



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Matter of: CitiWest Properties, Inc.

File: B-274689.4

Date: November 26, 1997

Anthony F. Radd, Esq., Payne, Gates, Farthing & Radd, P.C., for the protester.
Arthur Serratelli, Esq., and Howard W. Roth III, Esq., Vandeventer, Black,
Meredith & Martin, L.L.P., an intervenor.
Virginia Kelly Stephens, Esq., Department of Housing & Urban Development, for the
agency.
Charles W. Morrow, Esq., and Guy R. Pietrovito, Esq., Office of the General
Counsel, GAO, participated in the preparation of the decision.

DIGEST

An agency failed to conduct meaningful discussions with the protester, where the agency did not inform the protester during discussions of the weaknesses or deficiencies in its proposal that led to its exclusion from the second, post-discussions competitive range.

DECISION

CitiWest Properties, Inc. protests the award of a contract to Tidewater Homes Realty, Inc. under request for proposals (RFP) No. H03R95062400000, a total small business set-aside, issued by the Department of Housing and Urban Development (HUD), for real estate asset manager services for single-family properties owned by HUD or in its custody in the Virginia Beach, Virginia area. Although CitiWest originally received award under the RFP, in Tidewater Homes Realty, Inc., B-274689, Dec. 26, 1996, 96-2 CPD ¶ 241, we sustained Tidewater's protest because we found that Tidewater's proposal was evaluated unequally vis-à-vis CitiWest's proposal. In response to our recommendation, HUD reevaluated proposals, determined that CitiWest's proposal was not in the competitive range, and selected Tidewater's proposal for award.

We sustain the protest.

The RFP, issued on June 1, 1995, provided for the award of a firm, fixed-price indefinite quantity, contract for a base year with 3 option years, on a best-value basis with technical worth more than cost/price. The technical evaluation factors and corresponding values were as follows:

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 costs of repairs. [25 points]
3. Demonstrated experience in soliciting repair bids, coordinating 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]

Among other things, the RFP required offerors to submit a completed Form 477, List of Repairs (included in RFP), for a specified property in Virginia Beach and cautioned that omission of the form may adversely affect the evaluation of the offeror's proposal under factor 2. The RFP also required that the offeror submit with its proposal evidence of its Virginia real estate broker license.

Twelve proposals were received in response to the RFP, including one from Tidewater, whose principals were a manager and former employee of the local incumbent contractor, and one from CitiWest from Tucson, Arizona. Five proposals, including CitiWest's, which received a score of 91 points, and Tidewater's, which received a score of 37 points, were found to be in the competitive range and received discussions.

HUD advised Tidewater and the other offerors of the weaknesses/deficiencies in their technical proposals. Among other things, HUD asked Tidewater to provide additional information detailing its experience, more specificity in its Form 477, and information establishing the adequacy of its proposed office. CitiWest, on the other hand, was not advised of any specific weaknesses/deficiencies in its technical proposal. Rather, HUD informed CitiWest that:

HUD has completed the initial evaluation of your proposal and that your proposal was determined to be within the competitive range for negotiation purposes.

You are hereby given the opportunity to improve any aspect of your technical and/or pricing proposal. Please review your proposal to insure completeness and to assure that all necessary information is supplied and any deficiencies corrected.

Best and final offers (BAFO) were requested and received. CitiWest's BAFO, at an evaluated unit price of \$1,317, received the same technical score of 91 points as its initial proposal. Tidewater's BAFO, at an evaluated unit price of \$1,233, received a technical score of 47 points. HUD determined that CitiWest's technically superior proposal was worth the additional costs and made award to CitiWest.

In response to Tidewater's protest, we found that CitiWest's and Tidewater's proposals were evaluated unequally under the RFP's evaluation factors. 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. The record established, however, that the information contained in Tidewater's Form 477 and its overall response to this factor contained the same substantive detail as CitiWest's proposal.¹ We found that the evaluators could not have reasonably rated CitiWest's proposal with the maximum score and much more favorably than Tidewater's proposal for this factor, given CitiWest's failure to provide a Form 477 for the specified property as requested by the RFP.

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

¹CitiWest's proposal seemed to address the same categories of information for repairing property as required in a Form 477, but no Form 477 was included in its proposal and the property that the proposal addressed under this factor was not the Virginia Beach property specified in the RFP.

In addition, we found that there was no evidence in the record that CitiWest had provided a Virginia real estate broker license with its proposal and that the agency had effectively waived a definitive responsibility criterion for CitiWest.

