



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Town & Country Escrow and Title Company, Inc.

File: B-242355

Date: April 23, 1991

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P.C., and Jon L. Sandler, Esq., for Lawyers Advantage Title
Group, interested parties.
Carole W. Wilson, Esq., Department of Housing and Urban
Development, for the agency.
Scott H. Riback, Esq., Andrew T. Pogany, Esq., and Michael R.
Golden, Esq., Office of the General Counsel, GAO, participated
in the preparation of the decision.

DIGEST

Protest that agency improperly rejected protester's offer for failing to propose a Department of the Treasury-approved corporate surety for a fidelity bond is denied where record shows that protester proposed an unapproved surety contrary to the express terms of the solicitation.

DECISION

Town & Country Escrow and Title Company, Inc.^{1/} protests the rejection of its offer under request for proposals (RFP) No. 0102-90-000, issued by the Department of Housing and Urban Development (HUD) to acquire closing agent services for Washington, D.C. and certain specified geographical regions in the surrounding areas. Town & Country argues that certain actions of the agency have resulted in the firm's being unable to obtain a fidelity bond which meets the requirements of the

^{1/} Town & Country Escrow and Title Company, Inc. and Town & Country Escrow and Title Company, Inc. of Maryland, described by the protester as "sister subsidiaries," have both protested to our Office. Both protests are identical and concern the same solicitation, although apparently each firm offered in different geographical areas contemplated under the RFP. Neither firm is a small business. As requested by these firms, we treat the two firms as having jointly filed one protest.

RFP and, consequently, that the agency improperly rejected an alternate fidelity bond offered by the protester.

We deny the protest.

The RFP called for the submission of unit prices for an indefinite quantity of closing agent services in seven specified geographical areas for a 1-year base contract and two 1-year options. Firms were essentially required to offer a "price per closing" in each of the geographical areas. The RFP further provided that HUD could make multiple awards.

The solicitation also contained a detailed fidelity bonding requirement.^{2/} Specifically, the RFP called for offerors to submit with their initial offers evidence of their capability to secure fidelity bonding in an amount sufficient to cover the agency's requirements as outlined in the RFP. Firms were also required to secure actual bonding within 10 days of being notified of the agency's intent to make award of a contract, and the RFP precluded the agency from making an award to any firm which had not secured the requisite bonding. The RFP also advised offerors that corporate sureties had to be Department of the Treasury-approved.^{3/} The RFP provided that firms needed to submit bonds in an amount equal to the average number of closings for a 2-month period multiplied by the average selling price in the applicable geographic area; these requirements were expressed in the RFP as lump-sum dollar amounts.^{4/}

In response to the solicitation, HUD received six initial offers, five of which, including the protester's, were determined to be in the competitive range. Several weeks

^{2/} A fidelity bond is a bond to secure the government against loss due to theft, embezzlement, or fraudulent acts on the part of the contractor or its employees. Fidelity bonds are used by HUD in its closing agent contracts because closing agent contractors routinely acquire custody of significant sums of government funds in the form of sale proceeds from the disposition of HUD-owned real property.

^{3/} Proposed sureties had to be firms listed in the Department of the Treasury's Circular 570 entitled "Companies Holding Certificates Of Authority As Acceptable Sureties On Federal Bonds And As Acceptable Reinsuring Companies." See 55 Fed. Reg. 27,332 (1990).

^{4/} For example, if, in the geographic region in question, there occurred an average of five closings per month at an average selling price of \$100,000, firms would be required to submit bonding coverage for \$1 million.

later, on October 24, HUD forwarded to each of the competitive range firms a listing of some eight bonding firms in an effort to assist the offerors in obtaining appropriate bonding. On October 29, HUD requested that all competitive range offerors submit the proof of bonding called for in the RFP and, on November 1, a list of three bond brokers was forwarded to the offerors in an effort to further assist them in locating proper bonding. On November 7, all firms were granted a 2-day extension beyond the 10 days contemplated in the RFP to produce proof of adequate bond coverage. On November 9, the protester submitted to the agency written confirmation that it had obtained bonding coverage from Lloyd's of London. On December 3, the protester was advised by the agency that its offer was no longer being considered for award because its proposed surety was not a Treasury-approved surety. This protest followed.

