made by the parties in their submissions, is fully considered in rendering the decision. *Fort Lincoln*,

⁵ See *Essex Electro Engineers, Inc.*, Comp. Gen. Dec. 234089.2, 90-1 CPD 253 (March 6, 1990) (protest sustained under CICA); *University Research Corporation*, 64 Comp. Gen. 273 (1985), 85-1 CPD 210 (protest sustained under FAR 15.105, which then required competition to the "maximum practical extent"). We note that the standard of competition required for the negotiated selection of non-postal leased government space is, like that for postal leased space, somewhat less stringent:

Acquisition of space by lease will be by negotiation In negotiating, competition will be obtained to the maximum extent practical among suitable available locations meeting minimum Government requirements.

Federal Property Management Regulations 101-18.100(c), 41 CFR 101-18.100(c).

⁶ The protester claims that its proposal was either arbitrarily and prematurely eliminated from the competitive range or, contrary to the contracting officer's assertions, actually was in the competitive range because the Postal Service asked for Federal Properties' "best and final" offer. As discussed in the original decision, the Postal Service was not obligated to negotiate with the protester. That the Postal Service considered Federal Properties' offer(s) and granted it the courtesy of an opportunity to improve its proposal did not in itself negate the correctness of the contracting officer's ultimate conclusion that the proposal was not in the competitive range. *Federal Properties* at 13-14; footnote 20.

⁷ *Rix Industries, Inc.*, Comp. Gen. Dec. B-241498, 91-1 CPD 165 (February 13, 1991), and *Union Carbide Corporation*, 55 Comp. Gen. 802 (1976), 76-1 CPD 134.

supra. Federal Properties contends that the decision failed to take into account an incorrect entry on a spreadsheet cost analysis of the relative costs of the two sites. We fully considered the protester's strenuous arguments that it would have submitted the most cost-effective proposal and found instead that the contracting officer's position to the contrary was reasonable.⁸ The amendment to the narrative report completed by the contracting officer's representative discussed the abandonment of the land exchange proposal and concluded that the substituted cash transaction with Pearl would be at a price "substantially below the initial proposal and USPS construction estimates." The protester did not present convincing evidence refuting that statement nor the statement (quoted in footnote 11 of the protest decision) that its site was ruled out "primarily due to the traffic safety issues" for which mitigating efforts would be "cost prohibitive." Similarly, the protester failed to show that the decision's analysis of its offers was flawed. (See *Federal Properties*, footnote 12.)⁹ In its request for reconsideration, the protester once again insists that had the Postal Service not terminated negotiations with it, it would have provided the most cost-effective proposal. However, these contentions are matters of opinion and speculation, and "we have no basis to overrule [the contracting officer's] judgment that Pearl's proposal met the evaluation criteria at a more cost-effective price." *Federal Properties* at 13. Federal Properties has not met its burden of showing that information was not considered which would negate the contracting officer's conclusion that Pearl's remained the most advantageous offer.¹⁰ Therefore, the protester has not shown sufficient grounds for reconsideration. *Fort Lincoln, supra*.

4. The Code of Federal Regulations does not give Handbook 191 the force of law. As discussed in the decision, only the PM has been incorporated by reference into Title 39 of

⁸ The decision stated:

While the record shows that the protester disagrees with the contracting officer and postal analysts over the relative costs of its proposal and Pearl's, the protester has not met its burden of proving that the cost analyses were incorrect or flawed.

Federal Properties at 13.

⁹ The protester argues that the contracting officer's assertion that location was the primary determinant for award is incorrect. The protester alleges that cost alone determined the award, and cites as supporting evidence a written conclusion that efforts to mitigate the traffic and parking problems at the protester's site would be cost-prohibitive. These arguments are not persuasive.

The record clearly shows that the postal officials were not convinced that the protester could alleviate the traffic problems at its site, and the contracting officer's representative wrote that the protester's site was ruled out primarily because of those problems. *Federal Properties* at 14. After comparing the advantages of remaining at the protester's site with relocating to Pearl's, the contracting officials concluded that relocation would solve problems experienced at the protester's site at a more advantageous price.

¹⁰ The contracting officer's statement that the protester's figures failed to take into account the mezzanine and basement space and costs for redesign and associated work was on the record long before the protester's opportunities to make submissions to the record expired. The protester's rebuttal that it has no basement or mezzanine, first made in its request for reconsideration, is not new information which could not have been presented in the course of the initial protest.

the C.F.R., and thus has the force of law.

In the original protest, Federal Properties argued that its site is preferable to Pearl's. In its request for reconsideration the protester has made additional citations to the protest record in an effort to support its arguments. Insofar as the evidence it presents differs from that originally presented, it cannot be examined on reconsideration because it was available during the original protest and could have been presented at that time. *Fort Lincoln, supra*. Consequently, as discussed above, such evidence may not be grounds for reconsideration. *Id.* For the most part, however, the protester does no more than to argue the same case as it did previously, seeking to persuade us to adopt its conclusions about the propriety of the negotiations, the land exchange idea, the comparative cost analyses and the traffic safety problems. In so doing the protester has not met the requirements for presenting sufficient grounds to warrant reversal or modification of our decision on reconsideration. *MacKercher, supra*.

The request for reconsideration is denied.

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