



Comptroller General

of the United States

Washington, D.C. 20548

Decision

Matter of: Harlan & Associates

File: B-241590.2; B-241636.2; B-241638.2; B-241640.2;
B-241590.3; B-241636.3; B-241638.3; B-241640.3

Date: February 12, 1991

Douglas S. Harlan, Esq., Harlan & Associates, for the protester.

Carole W. Wilson, Esq., Department of Housing and Urban Development, for the agency.

Richard P. Burkard, Esq., and Andrew T. Pogany, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest allegations filed more than 10 working days after protester learned of initial adverse agency action (notice of award to another firm) on protest to agency is untimely. Protester's continued pursuit of protest with contracting agency does not alter this result.
2. Protests filed more than 10 working days after the protester learned of the basis of its protests are untimely.
3. Protester alleging that awardee is ineligible for award does not have the direct economic interest in the contract award to be considered an interested party under General Accounting Office Bid Protest Regulations where there are other intermediate offerors that have a greater interest in the procurement than the protester.

DECISION

Harlan & Associates protests the award of four contracts to the law firm of Pope, Roberts, and Warren, P.C., under request for proposals (RFP) Nos. 24-90-115, 25-90-115, 26-90-115, and 27-90-115, issued by the Department of Housing and Urban Development (HUD) for real estate closing services in the San Antonio, Texas area.^{1/}

^{1/} The RFPs differed only in that they required closing services for properties located in separate locations in the San Antonio area. The proposals submitted by the offerors were also virtually identical.

We dismiss the protests.

The RFPs were issued on June 20, 1990, and following an amendment to the RFPs, the closing date for receipt of proposals was July 24, 1990. The RFPs provided that awards would be made to the responsible offerors whose proposals were considered most advantageous to the government, cost/price and other factors considered. While the RFPs advised that technical and management quality factors would be more important than price in making the award decisions, they cautioned that as proposals became more equal in their technical merit, the evaluated cost/price would become more important. The RFPs further advised the offerors that since HUD may award the contracts on the basis of initial offers, each initial offer should contain the offeror's best terms from a cost or price and technical standpoint.

The agency received six proposals for each of the solicitations, except for RFP No. 25-90-115, for which seven proposals were received. Upon receipt of the proposals, members of an agency technical evaluation panel individually evaluated and scored the proposals. The panel then averaged the individual scores to determine a rating for each offeror. The panel determined that Pope submitted the highest-rated technical proposals for each of the RFPs, and Harlan submitted the third highest technically rated proposals. Harlan's price was by far the highest of all the offers; it was nearly two times the price of the next highest-priced offeror, which also submitted proposals determined to be superior to Harlan's. Since Pope's proposals were the lowest-priced technically acceptable offers, the panel recommended that award be made to Pope contingent upon its demonstrating that it had adequate bonding capacity to perform the contracts.

The agency states that on or about August 21, 1990, Harlan was telephonically notified that HUD planned to make awards to Pope. The protester does not dispute this date and states that it knew as early as August that HUD intended to make awards to Pope. Harlan states that prior to September 27, it learned that the award decisions were made on the basis of initial proposals since Pope's proposals received the highest technical score and were also the lowest-priced technically acceptable offers. Harlan also states that prior to September 27, Harlan contacted Pope to discuss the possibility of subcontracting the performance of the San Antonio contracts.

On September 27, Harlan filed a protest with HUD alleging that (1) HUD misrepresented facts concerning its intent to make multiple awards; (2) HUD officials orally misled Harlan regarding how the offers would be evaluated; (3) the technical evaluation panel was not composed of the individuals HUD had stated would be on the panel; and (4) HUD had improperly

delayed the official announcement of the award decision. The September 27 protest did not allege that Pope's proposals had been evaluated improperly. On October 1, the agency made awards to Pope, and notices were sent to the offerors, including Harlan, on that date. While it is unclear when Harlan received the notification, the protester states specifically that it received an additional notification of the award decisions, including notice of awards to Pope, by an undated notice which the protester received on October 5. HUD denied Harlan's agency-level protest on October 17.

Harlan filed its protests with our Office on November 2. In addition to the four arguments raised in its agency-level protest, Harlan's November 2 protests object to the following HUD actions: (1) improper evaluation of Pope's proposals as technically highest-rated; (2) awards to Pope, despite a change in that firm's corporate structure after submission of its offers; and (3) failure to withhold awards during the pendency of Harlan's agency-level protest and to suspend performance during the pendency of another offeror's post-award protests. In subsequent protests, Harlan alleges that Pope is ineligible for awards since it allegedly failed to properly furnish bonds required by the RFPS.

