

**DECISION**



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

**FILE:** B-206152

**DATE:** January 24, 1983

**MATTER OF:** Bradley Construction, Inc.

**DIGEST:**

1. Complaint against action of grantee filed with GAO 16 working days after an adverse agency decision will be considered since complaint was filed within a "reasonable" time.
2. Indian Housing Authority (IHA) had a reasonable basis for rejecting bid submitted by firm that by bid opening had not demonstrated to IHA's satisfaction through a required "prequalification statement" that it was a qualified Indian-owned organization or Indian-owned enterprise.

Bradley Construction, Inc. (Bradley), has filed a complaint concerning the refusal of the Zuni Housing Authority (ZHA) to consider its bid submitted in response to an invitation for bids for a construction contract for three Demonstration Housing Units in the Zuni Pueblo Indian Reservation for project No. NM19-11. Bids were limited to 100-percent Indian-owned organizations and Indian-owned economic enterprises and bid opening was scheduled for December 11, 1981. Bradley contends that the ZHA arbitrarily and capriciously refused to consider its bid which was returned unopened. Bradley also objects to the subsequent issuance of another solicitation which was not limited to Indian-owned firms and the award to Hunt Building Corporation (Hunt).

Based upon our review of the record, we deny the complaint.

Background

On January 16, 1976, the United States of America and the ZHA entered into Annual Contributions Contract No. SF-651, pursuant to the United States Housing Act of 1937, 42 U.S.C. § 1437 et seq. (1976), and the Department of

Housing and Urban Development Act, 42 U.S.C. § 3531 (1976). Under the Annual Contributions Contract (ACC) the ZHA agrees to develop and operate low-rent housing projects and the Government agrees to provide financial assistance for such projects in the form of annual contributions. On July 13, 1981, the United States Department of Housing and Urban Development (HUD) and the ZHA entered into an Amendatory Agreement to the Annual Contributions Contract, concerning project No. NM99-11 for the development of three units of housing at a maximum development cost of \$750,000.

The IFB provided that any firm seeking to qualify as an Indian contractor submit evidence 15 days prior to bid opening sufficient to establish to the satisfaction of the ZHA its qualifications as an Indian organization or an Indian-owned economic enterprise. Pursuant to 24 C.F.R. § 805.204(a)(3), this prequalification package also was to contain sufficient evidence to demonstrate that the prospective contractor had the technical, administrative and financial capability to perform contract work of the size and type involved and within the time provided under the proposed contract.

On December 9, 1981, the Board of Commissioners reviewed Bradley's November 25, 1981, submittal for qualification as an Indian organization or an Indian-owned economic enterprise. Based on the evidence submitted, the ZHA determined that Bradley did not have the technical, administrative and financial capacity to perform contract work of the size and type involved within the time provided under the proposed contract. Bradley was informed of this determination by mailgram on December 9, 1981.

At the December 11, 1981, bid opening, the only bid received was the one submitted by Bradley which was rejected by the ZHA and returned unopened. On December 23, 1981, HUD authorized the ZHA to readvertise for bids without limiting the advertisement to Indian-owned organizations or Indian-owned economic enterprises and on the same date ZHA denied Bradley's protest to it regarding the rejection of its bid.

HUD regulation, at 24 C.F.R. § 805.204(a)(2), provides that if an Indian Housing Authority (IHA), after attempting to afford Indian preference in the award of the contract fails to receive an acceptable bid from one or more qualified Indian enterprises, it:

"\* \* \* may advertise for bids or proposals without limiting the advertisement to Indian Organizations and Indian-owned Economic Enterprises and as in all cases shall accept the lowest responsible bid or the best proposal."

Four bids were received on January 20, 1982, and the low bid was submitted by Hunt in the amount of \$521,000. Bradley submitted the second low bid of \$578,000. Award was made on February 25, 1982, to Hunt as the low responsive bidder.

Bradley protested to our Office by mailgram dated January 18, 1982, received here on January 20, 1982, the rejection of its unopened bid and the subsequent readvertisement. In addition Bradley sent another mailgram dated January 20, 1982, which was received here on January 27, 1982, protesting the new bid opening of January 20, 1982, because it felt its bid of December 11, 1981, met the ZHA requirements. In effect, the later mailgram was a restatement of the earlier one.

While this procurement is not a direct Federal procurement and, therefore, not reviewable under our Bid Protest Procedures, 4 C.F.R. part 21 (1982), we have recognized that contracts pursuant to ACC's are reviewable under our Public Notice entitled "Review of Complaints Concerning Contracts Under Federal Grants." 40 Fed. Reg. 42406 (1975). See Curtiss Development Co. and Shipco, Inc., 61 Comp. Gen. 85 (1981), 81-2 CPD 414.

#### Timeliness

HUD contends that Bradley's complaint is untimely under 4 C.F.R. § 21.2(a) (1982) of our Bid Protest Procedures since it was not filed within 10 days of the ZHA's decision to reject it. We point out that since this is not a direct Federal procurement, the time limits of our Bid Protest Procedures are not literally applicable to our review of grant complaints but we require that complaints be filed within a reasonable time. Urban Transportation Development Corporation, Ltd., B-201939, August 7, 1981, 81-2 CPD 107.

Bradley protested the ZHA's rejection of its bid on December 11, 1981, and, as noted earlier, the ZHA denied the protest on December 23, 1981, which Bradley should have received within 1 calendar week. On January 8, and 12, 1982, Bradley sent letters to HUD appealing the ZHA decision and providing further documentation concerning its Indian status. On January 13, 1982, HUD responded to Bradley's January 8, 1981, letter concerning the December 11, 1981, bid opening. HUD found that the ZHA had complied with the rules and regulations governing the development of Indian housing and with the IFB on project NM19-11.