We recommended that the agency assess whether it required that an offeror possess a Virginia real estate broker license in order to receive the award; if it did not, our recommendation was that the agency amend the RFP, obtain new proposals, and make award in accordance with the revised RFP. If the agency required the license, we recommended that the agency reject CitiWest's proposal if CitiWest did not possess the requisite license (subject to Small Business Administration review under certificate of competency procedures), terminate CitiWest's contract, reevaluate the remaining competitive range proposals in accordance with the RFP, and make a new award selection. We also recommended that a new TEP be appointed to evaluate the new proposals to ensure an equal evaluation.

In response to our decision, HUD determined that it did need the offeror to possess a Virginia real estate broker license, but that it was enough that the firm possess the license by the time of award (rather than at the time of proposal submission, as the RFP had indicated) and amended the solicitation to clarify that the requirement for the license could be met at that time. HUD also found that CitiWest satisfied this requirement. A new TEP was convened to reevaluate the competitive range offerors' BAFOs, as submitted prior to our decision sustaining Tidewater's protest. CitiWest's BAFO received a score of 81 points and Tidewater's received a score of 99 points. The increase in Tidewater's technical score reflected the TEP's view that Tidewater's BAFO had adequately addressed the concerns raised by the agency during discussions. Two other offerors' proposals received scores of 97 points and the remaining offeror's proposal received a score of 67 points.

Based upon this reevaluation, HUD made a second competitive range determination, finding that neither CitiWest nor the other lower ranked offeror had a reasonable chance of being selected for the award. Their proposals were therefore excluded from the competitive range. The remaining offerors, including Tidewater, were allowed to submit revised price proposals. Tidewater's lowest-priced proposal was determined to be the best value to the government and selected for award. This protest followed.

CitiWest complains that in taking corrective action HUD treated it unfairly and unequally. Specifically, CitiWest contends that the other offerors were given the opportunity to improve their proposals through discussions but CitiWest was not. CitiWest argues that it is improper for HUD in its implementation of our recommendation to exclude CitiWest's proposal from the competitive range where CitiWest had not received meaningful discussions.

HUD responds that CitiWest was not treated unequally or unfairly as compared to the other offerors, because the agency conducted discussions with CitiWest and

provided CitiWest with the opportunity to submit a revised proposal. HUD also argues that not conducting discussions following the reevaluation of the proposals was reasonable, given the specificity with which our decision discussed the technical weaknesses in Tidewater's and CitiWest's proposals.

In negotiated procurements, contracting agencies generally must conduct discussions with all offerors whose proposals are within the competitive range. 41 U.S.C. § 253b(d)(1)(A) (1994); Federal Acquisition Regulation § 15.610(b) (FAC 90-44). Although discussions need not be all-encompassing, they must be meaningful; that is, an agency is required to point out weaknesses or deficiencies in a proposal as specifically as practical considerations permit so that the agency leads the offeror into areas of its proposal which require amplification or correction. Professional Servs. Group, Inc., B-274289.2, Dec. 19, 1996, 97-1 CPD ¶ 54 at 3. Discussions cannot be meaningful if an offeror is not advised of the weaknesses, deficiencies, or excesses that must be addressed in order for the offeror to be in line for the award. Columbia Research Corp., B-247631, June 22, 1992, 92-1 CPD ¶ 539 at 5. Unequal discussions, where one competitive range offeror is advised of areas in which its proposal is believed to be deficient, but another competitive range offeror is not, do not satisfy the requirement for meaningful discussions. See SeaSpace, 70 Comp. Gen. 268, 272-273 (1991), 91-1 CPD ¶ 179 at 5-7.

We find that HUD's actions have resulted in Citiwest being deprived of meaningful discussions. Although it is true, as asserted by HUD, that the agency provided CitiWest with the opportunity to revise its proposal after the first competitive range determination (prior to the agency's original source selection decision), this does not constitute meaningful discussions, inasmuch as CitiWest was not informed of, or given the opportunity to respond to, the specific weaknesses/deficiencies in its proposal that ultimately resulted, in the second competitive range determination, in CitiWest's proposal being excluded from further consideration.

