

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-222139

DATE: June 20, 1986

MATTER OF: A&A Realty, Inc.

DIGEST:

1. Although letter from agency official transmitting agency level protest to agency's headquarters may be construed as indicating bias against the protester because the protester was the incumbent contractor under prior two contracts and the agency had received complaints from other potential offerors, the letter read as a whole may be reasonably construed as stating that award was made on the basis of the proposal which rated highest in the agency's evaluation. Even if bias in the evaluation of proposals were assumed, it does not appear to have been translated into action which affected the protester's competitive position where there was a reasonable basis for the evaluators' determinations.
2. General Accounting Office (GAO) review of evaluation of proposals is limited to examining whether the agency evaluation was fair and reasonable and consistent with the stated evaluation criteria. GAO review shows that agency's evaluation was reasonable.
3. Specific grounds of protest are dismissed as untimely where the allegations were first presented to General Accounting Office more than 10 working days from the date on which protester received evaluators' scoring sheets, under Freedom of Information Act request, which contained the information which forms the basis for the new grounds of protest.

A&A Realty, Inc. (A&A), protests award to Four Star Realty, Inc. (Four Star) under solicitation No. 15-00-6-033 issued December 18, 1985, by the Farmers Home Administration (FmHA), United States Department of Agriculture, for exclusive real estate brokerage services for the sale of

035980

FmHA's inventory of single family dwelling properties in Lawrence County, Indiana. The solicitation contemplated a Basic Ordering Agreement under which an estimated 15 to 35 homes would be listed for sale during the contract period of calendar year 1986.

The protest is denied in part and dismissed in part.

The solicitation provided that proposals were due by January 8, 1986. Eight offerors submitted timely proposals and award was made to Four Star on or about January 15 on the basis of initial proposals, without discussions. Following the agency's denial of A&A's protest to it of the award to Four Star, A&A filed its protest with this Office on February 26. In its protest A&A alleges in general terms that award was not made consistent with the criteria set forth in the solicitation and that the agency breached its duty to fairly consider A&A's proposal.

As support for its protest the protester points out that it served as the exclusive broker for the FmHA in Lawrence County under prior contracts for calendar years 1984 and 1985 and that it is undisputed that its performance has been "very good." The protester advises that prior to contract award it became aware that Four Star's proposal had received a higher point score in the agency's evaluation of proposals and that based on its knowledge of "Four Star Realty's operation," it suspected that an objective evaluation had not been made. A&A asserts that in a meeting with FmHA's Chief of Rural Housing for Indiana, it was advised that it was not awarded the 1986 contract for broker's services because the FmHA believed that after 2 years it was time to award the contract to a different broker. A&A also points out that in a letter dated January 28, 1986, transmitting A&A's agency level protest to the FmHA's headquarters in Washington, D.C., the Indiana state director for the FmHA stated:

"A&A Realty's performance as an exclusive broker in the 1984 and 1985 calendar years has been very good. It was a difficult decision to select another broker; however, based on the [proposals] received, this Office felt it to be in the best interest of FmHA to use a different broker for this year. We have received considerable criticism from other brokers in the area for use of the same broker for two years."

The protester asserts that this letter confirms that the FmHA's evaluation of its proposal was not based on the specified evaluation criteria, but instead, it was denied award simply because it had held the contract for the prior 2 years.

The FmHA states that the rural housing chief's remarks to A&A have been taken out of context and that he explained to the protester that the evaluation of the proposals submitted resulted in Four Star receiving a higher evaluation point score. The agency further points out that in his letter of January 28, the state director also stated that "a number of very professional proposals" were received which were reviewed and evaluated by a committee of three people, and that "based on the proposals submitted" award was made to Four Star. The FmHA asserts that its evaluation of proposals was conducted in a fair and unbiased manner consistent with the solicitation's evaluation criteria and that award was made to the offeror who submitted the proposal with the highest evaluation score. The protester's technical point score was 66 points out of 100 while the awardee's point score was 68.3.

Apparently, A&A in part believes that it submitted the best proposal under the solicitation because of its prior experience and performance as the exclusive broker in Lawrence County. The fact that A&A was the incumbent contractor in calendar years 1984 and 1985 and was deemed by the agency to have performed in a "very good" manner does not establish entitlement to award in a subsequent year. The propriety of each award under a negotiated procurement depends not on prior procurements but on the facts and circumstances of each particular procurement. See Ensign-Bickford Co., B-211790, Apr. 18, 1984, 84-1 C.P.D. ¶ 439 at 9. There is no basis for favoring a firm in a competition with presumptions based on prior performance or experience. The Management and Technical Services Co., a subsidiary of General Electric Co., B-209513, Dec. 23, 1982, 82-2 C.P.D. 571. Thus, the fact that award was not made to A&A does not in itself indicate that the award to Four Star was improper.

