



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: 3DAV Development, Inc.; San Sebastian Shopping Center, S.E.

File: B-274933.2; B-274933.5; B-274933.6

Date: January 16, 1997

Charles E. DeWitt, Jr., Esq., and Daniel J. Moynihan III, Esq., for 3DAV Development, Inc.; and Jose M. Biaggi Landron, Esq., for San Sebastian Shopping Center, S.E., for the protesters.

Douglas L. Fox, Esq., Shumway, Giguere, Byrne, Fox & Aloise, for N.E.D.A. Development Corporation, the intervenor.

Jane S. Converse, Esq., Philip Kauffman, Esq., and Phillipa L. Anderson, Esq., for the Department of Veterans Affairs, for the agency.

Aldo A. Benejam, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Information relating to offerors' ability to perform contract is a matter of responsibility and not related to the technical acceptability of proposals and, even though solicitation required submission of information with proposals, requirements that relate to responsibility may be satisfied at any time prior to award.

DECISION

3DAV Development Inc. and San Sebastian Shopping Center (SSSC), S.E. protest the award of a lease to N.E.D.A. Development Corporation under solicitation for offers (SFO) No. 184B-02A-95, issued by the Department of Veterans Affairs (VA) for an outpatient clinic in Ponce, Puerto Rico. The protesters contend that award was improper because N.E.D.A. did not include with its proposal evidence of site "ownership or control" as required by the SFO.

We deny the protests.

At issue is section 3.21 of the SFO, entitled "EVIDENCE OF CAPABILITY TO PERFORM PRIOR TO AWARD," which called for offerors to include with their proposals certain information, including "evidence of ownership or control of [the] site" proposed. In response, N.E.D.A. submitted a letter, written in Spanish, from the "Administracion de Terrenos, Estado Libre Asociado de Puerto Rico," (hereinafter the Land Administration). The letter references "Lot #37 Multedo Estrella Land, Ponce, P.R., V.A. Outpatient Clinic," the tract of land where N.E.D.A.

offered to construct a new building. To that document, N.E.D.A. attached what it described as an English translation of the Land Administration's letter.¹

The protesters contend that N.E.D.A.'s letter is not sufficient evidence of ownership or control of the site it proposed and, as such, the VA should have rejected N.E.D.A.'s proposal as technically unacceptable.

We disagree with the protesters' premise that compliance with the SFO's "ownership or control" provision concerns the acceptability of N.E.D.A.'s proposal. Ownership or control of the proposed site was not listed in the SFO as a selection criterion or evaluation factor. In this regard, this case is distinguishable from W.D.C. Realty Corp., 66 Comp. Gen. 302 (1987), 87-1 CPD ¶ 248, where the solicitation stated that, for evaluation purposes, certain technical data were "required as a minimum submission for consideration" of proposals, including "evidence of site ownership or access to ownership through held options." In that case, since the solicitation specifically stated that this information was required as a precondition for considering the proposals for award, we concluded that the requirement was related to the technical acceptability of proposals.

By contrast here, the SFO simply required offerors to submit evidence of site ownership or control, along with other type of information such as evidence of financial resources; construction team qualifications, including licenses or certifications of the firms providing architectural and engineering design services; and evidence of compliance with local zoning laws. This information relates to the ability of the successful offeror to perform the contract rather than to whether the offer is acceptable and, therefore, is a matter of responsibility. NFI Management Co., 69 Comp. Gen. 515 (1990), 90-1 CPD ¶ 548; SDA, Inc.--Recon., B-249386.2, Aug. 26, 1992, 92-2 CPD ¶ 128. In fact, the SFO warned that "FAILURE TO MEET ANY OR ALL OF THE REQUIREMENTS SET FORTH IN PARAGRAPH [3.21] . . . SHALL BE A BASIS FOR A DETERMINATION OF NON-RESPONSIBILITY . . . ," indicating that the agency intended to use the information submitted in response to section 3.21 of the SFO to assess responsibility, and not as a precondition to considering the proposals or to determine the technical acceptability of proposals.

¹The English translation that N.E.D.A. submitted with its proposal states:

"Your option for purchase request for the above referenced [tract of land] was received and is [being] evaluated by our Planning Office along with other similar requests.

As soon as the [VA] informs us who is authorized to negotiate with this Administration we will proceed with the requisites for the land."

In awarding the lease to N.E.D.A., the agency necessarily determined that the firm was a capable and responsible contractor. Mitel, Inc., B-270138, Jan. 17, 1996, 96-1 CPD ¶ 36 at 4. We will not review such affirmative determinations of responsibility absent a showing of possible bad faith on the part of government officials or that definitive responsibility criteria in the solicitation were not met. Bid Protest Regulations, § 21.5(c), 61 Fed. Reg. 39039, 39045 (1996) (to be codified at 4 C.F.R. § 21.5(c)).

Although the protesters do not allege bad faith on the part of government officials, they contend that the SFO's "ownership or control" provision is a definitive responsibility criterion. According to the protesters, since N.E.D.A. failed to meet that criterion, the VA should have rejected its proposal.

A definitive criterion is an objective standard imposed by a solicitation which must be satisfied as a prerequisite to determining an offeror to be responsible. Here, the SFO required offerors to submit evidence of ownership or control over the proposed site but did not specify any particular type of information or documentation necessary to satisfy the VA's concerns in this regard. As such, the SFO left it up to the offerors to submit whatever information they believed would satisfy the requirement and to the VA to determine if what was submitted satisfied its concerns about ownership and control. Thus, unlike in The Mary Kathleen Collins Trust, B-261019.2, Sept. 29, 1995, 96-1 CPD ¶ 164, where we found that a solicitation requirement for a certification from the local authority concerning zoning of the property in question constituted a definitive responsibility criterion, here the SFO did not provide any objective standard or impose any specific requirement on which the agency was to rely to determine offeror compliance with the site ownership or control provision. Accordingly, this record affords us no basis to conclude that the VA ignored a definitive responsibility criterion in finding N.E.D.A. to be responsible.

SSSC argues that the VA's determination that N.E.D.A. is a responsible contractor was erroneously based on an intentional "misrepresentation" in the letter N.E.D.A. submitted with its proposal regarding its property rights in the site in question. In this connection, both protesters have provided their own interpretation of the Land Administration's original letter, which they claim is a more accurate translation than the one N.E.D.A. provided with its proposal.

We think the record falls short of establishing that N.E.D.A. "misrepresented" its ownership or control of the proposed site. At most, what the record does show is that there is some disagreement among the parties as to the precise meaning of the Land Administration's original letter. The fact that the protesters believe that the English translation which N.E.D.A. provided does not accurately capture the original meaning does not mean that N.E.D.A. "misrepresented" its property interests in the proposed site. In this connection, the contracting officer has submitted a sworn

affidavit attesting that he, along with other VA officials, contacted the Land Administration which confirmed that the letter N.E.D.A. submitted with its proposal "is a confirmation of the Land Administration's intent to sell [the proposed site] to [N.E.D.A.]. . . ." Thus, any question that the VA may have had concerning N.E.D.A.'s property interests in the proposed site was eliminated as a result of the contracting officer's inquiry. Whether N.E.D.A.'s English translation accurately reflects the meaning of the Land Administration's original letter, and thus whether that letter constituted adequate evidence of site control or ownership, is a matter encompassed by the contracting officer's responsibility determination which we will not review. See Patterson Pump Co., B-204694, Mar. 24, 1982, 82-1 CPD ¶ 279.

The protests are denied.

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