**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Shel-Ken Properties, Inc.; McSwain and Associates, Inc.--Requests for Reconsideration

File: B-261443.3; B-261443.4

Date: May 20, 1996

Charlotte C. Jenkins, and Michael J. McSwain, for the protester.
Robert Arsenoff, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Requests for reconsideration are denied where protesters have not shown errors of fact or law or information not previously considered which warrant reversal or modification of earlier decision.

DECISION

Shel-Ken Properties, Inc. and McSwain & Associates, Inc. request reconsideration of our decision, Shel-Ken Properties., Inc.; McSwain and Assocs., Inc., B-261443; B-261443.2, Sept. 18, 1995, 95-2 CPD ¶ 139, dismissing in part and denying in part their protests against the award of contracts to Intown Properties, Inc. and Prose, Inc., under request for proposals (RFP) No. 49-94-053, issued by the Department of Housing and Urban Development (HUD) for real estate management services (REAMS) in North Carolina.

We deny the requests for reconsideration.

Our earlier decision: (1) dismissed both protesters' allegations that Intown's post-award subcontracting with former REAMS contractors participating in the competition indicated the existence of collusive bidding; (2) dismissed Shel-Ken's allegation that awards were invalid because the awardees' offers had expired; (3) dismissed a common allegation that the agency's decision to override the statutory stay of contract performance was improper; (4) dismissed a common allegation that the procurement should have been set aside for the exclusive participation of small business; (5) dismissed McSwain's allegation that neither awardee possessed a North Carolina real estate broker's license prior to award; and (6) denied each protester's allegation that its own proposal was misevaluated.

Common to the requests for reconsideration is an objection to our treatment of the "collusive bidding" issue; the remaining five parts of our decision are the subject of

individual requests for reconsideration. Accordingly, we will first consider the common issue and then do a separate analysis of the individual requests. As explained below, neither reconsideration request meets the standard for changing our earlier decision--i.e., neither presents a showing of errors of fact or law or information not previously considered which warrant reversal or modification of the decision. Bid Protest Regulations, 4 C.F.R. § 21.12(a) (1995).

"COLLUSIVE BIDDING"

Both protesters alleged that Intown's post-award subcontracting with former REAMS contractors that participated in the competition was indicative of an attempt to manipulate the procurement in an improper manner. We dismissed this allegation because such allegations concern possible criminal implications which are not for resolution by this Office; rather, as we noted, if the contracting officer suspected collusion, the matter was appropriate for referral to the Attorney General.

In each request for reconsideration, the parties suggest that "collusion" was not the thrust of their protests; rather, they assert, their protests involved the possible violation of Federal Acquisition Regulation (FAR) § 52.214-17, a clause which requires "bidders" to disclose affiliations and is included in solicitations when the contracting officer deems it necessary to ensure against improper bidding practices--e.g., collusive bidding.

A review of the issue as raised by each protester during the course of the protests reveals that neither firm coherently explained how post-award subcontracting necessarily leads to a conclusion that the firms were affiliated at the time offers were submitted. Nonetheless, as we have consistently held, an improper procurement practice such as collusion is for the contracting officer to consider in determining responsibility and in deciding whether to refer the matter to the Department of Justice. Conva-Lance, Inc., B-244578, July 5, 1991, 91-2 CPD ¶ 31.

SHEL-KEN'S REQUEST FOR RECONSIDERATION

At the outset we note that Shel-Ken states that our analysis of the evaluation of its own proposal--which led to its elimination from the competitive range in this negotiated procurement--is "no longer an issue with our firm." Notwithstanding this position, Shel-Ken takes further issue with our treatment of two dismissed allegations--i.e., the issues involving expired bids and the unrestricted nature of the procurement.

Expired Bids

Shel-Ken alleged that the awards were invalid because the awardees' "bids" were allowed to expire prior to the mailing of the notices of award. The agency responded to this allegation and we found that Shel-Ken had abandoned the issue for failing to rebut the agency's position in its comments on the agency report.

Shel-Ken points to certain cryptic remarks contained in a submission styled a rebuttal to the agency report which is principally a personal attack on agency counsel. Even if we were to consider these remarks as a substantive rebuttal, the outcome would not change because where, as here, companies offer at least the minimum acceptance period set forth in the RFP, they may unilaterally revive their offers without any resulting prejudice to other offerors. Rentfrow, Inc., B-243215, July 5, 1991, 91-2 CPD ¶ 25.

Failure To Set Aside For Small Businesses

Shel-Ken alleged that the RFP should have been set aside for small businesses. We dismissed the allegation as untimely because it involved a challenge to an alleged solicitation impropriety which was not protested prior to the time set for receipt of initial proposals. In its request for reconsideration, Shel-Ken characterizes the issue as a challenge to an undisclosed failure on the part of the contracting officer to consider past small business participation before issuing the RFP. This line of argument is not supported by the record, which indicates that Shel-Ken believed, prior to the time set for closing, that a set-aside was supportable; Shel-Ken itself references a 1993 document purporting to underline its position and refers to its knowledge of expressions of interest from small businesses to HUD. Thus, there is no basis for disturbing our earlier decision in this regard.

MCSWAIN REQUEST FOR RECONSIDERATION

Broker's Licenses

McSwain alleged that neither awardee possessed a state broker's license prior to award and argued that this precluded the acceptance of their proposals. Noting that the only reference of record to licensing was contained in pre-bid conference minutes, which were not incorporated into the RFP, we dismissed the allegation because, without a specific requirement that a license be obtained prior to award, the contracting officer was not obligated to consider whether an offeror had such license as a precondition to award. McSwain disputes our finding that the minutes were not incorporated into the RFP and urges that the minutes establish a precondition to award.

Even if the record had established that the minutes were incorporated, the result would not change. The reference to licenses merely advises offerors that a broker's license will be required for performance and that evidence of licensing "should" be submitted with initial offers. It does not constitute a specific requirement for possession of a license prior to award. Accordingly, the contracting officer had no basis to reject the offers as argued by McSwain. Honolulu Marine, Inc., B-248380, Aug. 6, 1992, 92-2 CPD ¶ 87.

Stay of Contract Performance

McSwain objected to the agency's decision to override the statutory stay of contract performance. Citing Harding Lawson Assocs.; ICF Technology, Inc.--Recon., B-239231.7; B-239231.8, Dec. 4, 1990, 90-2 CPD ¶ 450, we dismissed the allegation because our jurisdiction does not encompass the review of such determinations. McSwain bases its reconsideration request on a reading of that decision which would first have us find that an agency's determination to override was proper before we declined to review it; this is simply a misreading by the protester of our Office's holding in that case. For an expended statement of the law in this regard, see Mark Group Partners and Beim & James Properties III, Joint Venture, B-255762 et al., Mar. 30, 1994, 94-1 CPD ¶ 224, in which we stated:

> "Where an agency determines that urgent and compelling circumstances require performance notwithstanding the stay provisions of the Competition in Contracting Act . . ., its only obligation is to inform our Office of that decision. . . . There is no requirement that a protester be allowed to rebut the agency's finding, nor do we review such a determination."

The requests for reconsideration are denied.

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