



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Tidewater Homes Realty, Inc.

File: B-274689

Date: December 26, 1996

Freida V. Rapp and Kenneth S. Rapp for the protester.

Virginia Kelly Stevens, Esq., and Jane D. Atkinson, Department of Housing and Urban Development, for the agency.

Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency's best value award selection is not reasonably supported where the record reflects that the selection of the awardee was based on an unequal evaluation of the protester's and awardee's proposals.
2. Agency improperly waived definitive responsibility criterion which required the awardee possess a Virginia Real Estate Broker License at the time of award, where the agency determined the awardee to be responsible, despite not possessing the license.

DECISION

Tidewater Homes Realty, Inc. protests the award of a contract to CitiWest under request for proposals (RFP) No. H03R95062400000, a total small business set-aside, issued by the United States Department of Housing and Urban Development (HUD), for real estate asset manager (REAM) services for single-family properties owned by HUD or in its custody in Virginia Beach, Virginia area under a firm, fixed-price, indefinite quantity, contract for a base year with 4 option years.

We sustain the protest.

The RFP, issued as a small business set-aside on June 1, 1995, provided for a best value award with the technical evaluation being worth more than cost/price. The RFP listed the following technical evaluation factors and corresponding values:

1. Demonstrated experience in the management of single-family properties similar to and in a like area as those covered by this solicitation. [25 points]

2. Demonstrated experience in developing lists of needed repairs, such as is required by HUD's Minimum Property Standards (MPS), and estimating the cost of repairs. [25 points].
3. Demonstrated experience in soliciting repair bids, coordination and overseeing repair work, and inspecting for satisfactory work completion. [15 points]
4. Demonstrated experience in managing a rental program, including establishing fair market rentals and collections from present and former tenants, for single-family properties. [10 points]
5. Understanding of HUD objectives and the required tasks as specified in the solicitation. [10 points]
6. Evidence of adequate office--staffed with appropriately trained staff and equipped appropriately (or the ability to establish such), reasonably located so as to provide convenient service to HUD and its clients in the area to be served, and to carry out all duties specified in the solicitation. [15 points]

As part of their technical proposal, offerors were required to submit a completed Form 477, List of Repairs (included in RFP), for a specified property in Virginia Beach. Offerors were cautioned that:

"Proposals submitted without this form will not be disqualified from competing for the award, but omission of the form may adversely affect the offeror's technical points achieved in [factor 2]."

In addition the RFP required:

"The contractor **must** supply with its Technical Proposal evidence of its Virginia Real Estate Broker License--**in the contractor's name as it appears on the offer**--to be determined responsible and eligible for award." [Emphasis in original.]

At the pre-proposal conference, a HUD official stated that if evidence of the foregoing license were not included in the proposal, "evidence of [the offeror's] ability to provide the license at award must be provided." The RFP expressly stated that proposals would be initially screened to ensure that they contained a Form 477 for the specified property and evidence of a Virginia Real Estate Broker License.

HUD received 12 initial proposals by November 13. Tidewater, whose principals were a manager and former employee of the local incumbent contractor performing

these services, and CitiWest, from Tucson, Arizona, both submitted proposals. A technical evaluation panel (TEP), comprised of members from the regional contracting office in Philadelphia, Pennsylvania evaluated proposals. Five proposals, including those of Tidewater and CitiWest, were included in the competitive range. Three of the proposals, including CitiWest's, with a score of 91 points, were found technically acceptable and two, including Tidewater's, with a score of 37 points, were found capable of being made acceptable.

By letter of June 21, 1996, HUD conducted discussions with the competitive range offerors, during which it advised Tidewater of the weaknesses and/or deficiencies in its proposal. HUD received best and final offers (BAFO) by July 9. CitiWest's BAFO at an evaluated unit price of \$1,317 received the same technical score of 91 points. Tidewater's BAFO at an evaluated unit price of \$1,233 received a technical score of 47 points.

The TEP rated Tidewater's BAFO relatively low under five of the six evaluation factors, finding that Tidewater's proposal lacked pertinent detail in many respects. In contrast, CitiWest's proposal received high point scores under all of the factors and was determined to be reasonably priced. HUD determined that CitiWest's technically superior proposal was worth the additional cost because it would likely have fewer performance problems, resulting in less costs to the government, and made award to that firm on August 23. This protest followed.