Concerning the protester's contention that the agency was biased against it precisely because it had held the contract for the prior 2 years, a protester has a heavy burden of proving bias on the part of procurement officials and unfair or prejudicial motives will not be attributable to those officials on the basis of inference or supposition. Kelsey-Seybold Clinic, P.A., B-217246, July 26, 1985, 85-2 C.P.D. ¶ 90. A protester must produce "hard facts" showing

actual bias. See HSA Technology, B-219410, Sept. 18, 1985, 85-2 C.P.D. ¶ 300. Furthermore, we will not find a discretionary action to be biased or arbitrary if the record indicates a reasonable basis for such action. Thus, even if bias is assumed it must be shown that it was translated into action which affected the offeror's competitive position. Nuclear Assurance Corp., B-216076, Jan. 24, 1985, 85-1 C.P.D. ¶ 94.

We do not believe that the protester has presented hard facts which would meet its heavy burden of establishing bias. As set forth above, the agency advises that the statements made to A&A by the Chief of Rural Housing have been taken out of context by the protester and that this official had advised the protester that award was made to Four Star on the basis that it had submitted the highest rated proposal. While a portion of the January 28 letter from the State Director to FmHA headquarters may be construed as indicating a bias against making award to A&A as the incumbent contractor, we believe that read as a whole the letter may be reasonably construed as stating that award was in fact made on the basis of the proposals submitted, and that the State Director merely recognized that some brokers had complained about the fact that award had been made to the same broker for the prior 2 years.^{1/}

Moreover, our overall review of the evaluation score sheets used by the evaluators and the proposals submitted by A&A and Four Star indicates that both offerors were essentially treated fairly and equally. The evaluators used the same score sheets in evaluating both A&A's and Four Star's proposals, the evaluation criteria set forth in the score sheets directly correspond to the criteria stated in the evaluation and the subcriteria listed in the score sheets generally fall within the evaluation criteria set forth in the solicitation. Furthermore, none of the criteria or subcriteria set forth in the score sheets would appear to unfairly prejudice an incumbent offeror. Furthermore, our review of the evaluation of A&A's proposal does not reveal any determination by the evaluators which was so clearly arbitrary or unreasonable as would indicate prejudice against the incumbent contractor.

The solicitation provided that selection of the successful offeror would be based upon evaluation of

^{1/} The agency states that one of these complaints resulted in an inquiry from a congressman. This inquiry was not received until after the award selection had been made and does not appear to have influenced it.

proposals with all elements of the solicitation's statement of work to be addressed by the offerors. The evaluation criteria and the allocation of points are set forth in the solicitation's "Selection Criteria" section as follows:

<u>Criterion^{2/}</u>	<u>Weight</u>
I. <u>Experience with FmHA Sales and Loan Procedures</u>	15
II. <u>Member of Multiple Listing Service (MLS)</u>	5
III. <u>Knowledge of Local Real Estate Market</u>	10
IV. <u>Convenience of Office Facilities</u>	10
V. <u>Availability of Broker/Agents</u>	10
VI. <u>Advertising Plan</u>	15
VII. <u>Innovations to be Utilized</u>	10
VIII. <u>Financial Capability</u>	5
IX. <u>Investor Property Analysis</u>	10
X. <u>Broker Qualifications</u>	10
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TOTAL POINTS.....	100

The solicitation later set forth a narrative description of each evaluation criterion. Cost or price was not an evaluation factor since the solicitation established the commission schedule for the broker. In pertinent part, the solicitation provided that the broker will receive 6 percent of the sale price of residential properties of one to four living units.

The agency advises that an initial evaluation of the protester's and Four Star's proposals resulted in a tie score. As a result, a panel composed of three employees from the Indiana FmHA staff was convened, each of whom reviewed and evaluated the proposals separately. This panel gave the Four Star proposal a higher rating and the contract was awarded to Four Star on this basis.

