



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** R.J. Crowley, Inc.

**File:** B-253783

**Date:** October 22, 1993

Paralee White, Esq., and Nikki E. Koulizakis, Esq., Cohen & White, for the protester.  
Jacqueline Jackson, Esq., and Justin P. Patterson, Esq., Department of the Interior, for the agency.  
Daniel I. Gordon, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

Agency improperly relied on a non-current list of ineligible contractors as the basis for determining that protester was ineligible for award where the protester was included on that list because of a government computer error; the list was more than 2 months old; and the contracting officer, despite his concern about the currency of the list, failed to consult the available electronic update to the list.

### DECISION

R.J. Crowley, Inc. protests the rejection of its bid under invitation for bids (IFB) No. FWS 10-93-1013, issued by the U.S. Fish and Wildlife Service of the Department of the Interior. The agency rejected the bid because it found Crowley's name contained in the most recent available printed version of the government-wide list of ineligible contractors. Crowley contends that the list relied on by the agency was inaccurate and that the contracting officer failed to take reasonable steps to ascertain whether Crowley was actually an ineligible contractor.

We sustain the protest.

On March 15, 1993, the Fish and Wildlife Service issued the IFB to obtain bids for the construction of a waste-water treatment facility. The procurement is a small business set-aside. Bid opening was held on May 26.

After the lowest of the nine bids received was rejected as nonresponsive, Crowley's offered price of \$269,000 became low. Accordingly, on the morning of June 1, the contracting officer reviewed Crowley's bid to determine its

responsiveness. Having satisfied himself that the bid was responsive, the contracting officer proceeded, later during the morning of June 1, to consider Crowley's responsibility.

As part of that review, he consulted the "Lists of Parties Excluded from Federal Procurement or Nonprocurement Programs" ("the list"), and discovered that Crowley was identified on the list as proposed for debarment and therefore ineligible for award. Apparently because the list was more than 2 months old--it was dated March 1993 and purported to be accurate as of March 15--the contracting officer had concern about the currency of the list. Because of this concern, he made various efforts during the course of the late morning and the afternoon of June 1 to confirm Crowley's current status.

First, the contracting officer telephoned Crowley to inquire whether the company was still proposed for debarment. When he was unable to reach the particular person with whom he asked to speak, he left a message asking that person to return the call. He did not disclose his specific concern. Next, the contracting officer called the General Services Administration (GSA), which publishes the list of ineligible contractors, to ask whether the March list was the most current list. A GSA employee replied that it was. Finally (and still during the course of the afternoon of June 1), the contracting officer attempted to reach the Defense Mapping Agency (DMA), the agency which had proposed Crowley for debarment, but no one at that agency answered the telephone calls.

At the close of business on that day, June 1, the contracting officer determined that Crowley was ineligible for award "[b]ased on the information that had surfaced and [been] verified as being correct." Accordingly, the contracting officer proceeded to review the next low bid and to determine the responsibility of the company which submitted it. After completion of that process on June 14, award was made to that bidder.

Crowley contends that the March list inaccurately identified the company as an ineligible contractor and that the agency acted improperly in relying on that list as a basis for rejecting its bid. In support of its protest, Crowley has submitted a letter from GSA which explains a number of matters relevant here. The following chronology is based on GSA's letter, the accuracy of which is unchallenged.

GSA's letter states that, based on DMA's proposing Crowley for debarment, the company's name was added to the electronic database of ineligible contractors during the week ending November 6, 1992, but was removed the following week after DMA determined that Crowley should no longer be

on the list. That is, Crowley appeared on the list for approximately 1 week.

At some time after Crowley was removed from the list, GSA transferred the electronic database from one computer system to another. During that conversion process, the entire current database was lost, and the data had to be restored from backup computer tapes. Unbeknownst to GSA at the time, the backup tapes included names of companies, such as Crowley, which had recently been removed from the list of ineligible contractors. As a result, in the printed list of ineligible contractors which GSA publishes, Crowley appeared in the issues dated December 1992/January 1993, February 1993, and March 1993 (the March version being the one relied on by the contracting officer in this procurement). That listing was inaccurate--at the time those printed lists were published, Crowley was not debarred, suspended, or proposed for debarment.

GSA discovered its mistake near the end of April 1993 and immediately proceeded to correct the errors in its database. In the meantime, it halted publication of the monthly printed version of the list. For that reason, no printed version was issued in April or May.<sup>1</sup> Crowley's name had been deleted from the electronic database by June 1, and GSA notes that, "[h]ad [the contracting officer] checked the electronic List, where the error had been corrected, he would have found that [Crowley] was not listed."

The protester contends that the contracting officer improperly relied on an inaccurate and non-current list of ineligible contractors as the basis for rejecting Crowley's bid. The agency argues that it reasonably relied on the printed list and asserts that the case is controlled by our decision in J.B. Kies Constr. Co., Inc., B-250797 et al., Feb. 11, 1993, 93-1 CPD ¶ 127. The agency argues that, as in this protest, Kies involved a contracting officer's reliance on the list of ineligible contractors as a basis to exclude a bidder whose name erroneously appeared on that list.

