

DECISION

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

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FILE: B-215007

DATE: September 25, 1984

MATTER OF: Claremont Development Associates

DIGEST:

1. State finance agency's attempt to clarify or even expand the role of the vice president of one of the firms proposed by a developer to serve as its general contractor for a federally-assisted public housing project does not violate federal statutes or regulations and is consistent with state law. The fact that clarification occurred after proposal submission does not establish that the housing authority accepted a late proposal, since the record does not support an allegation that the general contractor has been substituted for the developer.
2. Rule that if correction of inaccuracies in evaluators' comments does not change the relative standing of offerors, the inaccuracies do not provide a basis to sustain a protest, applies to a complaint concerning selection of a developer by a federally-assisted public housing authority.

This is a complaint against the proposed selection of a developer for two public housing projects owned by the Boston Housing Authority, a recipient of financial assistance from the Department of Housing and Urban Development (HUD) under the United States Housing Act of 1937, as amended, 42 U.S.C. § 1437 (1982).

Claremont Development Associates alleges that after proposal submission, the Authority improperly permitted another developer to substitute for or join H. J. Davis Development Corporation, the firm selected to rehabilitate existing housing and construct new units at the projects. Such action, Claremont contends, is tantamount to acceptance of a late proposal. Claremont also alleges that

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the Authority failed to give it sufficient credit in evaluating its proposed use of minority subcontractors.

We deny the complaint.

Background:

As the Authority's solicitation, issued in October 1983, indicates, the "turnkey" method of construction will be used to rehabilitate three high-rise buildings at Bromley Park in the Jamaica Plain area of Boston and two at the Mission Hill Extension in Roxbury. In addition, three high rises at the Mission Hill site will be demolished and replaced with low-rise, lower-density buildings. In all, 302 units are involved.

Under the turnkey method, as described in HUD regulations, a public housing authority solicits proposals, selects a developer, and presents a proposal that includes the developer's submission to HUD for approval. This provides the basis for an Annual Contributions Contract between the public housing authority and HUD. The housing authority, with HUD approval, then sells the buildings to be rehabilitated or the site on which new buildings are to be constructed to the developer. Under the sales contract, the developer must obtain construction financing and construct the project according to agreed-upon plans and specifications. Upon satisfactory completion, the housing authority, with HUD funds, repurchases and operates the project as low-income public housing. See 24 C.F.R. § 841.102(b) (1983).

HUD's Public Housing Development Handbook, 7417.1 REV-1 (1980), requires the public housing authority to select the turnkey developer in a manner that is consistent with state and local requirements, the federal regulations included in 24 C.F.R. Part 841, and the selection and evaluation procedures set forth in the handbook. In addition, the standard Annual Contributions Contract requires the housing authority to adhere to the basic principles of competition inherent in federal procurement. See Guarantee Electric Co., B-201697, March 18, 1983, 83-1 CPD ¶ 276.

In this case, HUD has agreed to provide loans and annual contributions totaling \$20.4 million. Because substantial work is required to correct substandard conditions at the two projects--conditions that in 1980 led

the Massachusetts Superior Court to place the Boston Housing Authority in receivership--and because the cost is expected to exceed HUD funding limitations, federal assistance here will be supplemented with between \$6 and \$7 million in state funds. Legislation to provide this additional amount was pending at the time proposals were solicited.

Relevant Solicitation Provisions:

The solicitation in question, which was amended to advise developers of the passage of the state legislation, specifically stated that the Massachusetts Housing Finance Agency (MHFA) would participate in the selection of the developer. It also stated that under state law, MHFA's approval of the developer as an eligible borrower would be required, although use of state funds for construction financing theoretically remained optional.

Prospective developers were asked to submit, with their proposals, information as to their own and their proposed general contractor's experience, as well as personal financial and credit statements for both. In addition, solicitation Appendix O, covering construction loan standards and forms, specifically stated that the "Contractor must execute a corporate or personal guarantee of completion" satisfactory to the executive director of MHFA.

Developer Selection:

On January 17, 1984, six proposals were submitted to the Boston Housing Authority. The Authority evaluated them under a 94-point scheme, approved by HUD, and rated the two best as follows:

| | Maximum | Davis | Claremont |
|---|-----------|-----------|-----------|
| Site, Design, and Construction Quality | 54 | 39 | 33 |
| Developer Qualifications | 20 | 10 | 20 |
| Price | <u>20</u> | <u>10</u> | <u>5</u> |
| TOTAL | 94 | 59 | 58 |

Following interviews with all prospective developers and a second round with Davis and Claremont, the Authority selected Davis, concluding that its proposal, which was \$1.5 million less than Claremont's, actually represented a much greater value per dollar than indicated by the point scores. Davis's development team,^{1/} identified in its proposal, included the joint venture of CWC Builders/Siegfried Construction Co., Inc. as general contractor and another joint venture, Comunitas and Wallace/Floyd Associates, as architect for the projects.

Claremont's Complaint:

A. Alleged Late Proposal

Claremont's complaint is based upon the fact that, during its review of developers, the MHFA found that relative to others in the competition, Davis lacked corporate experience and expertise. However, MHFA advised the Authority by letter of March 22, 1984, a vice president of one of the firms proposed as Davis's general contractor, CWC Builders, had considerable experience. MHFA stated that if the Authority could confirm that this individual, Gerald Schuster, would "play an active and substantive role in the projects," perhaps by participating in the guarantee to complete them, the Davis team would be acceptable to it.

