



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

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Matter of: Property Analysts, Inc.

File: B-277266

Date: September 12, 1997

James L. Babb, Jr., for the protester.

Lewis M. Nixon, Esq., and Elisa J. Yochim, Esq., Department of Housing & Urban Development, for the agency.

Paula A. Williams, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Firm which submitted the highest priced of three technically equal proposals is not an interested party to protest an award since price properly was the determinative factor for award and protester would not be in line for award if the protest were sustained.
2. General Accounting Office will not consider challenges to contracting officer's affirmative determination of awardee's responsibility absent evidence of bad faith; protester's unsubstantiated allegations that contracting officer ignored awardee's noncompliance under prior contracts do not meet this standard.

DECISION

Property Analysts, Inc. (PAI) protests the award of a contract to MT Mullen Corporation under request for proposals (RFP) No. HO5R96010800000, issued by the Department of Housing & Urban Development (HUD) for field review of appraisals for single family homes in the Northern Indiana geographic area. PAI protests the technical acceptability of Mullen's proposal and contends that the contracting officer otherwise improperly determined Mullen to be a responsible contractor.

We dismiss the protest.

The RFP, issued as a total small business set-aside, contemplated the award of a fixed-price requirements contract for a base period and two 1-year options, not to exceed 36 months in total. The contractor will perform on-site field reviews of appraisals to determine the accuracy and quality of the appraisals completed by authorized appraisers.

Offerors were advised that field review appraisers must be licensed by the State of Indiana and that this licensing requirement could be satisfied through reciprocity or temporary practice provisions to the extent permitted by state law.

The RFP provided that award would be made to the offeror whose proposal was determined most advantageous to the government, price and other factors considered. The RFP stated that technical merit would be more significant than price in the award selection, and listed the following technical evaluation factors to be scored on a 100-point scale: work accomplishment (25 points), ability to perform (25 points), capacity (20 points), appraisal knowledge (20 points), and management plan (10 points). Price was not rated or scored but would be evaluated for reasonableness. The RFP further advised offerors that total evaluated price could be the determining factor for award if there were no significant technical or management differences among proposals.

Proposals were received from five firms, including PAI and Mullen, by the July 1, 1996, closing date.¹ The proposals were evaluated by a three-member technical evaluation panel (TEP) and four proposals, including those submitted by PAI and Mullen, were determined to be technically acceptable and within the competitive range. On August 21, discussions were held, best and final offers (BAFOs) were requested, and three BAFOs were timely received and evaluated. Because the TEP considered the three competing proposals technically equivalent, the TEP recommended Mullen for award, noting that the firm has successfully performed under prior FRA contracts and offered the lowest evaluated price.

However, the contracting officer was aware of a June 25, 1996, Small Business Administration (SBA) determination that MTB Investments, Inc. (the incumbent contractor) was other than a small business. Since this determination indicated that Mullen was affiliated with MTB Investments, the contracting officer questioned Mullen's self-certification as a small business concern. On September 13, the contracting officer filed a size status protest with the SBA regarding the business size standard representation of Mullen. After various appeals to the SBA's Office of Hearings and Appeals and the submission of additional information by MTB Investments, the SBA ultimately determined that MTB, and its affiliate Mullen, was

¹PAI is the current field review appraisal (FRA) contractor for the Central Indiana area; Mullen is the current contractor for the Northern Indiana area (under the name MTB Investments, Inc.) and the Southern Indiana area.

small under the size standard in this procurement and, as of February 19, 1997, recertified the firm as small and therefore eligible to participate in this procurement.

Thereafter, on February 28, the contracting officer sent discussion letters to the three offerors who had submitted BAFOs. Each was asked to update/supplement its prior BAFO submission, including any changes to proposed key personnel and the use of subcontractors/appraisers, and to provide the names and current appraisal licenses for each proposed appraiser. A two-member TEP reconvened to evaluate the three offerors' responses to the contracting officer's discussion request. A second round of oral discussions was conducted and a second round of BAFOs was requested for evaluation.² While the TEP concluded that all three proposals still remained technically acceptable, it increased the technical scores of PAI and the second offeror and decreased Mullen's technical score with the following results:

Offeror	Consensus Score	Rating	Total Price
PAI	99	Acceptable	\$215,600
A	[deleted]	Acceptable	[deleted]
Mullen	80	Acceptable	\$166,180

In its final evaluation report, the TEP recommended award to either PAI or the second offeror, stating that selecting either firm (both are located within the state) would save the agency time in packaging and mailing assigned reviews and noting that the evaluated prices of both firms were about equal and considered adequate to ensure either firm's ability to hire quality appraisers.

