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**Comptroller General
of the United States**

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

Decision

Matter of: Acquest Development LLC

File: B-287439

Date: June 6, 2001

Derek J. Mohr, Esq., Lippes, Silverstein, Mathias & Wexler, for the protester.
Marilyn M. Paik, Esq., General Services Administration-Public Buildings Service, for the agency.
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DIGEST

1. Agency reasonably determined that protester was nonresponsible to perform construction/lease contract based on lack of financial capability, where protester's financial information contained significant discrepancies and indicated that protester had proposed a rental rate insufficient to cover the cost of construction.
2. Although solicitation required that information relating to offeror's ability to perform contract be submitted at time of best and final offers (BAFO), since such information concerns offeror responsibility, the information could be submitted any time prior to award; awardee's furnishing of the information after the BAFO due date therefore was not a basis for rejecting its offer.

DECISION

Acquest Development LLC protests the award of a contract to Western Devcon, Inc. under solicitation for offers (SFO) No. 9CA01019, issued by the General Services Administration (GSA) for the construction and lease of office and laboratory space. Acquest challenges the agency's evaluation of the proposals and the award determination.

We deny the protest.

The SFO sought proposals to build and lease 54,119 rentable square feet of office and laboratory space for the U.S. Drug Enforcement Agency (DEA) in San Diego, California. The space is to be used by the DEA for chemical analysis of controlled substances purchased or seized as evidence in illegal operations. The SFO

contemplated a firm lease-term of 18 years. The procurement was conducted in two phases. The first phase consisted of evaluation of the technical qualifications of offerors, including past performance (key personnel and experience on comparable projects) and quality of the location and site. The second phase consisted of a technical and price evaluation, plus a carry-over of the offerors' past performance scores from the first phase. The technical factors combined were weighted greater than price. Award was to be made to the firm whose offer represented the greatest value to the government. SFO § 2.2.

Both Acquest and Western submitted offers and, after discussions, submitted best and final offers (BAFO). Due to deficiencies in both BAFOs, the contracting officer reopened negotiations. Among Acquest's deficiencies were its failure to submit financial information, its proposal of an unusually high operating-cost rate, and its continued lack of a detailed construction budget. After reviewing the revised BAFOs, the contracting officer requested a financial responsibility check on both offerors. During this period, Acquest submitted additional information bearing on its financial capability, and Western on control of its building site. GSA's credit and finance division found Western's financial capability satisfactory, but found Acquest's unsatisfactory. GSA's construction management consultant also found that, based on its construction budget, Acquest would be unable to recover its construction costs through its proposed rental rate. Based on these considerations, the contracting officer determined that Acquest was not financially responsible and awarded the contract to Western. After a debriefing, Acquest filed this protest.¹

Acquest's protest centers around an SFO provision, "Evidence of Capability to Perform," which required that, "[u]pon request of [BAFOs]," offerors submit "[s]atisfactory evidence of at least a conditional commitment of funds in an amount necessary to prepare the space," and "demonstrate evidence of ownership [of its proposed site] through a copy of recorded grant deed . . . [or show] that it has control of site through a valid, binding legally enforceable option to purchase the site." SFO § 3.10. Acquest first asserts that the agency erred in finding it nonresponsible under SFO § 310.² In this regard, the protester maintains that it submitted sufficient information to establish its financial capability.

¹ Acquest also protests that its written debriefing was inadequate because it did not have the opportunity to ask questions. The adequacy of a debriefing is a procedural matter concerning agency actions after award which are unrelated to the validity of the award; we generally will not review such matters. C-Cubed Corp., B-272525, Oct. 21, 1996, 96-2 CPD ¶ 150 at 4 n.3.

² In its comments on the agency's report, Acquest, a small business, for the first time challenged the agency's failure to refer its nonresponsibility finding to the Small Business Administration (SBA) for a certificate of competency (COC) review. This allegation is untimely. A protest such as this, based on other than alleged improprieties in a solicitation, must be filed no later than 10 calendar days after the
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The Federal Acquisition Regulation (FAR) requires that a prospective contractor have adequate financial resources to perform the contract, or the ability to obtain them. FAR § 9.104-3(a). Contracting officers are vested with broad discretion in exercising the business judgment involved in a nonresponsibility determination. Blocacor, LDA, B-282122.3, Aug. 2, 1999, 99-2 CPD ¶ 25 at 4. Our Office generally will not disturb a nonresponsibility determination absent a showing either that the agency had no reasonable basis for the determination, or acted in bad faith. Id. In our review of nonresponsibility determinations, we consider only whether the negative determination was reasonably based on the information available to the contracting officer at the time it was made. Document Printing Serv., Inc., B-256654, B-257051, July 8, 1994, 94-2 CPD ¶ 13 at 4.

