Golden

DECISION

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

26701

FILE: B-212286 **DATE:** November 2, 1983

MATTER OF: B.M.I., Inc.

DIGEST:

A procuring agency is not required to delay award indefinitely while an offeror attempts to cure the causes for the firm being found nonresponsible. Thus, where low offeror fails to supply required information prior to agency-established deadline, after having been provided ample opportunity to do so, the agency reasonably may find the low offeror nonresponsible.

B.M.I., Inc. (BMI), protests award to any other offeror under request for proposals (RFP) No. F29651-83-R-0011 for a cable television (CATV) franchise at Holloman Air Force Base, New Mexico (Air Force). Essentially, BMI protests the Air Force's determination that BMI is nonresponsible because of lack of financial capability. BMI failed to submit a loan commitment indicating it had sufficient financial capital to perform the contract. BMI asserts that the Air Force sent it the wrong forms for proving it had the needed financial backing and that it was given insufficient time to obtain its financing.

We deny the protest.

Initially, we note that the Air Force argues that our Office has no jurisdiction to consider this protest under our Bid Protest Procedures because the award of a CATV franchise does not involve the use of appropriated funds. In this connection, the Air Force states that GAO does not have authority to consider a protest concerning procurements that do not involve the direct expenditure of appropriated funds, citing, for example, Pinkerton's Inc., B-210541, February 1, 1983, 83-1 CPD 121.

While the CATV awards may not necessarily involve direct expenditure of appropriated funds, this Office has considered protests against CATV procurements. See, for example, Teleprompter of San Bernadino, Inc., B-191336, July 30, 1979, 79-2 CPD 61, in which we considered a protest against an award of an Air Force CATV franchise. In this

027110

connection, we have stated specifically that we will consider protests involving the award of a franchise for services on a military base to be paid principally by military personnel ordering such services where the franchise includes services for the government and the government is obligated for termination costs. See John C. Lozinyak, B-211923, September 7, 1983, 83-2 CPD ___; Arrow Transportation, Inc., B-201882, February 10, 1981, 81-1 CPD 90.

With regard to the merits, the agency reports that BMI was the apparent low offeror on this RFP issued on April 22, 1983. The contracting officer requested that the Defense Contract Audit Service (DCAS) conduct a preaward survey because BMI was a new company with no record of performance. This survey was initiated on May 11, 1983, and, on the next day, DCAS discussed BMI's financial arrangements with BMI. BMI admits that from this date, it initiated efforts to arrange the necessary financing of $300,000 to satisfy its contractual obligations to establish CATV services on the base. According to DCAS, on May 18, BMI stated that bank financing had been located and a verification letter would be sent to DCAS. However, on May 25, 1983, BMI advised DCAS that financing was being obtained from another source and DCAS gave instructions for preparing a commitment letter to BMI and the financial firm. DCAS advised BMI that it needed the letter by June 3, 1983, to consider it in its preaward survey. DCAS failed to receive the letter by that date. BMI advised DCAS that an individual, not a bank, might provide the financing. DCAS sent BMI a guaranty agreement form which when completed would establish that BMI had noninstitutional financing.

On June 16, 1983, the contracting officer decided that the award should not be delayed further and requested that the preaward survey report be completed. Since DCAS had not received either a bank commitment letter or proof of other financing, DCAS made a "No-Award" recommendation because BMI had not established its financial capacity. DCAS also advised that, "with the availability of financial support, the offeror has the capability to perform to this solicitation." The contracting officer determined BMI nonresponsible.

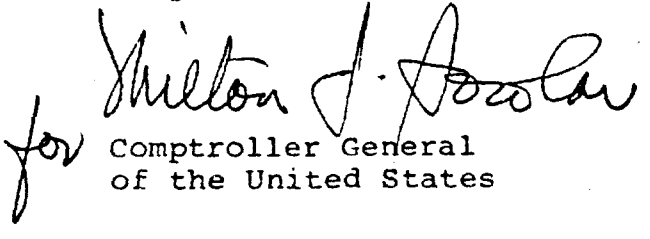
On June 17, 1983, BMI advised the contracting officer that BMI had found financing. Although the DCAS survey was completed, the contracting officer advised that BMI's nonresponsibility would be reconsidered if BMI submitted proof of financing by June 24, 1983. BMI did not submit

proof of financing to the Air Force on that date; instead, BMI filed its protest with GAO.

We note that BMI has submitted financing documents with its protest. However, the documents do not show that BMI had adequate financing as of June 17, 1983, as its alleges, or by the extended deadline of June 24, 1983. Moreover, the documents indicate BMI's financing agreement expired on September 15, 1983. We also note that the matter of BMI's nonresponsibility was referred to the Small Business Administration (SBA) for a certificate of competency (COC) proceeding. The SBA declined to consider the matter because there was no certification required under the RFP to show BMI was a small business eligible for a COC.

This Office has stated that a procuring agency is not required to delay award indefinitely while a bidder attempts to cure the causes for its being found nonresponsible. See Roarda, Inc., B-204524.5, May 7, 1982, 82-1 CPD 438.

Here, the record indicates that BMI was given approximately 6 weeks to provide the Air Force with proof of its financing and failed to submit any proof. BMI argues it had financing by June 17, but failed to submit proof of the financing because the financial institution would not sign the personal guaranty form, and asserts the Air Force sent it incorrect forms. The record indicates that the personal guaranty form was sent to BMI because, at one point, BMI had indicated that an individual would be financing the contract. Assuming BMI did not have the correct form for financial institutions or misunderstood the procedural requirements, this did not excuse BMI from submitting substantive evidence of its financing within the established deadline. It was BMI's responsibility to show that it was financially capable in order to qualify for award, and it failed to accomplish this. In our view, the record shows the agency acted reasonably and provided ample opportunity for BMI to establish its financing.



for Comptroller General
of the United States