However, the contract specialist disagreed with the award recommendation of the TEP because the final evaluation report did not document the reasons for the increase or decrease in technical point scores assigned to the second BAFO submissions nor, in her judgment, did the evaluators adequately justify their award recommendation. Therefore, the contract specialist prepared an analysis of the evaluators' technical findings of the strengths and weaknesses of each offerors' proposal under each evaluation factor and a price reasonableness determination, as contemplated by the RFP. The contract specialist concluded that the technical evaluations did not support a price/technical tradeoff based on the technical superiority of one offeror over another and essentially considered all three

²The proposed prices for each firm remained unchanged.

proposals--which were each rated technically acceptable--to be technically equivalent. Consequently, the contract specialist recommended Mullen's low-priced, technically acceptable proposal for award.

The contracting officer, who served as the source selection official (SSO), reviewed the TEP report and the factor-by-factor analysis of the technical and price evaluations prepared by the contract specialist, and concurred with the contract specialist's finding that the [deleted] point difference in the point scores did not represent technical superiority under the solicitation terms which would warrant paying the price premium associated with PAI's proposal. For example, with regard to the technical differences between the proposals of PAI and Mullen, the TEP report indicated that the evaluators considered PAI's in-state location to be an advantage for the program office while Mullen's out-of-state location and proposed method for pick-up and return of assigned reviews was considered time consuming and offered no benefits to the program office (the program office staff would, as it has done under Mullen's two prior FRA contracts, package and prepare the cases for pick-up by an overnight carrier). In this regard, the TEP's narrative evaluation noted that under Mullen's earlier contract, the "last batch of cases took more than 15 days." However, the contract specialist pointed out that the TEP did not indicate whether this was a one time occurrence or a documented pattern of late delivery. An additional weakness noted in the TEP report was that some of PAI's and Mullen's appraisers did not have experience in performing FHA appraisals or reviews; however, in her analysis of the TEP's evaluations, the contract specialist pointed out that there was no evidence in the proposals themselves which supported this technical finding. The TEP report further indicated that because Mullen's principal was not a licensed appraiser, the evaluators considered this a weakness in Mullen's ability to recruit and train its appraisers; however, Mullen's proposal identified one of its employees as the manager who would supervise and train the field review appraisers.

In short, the SSO concurred with the contract specialist's conclusion that there were no competitive strengths in PAI's proposal that outweighed those in the proposal of Mullen, the low-priced offeror, and considered the reasons memorialized in the TEP report for Mullen's lower point score as minor with little significant impact on contract performance. Accordingly, the SSO selected Mullen's proposal for award. This protest followed.

In its protest, PAI challenges the agency's determination that Mullen's proposal was technically acceptable. These allegations are based on the premise that Mullen "has never met [its] contractual obligations in Northern or Southern Indiana, and [this] noncompliance has been ignored [by the agency]." The protester states that these alleged contract performance irregularities and violations by Mullen were known by other third parties as well as agency officials.

In related arguments, PAI contends that the contracting officer otherwise improperly determined Mullen to be a responsible contractor claiming, in essence, that the agency has inadequate assurance that Mullen will meet the performance requirements of this contract given its alleged noncompliance with the terms of its previous FRA contracts. Alternatively, PAI contends that Mullen submitted a below-cost offer.

We dismiss PAI's protest against the award to Mullen.

Under the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3556 (1994), only an "interested party" may protest a federal procurement. That is, a protester must be an actual or prospective supplier whose direct economic interest would be affected by the award of a contract or the failure to award a contract. Bid Protest Regulations, 4 C.F.R. § 21.0(a) (1997). Here, the record shows that three firms--Mullen, offeror A, and PAI--were found technically equal and that the protester submitted the highest-priced proposal. If the protester is correct that Mullen should not have been awarded the contract, offeror A, not PAI, is next in line for award. Thus, PAI is not an interested party to protest the award to Mullen. See Watkins Sec. Agency, Inc., B-248309, Aug. 14, 1992, 92-2 CPD ¶ 108 at 4. See also Premier Nurse Staffing, Inc.--Recon., B-258288.3, Apr. 3, 1995, 95-1 CPD ¶ 174. In its comments, PAI asserts that offeror A is "an independent fee appraiser who works alone out of his home . . . and could not possibly compete with [the protester] with respect to a technical evaluation." However, this unsubstantiated challenge to the capability of offeror A provides no basis to object to HUD's evaluation and rankings under which PAI is third-ranked based on its higher price.

