BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of HARVEY DEVELOPMENT CO., INC.	)	Docket Nos. 1457 and 1460
Under Lease-Division of Parole & Probation	)	

September 28, 1989

Noncompetitive Negotiation - By direct solicitation and without republication of notice, the procurement officer may acquire additional offers for a lease of real property without also requesting a further offer from a sole previous offeror with whom negotiations have failed.

APPEARANCES FOR APPELLANT:	John Hardin Young, Esquire Jonathan A. Gruver, Esquire Porter, Wright, Morris & Arthur Washington, D.C.
APPEARANCE FOR INTERESTED PARTY: Colemont Associates Limited Partnership	Steven G. Friedman, Esquire Grossberg, Yochelson, Fox & Beyda Washington, D.C.
APPEARANCES FOR RESPONDENT:	Allan B. Blumberg Michael P. Kenney Assistant Attorneys General Baltimore, MD

OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the denial of its bid protests based on the contention that the General Procurement Law requires that (1) it be awarded a lease as landlord of certain premises at 1104 Spring Street, Silver Spring, Maryland or (2) the Department of General Services (DGS) must obtain best and final offers from it and another proposed landlord prior to recommending a lease agreement to the Board of Public Works.

Findings of Fact

1. Pursuant to the competitive solicitation requirements of Title 4, Subtitle 3, Part III and Section 13-105 of the State Finance and Procurement Article and COMAR 21.05.03, DGS on behalf of the Division of Parole and Probation

(DPP) undertook in April 1988 to obtain approximately 6,900 square feet (subsequently reduced to approximately 6,300 square feet) of rental space in the Silver Spring area of Montgomery County for client contact use by DPP.

2. Lease of space for DPP in the Silver Spring area has historically been very difficult to achieve and no response was received. Telephonic and in person solicitation in the Silver Spring area was then undertaken without success until January of 1989 when Appellant expressed interest in leasing its premises.

3. Since Appellant was the only firm to have expressed interest in the possibility of leasing space to DPP, DGS commenced negotiations with Appellant and its agent Barnes, Morris & Pardoe a commercial real estate broker. Negotiations were conducted at various times during the period March 3, 1989 to May 3, 1989 and led to agreement between Appellant and DGS on the terms of a lease. The participants in such negotiations on behalf of DGS were Mr. Hilary Gans, an acquisition specialist, and his supervisor, Mr. George Shriner, both employees in the DGS office of Real Estate.

4. On May 9, 1989, DGS sent a lease incorporating the agreed upon terms and including standard clauses required by State law to Appellant for execution. Appellant sent the lease to its attorney for review on May 10, 1989.

5. On or about May 24, 1989, the Board of Public Works of Maryland approved the terms of the proposed lease with Appellant which included the effective square foot rental rate.[1] DGS had placed the lease on the agenda of the Board of Public Works for consideration in anticipation of its execution by Appellant based on assurance by Appellant's agent that Appellant would shortly execute and return the lease that DGS had sent to it on May 9, 1989.

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[1]Board of Public Works approval of the terms including consideration of the conveyance of an interest in real property where the State is the lessee is specifically required by the provisions of Section 12-204, Division II, State Finance and Procurement Article.

6. On May 30, 1989, Appellant's attorney mailed the lease back to DGS, to the attention of Mr. Gans. The lease was not executed and was marked up with numerous comments and revisions. Mr. Gans did not receive or review the marked up lease because he departed State service on May 30, 1989.

7. On June 7, 1989, representatives of Appellant and DGS conferred over the telephone concerning the comments on the marked up lease and agreed to certain of the changes. By and large the changes that were agreed to over the telephone did not materially vary the terms of the lease as originally negotiated and approved by the Board of Public Works. However, agreement was not reached concerning which party was to bear the responsibility to absorb the cost of several items which affected the consideration to be paid by DPP. Specifically, no agreement was reached on Appellant's proposed revisions to certain cost items encompassed inter alia by paragraphs 5.1 to 5.4, 6.1,[2] 8.3 and 16 of the lease. The reason that no agreement was reached on certain cost items under these paragraphs was that the DGS representatives (Mr. Gene Dombrowski, an acquisition specialist, and Ms. Susan Dubin, a staff attorney) participating in the telephone conference had not been involved in the previous negotiations which had led to agreement on the terms of a lease and Board of Public Works approval thereof and were therefore unable to respond or agree to Appellant's comments and requested changes.

