



Comptroller General  
of the United States

Washington, D.C. 20548

148141

## Decision

**Matter of:** Commercial Land Title of San Antonio, Inc.

**File:** B-249969

**Date:** December 8, 1992

Donald E. Barnhill, Esq., East & Barnhill, for the protester.  
Thomas A. Rutledge, Esq., Sneed, Vine, Wilkerson, Selman & Perry, for Texas Land Title Assoc., an interested party.  
Michael D. Weaver, Esq., Department of Housing and Urban Development, for the agency.  
Peter A. Iannicelli, Esq. and Jerold D. Cohen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. Nonbidding protester alleging that invitation for bids for real estate closing services unduly restricted competition is an interested party eligible to protest, because if the protest is successful and the procurement resolicited without the restrictive provision, the protester will be eligible to compete.

2. Invitation for bids (IFB) for realty closing services to be performed in Texas was improperly restricted to attorneys only where Texas statute, case law and Attorney General's opinion do not prohibit protester--a title company--from hiring an independent law firm to perform the law-related services required and then seeking reimbursement for costs so incurred.

### DECISION

Commercial Land Title of San Antonio, Inc., protests that invitation for bids (IFB) No. 37-92-113, issued by the Department of Housing and Urban Development (HUD) for real estate closing services, unduly restricts competition. Commercial Land Title objects to the IFB's requirement that only attorneys licensed by the State of Texas may bid for the contract.

We find that the attorney-only requirement is overly restrictive and, therefore, we sustain the protest.

Issued on July 21, 1992, by HUD's Fort Worth Regional Office, the IFB requested bids to provide real estate closing services in the San Angelo area of Tom Green county, Texas, for single-family properties owned by HUD. The IFB indicated that the contract would be a fixed-price, indefinite quantity contract for a basic period of 1 year with options for 2 additional years; bids were to be based on a fixed-price per closing. Commercial Land Title filed this protest in our Office on August 19, 1 day before the closing date for submission of bids. Award of a contract has been withheld award pending resolution of the protest.

The requirement that all bidders be attorneys was contained in the cover letter to the IFB as well as in the IFB itself. The IFB stated:

"License. A bidder on this HUD sales closing contract must be able to demonstrate:

- a. A current license to practice law in the State of Texas;
- b. Good standing with the State Bar of Texas;
- c. Engagement in the practice of law under its own name and not as an employee or agent of a non-attorney."

As a preliminary matter, HUD argues that the protest should be dismissed because Commercial Land Title is not a licensed attorney, was not eligible to bid, and did not submit a bid. HUD argues that Commercial Land Title therefore is not an interested party eligible to protest under our Bid Protest Regulations.

We find no merit in HUD's argument. Commercial Land Title was precluded from bidding by the IFB's requirement that all bidders be attorneys. We have held that a protester is an interested party where the protester alleges that the IFB is restrictive, and the firm would have an opportunity to bid if the procurement is resolicited without the restrictive requirement. See Remtech, Inc., B-240402.5, Jan. 4, 1991, 91-1 CPD ¶ 35; H.V. Allen Co., Inc., B-225326 et al., Mar. 6, 1987, 87-1 CPD ¶ 260.

The agency contends that the attorney-only restriction is necessary under section 83.001 of the Texas Government Code Annotated (Vernon 1992), which states:

"(a) A Person, other than a person described in Subsection (b), may not charge or receive, either directly or indirectly, any compensation for all

or any part of the preparation of a legal instrument affecting title to real property, including a deed, deed of trust, note, mortgage, and transfer or release of lien.

"(b) This section does not apply to:

(1) an attorney licensed in this state;

(2) a licensed real estate broker or salesman performing the acts of a real estate broker pursuant to The Real Estate License Act . . .; or

(3) a person performing acts relating to a transaction for the lease, sale, or transfer of any mineral or mining interest in real property.

"(c) This section does not prevent a person from seeking reimbursement for costs incurred by the person to retain a licensed attorney to prepare an instrument."

Before issuing the IFB, the contracting activity solicited the opinion of HUD's Regional Office of Counsel to find out whether the Texas law required licensed attorneys to perform the services required under the contract. After reviewing State statutes, case law, and a Texas Attorney General opinion, the regional counsel concluded that only licensed attorneys could legally perform all of the required services and recommended that the IFB be restricted on that basis.

Commercial Land Title contends that the requirement that bidders be licensed attorneys is overly restrictive of competition. The protester acknowledges that several of the IFB's required services must be performed by a licensed attorney. However, the protester argues that the remaining services can legally be performed by a title company such as itself. Commercial Land Title states that it should be allowed to compete and, if it is awarded the contract, it will subcontract with an attorney to perform those activities that are required to be done by a lawyer under Texas law.

HUD points out that the IFB solicits a variety of closing services, including the entire process of closing on sales of HUD-owned properties from the contract of sale until the proceeds are properly transmitted to HUD. Among other things, the contractor will be required to do law-related work such as reviewing title information, preparing warranty deeds, and explaining all closing papers and documents to purchasers.

HUD argues that award of a contract to a non-attorney could result in violation of section 83.001 if, for example, the contractor charged the government a fee for having a licensed attorney prepare a deed. HUD cites a 1988 opinion issued by the Attorney General of the State of Texas<sup>1</sup> for the proposition that section 83.001 is to be given a broad interpretation concerning what constitutes accepting compensation for preparing legal instruments.

