

Cooper



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Darby Development Company, Inc.; James J. Kerr

File: B-234944.2; B-234944.3

Date: November 9, 1989

DIGEST

1. Contracting officer's decision to exclude firm from the competitive range was reasonable where the firm was ineligible for award based on the agency's issuance of a Limited Denial of Participation (LDP) and a proposed debarment.
2. A protester that did not submit a proposal is not an interested party where another intermediate party of greater interest in the propriety of the award has filed a protest.

DECISION

Darby Development Company, Inc., and James J. Kerr, protest the award of a contract to any other offeror under request for proposals (RFP) No. 1-89-054, issued by the Department of Housing and Urban Development (HUD) for management and disposition services for HUD properties in South Carolina. Darby protests its exclusion from the competitive range, and Kerr alleges that HUD misinformed him concerning the effect of certain loan foreclosures, thereby unfairly denying him the opportunity to have Darby's proposal under the same solicitation assigned to himself.

We deny the protests.

The RFP, issued March 10, 1989, sought to acquire area management broker services for single-family properties owned by, or in the custody of, HUD in South Carolina. Broker services include inspections, estimates of property value, overseeing minor repairs, paying bills, upkeep, obtaining subcontractors and collecting rents. HUD received 26 proposals by the April 10 closing date. On June 19, HUD issued a Limited Denial of Participation (LDP) to Robert Gordon Darby, and his affiliates, including Darby Development Company, Inc., which restricted Darby's

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contractor, the effect of the LDP (formerly called Temporary Denial of Participation or TDP) is tantamount to a suspension of the protester, limited to the relevant jurisdiction and programs, since it renders the firm ineligible to compete for any solicitation issued under that authority. See FAR § 9.407; Jerry Watson Realty, B-228122, Sept. 25, 1987, 87-2 CPD ¶ 303 (TDP, the precursor of the LDP, is equivalent to suspension).

Our Office will consider protests of allegedly improper suspensions and debarments occurring during the pendency of an award decision to ensure that the contracting agency is not acting arbitrarily in order to avoid making award to a firm which is otherwise entitled to award and also to ensure that minimal due process standards have been met. Far West Meats, B-234642.2; B-234690, June 9, 1989, 68 Comp. Gen. ___, 89-1 CPD ¶ 547. However, the scope of our review is restricted to a consideration of whether the agency has put forth sufficient evidence to show the reasonableness of its decision to exclude the firm and whether it has followed proper procedures in suspending the firm; our Office is not the appropriate forum to consider the weight or sufficiency of evidence for purpose of the ultimate debarment decision or to consider whether an agency has acted properly in proposing one firm but not another firm for debarment. Id.

Applying this standard, we conclude that HUD has made a showing sufficient to support its decision not to include Darby in the competitive range and has also followed proper procedures in the LDP proceedings and in proposing the protester for debarment.

Although FAR § 9.405 specifically excludes suspended or debarred contractors from being awarded contracts, no provision specifically addresses when an agency may, or whether an agency must, reject an offer during the negotiation stage of a negotiated procurement, before award. See Southern Dredging Co., Inc., 66 Comp. Gen. 300 (1987), 87-1 CPD ¶ 245. We have held, however, that a contracting officer has discretion to restore to the competition an offeror that has been suspended during the course of a negotiated procurement once the suspension has been lifted. See Casde Corp., B-235202, Aug. 14, 1989, 68 Comp. Gen. ___, 89-2 CPD ¶ 136. Similarly, we think that the contracting officer retains the discretion to exclude from the competition an offeror who is suspended or proposed for debarment during a negotiated procurement. Accordingly, we find that HUD did not act unreasonably in excluding Darby from the competitive range as a result of the LDP and the proposed debarment which rendered the firm ineligible for award at that stage of the procurement.

With respect to whether HUD has put forth sufficient evidence to show the reasonableness of its decision to issue an LDP and proposed debarment to Darby, the record demonstrates that HUD alleges that Darby participated in a scheme to process 33 multifamily housing units for insurance purposes through straw buyers, thereby obtaining insured mortgage proceeds in the amount of \$485,000, without making an investment in the properties as required under the Single Family Insurance Program of the National Housing Act, 12 U.S.C. § 1709(b). HUD also alleges that Darby acted as a straw buyer itself on seven properties, resulting in \$73,000 in net proceeds, and falsely certified that the loan applications were for refinancing. All straw buyers, including Darby, have defaulted on the loans, resulting in possible Federal Housing Authority (FHA) mortgage insurance losses estimated at \$31,386,122.