The agency's determination here was reasonable. While Acquest submitted a great deal of financial information on itself and its related entities, the agency concluded that the information was insufficient to establish financial capability and, in fact, raised more questions than it answered.³ For example, Acquest's financial statements were considered unreliable, in part, because the net loss for the relevant period was not shown in the equity section of the balance sheet, and a deposit on a

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protester knew, or should have known, of the basis for protest. Bid Protest Regulations. 4 C.F.R. § 21.2(a)(2) (2001). In its March 7, 2001 debriefing letter, the agency advised Acquest that its proposal was deficient under the "financial responsibility check" and that it had failed to demonstrate financial capability. Protest Exh. A. From this, Acquest should have known that the agency had found it nonresponsible and had not referred the matter to the SBA. Since this protest ground was raised more than 1 month later, it is untimely and not for consideration on the merits.

³ Complicating the issue of the protester's financial responsibility was its submission of financial information on various "related" entities without explaining the legal relationship to Acquest Development LLC, the name under which the initial proposal was submitted. These related entities included: Acquest Development Company, Acquest Government Holdings, LLC, Acquest Government Holdings II, LLC, Acquest Government Holdings III, LLC, Acquest Development Group, Acquest Company, and Acquest Affiliates. Agency Legal Memorandum at 7. In this regard, GSA argues that Acquest's BAFO was unacceptable because it was submitted under the name of Acquest Government Holdings III, LLC, a different entity than had submitted the original proposal. Acquest responds that the agency was well aware of, and requested, the substitution of entities. We need not address this issue, since GSA considered the financial information submitted on behalf of the entity before making its determination of nonresponsibility and, as discussed further below, we find that this determination was reasonable.

land purchase was shown on the November 2000 balance sheet while other documents showed the deposit had not been made until December 2000. Agency Report (AR), Tab 22, Preaward Survey, Jan. 30, 2001. Similarly, although Acquest certified that there had been no material changes in its assets between November 2000 and January 2001, GSA's reviewer found that Acquest's year-end financial statement showed material changes, including a one-third reduction in assets and liabilities, plus an increase in equity although no income was shown. *Id.* GSA also found that Acquest's equity "appear[ed] light and no revenues [were] shown," *id.*; that there was no current information on a loan that was to be extended to end of January 2001 or on a purchase option that expired on January 28; and that Acquest's proposed rental rate was not sufficient for it to recover its construction costs. AR, Tab 23. In light of these discrepancies and the inadequate rental rate, we think the contracting officer reasonably concluded that Acquest was not financially responsible.

Acquest contends that it was treated unequally vis-à-vis Western since, it claims, the agency disregarded financial information it submitted after January 10, but allowed Western to cure a problem with its proposal as late as January 26. This allegation is based in part on an e-mail in which the contracting officer advised the official conducting Acquest's preaward survey that information submitted by Acquest after January 10 (5 days after the last request for information) "should not be considered." AR, Tab 20, E-mail, Jan. 25, 2001.⁴ Acquest concludes that it should have been given until the time of award to furnish any further information the agency needed.

We find nothing improper here; there is no evidence of unequal treatment. Both offerors were provided post-BAFO opportunities to cure their respective responsibility deficiencies. Acquest was provided multiple opportunities to submit financial capability information. Specifically, in discussions, the agency requested evidence of the SFO § 310(a) funding commitment and more information on its construction budget. AR, Tab 7. In its November BAFO request, the agency again sought satisfactory evidence of a funding commitment. AR, Tab 11. In its December BAFO request, the agency advised Acquest that it had failed the financial responsibility clearance and asked for financial statements, proof of financing, and evidence of ownership or control of the building site. AR, Tabs 15, 17. After receiving Acquest's second BAFO, by letter of January 5 the agency requested a complete Contractor's Qualifications and Financial Information form (GSA Form

⁴ Acquest also claims that GSA improperly applied an unspecified financial formula that made its proposal "look like it would generate negative cash flow." Comments at 6. This argument is untimely. The SFO clearly advised offerors that the agency's price evaluation would include calculation of a present value cost-per-square-foot by applying the percentages Acquest now challenges. To be timely, protests of such alleged solicitation improprieties must be filed prior to the closing time for receipt of proposals. 4 C.F.R. § 21.2(a)(1).