We find Bradley's complaint dated January 18, 1982, and received on January 20, 1982, for consideration on the merits since we believe its complaint, filed 16 working days after the ZHA denied its protest, was filed within a "reasonable" time after the basis was known. Contrary to HUD's assertion, we find the first mailgram adequately stated Bradley's grounds for complaint and the second mailgram added nothing which would require our Office to use January 27, 1982, as the filing date.

Essentially, the basis of Bradley's protest is that the ZHA improperly returned its bid unopened after determining that the Bradley prequalification package failed to demonstrate that Bradley had the "prerequisite technical, administrative and financial capability to perform contract work of the size and type involved within the time provided under the proposed contract." Bradley also protests the resolicitation on the ground that it was not required since an award could have been made to Bradley under the original solicitation.

Pursuant to the Indian Self-Determination Act, 25 U.S.C. § 450e (1976), HUD regulations permit an IHA to include in solicitations special HUD-approved Indian preference requirements. HUD regulations at 24 C.F.R. § 805.204 provide that an IHA shall to the "greatest extent feasible" give preference in the award of contracts in connection with a project to Indian organizations and Indian-owned economic enterprises. Here the ZHA issued an IFB limited to 100-percent Indian-owned organizations and

Indian-owned economic enterprises. The IFB required a prospective contractor seeking to qualify for the preference to submit, 15 days prior to bid, opening evidence sufficient to establish its qualifications as an Indian organization or Indian-owned enterprise.

24 C.F.R. § 805.204 sets forth the HUD regulations regarding Indian preference. Section 805.204(a)(3) provides:

"A prospective contractor seeking to qualify as an Indian Organization or Indian-owned Enterprise shall submit with or prior to submission of his bid or proposal:

"(i) Evidence showing fully the extent of Indian ownership and interest.

"(ii) Evidence of structure, management and financing affecting the Indian character of the enterprise, including major subcontracts and purchase agreements; material or equipment supply arrangements; and management, salary or profit-sharing arrangements; and evidence showing the effect of these on the extent of Indian ownership and interest.

"(iii) Evidence sufficient to demonstrate to the satisfaction of the IHA and HUD that the prospective contractor has the technical, administrative and financial capability to perform contract work of the size and type involved within the time provided under the proposed contract \* \* \*."

HUD reports that the Board of Commissioners of the ZHA, after reviewing Bradley's prequalification package, determined from the documents submitted that Bradley did not have the technical, administrative and financial capacity to perform the work of the size and type involved and within the time provided under the proposed contract. HUD contends that the record shows that the ZHA's evaluation of Bradley's

prequalification package was in accordance with established criteria and was based on the reasoned judgment of the ZHA Board of Commissioners.

HUD contends that the review of the prequalification statement is analogous to a responsibility determination. Bradley, following up on this argument, contends that since its qualifications were a question of responsibility it should have been determined after bid opening in accordance with Federal Procurement Regulations (FPR) § 1-1.1205-2 (1964 ed.) (Second Amendment, August 1971). Bradley further argues that the ZHA's decision to disqualify its firm based on issues of responsibility was unreasonable.

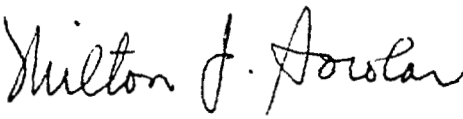
Initially, we point out that since an IHA procurement is involved rather than a direct Federal procurement, the FPR's are not applicable. Further, although we agree that the review of the prequalification package was analogous to a nonresponsibility determination, the review was made not for the purpose of determining a prospective contractor's capability to perform a contract but for the purpose of determining whether Bradley was eligible for Indian preference pursuant to HUD regulations. Under that regulation IHA are permitted to require such information prior to the submission of bids as was, therefore, properly done here.

With regard to the reasonableness of that determination, we believe the following principles are applicable. In direct Federal procurements we have held that a procuring agency has broad discretion in making responsibility determinations. Deciding a prospective contractor's probable ability to perform a contract involves a forecast which must of necessity be a matter of judgment. Such judgment should be based on fact and reached in good faith. However, it is only proper that it be left largely to the sound administrative discretion of the contracting agency involved. The agency logically is in the best position to assess responsibility, must bear the major brunt of any difficulties experienced in obtaining required performance, and must maintain day-to-day relations with the contractor. 43 Comp. Gen. 228 (1963). Thus, we will not disturb an agency determination of nonresponsibility unless it lacks a reasonable basis. See The Mark Twain Hotel, B-205034, October 28, 1981, 81-2 CPD 361.

In our view, the ZHA had a reasonable basis for its determination that Bradley was not qualified to perform the work called for in the IFB based upon the information furnished by Bradley on November 25, 1981, which failed to show that the firm had performed work of the size involved here. In 7 years, Bradley had received only one contract of this magnitude, which it was currently completing. Further, additional information submitted by Bradley during the course of its appeals to the ZHA and HUD in support of its qualifications is not germane. It was the obligation of Bradley to submit with its prequalification package all information available to support its qualifications. At the time of the determination by the ZHA, the only evidence submitted by Bradley bearing on its qualifications was considered and reasonably determined inadequate.

In view of our conclusion that Bradley's bid was properly rejected under the first solicitation and it was not the low bidder under the second solicitation, we find it unnecessary to consider Bradley's allegations concerning what it characterizes as "Inferences of Fraud, Gross Mismanagement of Abuse," such as the failure of HUD to cancel the resolicitation and an alleged change in the cost limitation applicable to the procurement.

We deny Bradley's complaint.

*for*   
Comptroller General  
of the United States