The facts and the legal issues here are clearly distinguishable from those in Kies. In Kies, while administrative delay had caused the contractor's 3-year debarment to begin (and therefore to end) later than anticipated, the contractor was actually debarred at the time of bid opening. As a result, the issue in that protest was whether the agency was required to find that the

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<sup>1</sup>The next printed version was published after the contracting officer in this procurement determined that Crowley was an ineligible contractor.

administrative delay constituted a "compelling reason" permitting award to the protester notwithstanding its debarment. See Federal Acquisition Regulation (FAR) § 9.405. In contrast, here the protester was not ineligible at the time of bid opening; its 1-week period of ineligibility ended months before the solicitation was issued. Accordingly, the question presented is not whether a compelling reason existed to award a contract to an ineligible contractor; instead, the issue is the propriety of the agency's determination that Crowley was ineligible.

Contracting officers have broad discretion in making nonresponsibility determinations, and our Office will not question such a determination unless a protester can establish that it lacked a reasonable basis or was made in bad faith. Schwendener/Riteway Joint Venture, B-250865.2, Mar. 4, 1993, 93-1 CPD ¶ 203. We apply the same standard here, where the contracting officer effectively found that Crowley was nonresponsible because it appeared on the list of ineligible contractors. The specific question presented, then, is whether that finding had a reasonable basis.

As part of the government's policy of awarding contracts only to responsible contractors, the FAR states that GSA "shall . . . [c]ompile and maintain a current, consolidated list of all contractors debarred, suspended, proposed for debarment, or declared ineligible by agencies or by the General Accounting Office." FAR § 9.404(a). See also FAR § 9.402(a). Firms which appear on the list of ineligible contractors "are excluded from receiving contracts . . . unless the acquiring agency's head or designee determines that there is a compelling reason for such action." FAR § 9.405(a). Accordingly, after bid opening, the contracting officer is required to review the list of ineligible contractors and reject a bid from any offeror appearing on the list, unless a determination of compelling reason is made. FAR § 9.405(d).

The FAR provides that the list of ineligible contractors is available in a printed version, "published monthly," and an electronic version, "updated daily." FAR § 9.404(d). The reference to the electronic version was added to the FAR in December 21, 1992, through Federal Acquisition Circular (FAC) No. 90-16, which explained, on page 2, that the FAR was being amended in this area "to provide additional guidance on accessing the [list of ineligible contractors]."

The agency contends that the contracting officer made a reasonable effort to verify Crowley's current status. The agency points out that the contracting officer confirmed that GSA had published no version of the list superseding that of March 1993, and that the contracting officer

attempted, albeit unsuccessfully, to contact both Crowley and DMA prior to determining the company ineligible for award.

While the contracting officer apparently acted in good faith, we conclude that his determination of Crowley's ineligibility lacked a reasonable basis. Crowley was not ineligible on June 1, 1993, nor had it been ineligible since early November 1992. Although the contracting officer had no way of knowing on June 1 that GSA's computer errors were the only reason that Crowley's name appeared in the March 1993 list, he did have reason to doubt that the March 1993 list was still current--and, indeed, the agency concedes that he had concern in this regard. In that context, the contracting officer acted unreasonably in failing either to obtain oral confirmation of Crowley's current status or to consult the electronic update of the list of ineligible contractors.<sup>2</sup>

The agency concedes that it had the capability of consulting the electronic update for several months prior to June 1. Apparently, however, the contracting officer was not aware, at that time, of the existence of that capability or of the FAR provision advising that an electronic update of the list of ineligible contractors was available.<sup>3</sup> As GSA points

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<sup>2</sup>The agency has not explained the very limited scope of the contracting officer's efforts to confirm the currency of the 2-month-old listing. For example, it is not clear why the contracting officer sought to speak with only one individual at Crowley, since someone else at the company might have been able to advise whether the company was still proposed for debarment. In addition, the fact that no one at DMA answered the telephone does not provide support for the reasonableness of the contracting officer's conclusion that Crowley was still proposed for debarment. In this regard, we note the protester's suggestion that, due to the difference in time zones, the contracting officer, who works in Colorado, may have called DMA, which is in Washington, after the close of business at the latter agency. Moreover, the agency has offered no rationale for reaching the final determination within hours of finding Crowley's name in the printed version of the list on June 1, without waiting until the next day to undertake an additional effort to verify the currency of that list, yet not making the final award until almost 2 weeks later.

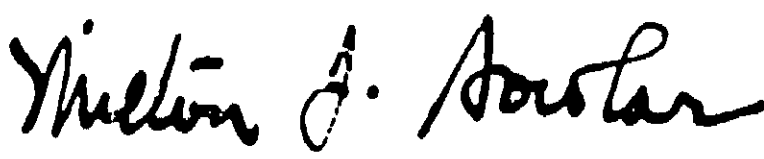
<sup>3</sup>Because the FAR, since the inclusion of FAC No. 90-16 in December 1992, explicitly advises contracting officers of the existence of a daily update through the electronic version, the fact that the GSA employee with whom the

(continued...)

out, if the contracting officer had consulted the electronic version of the list, he would have immediately discovered that Crowley was not on the list.

In light of these factual circumstances, we conclude that the agency acted improperly in relying on the March 1993 list of ineligible contractors as a basis for rejecting Crowley's bid. We recommend that the contract awarded to the next low bidder be terminated and that award be made to Crowley, if otherwise appropriate. We also find that the protester is entitled to recover its costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(f)(1) (1993). Crowley's certified claim for those costs, detailing the amounts incurred and time expended, must be submitted directly to the agency within 60 days of receipt of this decision. 4 C.F.R. § 21.6(f).

The protest is sustained.

*for*   
Comptroller General  
of the United States

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<sup>3</sup>(...continued)

contracting officer spoke on June 1 failed to mention that version is without legal consequence.