Under HUD's LDP Regulations, 24 C.F.R. § 24.705(a), cause for an LDP is established where any of the following are found: approval of an applicant for insurance would constitute an unsatisfactory risk; irregularities in contractor's past performance in a HUD program; failure to proceed in accordance with HUD's regulations; false certification with respect to any HUD program; and commission of an offense that is cause for debarment under 24 C.F.R. § 24.305, including failure to pay a number of outstanding debts owed to a federal agency.

Darby argues that the transcript the firm submitted to our Office of the informal June 6, 1989, LDP conference shows that the firm can refute all of HUD's allegations, and that HUD officials were unclear on how Darby should have completed the certifications on the loan applications.

In response, HUD identified the June 19 Notice of LDP detailing the charges against Darby; an audit report for the Assistant Secretary for Housing--Federal Housing Commissioner on abuses of the Single Family Insurance Program prepared by HUD's Inspector General for Audit; a 1989 Field Study Report Memorandum for the Assistant Secretary for Housing on the type of scheme used by Darby; the HUD forms and settlement statements prepared by Darby for six properties; the transcript of a 1986 HUD interview with Darby; and the August 28, 1989, complaint filed by HUD in support of the LDP and the proposed debarment of Darby.

From our review of the record, applying the standard set forth above, we conclude that HUD has made a showing sufficient to support its decision to issue an LDP and a proposed debarment to Darby, and, as a result, not to include Darby in the competitive range for this procurement.

(Darby has not challenged HUD's procedures in issuing the LDP or the proposed debarment.) The record goes into great depth in detailing, particularly in the 269 paragraphs and 41 counts in the debarment complaint, Darby's involvement in the scheme to process multifamily housing units in the two subdivisions in South Carolina in order to obtain HUD/FHA single family mortgage insurance for 40 properties to pay off construction loans and obtain additional funds. Darby's general statements of denial of these allegations and the submission of a transcript of the informal LDP hearing do not adequately refute the evidence presented by HUD in support of its decisions.

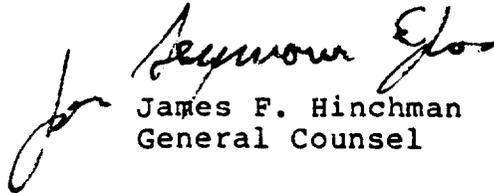
With respect to Kerr's protest, in order for a party to have its protest considered by our Office, that party must be "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or failure to award the contract." Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3551(1) (Supp. IV 1986); Bid Protest Regulations, 4 C.F.R. § 21.0(a) (1989).

Here, Kerr, the vice-president of Darby, did not submit a proposal in response to the solicitation although he had the opportunity to do so. See Robert Wall Edge--Reconsideration, B-234469.2, Mar. 30, 1989, 68 Comp. Gen. _____, 89-1 CPD ¶ 335. Moreover, because Darby is an intermediate party of greater interest in the propriety of the award than Kerr, we consider Kerr's position to be too remote to establish interest within the meaning of CICA and our Regulations. See Bonar August Sys., B-231366, May 23, 1988, 88-1 CPD ¶ 489. Accordingly, Kerr would not be an interested party for the purposes of filing a protest against award of this contract.

Further, we do not find Kerr's additional argument--that he would have taken the necessary steps to submit a proposal himself had he not allegedly been advised by HUD that Darby would not be excluded from the competition based on property foreclosures--to be persuasive, since offerors who rely on oral statements by agency employees do so at their own risk, Tenavision, Inc., B-221540, Apr. 21, 1986, 86-1 CPD ¶ 387, and, in any case, HUD denies that the information Kerr received was incorrect. According to HUD, the contracting

officials correctly advised Darby^{1/} and Kerr that certain loan foreclosures would not affect Darby's eligibility for award of a contract. At the time of the conversation, however, the decision had not yet been made to issue the LDP or proposed debarment. Moreover, HUD is not responsible for advising offerors as to whether a business should be purchased so as to effect an assignment of a proposal.

The protests are denied.


James F. Hinchman
General Counsel

^{1/} In its comments on the agency report, Darby argues that it would not have incurred the expense of preparing a proposal had it not received the allegedly misleading advice from HUD regarding its eligibility for award. This argument is untimely since it could have been raised in the initial protest, but was not raised until Darby's comments on the report. In any event, our conclusion with regard to Kerr's argument on this issue applies equally to Darby's argument.