In its February 26 protest, A&A made allegations of bias which were rather broad. At the conference on this protest, however, and in its combined comments filed on April 14 concerning the April 7 conference and the agency report, A&A presented for the first time a number of specific objections concerning the agency's evaluation of its proposal and that of Four Star. In addition, the

^{2/} Although here the criteria are identified by roman numerals, in the solicitations's "Contractor's (Broker's) Proposal" section and on the evaluators' score sheets the criteria are identified by the letters "A" through "J" and will be referred to by their letter designation in the remainder of this decision.

protester has raised some specific objections to certain subcriteria adopted by the evaluators in their evaluation of proposals. These specific allegations are based on the evaluation score sheets which the agency provided A&A subsequent to its filing of its protest as a result of the protester's request for information under the Freedom of Information Act (FOIA). We note that the agency has denied the protester access to the awardee's proposal which has been submitted for our in camera review in connection with this protest. Our discussion of the contents of such material is necessarily limited because of the agency's restrictions on its disclosure. See Raytheon Support Services Co., B-219389.2, Oct. 31, 1985, 85-2 C.P.D. ¶ 495.

The protester advises that on or about March 18 the agency provided it with copies of the evaluation score sheets on Four Star's proposal and that on or about April 3 it was provided with incomplete copies of the evaluation of its own proposal. In contrast with its original protest the new allegations presented by the protester at the conference and in its subsequent comments filed on April 14 are quite specific and detailed in nature and concern the precise number of points which were awarded by the evaluators under certain subcriteria set forth in the evaluation score sheets. We regard these new specific allegations as being only tangentially related to the protester's original broad grounds for protest and accordingly these grounds for protest must independently satisfy the timeliness requirements of our bid protest regulations. See Professional Review of Florida, Inc.; Florida Peer Review Organization, B-215303.3; B-215303.4, Apr. 5, 1985, 85-1 C.P.D. ¶ 394 at 6, 7. Thus, these new allegations are untimely raised where they are based on information contained in the evaluation score sheets and are not raised within 10 working days of the protester's receipt, pursuant to its FOIA request, of those score sheets. See id. at 8; Farrell Lines, Inc.-- Reconsideration, B-220442.2, Dec. 2, 1985, 85-2 C.P.D. ¶ 619 and 4 C.F.R. § 21.2(a)(2) (1985). Accordingly, as set forth below we dismiss as untimely a number of the protester's specific allegations which are based on information which it received on or about March 18--the date when it received the evaluation score sheets on Four Star's proposal.

The specific allegations raised by the protester concern several of the evaluation criteria set forth in the solicitation and the subcriteria established and used by the evaluators in their scoring of the proposals. In pertinent part, part II of the solicitation provided that proposals

should respond to all of the items set forth in the solicitation's evaluation criteria giving a brief but complete description of the manner in which each specification requirement would be met or of the qualifications and background requested. The allegations raised by the protester at the conference and in its comments concern the evaluation of proposals under the following criteria as described in the statement of work:

"A. Experience with FmHA Sales and Loan Procedures. State prior FmHA, VA, and HUD experience including numbers of properties sold in last 3 years. This should include not only properties sold in the last year for which you may have acted as selling broker, but also private sales for which the Government was the mortgagee.

"F. Advertising Plan. Indicate the means and frequency by which FmHA-owned properties will be advertised throughout the market area. Indicate specifically how that advertising will be tailored to FmHA properties and program-eligible applicants. Provide examples of advertisements presently published by your firm (not necessarily FmHA oriented). Newspaper clippings are acceptable.

"G. Innovations to be Utilized. Briefly describe any innovation plans contemplated for the sale of suitable and unsuitable properties, e.g., "open house", etc.

"H. Financial Capability. Provide banking reference or financial statement in support of capability to provide advertising, sign posting, retain office, pay secretarial salaries, etc.

"J. Broker Qualifications. Provide a brief narrative supporting broker's sales experience and results. The narrative should state any other information which would be

helpful in determining qualifications; such as professional designation, professional sales awards, continuing education and organization membership."

We point out in connection with the protester's allegations concerning the evaluation of proposals that procuring agencies are given a considerable range of judgment and discretion in carrying out a technical evaluation. See Spectrum Leasing Corp., B-205781, Apr. 26, 1982, 82-1 C.P.D. ¶ 383. Furthermore, it is not the function of this Office to rescore proposals nor will we make independent judgments as to the numerical scores which should have been assigned. Blurton, Banks and Associates, Inc., B-206429, Sept. 20, 1982, 82-2 C.P.D. ¶ 238. Our review is limited to examining whether the evaluation was fair and reasonable and consistent with the stated evaluation criteria. Southwest Regional Laboratory, B-219985, Dec. 16, 1985, 85-2 C.P.D. ¶ 666 at 4. The fact that the protester disagrees with the selecting official's conclusions does not in itself render the evaluation unreasonable. Id.

