



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: The Real Estate Center

File: B-274081.4

Date: February 24, 1997

Lynn Hawkins Patton, Esq., Ott & Purdy, for the protester.
Jane Converse, Esq., Department of Veterans Affairs, for the agency.
Robert C. Arsenoff, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

1. Protester that received a copy of an invitation to submit an application to become an approved real estate management broker is not an interested party to object on behalf of other firms that were not solicited.
2. Agency predetermination of fees to be paid to real estate management brokers without conducting a price competition is unobjectionable where statutory requirement that price be considered in all selection decisions does not apply to the agency's solicitation of brokers at issue.
3. Agency's failure to timely respond to protester's requests for clarifications concerning broker assignment process does not provide a basis for sustaining a protest where letter soliciting broker applications indicated basically what performance would be required, the contents of the application form revealed the factors that the agency would consider in the approval process, and the protester did not indicate that it would have completed the application in a different manner had it received the requested information earlier.

DECISION

The Real Estate Center (REC) protests the issuance of a letter on November 7, 1996, by the Department of Veterans Affairs (VA) inviting certain firms to submit applications (VA Form 26-6685) for designation as approved real estate management brokers to manage assigned VA properties in the San Diego, California area. Earlier in the year, the VA had issued solicitation No. 691-81-95 for property management services and had awarded a contract to O'Malley & Principi; in response to a protest filed by REC, the agency decided to terminate that contract and, following revisions to the solicitation, to resolicit for its requirements. Pending the resolicitation effort, the November 7 letter, which was issued to all firms that responded to the original solicitation, sought to obtain interim property management coverage on a

preestablished fixed-fee basis. REC complains that competition was improperly restricted: (1) by virtue of the limited distribution of the letter; (2) by the establishment of the fees to be paid by VA without price competition; and (3) because the agency did not respond to a series of clarification requests from REC prior to the submission of its application.¹

We deny the protest.

At the outset, we note that much, if not all, of REC's protest is cast in terms of alleged VA violations of procurement statutes and regulations, most notably the Competition In Contracting Act of 1984, as amended (CICA), and the Federal Acquisition Regulation (FAR). However, the referenced statute and regulation do not apply to the approved management broker program at issue. As the VA application form No. 26-6685 indicates, the designation of VA management brokers is authorized by 38 U.S.C. § 3720(a)(6) (1994), which broadly empowers the Secretary of Veterans Affairs to administer property acquired or held by VA; subsection 3720(b) provides:

"The powers granted by this section may be exercised by the Secretary without regard to any other provision of law not enacted expressly in limitation of this section, which would otherwise govern the expenditure of public funds; however, section 3709 of the Revised Statutes (41 U.S.C. 5) [requiring advertising of requirements for a sufficient time before receiving proposals] shall apply to any contract for services or supplies on account of any property acquired pursuant to this section if the amount of such contract exceeds . . . [\$25,000]."

Since the record indicates, and the protester does not dispute, that the \$25,000 threshold is extremely unlikely to be met in light of the fee schedule prescribed by VA for managing properties, even the advertising requirements of 41 U.S.C. § 5 (1994) do not apply to the program in dispute. In cases where the basic procurement statutes are not applicable to a protested "procurement," we review the actions taken by the agency to determine whether they were reasonable. Kennedy & Assocs. Art Conservation, 68 Comp. Gen. 261 (1989), 89-1 CPD ¶ 186.

First, REC protests that the VA improperly limited the distribution of the November 7 letter to only those firms participating in the earlier, unsuccessful

¹On February 7, 1997, REC filed a protest challenging the approval of three broker applications submitted in response to the November 7 letter from VA and the rejection of its own application; that protest was supplemented on February 18. The allegations contained in these filings will be separately considered under file Nos. B-274081.5 and B-274081.6.

procurement. It is clear, however, that REC was unaffected by the limited distribution because it received a copy of the letter and responded to it. In order for a protest to be considered by our Office, a protester must be an "interested party," which means it must have a direct economic interest in the resolution of a protest issue. Bid Protest Regulations, section 21.0(a), 61 Fed. Reg. 39039, 39042 (1996) (to be codified at 4 C.F.R. § 21.0(a)). This protest basis is essentially on behalf of other potential applicants that were not solicited. REC lacks the requisite interest to advance the issue in this case. Galaxy Custodial Servs., Inc. et al., 64 Comp. Gen. 593 (1985), 85-1 CPD ¶ 658. In any event, REC has not indicated how it was prejudiced by VA's failure to solicit other firms. Id.

Next, REC objects to the fact that the VA has established the fee schedule it will pay approved brokers and has not permitted price competition to possibly obtain lower prices. While it is true that CICA requires agencies to consider cost or price in all selection decisions, 41 U.S.C. § 253b(d); Sturm, Ruger & Co., Inc., B-250193, Jan. 14, 1993, 93-1 CPD ¶ 42, as explained above, CICA does not specifically apply to the actions inviting broker applications taken by VA in this case. Moreover, the method of establishing fees, as set forth in Chapter 5 of the VA Property Manual, appears reasonable insofar as it takes into account prevailing community rates and current market surveys. Accordingly, VA's use of the fee schedule does not provide a basis for sustaining the protest.

Further, REC objects to the agency's failure to respond to 17 questions concerning the November 7 letter posited by the protester in a letter to VA dated November 12. As the protester states, "[t]he primary focus of the questions was to obtain information concerning the procedures by which VA properties would be assigned." It is apparent from the context of the questions that REC was principally interested in obtaining additional information concerning the duties of the management brokers once approved and the criteria to be used in their approval.

The November 7 letter and the accompanying broker applications reasonably convey enough information for a prospective applicant to understand what successful performance would entail and what factors would be used to determine the acceptability of an application. For example, the letter specifically delineated the four services for which brokers will be compensated: (1) the preparation of an initial property inspection report; (2) regular monthly inspections; (3) supervision of repairs; and (4) supervision of maintenance services. Nothing in the record indicates that other duties will be required of a successful applicant.

Likewise, the text of the application reveals the criteria that the VA considers in deciding whether or not to approve a broker application. The application sought specific information concerning the length, nature and location of property management experience, client references and resources available to perform management duties and it advised applicants that a credit check would be

performed. These categories of information parallel those portions of Chapter 5 of the VA Property Manual, which outlines the factors to be considered by the VA in evaluating an application.

Finally, while the agency did not respond to REC prior to the time it submitted its application, the answers to the protester's questions were appended to the agency report in this matter and REC, having had an opportunity to comment on them. makes no argument that it would have completed the application any differently had it received the responses prior to responding to the November 7 letter. Thus, we have no basis to conclude that the format of the invitation package was deficient.

The protest is denied.

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