HUD also cites as support for the restriction a 1944 ruling by the Supreme Court of Texas, Hextar Title & Abstract Co. v. Grievance Comm., Fifth Congressional Dist., State Bar of Tex., et al., 179 S.W.2d 946 (1944). There, the Court affirmed the Court of Civil Appeals' judgment enjoining a title and abstract company from practicing law by drawing instruments affecting title to real property, furnishing opinions on titles to real estate, and advising interested persons on the legal effect of instruments affecting title.

Because significant portions of the required work involve the practice of law, including preparation of legal instruments affecting title, HUD determined that award to a non-attorney could lead to the unauthorized practice of law and might result in litigation to enjoin performance under the contract. As its functions would be severely disrupted in such event, HUD stipulated that all bidders must be licensed attorneys in the State of Texas.

Where a contracting agency determines that the lack of a particular State license might result in enforcement action by the State to prevent performance and might thereby disrupt performance by an unlicensed contractor, the contracting officer may incorporate a requirement for that license as a prerequisite to an affirmative determination of responsibility, and thus refuse award to an unlicensed bidder. See What-Mac Contractors, Inc., 58 Comp. Gen. 767 (1979), 79-2 CPD ¶ 179. Our Office, however, will object to a contracting agency's determination of its need in that regard if the determination is shown to be unreasonable. See Dynateria, Inc., B-222773, Aug. 5, 1986, 86-2 CPD ¶ 157.

The purpose of section 83.001 of the Texas Government Code is to prevent the unauthorized practice of law that occurs when a person other than an attorney prepares legal instruments affecting title to real property, and to protect the public interest in having clear legal titles.<sup>2</sup> However, the provision does not mandate that only attorneys are eligible to perform closings in the state of Texas. For

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<sup>1</sup>Op. Atty. Gen. 1988, No. JM-943.

<sup>2</sup>Op. Atty. Gen. 1988, supra.

example, the statute specifically states that licensed real estate brokers or salesmen performing the acts of real estate brokers are exempted from the prohibition. The statute also specifies that it does not prevent a person from seeking reimbursement for costs incurred by the person to retain a licensed attorney to prepare an instrument.

Neither the Hextar case nor the Texas Attorney General's opinion relied upon by HUD supports the agency's decision to restrict this procurement to attorneys. Our analysis of both, as well as the above-quoted Texas statute, leads us to conclude that a title company could properly perform the contract, provided the title company subcontracted all law-related work to an independent attorney and then recouped from HUD only the fees (without profit) spent to retain the attorney for the law-related services. Basically, this is the contracting arrangement that Commercial Land Title states it will use if awarded this contract.

The Hextar decision does not require that only lawyers be allowed to bid for this closing services contract. In Hextar, the Supreme Court of Texas held that Hextar was engaged in the unauthorized practice of law because the title and abstract company was performing law-related services in connection with sales of realty in which it held no interest. Among the law-related services performed illegally by Hextar were: furnishing opinions as to conditions of titles to real estate; preparing legal instruments affecting title; and holding itself out to the public as possessing authority to perform such acts. The Court specifically ruled that Hextar's activities were illegal even though Hextar employed four licensed attorneys to do its law-related work. Furthermore, the Court found that Hextar was receiving compensation for the law-related services it provided even though Hextar did not list a separate charge for those services; Hextar's compensation for the law-related portion of its services was included in the overall fee or premium it charged for issuing title insurance and related services.

However, the Supreme Court of Texas did not hold that a title company was prohibited from performing all real estate closing services that do not amount to practicing law, and hiring an independent law firm to perform those functions that do constitute practicing law as Commerce Land Title indicates it will do if it is allowed to bid and if awarded the HUD contract. The present IFB solicits a variety of services, most of which could be performed by a non-attorney. For example, the contractor will be required to: establish individual property files; arrange and coordinate closing dates; verify that rental monies due HUD have been paid; accept payment; collect recording fees; and record the deed. Examples of required law-related services include:

reviewing title information; preparing warranty deeds; and explaining all closing documents to purchasers.

The Texas Attorney General's Opinion cited by HUD also does not state that title companies are prohibited from performing closing services and subcontracting with an independent law firm to do those tasks that are law-related. Essentially, the Attorney General (interpreting the predecessor statute to section 83.001) stated that Texas law envisioned a liberal interpretation of what constitutes the practice of law. He further indicated that if a savings and loan association charged a fee for preparing legal instruments affecting title to realty, it would be violating the Texas law.

In view of our finding that HUD restricted the procurement more stringently than necessary to satisfy HUD's needs, we find that the attorney-only requirement unduly restricted competition.<sup>3</sup> By letter of today, we are recommending to the Secretary of Housing and Urban Development that HUD cancel the IFB and resolicit the requirement using a solicitation that will allow title companies to bid providing they can show that they will subcontract with licensed attorneys for those services--such as reviewing title information, preparing warranty deeds, and explaining all closing papers and documents to purchasers--that must be done by a licensed attorney under Texas law.

Accordingly, we sustain the protest. Also, Commercial Land Title is entitled to the costs of filing and pursuing the protest, since the firm has successfully challenged an unduly restrictive specification. 4 C.F.R. § 21.6(d) (1992).

*for Milton T. Hoveler*  
Comptroller General  
of the United States

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<sup>3</sup>We recently found that HUD properly canceled an IFB in order to require bidders to establish that closing services, such as preparing legal documents affecting title to real property, would be performed by an attorney in accordance with Texas law. Renic Government Systems, B-249484, Nov. 9, 1992, 92-2 CPD ¶ \_\_\_\_\_. There, however, the solicitation did not require any attorney performance, and the specific language HUD might adopt was not an issue.