In its comments the protester first objects to the subcriteria used by the evaluators in the evaluation of criterion "H," "Financial Capability." The protester notes that the solicitation states that an offeror must "provide banking reference or financial statement" whereas the subcriteria for "Financial Capability," as set forth in the printed evaluation score sheets used by the evaluators, shows that the maximum 5 points for this criterion would only be awarded where the offeror has submitted "adequate and sound financial statement or three favorable bank references." In the alternative, 2 points were to be allocated for two bank references or 1 point for one favorable banking reference. The protester asserts that such subcriteria are improper since the criterion for "financial capability" required only a "banking reference or financial statement." A&A asserts that had it been aware of the subcriteria used by the evaluators it would have submitted in its proposal sufficient financial information to receive the maximum 5 points for that criterion instead of the single bank reference for which it only received 1 point. Since the subcriteria to which the protester objects are clearly set out in the evaluation score sheets, A&A should have been aware of the basis of this protest on March 18, when it first received copies of the evaluation score sheets on Four Star's proposal. Accordingly, we dismiss as untimely the protest of the scoring of the financial capability criterion

since such protest was first raised more than 10 working days after the protester received the information which forms the basis of its protest. See 4 C.F.R. § 21.2(a)(2).

The protester also asserts that it should have received an additional 2 points in the evaluation under subcriterion "F.2," "Means of advertising FmHA properties in area," under criterion "F," "Advertising Plan." Under subcriterion F.2, as established in the scoring sheets, a total of 5 points was to be allocated as follows:

"2. Means of advertising FmHA properties in area

"Posting ad in broker office with photo Plus sign on individual property	- 1
"Exterior marquee or signs advertising FmHA properties	- 1
"Local publications other than MLS	- 1
"Radio and/or TV	- 1
"More than one newspaper utilized	- 1"

First, A&A asserts that it was entitled to an additional point under subcriterion F.2 from each evaluator because it indicated in its proposal and in the accompanying advertisements that it would use an exterior marquee or signs, and local publications other than multiple listing service (MLS) and would advertise in more than one newspaper. A&A's proposal does indicate that A&A would use an exterior sign advertising FmHA properties and that FmHA properties would be listed in two newspapers; A&A received appropriate credit therefor from the evaluators under the second and fifth elements of subcriterion F.2. However, in view of the subcriterion providing credit for advertising in more than one newspaper, the subcriterion concerning non-MLS local publications may be reasonably construed as encompassing publication in other than newspapers, and A&A's proposal does not show that A&A will advertise in a publication other than MLS. We note that the protester proposes, as an innovation, to advertise FmHA property in the local telephone directory for which it received point credit from the evaluators under criterion "G"--"Innovations to be Utilized." Accordingly, we cannot conclude that the

evaluators acted unreasonably in not crediting A&A for proposing to advertise in a non-MLS publication.

A&A also asserts that it should have received an additional point from each evaluator under subcriterion F.2 since it indicated that it would post in its office a photo advertisement of FmHA owned properties and that it would place a sign on each individual property. Although the protester's proposal states that it would put a special "For Sale" yard sign in connection with all FmHA properties which would be promptly "photo listed," the proposal did not specifically state that such photo listing would be posted in its office. The protester asserts that the term "photo listing" is synonymous with posting a photo advertisement in the broker's office. While the protester's proposal to photo list may be construed as involving its posting a photo advertisement in its office, we cannot conclude that the evaluators were unreasonable in concluding otherwise.

The protester also contends that it should have received an additional 2 points each from two of the evaluators for subcriterion F.4 which provides as follows:

"4. How will [the offeror] tailor advertising for FmHA eligible applicants

Telephone numbers of salespersons shown
in ad - 1

FmHA Listings to be separated under FmHA
heading - 2

Some FmHA eligibility criteria stated in
ad. - 2"

The protester states that although one of the evaluators awarded it the maximum 5 points under sub-criterion F.4 the other two evaluators did not credit its proposal with the 2 points for setting forth FmHA eligibility criteria in advertising. The protester asserts that it should have received 2 points from every evaluator for meeting the last factor since it submitted with its proposal copies of newspaper advertisements which address FmHA eligibility requirements by stating "no down payment to qualified applicants." The protester apparently was denied points because two of the evaluators evaluated this sub-factor on the basis of whether there would be information in

the advertisements concerning the FmHA eligibility or qualification requirements of buyers. It is unclear from the record before us whether one of the evaluators did in fact award points to A&A for this factor since that evaluator, while apparently following the evaluation scoring scheme, indicated the total points awarded under the evaluation criteria and subcriteria on a separate sheet of paper for both A&A's and Four Star's proposals. However, given the limited and general information contained in A&A's advertisements concerning FmHA eligibility we cannot conclude that an evaluator's not crediting the protester's proposal with points for this subfactor was unreasonable.