Claremont, in its complaint, characterizes this as a rejection of Davis by MHFA, and asserts that the only proper action at this point would have been for the Authority to make an award to Claremont. Instead, however, apparently as a result of discussions between the Authority

^{1/} The parties use the terms "developer" and "development team" interchangeably. Developer, however, refers only to the firm with which the public housing authority will contract for the sale and resale of the project. The general contractor and architect, both required to be identified in developers' proposals, along with the developer, comprise the development team.

and Davis, on March 30, 1984, Davis wrote Mr. Schuster summarizing MHFA's concerns. Davis stated:

"[T]o allow the project to proceed with MHFA approval, you have agreed to execute a guaranty of developer performance in a form acceptable to MHFA.

"Please signify your acceptance of the terms of our understanding herein by executing the following."

Mr. Schuster signed this letter below the signature of Jonathan Davis and the typed notation: "The above terms accepted." No other terms and conditions were either included in or attached to the agreement. On the same date, March 30, 1984, MHFA advised Davis in writing that it met threshold requirements for loan purposes, and on April 12, 1984, the Boston Housing Authority formally submitted documents to HUD in which it proposed Davis as developer of the Bromley Park and Mission Hill Extension projects. Due to Claremont's complaint, no further action has been taken.

Claremont argues that the "belated entry" of Mr. Schuster, whom it contends was not a member of the original development team but is a developer in his own right, is a material change, and that the Authority's acceptance of it is tantamount to acceptance of a late proposal. If this is permissible, Claremont argues, all prospective developers should have an opportunity to amend their development teams.

We are not persuaded. First, the Authority recognized Davis's relative lack of experience in awarding it only 10 of a possible 20 points in the category covering "Developer's Qualifications." The evaluation summary states that although Davis is a newcomer to the field of subsidized housing, its proposed project manager is familiar with the turnkey process and the redevelopment of public housing for families and has worked with public housing tenants. In addition, the summary credits CWC Builders with a "very strong track record" as rehabilitation specialists. While Claremont received a full 20 points in this same evaluation category, its overall point score still was not equal to that of Davis.

As the Authority points out in its report to our Office, the ranking was not changed during MHFA's subsequent review of developers' qualifications as eligible borrowers. We therefore do not view MHFA as having rejected Davis. Since state funds were to be used for the project, however, its review was required by state statute and was a condition precedent to the Authority's final selection of a developer and presentation of its proposal to HUD.

In this context, we see nothing improper in the state agency's attempt to clarify or even to expand the role of an individual who, the record shows, is a vice president and one-third stockholder in one of the joint venturers proposed as Davis's general contractor. Nor do we object to this individual's signing the guarantee of completion required by MHFA.

Moreover, in reviewing Davis's eligibility for construction financing, we do not believe that MHFA was limited to considering only the experience of the joint venture, CWC Builders/Siegfried Construction. Rather, MHFA properly considered the separate qualifications of each of the legal entities proposed as general contractor. Cf. Parker-Kerlin, Joint Venture, B-213667, June 12, 1984, 84-1 CPD ¶ 621 (in direct federal procurement, unless terms of joint venture agreement provide that one of the entities no longer exists, separate qualifications may be evaluated).

That the clarification of Mr. Schuster's role occurred after proposal submission and before final selection of a developer does not establish that the Authority accepted a late proposal. The record simply does not support the inference that Claremont would have us make, i.e., that the agreement signed by Mr. Schuster substitutes one developer for another or permits Mr. Schuster to join Davis as the developer with whom the Boston Housing will contract. Nor does it establish that Mr. Schuster or CWC Builders, rather than the joint venture identified in Davis's proposal, will be the general contractor for the public housing projects.

Rather, we believe the actions complained of involve MHFA's consideration of the proposed developer's and the proposed general contractor's capability to perform, and are therefore related to responsibility. As such,

these matters were properly considered and clarified after proposal submission. See Bradley Construction, Inc., 62 Comp. Gen. 138 (1983), 83-1 CPD ¶ 76; Linde Construction, B-206442, March 17, 1983, 83-1 CPD ¶ 271.

Claremont further alleges that Mr. Schuster signed the guarantee of completion as an individual, rather than as a principal of CWC Builders, and argues that this is evidence of a material change in the development team. While it is not entirely clear in what capacity Mr. Schuster signed, since CWC Builders is one of the firms proposed by Davis to serve as general contractor, since Mr. Schuster is a principal of CWC Builders, and since the solicitation specifically stated that the guarantee of completion could be either corporate or personal, we find this argument without legal merit.

In summary, we find no federal statute or regulation that MHFA or the Boston Housing Authority violated, and their actions appear consistent with state requirements.

B. Proposed Minority Subcontractors

Claremont's remaining basis of complaint is that the Authority overlooked a minority subcontractor, proposed for mechanical engineering, in evaluating "Housing and Employment Opportunities," a subfactor under Site, Design, and Construction Quality." Claremont argues that evaluators incorrectly noted that it had not proposed to use any minority business enterprise. If it had been scored properly, Claremont states, it would have received at least three points (rather than zero, meaning "adequate") in this category, and thus would have outranked Davis in total points.

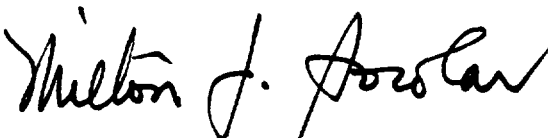
The Authority responds that recognition of Claremont's proposed mechanical engineer would not change overall rankings, since Davis, also rated "adequate," proposed a minority business enterprise for structural engineering. The two developers therefore are considered equal in this category.

In direct federal procurement, we have stated that if correction of inaccuracies in evaluators' comments does not change the relative standing of offerors, the inaccuracies

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do not provide a basis to sustain a protest. Andover Data Services, Inc., B-209243, May 2, 1983, 83-1 CPD ¶ 465. We believe the same rule should apply to complaints concerning procurements by public housing authorities.

Claremont's complaint is denied.

for 
Comptroller General
of the United States