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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

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Decision

Matter of: DePonte Investments, Inc.

File: B-288871; B-288871.2

Date: November 26, 2001

Richard J. Conway, Esq., and Denis W. Kohl, Esq., Dickstein Shapiro Morin & Oshinsky, for the protester.

James L. Weiner, Esq., Department of the Interior, for the agency.

Mary G. Curcio, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protester's offer was not entitled to preference for Indian-owned firms where solicitation did not provide for the application of a preference.
2. Protest that agency improperly accepted awardee's offer of a building constructed with pre-cast masonry facade is denied where solicitation specifically permitted this construction method; to the extent protester argues that agency advised it that pre-cast masonry facade would not be allowed, protester relied on such oral advice, which conflicted with the solicitation, at its own risk.
3. Agency was not required to evaluate protester's offer more favorably than awardee's for offering a longer lease term, where solicitation provided for award of either 10- or 15-year lease, agency determined that flexibility made 10-year lease preferable, and protester does not rebut agency's position; likewise, it was proper for agency not to give protester additional evaluation credit for offering early availability of the space where solicitation did not provide that early availability was preferable.

DECISION

DePonte Investments, Inc. protests the award of a contract to Opus West under solicitation for offers (SFO) No. 01-810, issued by the Department of the Interior to lease office and storage space for the Office of the Special Trustee for American Indians. DePonte challenges the award on several grounds.

We deny the protest.

The SFO provided for evaluation on a “best value” basis using the following factors in addition to price: location; experience in developing first-class office buildings; general contractor, architecture and engineering firm experience with similar projects; and building suitability for occupant’s mission. SFO § 2.3, adden. 1. The agency received five proposals—including Opus’s and DePonte’s—conducted an individual conference with each offeror, issued two addenda to the SFO, and received best and final offers from four offerors. Opus’s proposal received the highest technical score (10 out of 10 possible points) and offered the lowest price. DePonte’s received the lowest technical score (3.9 points) and offered the third lowest price. Contracting Officer’s Statement (COS) at 2. The agency concluded that Opus’s proposal represented the best value, and made award to that firm.

PREFERENCE

DePonte protests that, although it informed Interior that it was acting as an agent for an Indian-owned entity, the agency failed to provide DePonte with the preference for Indian-owned businesses established by the Buy Indian Act, 25 U.S.C. § 47 (2000), and the Indian Self Determination and Education Act (ISDEA), 25 U.S.C. §§ 450 et seq. (2000). DePonte recognizes that the solicitation did not provide for application of a preference, but asserts that, given the strong policy under these statutes in favor of giving preference to Indian-owned firms, the preference must be applied even where the solicitation is silent.

This argument is without merit. We have held that the Buy Indian Act does not mandate that Indian firms be accorded a preference in the award of contracts, unless the solicitation so provides. Orion Food Servs., Ltd., B-233145, Dec. 5, 1988, 88-2 CPD ¶ 563 at 1. This follows the well-established principle that the evaluation of offers must be based on the stated evaluation factors. American Imaging Servs., Inc.--Recon., B-250861.2, Jan. 5, 1993, 93-1 CPD ¶ 13 at 1. Thus, even where there is a strong policy in favor of applying a preference, if the solicitation is silent with respect to a preference, a procuring agency cannot properly apply it. Id. at 2 (procuring agency may not apply small disadvantaged business preference, despite strong policy in favor of preference, where solicitation is silent regarding preference).¹ Consequently, since the solicitation here did not provide a preference for Indian-owned firms, the agency properly did not apply one in favor of DePonte.

CONSTRUCTION METHOD

DePonte maintains that the award was improper because Opus offered a building with a pre-cast masonry facade; according to DePonte, the agency told DePonte that this construction method was unacceptable.

¹ While we have not specifically addressed this issue with respect to the ISDEA, since the same principle would apply, there is no basis for reaching a different conclusion.

Interior denies telling DePonte that it would not accept a building with a pre-cast masonry facade. COS at 4. Rather, the agency reports, it told DePonte that it would not accept tilt-up construction (where an entire structural wall is prefabricated). In this regard, the agency notes that the solicitation specifically provides with respect to the building shell, that “exterior walls are combinations of an aluminum and glass curtain wall system with aluminum grating, insulated and tinted vision glass and pre-cast concrete panels, or masonry.” SFO § 1.12(a)(4).

In its comments in response to the agency report, DePonte does not rebut the agency’s position but, instead, simply “rests on its initial protest.” Given the agency’s un rebutted explanation and the indication in the solicitation that a pre-cast masonry facade was permissible, we have no basis to find that DePonte was misled. In any case, offerors rely on oral modifications to the terms of a solicitation, which are inconsistent with the written solicitation, at their own risk. Occu-Health, Inc.; Analytical Scis., Inc., B-258598.2 et al., Feb. 9, 1995, 95-1 CPD ¶ 59 at 4.

LEASE TERM AND EARLY AVAILABILITY

DePonte argues that the agency improperly failed to give it evaluation credit for offering a 15-year lease term rather than the 10-year term offered by Opus, and for offering to have the space available 2 months sooner than required.

In response, the agency explains that the solicitation provided that the award would be made for a 10- or 15-year lease term. The agency reports that it elected to accept a 10-year term because it would provide the agency with more flexibility, and a 15-year term did not provide any monetary advantage. COS at 6. With respect to early availability of the space, the agency notes that this was not an evaluation consideration under the terms of the solicitation.

DePonte, again, has not provided any substantive response to the agency’s position, relying instead solely on the assertions in its initial protest. Since the solicitation specifically permitted the agency to choose a 10- or 15-year lease, and DePonte has not challenged the agency’s conclusion that a 10-year lease will be more beneficial, there is no basis for questioning the evaluation of the lease terms. Further, since the solicitation did not provide that early delivery would be an evaluation consideration, there was nothing improper in the agency’s not giving DePonte evaluation credit based on its offer of early delivery.²

² DePonte also asserts that the debriefing it was given by the agency was inadequate. We will not review a protest against the adequacy of the debriefing, since it is a procedural matter that does not affect the validity of the award. Thermolten Tech., Inc., B-278408, B-278408.2, Jan. 26, 1998, 98-1 CPD ¶ 35 at 5.

EXPERIENCE/PAST PERFORMANCE

DePonte protests that the agency improperly assigned its proposal zero out of 10 available points under the office building experience and architecture/engineering firm experience evaluation factors. DePonte maintains that these essentially constituted past performance factors and that, because it did not have any relevant past performance, it was entitled to a neutral rating under them according to Federal Acquisition Regulation § 15.305(a)(2)(iv). DePonte also asserts that the agency should have notified DePonte during discussions that its past performance information was not adequate.

Even if we agreed with DePonte's blurring of the distinction between experience and past performance (we do not reach this question), there is no basis for sustaining this aspect of the protest. In this regard, we will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions, that is, that but for the agency's improper actions, it would have had a substantial chance of receiving the award. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F.3d 1577 (Fed. Cir. 1996). As discussed above, Opus's proposal received the highest technical score--10 out of 10 available points--and offered the lowest price. Thus, even if DePonte's score under the experience factors were increased--indeed, even if its overall proposal score were increased to a perfect 10--DePonte would not be in line for award due to its higher price. Accordingly, DePonte was not prejudiced with regard to the evaluation and discussions in this area. See Ideal Elec. Sec. Co., B-279221, B-279221.2, May 19, 1998, 98-2 CPD ¶ 14 at 5 n.2.

The protest is denied.

Anthony H. Gamboa
General Counsel