The protester has also raised a number of objections to the subcriteria used by the evaluators to evaluate criterion "G," "Innovations to be utilized," and to the evaluators' scoring of that criterion. The subcriteria set out in the scoring sheets for innovations are as follows:

"Subcriteria

1. Innovations address sale of FmHA suitable property - 2
2. Innovations address sale of unsuitable FmHA property - 2
3. Other innovations -
(One point per innovation listed - up to 6 points)"

A&A objects to the distinction made in the score sheets between innovation for the sale of suitable and unsuitable FmHA property, since the solicitation did not indicate that the proposals were to separately address innovations for each category of FmHA owned property. This protest ground is untimely since it was first raised more than 10 working days from on or about March 18, the date when the protester received copies of the evaluation scoring sheets.

The protester also questions the evaluation of Four Star's proposal under subcriterion G.3, "Other innovations," since Four Star apparently received 1 point in the evaluation for a "special sign" which it proposed to use. The protester asserts that evaluation credit for this sign is improper since the sign violates a local ordinance regulating the size of advertising signs. This basis of protest would also appear to be untimely since the protest ground was first presented more than 10 working days from the date on which the protester received the evaluation score sheets on Four Star's proposal.

A&A also contends that under subcriterion G.3 it should have received a point from each evaluator for the sign which it stated it would place on all FmHA properties. Although A&A's proposal did not mention a sign in its discussion of innovations which it proposed to use in the sale of FmHA properties, it did refer to a special on-site sign for FmHA property in its discussion of its advertising plan under criterion "F." While Four Star received evaluation points for its proposed sign our review of the sign proposed by Four Star in its proposal indicates that the sign would contain a feature which could reasonably be regarded as "innovative" by the evaluators whereas, in its proposal, the protester appears to be proposing a standard type of sign notwithstanding its usage of the term "special sign." Accordingly, we do not believe that the evaluators acted unreasonably in determining that the protester's proposal should not receive an additional point under subcriterion G.3 for its proposed sign.

The protester also has objected to evaluation criterion "A," "Experience," which it feels was misleading. The protester states that while the criterion, as set forth in the solicitation, requested that offerors "state prior FmHA, VA and HUD experience" the score sheet provides for one point to be awarded for experience with a "State Housing Authority." The protester asserts that it has experience with a state housing authority and would have so stated in its proposal if the evaluation criteria had indicated that such information was relevant to the evaluation. This basis of protest is untimely since the protester first raised this ground for protest more than 10 working days from when it first received copies of the evaluation score sheets--on or about March 18--which clearly set forth the evaluation subcriteria for broker's experience.

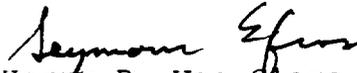
Finally, the protester objects to the fact that under criterion "J," "Broker Qualifications," Four Star's proposal was credited with the maximum 2 points under subcriterion J.2, "Professional sales awards," since the protester indicates that no such awards may have been received by Four Star during the last 3 years. This grounds for protest is untimely since it was first raised by the protester more than 10 working days after it received the copies of the evaluation score sheets on Four Star's proposal. In any event, we note that there is nothing in either criterion "J" as set forth in the solicitation or any other provision in the solicitation which provides that the evaluation of

broker qualifications would be restricted to the consideration of only those professional sales awards which were received during the prior 3 years.

Lastly, our review of the evaluation score sheets for Four Star's proposal has shown that one of the evaluators incorrectly added the total point score which was to be awarded in his evaluation to Four Star's proposal as 70 points whereas the correct total is 69 points. The adjustment would result in an average point score of 68 for Four Star's proposal versus 66 points for A&A's proposal.

A&A requests that it be awarded the costs of pursuing its protest, including attorney's fees, its proposal preparation costs and compensation for lost commissions under the contract. In view of our decision denying in part and dismissing in part its protest, the claims for bid protest and proposal preparation costs are denied. Norfolk Shipbuilding and Drydock Corp., B-219988.3, Dec. 16, 1985, 85-2 C.P.D. ¶ 667 and DSP Technology, Inc., B-220593, Jan. 28, 1986, 86-1 C.P.D. ¶ 96. Furthermore, there is no legal authority which would permit the recovery from the government of anticipated profits. See Smoke Busters, B-219458, Nov. 1, 1985, 85-2 C.P.D. ¶ 501 and Aaron Refrigeration Services, B-217070, Apr. 17, 1985, 85-1 C.P.D. ¶ 437 at 6.

The protest is denied in part and dismissed in part.

for 
Harry R. Van Cleave
General Counsel