We find that Harlan's November 2 protests to our Office were untimely filed with respect to the four allegations previously contained in its agency-level protest. When a protest is filed initially with the contracting agency, any subsequent protest to our Office must be received within 10 working days of the protester's notice of the initial adverse agency action. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(3) (1990). Adverse agency action is defined as any action or inaction on the part of a contracting agency, which is prejudicial to the position taken in a protest filed with the agency, including, among other things, a decision by the agency to award a contract. 4 C.F.R. § 21.0(f). Here, the protester was notified of the agency's initial adverse action, the awards to Pope, on October 5 at the latest. Its protest to our Office on these same issues filed nearly a month later is clearly untimely. Weitzul Constr., Inc., B-216036, Feb. 12, 1985, 85-1 CPD ¶ 184. The fact that Harlan continued to pursue its protest with the agency and that HUD formally denied the protest at a later time does not alter this result. Id. Accordingly, we will not consider the four allegations in the November 2 protests, which were also contained in the agency-level protest.

With respect to the issues raised for the first time in the November 2 protests, the principal allegation is that the agency improperly evaluated Pope's proposals as superior and technically highest-rated.

Our Bid Protest Regulations require that protests based on other than alleged improprieties in a solicitation be filed not later than 10 working days after the basis of protest is known or should have been known, whichever is earlier.

4 C.F.R. § 21.2(a)(2). Here, the record clearly shows that Harlan knew in September, at the latest, that the agency intended to make awards to Pope based on Pope's technically highest-rated, lowest-priced proposals. Indeed, in September, Harlan attempted to obtain a subcontracting agreement with Pope, rather than challenge the agency's decision to award contracts to that firm. Harlan's protests of the agency's evaluation of Pope's proposals as technically superior and highest-rated, filed more than a month later, are untimely.

In any event, even assuming this allegation were timely raised and that the protester's proposals should have been rated slightly superior technically to Pope's, we would not disturb the award. Notwithstanding an emphasis on technical factors, an agency may award to a lower-priced, lower technically scored offeror if it determines that the cost premium involved in awarding to a higher-rated, higher-priced offeror is not justified given the acceptable level of technical competence at the lower cost. Balantine's S. Bay Caterers, Inc., B-236633, Dec. 12, 1989, 89-2 CPD ¶ 544. Here, the RFPs specifically advised offerors that price could be the determinative factor, and there is no evidence in the record to suggest that the protester's proposals were sufficiently superior in merit (if at all) to warrant the extraordinary cost premium involved. As stated, the record shows that Harlan's price was exceedingly higher than the other offerors.^{2/}

^{2/} We recognize that Harlan attempts to justify its high price by asserting that HUD officials advised Harlan that price was unimportant and could be negotiated at a later time. While the RFPs did state that price was less important than technical factors, they also warned that since HUD may award the contracts on the basis of initial offers, each initial offer should contain the offeror's best terms from a cost or price and technical standpoint. To the extent that the oral advice of the HUD officials and the explicit terms of the RFPs were inconsistent, we have held that oral advice does not bind the government and that offerors rely on such advice at their own risk. Air Quality Serv., B-230284, May 16, 1988, 88-1 CPD ¶ 460. At a minimum, however, any apparent inconsistency should have been questioned or protested prior to the date for receipt of proposals. See 4 C.F.R. § 21.2(a)(1).

Harlan also alleges that the awards to Pope were improper since Pope reorganized its corporate structure after it submitted its proposals and failed to properly provide the agency with bonds required by the RFPS.

A protester must qualify as an interested party before its protest may be considered by our Office. That is, a protester must have a direct economic interest which would be affected by the award of a contract or the failure to award a contract. See 4 C.F.R. §§ 21.0(a) and 21.1(a). An offeror does not have the direct interest where there are intermediate parties that have a greater interest than the protester. See Caltech Serv. Corp., B-234424, May 1, 1989, 89-1 CPD ¶ 414.

Here, Harlan's offered price was nearly twice that of the next highest-priced technically acceptable offer received. Even assuming Pope were eliminated from the competition, we think that it would be unreasonable to expect the agency to have awarded these contracts to Harlan since the record shows that, for each RFP, HUD received comparable or even higher-rated proposals which were much lower in price. As Harlan has not contested the acceptability of these lower-priced offerors, we have no reason to believe that the agency would make awards to Harlan if its protests were sustained and conclude that there are intermediate parties that have a greater interest than Harlan. Ahtna, Inc.--Recon., B-235761.7, July 17, 1990, 90-2 CPD ¶ 38. Consequently, we find that Harlan is not an interested party within the meaning of our Regulations to challenge the eligibility of Pope to receive the awards.^{3/}

The protests are dismissed.

Michael R. Golden
Michael R. Golden
Assistant General Counsel

^{3/} Harlan also objects to the agency's determination not to suspend Pope's performance under the contracts notwithstanding another offeror's protests against the awards. The protester also challenges HUD's determination to make awards to Pope before ruling on its agency-level protest. In view of our findings, we will not consider these matters.