Tidewater protests that its proposal contained the required pertinent details and was misevaluated. Tidewater claims that the Philadelphia-based TEP was biased against Tidewater, as well as other locally based companies, and that HUD may have harbored resentment against Tidewater due to actions that Tidewater undertook in a prior procurement. Tidewater notes that it submitted essentially the same proposals in response to HUD procurements for similar REAM services that a HUD Richmond-based TEP rated very favorably. Tidewater also claims that CitiWest did not have the Virginia Real Estate Broker License in its name at the time of award as required by the RFP.

The evaluation of proposals is a matter within the discretion of the contracting agency. Our Office will only question the agency's evaluation where it lacks a reasonable basis or conflicts with the stated evaluation criteria for award. SC&A, Inc., B-270160.2, Apr. 10, 1996, 96-1 CPD ¶ 197. The record must reasonably support the evaluation of the proposals, Intown Properties, Inc., B-262236.2; B-262237.2, Jan. 18, 1996, 96-1 CPD ¶ 89, and it is fundamental that the contracting agency must treat all offerors equally; it must even-handedly evaluate offers against common requirements and evaluation criteria. Sci-Tec Gauging, Inc.; Sarasota Measurements & Controls, Inc., B-252406; B-252406.2, June 25, 1993, 93-1 CPD 494; Secure Servs. Technology, Inc., B-238059, Apr. 25, 1990, 90-1 CPD ¶ 421. As illustrated by the examples below, our review of the record reveals that CitiWest's

and Tidewater's proposal were unequally evaluated under the RFP's evaluation factors.¹

For example, under Factor 2, Tidewater's proposal received 6 points, while CitiWest's proposal received 24 points. Tidewater's low score was attributed to an asserted lack of detail and clarity contained in the submitted Form 477 on the Virginia Beach property specified in the RFP and questions regarding Tidewater's ability to prepare cost estimates. These evaluated problems were brought to Tidewater's attention during discussions. In its BAFO, Tidewater basically explained, with some further elaboration, why it believed the submitted Form 477 and repair list satisfied the agency's requirements as stated in Factor 2² and its method for preparing cost estimates. The TEP rated Tidewater's BAFO with the same score because the Form 477 still did not contain sufficient detail and because Tidewater's initial response regarding the preparation of cost estimates caused the TEP to question the validity and sincerity of Tidewater's response in its BAFO.

Our review of Tidewater's BAFO indicates that the information contained in its Form 477 and its overall response to this factor contained much the same substantive detail as CitiWest's proposal. Based on our review of the two proposals, we cannot identify what specific details are missing from, or unclear in, Tidewater's Form 477 with attachments. HUD does not explain what details are missing or what is unclear; nor does it comment upon the accuracy of the needed repairs on the specified property as identified by Tidewater.

On the other hand, while CitiWest's technical proposal seemed to address the same categories of information for repairing a specific property as required in a Form 477, no Form 477 was included in its proposal, despite the RFP's admonitions, and the property which was assessed by CitiWest under this factor was one that CitiWest was responsible for in Camden, New Jersey (under a REAM contract apparently administered by the Philadelphia HUD office), rather than the Virginia Beach property identified in the RFP.³ We do not believe the evaluators could have reasonably rated CitiWest's proposal with close to the maximum score and much

¹Our discussion of the respective contents and evaluation of CitiWest's and Tidewater's proposals is necessarily general because we recommend a reevaluation of the proposals and because no protective order was issued, inasmuch as the protester did not employ legal counsel.

²Tidewater's BAFO noted the limited size on the one-page Form 477 for notations.

³The agency incorrectly states in its report in response to the protest that CitiWest's proposal contained a Form 477 "for the property specifically identified in the RFP."

more favorably than Tidewater's proposal for this factor, given CitiWest's failure to provide a Form 477 for the specified property as was requested in the RFP.⁴

Moreover, we find questionable HUD's explanation concerning its failure to credit Tidewater under Factor 2 for its apparently appropriate BAFO response as to who will prepare cost estimates for this work, since agencies are generally required to credit offerors for explanations in response to discussion questions. Intown Properties, Inc., supra. Under the circumstances, the record suggests disparate evaluation of the two proposals under this factor.