Regarding PAI's challenge to Mullen's responsibility, before awarding a contract, the contracting officer must make an affirmative determination that the prospective contractor is responsible. FAR § 9.103(b). The determination of a prospective contractor's responsibility rests principally within the broad discretion of the contracting officer, who, in making that determination, must of necessity rely on his or her business judgment. Mine Safety Appliances Co., B-266025, Jan. 17, 1996, 96-1 CPD ¶ 86 at 2. While we review an affirmative responsibility determination where it is shown that it may have been made in bad faith, see 4 C.F.R. § 21.5(c), there has been no such showing here.

In any event, with regard to PAI's protest of the award to Mullen, we note that PAI provides no factual support for its assertions that Mullen has not met its contractual obligations under its HUD contract. The record shows that the TEP chairperson, who is the government technical representative for Mullen's current Southern Indiana contract, noted in the evaluation record that "[Mullen] is doing a satisfactory job," and noted as a strength that "[Mullen] has been handling the appraisals that we have been sending." Further, the contract specialist found no evidence of poor contract performance, although she did find an instance where

Mullen had taken longer than the allotted time frame for one batch of appraisals which she concluded was a "one time occurrence." The contract specialist also noted that Mullen had made mistakes on some appraisal review forms which, when pointed out to Mullen, Mullen responded, resulting in improvement. Further, Mullen furnished a list of other HUD appraisal contracts which demonstrated its prior appraisal experience. The evaluation record contains no evidence that Mullen's acceptable rating and the agency's determination that Mullen was technically equal to the other two firms were erroneous.

Moreover, while the principal of Mullen is not licensed or certified as an appraiser, the agency cites Article H-1 which provides that "[t]he contractor including any of its employees, subcontractors, or consultants performing Field Review of Appraisals under the contract shall be state of Indiana [licensed] or [certified]." Mullen proposed several licensed employees (not the principal) who would be performing the work, and the TEP reasonably found these individuals met the license requirement.

PAI's alternative claim that Mullen's proposed price is unreasonably low to ensure quality contract performance because, in the protester's view, "three field review appraisers [cannot] review all of Northern Indiana" within the time required, is not a valid basis for protest. An offeror, for various reasons, in its business judgment, may decide to submit a below-cost offer, and there is no prohibition against a procuring agency's accepting an unreasonably low or below-cost offer on a fixed-price contract. Intown Properties, Inc., B-256742, July 11, 1994, 94-2 CPD ¶ 18 at 4. Again, whether an awardee can perform the contract at the price offered is a matter of responsibility, which as discussed above, we will not review absent a showing of possible bad faith or that definitive responsibility criteria have not been met, exceptions that do not apply here. Id.; see also ENCORP Int'l, Inc., B-258829, Feb. 21, 1995, 95-1 CPD ¶ 100 at 5.

To the extent PAI is arguing that the SSO improperly emphasized price in the source selection decision, where, as here, the RFP provides that technical considerations will be more important than price, agency selection officials have broad discretion in determining the manner and extent to which they will make use of the technical and price evaluation results in making price/technical tradeoffs. Red River Serv. Corp.; Mark Dunning Indus., Inc., B-253671.2 et al., Apr. 22, 1994, 94-1 CPD ¶ 385 at 6. A contracting agency may properly award a contract to a lower-priced, lower technically scored offeror if it decides that the price premium involved in awarding to a higher-rated, higher-priced offeror is not justified given the acceptable level of technical competence available at the lower cost. See Dayton T. Brown, Inc., B-229664, Mar. 30, 1988, 88-1 CPD ¶ 321 at 4. Evaluation scores are merely guides for the selection official, who must use his judgment to

determine what the technical difference between competing proposals might mean to contract performance, and who must consider what it would cost to take advantage of it. Grey Advertising, Inc., 55 Comp Gen 1111 (1976), 76-1 CPD ¶ 325.

The protest is dismissed.³

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³PAI argues in its comments on the agency report that the agency acted in bad faith in order to assure award to Mullen. For example, PAI asserts that HUD improperly delayed its award decision until the contracting officer's size determination protest was resolved by the SBA. However, to show bad faith there must be a showing that the agency intended to harm the protester; PAI's arguments do not meet this burden. Complere Inc., B-257946, Nov. 23, 1994, 94-2 CPD ¶ 207 at 4.