

DECISION

26045
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE#-211170

DATE: August 23, 1983

MATTER OF: Community Economic Development
Corporation

DIGEST:

1. Contracting agency has reasonable basis for rejecting offeror as nonresponsible where property offered by firm under solicitation for 10-year lease was subject to foreclosure for failure to pay county taxes for prior 3 years. Foreclosure action raised doubt as to firm's ability to retain property, and risk of loss of title was not sufficiently lessened by firm's agreement to pay taxes since one missed payment could result in foreclosure.
2. One-time disqualification of firm from award based on nonresponsibility, which under the circumstances has reasonable basis, does not constitute de facto debarment and denial of due process.
3. Offeror found to be nonresponsible is not "interested" party under our Bid Protest Procedures to protest award to next low bidder where it does not appear that circumstances would lead to cancellation and resolicitation of procurement. However, GAO will review second low offeror's status due to court interest in our views.
4. Discussion with only one offeror intended to cure a material deficiency in offer held after receipt of best and final offers is improper because discussions reopened with one offeror after receipt of best and final offers must be reopened with all offerors in the competitive range and an opportunity must be given to submit revised proposals.
5. Where best available evidence submitted by agency, time-date stamp on offers, shows initial and best and final offers were timely submitted,

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allegation that offers were submitted late is denied.

Community Economic Development Corporation (CEDC) protests the rejection of its offer of office and related space for an Internal Revenue Service office in Nassau County, New York, under solicitation for offers (SFO) MWY-82-083, issued by the General Services Administration (GSA). CEDC protests GSA's determination that CEDC was a nonresponsible offeror. CEDC also argues that the awardee, Selo-Weiss Joint Venture (Selo), submitted its initial offer and best and final offer late, and the contracting officer improperly conducted negotiations with Selo after best and final offers and allowed Selo to revise its offer without affording all other offerors the same opportunity.

We deny the protest in part and dismiss it in part.

While CEDC's protest was pending in our Office, CEDC filed a motion for injunctive relief in the United States District Court for the District of Columbia under Civil Action No. 83-2226. This decision responds to a court request for our opinion on CEDC's protest.

Eight offers were received in response to the SFO, with CEDC and Selo submitting the two lowest offers. Discussions were conducted with the eight offerors. By letters dated May 27, 1982, offerors were advised to submit best and final offers by June 11, 1982. The contracting officer determined that the offers of Selo and CEDC met all factors for award. However, Selo was erroneously determined the low offeror when, in fact, CEDC was low. Selo was found responsible and Selo executed the lease on November 30, 1982. However, when it was returned, GSA withheld the final required approvals to effectuate the lease while GSA considered CEDC's low offer. From July 1982 until January 1983, GSA did not communicate with CEDC. On January 19, 1983, GSA asked that CEDC extend its offer and CEDC agreed to the extension on January 26.

On February 14, 1983, as noted in a GSA memo, CEDC's attorney advised GSA that CEDC had reached an agreement which would avoid the foreclosure of the offered property by the county for CEDC's failure to pay taxes and allow CEDC to retain the deed to the property.

Apparently, some time in February, the contracting officer determined CEDC nonresponsible. The contracting officer submitted this determination to the Small Business Administration (SBA) by letter dated February 22, 1983, and requested a determination from SBA as to whether the SBA would issue a certificate of competency (COC). By letter of March 3, 1983, the SBA advised that CEDC was not a small business as defined by SBA regulations and, thus, not eligible for consideration for a COC. GSA prepared a determination and finding that CEDC was nonresponsible, and by letter of March 9, GSA advised CEDC that its offer was rejected. By letter of March 15, CEDC protested GSA's rejection of its low offer to our Office.