527) and related reference materials. AR, Tab 19. While Acquest responded to each of these requests, as discussed above, the information it furnished was found inadequate to establish its financial responsibility. In contrast, Western had submitted evidence of a binding option to purchase its proposed site at the time of its initial BAFO, in November 2000. Although that option subsequently lapsed, Western's December 22 revised BAFO included a letter indicating its continuing intent to acquire its proposed building site. AR, Tab 16. By January 26, well prior to the agency's March 2 award, Western submitted sufficient evidence of its ownership and control of the property. AR, Tab 21.

It is clear that Acquest and Western were in entirely different postures with regard to the informational deficiencies in their proposals. Whereas Western had provided the agency with reason to believe that it intended, and would be able, to acquire its proposed site, Acquest, by never providing adequate information despite multiple opportunities to do so, had given the agency every reason to doubt its financial capability. This being the case, there was nothing objectionable in the agency's finally establishing a cutoff date for Acquest, but not for Western, or in its then determining--when Acquest still did not provide adequate information by the cutoff date--that Acquest either could not or would not furnish the necessary information. We conclude that the agency provided Acquest more than an adequate opportunity to establish its financial capability, and treated both offerors fairly based on their individual circumstances.

Acquest also asserts that the award to Western was improper because Western failed to demonstrate that it had legal control of its proposed site at the time of BAFO submission, as required by SFO § 3.10(b). Acquest maintains that this rendered Western's proposal technically unacceptable.⁵

This argument is without merit. First, the requirement concerned offeror responsibility, not technical acceptability. In this regard, the requirement was listed, not as a technical requirement, but as "Evidence of Capability to Perform," SFO § 3.10, and, more fundamentally, concerned offerors' ability to perform the contract rather than the acceptability of their offer. See 3DAV Dev., Inc.; San Sebastian Shopping Ctr., S.E., B-274933.2 et al., Jan. 16, 1997, 97-1 CPD ¶ 24 at 2; NFI Management Co., B-238522, B-238522.2, June 12, 1990, 90-1 CPD ¶ 548 at 5 (requirement for evidence of site ownership or control is matter of responsibility). Requirements which relate to responsibility may be satisfied any time prior to award, id., and a solicitation cannot convert a matter of responsibility into one of

⁵ Western's November BAFO met the requirements of SFO § 310(b) by providing evidence of a legally binding option to purchase Western's site. AR, Tab 16. However, because that option lapsed prior to the second BAFO request, Western was required to provide additional information confirming its control of the property before the agency could award it the contract.

acceptability by providing for rejection of an offer if information is not furnished by an earlier date. See generally Integrated Protection Sys., Inc., B-254457.2, B-254457.3, Jan. 19, 1994, 94-1 CPD ¶ 24 at 3 (even though solicitation required information relating to responsibility to be furnished at bid opening, agency properly accepted the information after bid opening). Accordingly, the agency properly considered the site control information Western submitted after the BAFO date.

Finally, Acquest asserts that GSA improperly evaluated its past performance and proposed site on a pass-fail basis, even though the SFO listed various evaluation criteria, and that the agency improperly made the award to the low, technically acceptable offeror, rather than to the best value offeror. In order to maintain a protest in our Office, a firm must be an interested party, that is, an actual or prospective bidder or offeror whose direct economic interest will be affected by the award of or failure to award a contract. 4 C.F.R. § 21.0(a). A firm is not an interested party if it is ineligible to receive award under the protested solicitation. The Swanson Group, Inc., B-249631, Aug, 10, 1992, 92-2 CPD ¶ 93 at 2. Acquest is ineligible for award because, as discussed above, the contracting officer reasonably determined the firm to be nonresponsible. The firm therefore is not an interested party for purposes of challenging the evaluation.

The protest is denied.

Anthony H. Gamboa
General Counsel