



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

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.

Decision

Matter of: Deutsche Bank

File: B-289111

Date: December 12, 2001

Stephen Sale, Esq., Claxton, Sale and Quinn, for the protester.

Richard J. Conway, Esq., and Bradley D. Wine, Esq., Dickstein Shapiro Morin and Oshinsky, for Real Estate Recovery, Inc., an intervenor.

Peter F. Pontzer, Esq., Department of Housing and Urban Development, for the agency.

Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest alleging that, in connection with procurement for loan support services, the awardee had an organizational conflict of interest that was not properly mitigated, is denied where the record shows that the contracting agency reasonably determined that the awardee's proposal adequately mitigated any conflict of interest through the use of a subcontractor to perform loan servicing on those properties where the awardee had previously been involved in handling administrative matters for the agency related to the same properties.

DECISION

Deutsche Bank protests the issuance of a task order to Real Estate Recovery, Inc. (RER) by the Department of Housing and Urban Development's (HUD) Office of Multifamily Housing Assistance and Restructuring (OMHAR) under request for quotations (RFQ) No. R-OPC-21968, issued to procure support services related to loans issued in support of HUD's Mark-to-Market program.¹ Deutsche Bank argues that the awardee has an organizational conflict of interest that the agency has failed to properly mitigate. In addition, it contends that the agency's evaluation was

¹ HUD's Mark-to-Market program (referred to by HUD as the "M2M program") exists to reduce rent payments to market levels under the agency's rental housing subsidy program, referred to as "Section 8 housing." Agency Report, Memorandum of Law, at 1-2.

improperly based on a different estimate of the number of properties than identified in the RFP.

We deny the protest.

The RFQ here was issued electronically on May 8, 2001, and anticipated issuance of a fixed-price task order for loan and other asset servicing, plus management of mortgages for multifamily housing projects, for a base period of 18 months, followed by three 1-year options, and one 6-month option. The solicitation advised that award would be made to the vendor whose quotation represented the best value to the government, defined here as the quotation demonstrating “the greatest potential to provide the most timely, efficient, and cost-effective approach to servicing/management of assigned mortgages eligible for the [M2M program].” RFQ at 5. The competition for this task order was limited to companies holding a Federal Supply Schedule (FSS) contract (FSS No. SIN 621-4) with the General Services Administration (GSA) for “Loan and Other Asset Servicing/Management Services.” Id. at 1.

By the May 25 closing date, HUD received quotes from four vendors. Upon completion of an oral presentation by each vendor, followed by submission of revised quotes, the agency’s technical evaluation panel (TEP) assigned a rating to each vendor in the areas of technical ability, prior experience, and past performance, as well as an overall summary rating, none of which are at issue in this protest. Because RER had the highest overall ratings and the lowest total price, the TEP recommended issuance of the task order to RER for its price of \$15,604,621. The task order was issued on September 25, and this protest followed.

The protester’s conflict of interest argument is based on RER’s role as a participating administrative entity (PAE) in HUD’s M2M program.² The statement of work (SOW) appended to this RFQ expressly advised potential vendors that contractors who had served as PAEs for HUD would be allowed to participate in this procurement, and that the agency would consider their proposals about how any conflicts of interest arising from their dual role might be mitigated, as follows:

² HUD operates the M2M Program using private contractors, referred to under the program’s terminology as “participating administrative entities” or PAEs. An overview of the operation of the M2M program is included in the report, “Multifamily Housing: Issues Related to Mark-to-Market Program Reauthorization,” GAO-01-800 (July 2001), Appendix I. As explained therein, PAEs are “responsible for making a complete and ongoing assessment of the eligibility of the [property] owner and the project” and for shepherding properties through the debt restructuring process. Id. at 35.

Participation in the M2M program as a PAE, lender, or otherwise, will not disqualify an offeror, provided that, in its response or prior thereto, the offeror discloses all actual or appearance conflicts of interest and proposes methods, acceptable to OMHAR/HUD in its sole discretion, that satisfactorily mitigate such conflicts.

SOW at 16.

In alleging that RER has an organizational conflict of interest that has not been properly mitigated, Deutsche Bank raises two arguments. First, it argues that RER's role as a PAE places the company in the unique position of overseeing its own performance, thus creating a conflict in RER's ability to provide impartial assistance to the agency. Second, it argues that RER's role as a PAE gave the company access to information not available to non-PAE vendors, and that this information provided RER with an unfair competitive advantage. Under either theory, Deutsche Bank argues that RER is not eligible for award here.

An organizational conflict of interest occurs where, because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the government, or the person's objectivity in performing the contract work is or might otherwise be impaired, or a person has an unfair competitive advantage. Federal Acquisition Regulation (FAR) § 9.501. Contracting officials are to avoid, neutralize or mitigate potential significant conflicts of interest so as to prevent unfair competitive advantage or the existence of conflicting roles that might impair a contractor's objectivity. FAR § 9.504(a)(2); Knights' Piping, Inc.; World Wide Marine & Indus. Servs., B-280398.2, B-280398.3, Oct. 9, 1998, 98-2 CPD ¶ 91 at 5. To assist with these judgments, the FAR counsels contracting officers to examine each situation individually and to exercise "common sense, good judgment, and sound discretion" in assessing whether a significant potential conflict exists and in developing appropriate ways to resolve it. FAR § 9.505; Epoch Eng'g, Inc., B-276634, July 7, 1997, 97-2 CPD ¶ 72 at 5. We will not overturn a contracting officer's determinations in this area except where they are shown to be unreasonable. SRS Techs., B-258170.3, Feb. 21, 1995, 95-1 CPD ¶ 95 at 9.