8. On the evening of June 7, 1989 or the morning of June 8, 1989, Mr. K. P. Heinemeyer, the then Director of the DGS Office of Real Estate, and the individual ultimately responsible for accepting the terms of any lease, subject to Board of Public Works approval, met with Mr. Shriner to discuss the revisions that Appellant proposed to the lease. Mr. Heinemeyer determined that certain of the proposed revisions to the lease proposed by Appellant were

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[2]This Board is not able to determine from the record what cost revisions were proposed under paragraph 6.1.

unacceptable because they modified the terms of the lease as approved by the Board of Public Works by shifting responsibility for certain cost items from Appellant, the lessor, to DPP, the lessee, and otherwise were contrary to State policy regarding allocation of costs between landlord and tenant. Specifically, pursuant to the original negotiations that led to Board of Public Works approval of the terms of the lease, the Appellant was responsible (pursuant to paragraphs 5.1 to 5.4, 8.3 and 16) for the cost of (1) a repainting of the premises once every five years, (2) services accepting janitorial services, and (3) exterior repairs not necessitated by the lessee's negligence. Under the revisions proposed by Appellant in the marked up copy, the responsibility for the cost of these items was placed on the lessee.

9. Having determined that the revisions proposed by Appellant were unacceptable, Mr. Heinemeyer instructed Mr. Dombrowski to attempt to find another realtor in the Silver Spring area. Mr. Dombrowski was immediately successful in this attempt and on June 12, 1989 this realtor, Colemont Associates Limited Partnership (Colemont), excecuted a lease.

10. On June 13, 1989, Appellant's counsel sent a letter to DGS by Federal Express and enclosed a clean unmarked lease executed by Appellant. However, the letter conditioned acceptance of the lease by Appellant upon incorporation by reference of a separate letter to be provided by DGS agreeing to certain terms and conditions which were included in the marked up revised lease that had been discussed by the parties in the June 7, 1989 telephone conversation and was to include those provisions that made the lessee rather than the lessor responsible for costs (all of which to some degree affect consideration) as set forth in Finding of Fact No. 8 above; i.e.

cost of exterior repairs not necessitated by the lessee's negligence, repainting and services accepting janitorial services. This letter was received by DGS on June 13, 1989.

11. While there is some indication in the record that Appellant was advised on June 13, 1989 that DGS had determined to consumate a lease with Colemont and terminate any further dealing with Appellant, the Board finds that Appellant was certainly advised of this state of affairs upon its receipt of a letter from DGS dated June 14, 1989 advising that Apellant's offer (as memorialized in the June 13 letter) was not acceptable and that DGS had arranged for leased space elsewhere.

12. Appellant filed a protest with DGS on June 21, 1989 contending that it must be awarded a lease. This protest was denied by final decision dated June 23, 1989 and Appellant appealed to this Board on June 29, 1989.

13. On June 27, 1989, Appellant filed a second protest with DGS contending that an award of a lease to Colemont would be improper and requesting that DGS request best and final offers from Appellant and Colemont. This protest was denied by final decision dated July 6, 1989. Appellant apealed this denial to this Board on July 17, 1989.

14. The appeals were consolidated for hearing and decision and heard on September 18, 1989.

Decision[3]

Appellant asserts in support of its initial appeal in MSBCA 1457 that the terms of the lease approved by the Board of Public Works on or about May 24, 1989 did not accurately reflect the terms that had been previously negotiated by representatives of DGS and Appellant. The record does not support this assertion. See Findings of Fact Nos. 3, 4 and 5. The Appellant alternatively argues that the negotiations that took place on June 7, 1989 did not materially vary the terms of the lease as approved by the Board of Public Works. The record does not support this assertion either. What the record reflects is that subsequent to Board of Public Works approval Appellant attempted to vary certain terms of the lease by making the lessee rather than the lessor as previously agreed upon responsible for the cost of certain exterior repairs, repainting and the cost of certain services that would have included potentially expensive items such as trash and snow removal. Had it accepted such revisions, DGS would have been required to submit a new lease incorporating such new terms to the Board of Public Works for approval. We find no requirement in the General Procurement Law, COMAR or elsewhere that DGS must accept or consider different terms or indeed engage in negotiations where the lessor wishes to vary the agreed upon terms of a lease as already approved by the Board of Public Works.