Essentially, the contracting officer based his nonresponsibility determination on the following information. First, GSA relied on a GAO report dated August 15, 1980, which reviewed CEDC's record with regard to the business ventures it has funded for the purpose of providing employment and business opportunities to Nassau County residents. Based on information in this report, GSA determined that the business enterprises funded by CEDC had "either gone bankrupt, ceased operations or are experiencing financial difficulties." Second, GSA relied on tax records that indicated that "ownership of the bus terminal building [the offered space] will be assumed by Nassau County because of CEDC's delinquent taxes in the amount of \$265,000," for the years 1979-1982. Third, GSA noted that, by its own statement in its offer, CEDC estimated annual costs of \$159,087 and, also, that CEDC offered to spend \$4.3 million to renovate the building for occupancy, which would place an additional debt burden on the offeror. GSA doubted that the rent would cover these costs.

GSA then stated that:

"CEDC's past performance clearly demonstrates its inability to manage and operate on-going businesses, including the bus terminal; despite substantial Federal funds granted to it, its record is replete with a continuous list of failures of the foregoing businesses. In addition, its inability to pay the required school, town and general taxes for 2-1/2 years on the property being offered for lease to the Government and the County's present foreclosure action support the conclusion that CEDC does not

have the capacity to manage and operate the building in accordance with the terms and conditions of the Solicitation for Offers.

* * * * *

"For the foregoing reasons, it has been determined that the offeror, over a period of years, has demonstrated a lack of capacity, tenacity, capability, perseverance and responsibility to operate, employ competent personnel, to manage various ventures, handle funds and complete projects in a sound business-like manner. Moreover, because of its evident lack of business acumen and judgment, CEDC does not have the capability to perform the major repairs and alterations and provide the daily services and maintenance that are required by the terms and conditions of the Solicitation for Offers for the District Office of the Internal Revenue Service which must serve the public without interruption to accomplish its mission. It is therefore determined that the offer be rejected as nonresponsible."

In a letter to CEDC, GSA advised that

"This determination was based on CEDC's performance record in its failure to manage federal funds in an efficient manner, as well as its precarious ownership of the proposed leased premises."

Finally, because, in GSA's view, the facts were clear and convincing to show CEDC would be incapable of performing the terms and conditions of the solicitation, regardless of its financial condition, a financial report was not requested.

CEDC contends that there was no reasonable basis for the contracting officer's determination that CEDC was nonresponsible. CEDC contends that GSA improperly relied on the GAO report because it concerns use of Federal funds of CEDC-sponsored minority enterprises for the years 1971 to 1978, 5 to 12 years prior to the award of this contract. CEDC asserts that a nonresponsibility determination based on prior performance must be based on information on as current

a basis as feasible, citing Federal Procurement Regulations (FPR) § 1-1.1202(d) (1964 ed. amend. 192) and a GAO decision, Drexel Industries, Inc., B-189344, December 6, 1977, 77-2 CPD 433. CEDC also points out that the GAO report contained a specific disclaimer that GAO did not review CEDC's activities for the purpose of rendering an opinion on the effectiveness of these programs. Finally, CEDC provides a list of more recent successful records of investment of accomplishments since May 1980 and points out that the contracting officer did not request any information from CEDC during GSA's review of CEDC's responsibility.

With regard to the question of CEDC's ownership of the building, CEDC argues that it notified GSA prior to GSA's nonresponsibility determination that CEDC had agreed to a payout schedule to settle the tax arrears on the property, and that the deed to the property would be retained by CEDC. In CEDC's view, this response should have resolved the ownership issue for GSA.

With regard to the reasonableness of GSA's nonresponsibility determination, we have held that a procuring agency has broad discretion in making responsibility determinations. Deciding a prospective contractor's probable ability to perform a contract involves a forecast which must of necessity be a matter of judgment. Such judgment should be based on fact and reached in good faith. However, it is only proper that it be left largely to the sound administrative discretion of the contracting agency involved. The agency logically is in the best position to assess responsibility, must bear the major brunt of any difficulties experienced in obtaining required performance, and must maintain day-to-day relations with the contractor. 43 Comp. Gen. 228 (1963). Thus, we will not disturb an agency determination of nonresponsibility unless it lacks a reasonable basis. See The Mark Twain Hotel, B-205034, October 28, 1981, 81-2 CPD 361.