HUD, in its reevaluation of proposals, essentially adopted the findings of our prior decision. Specifically, the TEP reduced CitiWest's technical score under factor 5 because CitiWest's proposal did not include a Form 477 on the Virginia Beach property specified in the RFP, reduced CitiWest's score under factor 6 because CitiWest did not identify any specific location or staff in its proposal, and reduced CitiWest's score under factor 1 because CitiWest did not demonstrate sufficient experience in a like area. The bases for these reductions are essentially the same reasons that supported our finding that Tidewater's and CitiWest's proposals had been unequally evaluated. Although all these weaknesses/deficiencies were present in CitiWest's proposal prior to HUD's conduct of discussions, HUD failed to inform CitiWest of these weaknesses/deficiencies or to allow CitiWest the opportunity to revise its proposal in response to our decision, thereby depriving CitiWest of meaningful discussions. The reduction in CitiWest's technical score due to these weaknesses/deficiencies is the sole reason CitiWest's proposal was excluded from the second competitive range.

In contrast, the other offerors, including Tidewater, were provided the opportunity to address the weaknesses/deficiencies in their proposals during discussions; these offerors received significantly higher technical ratings in HUD's reevaluation of proposals due at least in part to the improvements presented in their revised proposals. The agency does not contend that the weaknesses/deficiencies in CitiWest's proposal would have been more difficult to correct than those that were brought to the attention of the other offerors during discussions, or that there was any justifiable basis (such as, for example, concern about technical leveling) for not raising those issues with CitiWest during discussions. Instead, the failure to advise CitiWest of the weaknesses or deficiencies in its proposal arose solely because, at the time discussions were conducted, the agency had not yet identified those weaknesses or deficiencies. On the record before us, therefore, it appears that CitiWest could have adequately addressed the agency's concerns, if they had been raised with the protester. The agency's failure to do so thus prejudiced CitiWest.

Accordingly, we conclude that HUD's comparison, in its reevaluation of proposals, of CitiWest's proposal, which had not received the benefit of meaningful discussions, with the other offerors' proposals, which had been revised in response to discussions, was unfair and reflected unequal treatment. We find that CitiWest's proposal should not have been excluded from the second competitive range without having the opportunity afforded the other competitive range offerors to address the weaknesses/deficiencies in its proposal.²

HUD argues that not reopening negotiations to provide CitiWest with meaningful discussions was within the agency's discretion in implementing our protest recommendation, particularly because we did not specify that the agency conduct further discussions with CitiWest. As recognized by HUD, our protest recommendation was general and did not precisely address the situation presented here--that is, that HUD would require the Virginia real estate licensing requirement, that it would be acceptable for the offeror to present evidence of holding that license at any time up to the time of award, and that CitiWest's proposal satisfied that modified requirement. Our recommendation necessarily left the details of implementing appropriate corrective action to the discretion and judgment of the agency. See Ford Aerospace Corp. et al., B-239676.2 et al., Mar. 8, 1991, 91-1 CPD ¶ 260 at 4. Such discretion must be exercised reasonably and in a fashion that remedies the procurement impropriety that was the basis for our protest recommendation. Id. at 4-5. Here, HUD's implementation of corrective action was not reasonable because it resulted in CitiWest being deprived of meaningful discussions.

²CitiWest also protests HUD's evaluation of its proposal and asserts that HUD's new TEP was biased against it. However, we need not address the propriety of HUD's evaluation given our recommendation to reopen the competition, and we have found no support for CitiWest's speculative allegations of bias.

We also do not agree with HUD that the disclosures in our earlier decision made conducting discussions with CitiWest and the other offerors inappropriate. While it is true that the decision identified the concerns that the agency subsequently relied upon to downgrade CitiWest's proposal, no confidential or proprietary information was disclosed. While review of our decision would have disclosed to offerors that, for example, CitiWest's proposal had not included a Form 477 or identified any specific location or staff, we do not believe that learning this information would have given any of the offerors a competitive advantage; the information would have been of no value to the other offerors, and CitiWest should have been advised of these concerns during discussions. In any event, the need to preserve the integrity of the competitive procurement system and the importance of correcting an improper award through further negotiations overrides any possible competitive disadvantage to competing offerors. See NavCom Defense Elecs., Inc., B-276163.3, Oct. 31, 1997, 97-2 CPD ¶ ____ at 4.

We recommend that HUD reopen and conduct appropriate discussions with all offerors in the first competitive range, including CitiWest, request BAFOs, and make a new source selection. In addition, we recommend that the protester be reimbursed its costs of filing and pursuing the protest, including attorneys' fees. 4 C.F.R. § 21.8(d)(1) (1997). The protester should submit its certified claim, detailing the time expended and costs incurred, directly to the contracting agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Comptroller General
of the United States