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[3] DGS moved to dismiss the appeals on grounds that Appellant's protests were not timely filed, i.e. not filed within seven days of the date Apellant knew or should have known of the grounds for protest. We find that the record does not conclusively demonstrate that Appellant was advised that DGS had arranged for leased space elsewhere and would deal no further with Appellant until Appellant's receipt of a letter dated June 14, 1989 communicating such fact. Accordingly, Appellant's initial protest filed on June 21, 1989 was timely. Likewise, the record does not establish that Appellant became (or should have become) aware of the grounds for its second protest filed on June 27, 1989 more than seven days prior to such date.

Appellant next contends citing Chertkof v. Philadelphia, B&WR. Co., 254 Md. 557 (1969) that DGS is equitably estopped from not consumating a lease with it because DGS led Appellant to believe in the negotiations conducted prior to Board of Public Works approval that DGS would consumate a lease and that Appellant expended funds in reliance thereon. However, because we have found that Appellant attempted to vary material terms of the lease as originally agreed upon and approved by the Board of Public Works we reject Appellant's argument that DGS is equitably estopped from not consumating a lease with it. The record fails to establish that Appellant was mislead and that Appellant changed its position to its detriment in reliance upon such misrepresentations. What the record reflects is that Appellant and not DGS attempted to vary the terms of what had been agreed upon.[4]

Appellant finally argues that it should be legally presumed to have a valid lease with DPP because of the Board of Public Works approval of the terms and conditions of a lease with it. However, Appellant does not articulate whether such terms and conditions are those that it originally agreed to that were approved by the Board of Public Works on or about May 24, 1989 or those sought by Appellant in the revised marked up lease it mailed to DGS on May 30, 1987 and continued to insist on through the filing of its appeals with this Board. In any event we reject this argument since Board of Public

[4]Appellant places great reliance on the deposition testimony of Mr. Gans as demonstrating that agreement had been reached and that Appellant never attempted to vary the terms of such agreement. Nothing in Mr. Gans testimony, however, suggests that DGS had agreed to the changes proposed by Appellant's counsel in the marked up version of the lease that he sent to Mr. Gans attention on May 30, 1989. Mr. Gans also stated his belief that "rarely" were there items still to be negotiated following Board of Public Works approval.

Works approval of the terms of a lease does not settle any issues concerning whether the terms purportedly agreed to were accurately presented to the Board of Public Works.

For the foregoing reasons we deny Appellant's Appeal in MSBCA 1457.

We turn next to Appellant's appeal in MSBCA 1460. Appellant contends in support of this appeal that once DGS determined the existence of Colemont as a prospective landlord that the General Procurement Law, COMAR and the DGS internal operating procedures (as contained in the DGS Space Management Manual) required that DGS solicit offers from both it and Colemont and that to negotiate solely with Colemont was improper. We agree that where competition truly exists between two (or more) offerors, DGS is required to follow competitive procedures. However, the issue in the instant appeal is whether such procedures are required to be observed where there was previously but a single offeror with whom negotiations have failed. In this regard Section 13-105, Division II, State Finance and Procurement Article provides in part that:

> (f) Failure to produce lease. - By direct solicitation and without republication of notice, the procurement officer may acquire additional offers if:
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> (1) negotiations and best and final offers fail to produce a lease for real property with terms comparable to market rental rates in the boundaries in which the unit must obtain the lease; and
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> (2) the final offeror did not accept a lease with terms comparable to the market rental rates.

Similarly, the DGS Space Mangement Manual (issued pursuant to COMAR 21.02.05.05) at Section 309E1 provides that "If negotiations have failed to produce equitable rental rates or lease terms consistent with expressed policies and, in the opinion of the Space Management Branch [of the Office of Real Estate], an impasse has been reached, negotiations will be terminated."

In the instant case DGS did not seek to acquire additional offers until it rejected Appellant's attempt to negotiate more favorable terms respecting consideration for the lease than approved by the Board of Public Works. It should be recalled that DGS had been negotiating solely with Appellant because competitive solicitation efforts in the Silver Spring area previously had failed (see Findings of Fact Nos. 1 to 3). Only after DGS determined that the revisions proposed to the lease by Appellant were unacceptable did it attempt to find another realtor and once having found such realtor engage solely in negotiations with it. We do not find that this action was either unreasonable or in violation of applicable law, regulation or policy. Accordingly, we deny the appeal in MSBCA 1460.