Another example of unequal treatment involves the evaluation of Factor 6. The TEP awarded Tidewater's proposal a final score of 7 out of 15 points for this factor and CitiWest's proposal 12 points. The agency downgraded Tidewater's proposal because it was allegedly vague as to location of the office space and the division of responsibilities among staff members. Here again, our review indicates that Tidewater's BAFO and overall technical response to this factor was specific as to prospective locations, staff, and equipment. In contrast, CitiWest's proposal did not identify any specific location or staff in its proposal, but stated only how it would do so if awarded the contract.

Finally, Tidewater argues, and our review confirms, that CitiWest did not provide a Virginia Real Estate Broker License with its proposal. While CitiWest proposed to promptly obtain the license after award, Tidewater notes that its investigation reveals that CitiWest has not obtained the license and HUD has not disputed this assertion. In any event, the requirement that the offeror furnish a specific license to be eligible for award was a definitive responsibility criterion that had to be satisfied as prerequisite for award.⁵ RSI Realty Servs. Inc., B-262238, Dec. 12, 1995, 95-2 CPD ¶ 252 (finding the same requirement imposed in a REAM service procurement conducted by the HUD Philadelphia office to be a definitive responsibility criterion which was waived for CitiWest). By finding CitiWest responsible and making award to that firm, the agency effectively waived the

⁴It appears that the Camden property was in need of much more extensive repairs than the specified Virginia Beach property, which permitted CitiWest to provide a more extensive description and perhaps receive more credit under this factor.

⁵A definitive responsibility criterion is a specific and objective standard established by an agency to measure an offeror's ability to perform the contract. Federal Acquisition Regulation (FAR) § 9-104-2. Such special standards put firms on notice that the class of prospective contractors is limited to those meeting qualitative or quantitative criteria deemed necessary for adequate performance, e.g., unusual expertise, specialized facilities, or particular licenses. Tucson Mobilphone, Inc., B-258408.3, June 5, 1995, 95-1 CPD ¶ 267.

requirement for possession of the license prior to award.⁶ Where an agency waives such a requirement, it is required to amend the RFP; an agency's failure to amend represents unequal treatment of the offerors. See Topley Realty Co., Inc., 65 Comp. Gen. 510 (1986), 86-1 CPD ¶ 398.

In sum, as illustrated by the foregoing examples, we find that Tidewater's proposal was evaluated unequally vis-a-vis CitiWest's proposal. Thus, we cannot conclude that the award to CitiWest is reasonably supported, and we sustain the protest on this basis. Intown Properties, Inc., *supra*; Sci-Tec Gauging, Inc.; Sarasota Measurements & Controls, Inc., *supra*; Secure Servs. Tech., Inc., *supra*.

We recommend that the agency determine whether the requirement that an offeror possess a Virginia Real Estate Broker License in order to receive award exceeded the agency's requirements; if it does, the agency should amend the RFP, obtain and evaluate new proposals, and make award in accordance with the revised RFP. If CitiWest is not the successful offeror, its contract should be terminated. Alternatively, if the license remains a requirement, we recommend that the agency reject CitiWest's proposal if CitiWest does not possess the requisite license (subject to Small Business Administration review under certificate of competency procedures, *see* FAR subpart 19.6) and terminate the contract, reevaluate the remaining competitive range proposals in accordance with the RFP, and make a new award selection. In any event, in light of the evaluation discrepancies noted, we recommend that a new TEP be appointed to evaluate the new proposals to assure equal evaluation. See J.M. Cashman, Inc., B-233773, Apr. 14, 1989, 89-1 CPD ¶ 380. We further recommend that Tidewater be reimbursed the reasonable costs of filing and pursuing its protest under section 21.8(d)(1) of our Bid Protest Regulations, 61 Fed. Reg. 39043 (1996)(to be codified at 4 C.F.R. § 21.8(d)(1)). The protester should submit its certified claim for costs to the contracting agency within 60 days of receiving this decision pursuant to section 21.8(f)(1) of our Regulations, 61 Fed. Reg. 39043 (to be codified at 4 C.F.R. § 21.8(f)(1)).

The protest is sustained.

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⁶The agency now states that the requirement that the license be obtained prior to award overstated its minimum needs and that the requirement as stated was "sometimes confusing to offerors." The protester notes that this requirement may well have caused nonlocal firms not to compete and required other offerors to undergo the expense of obtaining the proper license prior to award.