For the reasons discussed below, we conclude that the "precarious ownership of the proposed property" provided a reasonable basis for rejecting CEDC as nonresponsible since it involves the ability of CEDC to perform the 10-year lease by supplying a building with clear title. Thus, we need not address the validity of the other stated bases for GSA's nonresponsibility determination.

The record shows that at the time CEDC submitted its offer, it had been delinquent in paying taxes over a 3-year period, and Nassau County had issued a foreclosure notice on the property. In our view, because of this tax problem and the doubt it raised as to the ability of CEDC to retain the title to the property, GSA could reasonably question CEDC's ability to perform the contract.

Our Office has stated that we are not aware of any obligation on the procuring agency's part to award a lease to a firm that it determines is nonresponsible, see H. Frank Dominquez d.b.a. Vanir Research Company, B-197842, August 27, 1980, 80-2 CPD 154; all we require is that the agency have a reasonable basis for the nonresponsibility determination.

The fact that CEDC had worked out a payout schedule to satisfy its tax liability and postponed foreclosure does not, in itself, show that a lease with CEDC for that property was sufficiently less of a risk since if CEDC missed a payment, CEDC's ownership of the property would be jeopardized. In fact, a local news article submitted by CEDC to indicate that the agreement was a matter of public knowledge of which GSA should have been aware quotes Nassau County officials as follows: "It [the payment schedule] will be rigidly enforced. If one payment is missed by as much as a day the * * * [CEDC] loses title." Under these circumstances, we cannot say that the nonresponsibility determination that CEDC would be unable to perform the lease lacked a reasonable basis.

CEDC asserts that GSA's nonresponsibility determination constitutes a de facto debarment. According to affidavits filed by CEDC's chief executive officer and two of CEDC's attorneys, at a meeting on July 11, 1983, GSA's contracting officer specifically stated that CEDC "would never get a contract from the U.S. Government," and that CEDC is "debarred--in my own mind." However, by affidavit, the contracting officer categorically denies that he made these statements, states that this was a one-time nonresponsibility determination which does not in any way prevent CEDC from bidding under future procurements and finally states that he has never discussed debarment of CEDC with anyone.

We note that in this regard, the protester has the burden of proving its case, and when the only evidence on the issue is conflicting statements by the protester and his

counsels and contracting officials, that burden is not met. See East Wind Industries, Inc., B-208170, December 29, 1982, 82-2 CPD 587.

While we have recognized that de facto debarment could result from repeated negative responsibility determinations, see 43 Comp. Gen. 140 (1963), or even a single negative determination if it is part of a long term disqualification attempt, see Myers & Myers, Inc. v. United States Postal Service, 527 F.2d 1252 (2nd Cir. 1975), at best, all that appears to be involved here is a one-time disqualification which under the circumstances had a reasonable basis and does not constitute a denial of due process. See 51 Comp. Gen. 551 (1972).

If this were not a court-requested decision, we would dismiss the other two issues as academic since CEDC as a nonresponsible offeror is not an interested party under our Bid Protest Procedures to protest an award to the next low bidder where it does not appear that cancellation and resolicitation of the procurement could be warranted. (GSA also argues CEDC is untimely regarding these two issues.) See Whitey's Welding and Container Repair dba Richmond Drydock and Marine Repair, B-202517.3, June 26, 1981, 81-1 CPD 533. However, since this is a court requested opinion, we will address the other issues raised.

With regard to CEDC's allegation that GSA improperly conducted discussions to cure a material deficiency in Selo's proposal, the record indicates the Selo best and final offer of June 11, 1982, contained a rental fee for overtime heat at the rate of \$50 per hour. The bid schedule also shows that on June 22, 1982, the overtime rental fee was reduced to \$15.84. According to the record, in a memo of July 15, 1982, the contracting officer described the Selo space to the GSA technical staff and then stated:

"The entire system must be turned on for the whole building to heat the subject space. The Lessor is requesting \$50.00 per hour for an overtime rate. Please advise if rate requested is fair and reasonable."