With respect to its argument that award of this contract to RER, together with RER's ongoing status as a PAE, gives RER conflicting roles that will bias its judgment, Deutsche Bank contends that RER's work as a PAE means it will be in the unique position of overseeing its performance under this contract, and that this conflict of interest cannot adequately be mitigated.³

³ As noted above, the RFQ specifically put vendors on notice that PAEs would be allowed to compete. Accordingly, an argument that, because of its role as a PAE, RER is ineligible for award under any circumstances, would involve an alleged impropriety on the face of the RFQ and therefore would have had to be raised before
(continued...)

In response, HUD explains that there were potential conflicts of interest for several of the vendors, including Deutsche Bank, and that the agency met with each to discuss both the nature of its particular conflict and the possible resolution of it. With respect to RER, HUD points out that the company proposed using a subcontractor to manage any property for which RER had served as the PAE. RER's quotation also indicated that the company would create a firewall between it and the subcontractor by allowing the subcontractor to report directly to HUD on those properties. In addition, HUD advises that when it decided to allow PAEs to participate in this procurement, it made adjustments to the nature of the relationship between the contractor here and the agency to heighten agency control. For example, instead of having the contractor serve as the project manager for certain loans, as originally stated in the SOW, the agency had the contractor provide support to HUD's project managers. Agency Report, Memorandum of Law, at 13.

In our view, HUD reasonably concluded that the solution proposed by RER adequately mitigates the conflict of interest arising from RER's dual roles as PAE and loan servicer. SRS Techs., supra. In addition to the solution itself, the record here contains a statement from the government's technical representative, who also served on the TEP, explaining the considerations and judgments leading to the conclusion that RER's approach was sufficient to mitigate any conflict arising from its dual roles. Our review of this statement reveals that the agency had a detailed and well-reasoned basis for its conclusion that RER's approach was sufficient to mitigate the conflict here, and the protester has offered no specific challenge to these conclusions. For example, the technical representative explains that even prior to considering RER's offer, when HUD first decided to permit PAEs to participate in this procurement, the agency decided that one way to mitigate potential conflicts would be to award more than one contract here, so that properties that had been reviewed by a contractor in its role as a PAE could be assigned to a different contractor for loan servicing. AR, Tab 3 at 6. We note that

(...continued)

the closing time set for receipt of quotations to be timely. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (2001); International Sci. and Tech. Inst., Inc., B-259648, Jan. 12, 1995, 95-1 CPD ¶ 16 at 2-4. On the other hand, Deutsche Bank has timely raised the more limited argument that RER's organizational conflict of interest will not be adequately mitigated, since the RFQ clause leaves open the possibility that a PAE vendor, like RER, will be ineligible for award if it fails to adequately disclose or mitigate any organizational conflict of interest it has. Similarly, Deutsche Bank has the direct economic interest necessary to qualify as an interested party to challenge the adequacy of RER's proposed mitigation since, if we were to sustain the protest on this ground and conclude that RER was ineligible for award, Deutsche Bank would be next in line for award. See 4 C.F.R. § 21.0(a).

RER's use of a subcontractor to interact directly with HUD officials when needed addresses this situation in much the same way.

In lieu of challenging the specific conclusions described above, Deutsche Bank argues that the agency did not take sufficient action to secure for itself the protections outlined in RER's quotation because the task order award does not include contractual language implementing the mitigation steps offered in the quotation, and because there is no separate contract between HUD and RER's subcontractor. We disagree on both fronts. Given that RER's quotation clearly details its approach of assigning to its subcontractor the loan servicing on any property for which RER has served as the PAE, we see no reason why the agency cannot control this situation as a matter of contract administration. See SRS Techs., supra, at 9-10. Similarly, we know of no reason why there must be a direct contract between HUD and RER's subcontractor for RER's proposed approach to work. See Epoch Eng'g, supra, at 7 n.6. In summary, as indicated above, we think HUD has taken sufficient and appropriate measures to mitigate the conflict of interest raised by award to RER, and none of the arguments raised by Deutsche Bank compels a contrary conclusion.

With respect to Deutsche Bank's contention that RER received an unfair competitive advantage through access to HUD data made available to PAEs (but not to other vendors), this issue is untimely. It is undisputed that PAEs received access to one or more internal HUD databases, which were not available to non-PAE vendors, in order to perform their administrative functions for the agency. There is also no dispute that PAEs were known within the industry to have had access to this information. Since we have no reason to conclude that Deutsche Bank was unaware of this matter prior to responding to this RFQ, and since the RFQ specifically stated that PAEs would be allowed to compete, this contention involves an alleged impropriety apparent on the face of the solicitation that had to be filed prior to the time set for the receipt of quotes. 4 C.F.R. § 21.2(a)(1)).

Finally, Deutsche Bank contends that the evaluation here was improper because HUD used an estimate of the number of properties to evaluate costs different from the one it identified in the RFQ. Here, again, the RFQ, on its face, advised that HUD reserved "the right to use the most current projections in performing the cost evaluation." RFQ at 4. Since the agency clearly disclosed its intent to evaluate quotes using different projections from those identified in its solicitation, Deutsche Bank was required to raise any challenge to HUD's intended evaluation approach

prior to the closing time set for the receipt of quotations. 4 C.F.R. § 21.2(a)(1). Since Deutsche Bank did not first raise this matter until after award, this challenge is untimely and will not be considered.

The protest is denied.

Anthony H. Gamboa
General Counsel