The GSA technical staff responded:

"That based on the info above, the rate of \$50.00 is NOT fair and reasonable * * * during

the heating season, the Lessor must run the boilers at a minimum to protect the building. The Government should only pay for that portion of the utility necessary to bring building to working temp usually about 25% of total." (Emphasis in the original.)

Apparently, at some point, the contracting officer advised Selo that the hourly overtime heating fee of \$50 an hour was not acceptable and obtained an almost 70-percent reduction in the overtime heating rate. GSA does not deny this and advises that "negotiations of an overtime rate for heat were commenced with Selo on May 20, 1982, but did not conclude until after best and final offers were received."

GSA recognizes that it is improper for the Government to continue discussions with only one of the offerors in the competitive range after best and final offers have been received, and that if negotiations are reopened with one offeror, they must be reopened with all of the other offerors in the competitive range, and a new round of best and finals requested. Bowman Square Properties, B-208699, December 13, 1982, 82-2 CPD 527; Harris Corporation, B-204827, March 23, 1982, 82-1 CPD 274. However, GSA refers to recognition in our decisions that an agency may contact offerors to clarify minor uncertainties and irregularities so long as no offeror is given an opportunity to make modifications or revisions of its proposals which would be essential to a determination of its acceptability. Electronic Data Systems Federal Corporation, B-207311, March 16, 1983, 83-1 CPD 264.

GSA contends that the overtime rate for heat was not an award factor for evaluation for determining the successful offeror and would not affect the award to Selo. GSA also points out that CEDC was not prejudiced by the negotiations of the overtime rate until after receipt of best and final offers. GSA states that assuming the contracting officer had conducted further negotiations with CEDC and permitted it to submit a revised offer, the outcome of this procurement would have been the same since CEDC was determined non-responsible and, therefore, not eligible for award.

We find that the negotiations concerning the overtime rate were material to the ultimate decision to award to Selo. GSA had determined that Selo's overtime heating rate

was not fair and reasonable. Selo would have been overcharging the Government under this requirement and after the contracting officer determined the rate unreasonable, he requested a rate reduction which resulted in a substantially lowered rate for overtime heating. Although the SFO did not require that Selo's offer be rejected if the overtime rate was not lowered, we find the discussions were material since they were designed to elicit new pricing, rather than to clarify a minor uncertainty or irregularity. Thus, GSA should have reopened negotiations with offerors.

CEDC also argues that the awardee's initial and best and final offers may have been submitted after the designated closing dates, and that GSA has violated the terms of the solicitation and GSA's own order which applies the Handbook, Acquisition of Leasehold Interests in Real Property to GSA's acquisition and administration of real property, lease agreements. CEDC complains that according to its investigation, the contracting officer failed to keep a log of offers or to preserve the transmittal envelopes received in response to the solicitation and suggests that this "exposes the procurement process to at least the appearance of impropriety. At worst it suggests that improper or possibly criminal conduct, may have occurred."

GSA has responded by submitting the contracting officer's statement that Selo's original offer was dated April 22, 1982, and the offer was received by GSA prior to the May 1, 1982, closing date, and that Selo's best and final offer was received on June 10, 1982, 1 day prior to June 11, 1982, the closing date for the submission of best and final offers. GSA has also submitted a copy of the first page of Selo's initial offer which GSA date-stamped April 26, 1982, and a copy of the June 8 letter date-stamped June 10, 1982.

GSA reports that this is the best evidence available to show that Selo's offers were timely received. CEDC requests that we investigate this matter further and requests that we obtain further evidence such as a log of offer received and the transmittal envelopes containing the offers. Since we find that the available evidence shows timely receipt of the offers submitted by Selo, we deny CEDC's protest on this issue. Furthermore, it is not part of our bid protest function to conduct investigations in order to establish the validity of speculative allegations. Marine Power and Equipment, Inc., B-208393, December 7, 1982, 82-2 CPD 514.

To the extent the protester is alleging criminal misconduct on the part of the procurement officials, we consider these allegations to be for the consideration of the Department of Justice, not our Office. Cf. Marine Power and Equipment, Inc., supra.

Harry R. Van Cleave
for Comptroller General
of the United States