The protester argues that it was the actions of the agency subsequent to the submission of offers which resulted in the firm's being unable to obtain bonding coverage from a Treasury-approved surety and that, consequently, the agency was obligated to consider and accept the bond which it offered. Specifically, the protester argues that on or about September 27 and 28, HUD issued a new bonding requirement to all of its current closing agent contractors nationwide, essentially quadrupling the bonding coverage required.^{5/} According to the protester, this resulted in a significant restriction in the market availability of bonding coverage nationwide. The protester alleges that firms which had no previous bond coverage for HUD closing agent contracts were unable to obtain such coverage from Treasury-approved sureties, while firms with preexisting bond coverage were able to secure additional coverage for purposes of offering on the subject RFP. The protester thus argues that the actions of the agency created an impermissible competitive advantage for incumbent offerors. Town & Country therefore alleges that the agency was obligated to consider the non-approved surety which

^{5/} Previous HUD guidelines required firms to have fidelity bonding in an amount equal to the value of the average number of closings for a 15-day period; the "new" HUD guidelines are the same as those outlined in the RFP, namely, bonding in an amount equal to the value of the average number of closings for a 2-month period.

it offered. In support of this latter argument, the protester directs our attention to a clause in the RFP which provides in pertinent part:

"If no offeror under this solicitation whose proposal is determined to be within the competitive range (i.e., those proposals that have a reasonable chance of being selected for award) is able to obtain the required bonding, the Government reserves the right to use alternative methods to determine and ensure the responsibility of the successful offeror."

The agency responds that it acted properly in rejecting Town & Country because it had not offered bonding from a Treasury-approved surety. Specifically, the agency argues that the bonding requirements were clearly outlined in the RFP, were applied equally to all offerors and properly reflected HUD's needs for purposes of ensuring against potential losses. In addition, the agency argues that it was legally precluded from awarding a contract to a firm which did not meet the solicitation's bonding requirements under the clause noted by the protester because other firms submitting offers were able to obtain the necessary bonding. Finally, the agency states that, despite the protester's assertion to the contrary, two of the firms receiving award under the solicitation were firms with no previous HUD contracts that were able to secure bonding from Treasury-approved sureties.

Since Town & Country has specifically indicated that it does not view the RFP's bonding requirements as unreasonable,^{6/} the question in this case is whether the actions of the agency in increasing the amount of bonding required by its current contractors resulted in an impermissible advantage in favor of incumbent offerors such that the agency was obliged to consider non-approved sureties.^{7/} Agencies are not required to equalize a competitive advantage enjoyed by a particular

^{6/} Town & Country states in its protest that "we did not then nor do we now consider the requirement of a bond to be unreasonable. Rather, it was the subsequent actions of HUD which rendered the strict fulfillment of the requirement impossible."

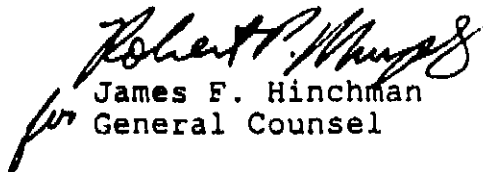
^{7/} The agency and the protester dispute whether in fact HUD's new bonding requirements were imposed after the receipt of offers under the RFP. We need not resolve this dispute since, even if the protester were correct regarding the timing of HUD's implementation of the new bonding requirements, we still see no basis upon which to sustain the protest.

offeror so long as that advantage is not due to preferential treatment or other unfair action on the part of the government. Hummer Assocs., B-236702, Jan. 4, 1990, 90-1 CPD ¶ 12. In our view, the agency's action here, taken in furtherance of its unchallenged needs on a nationwide basis, simply does not represent preferential treatment warranting special agency efforts to equalize whatever advantage its incumbent contractors may have incidentally enjoyed in the bond market. Also, the record contains evidence that non-incumbents were not disadvantaged in the manner alleged by the protester--two of the three awardees were firms which did not have prior HUD contracts.

With regard to the agency's rejection of Town & Country's offer because its proposed surety was not a Treasury-approved surety, we point out that the Surety Act, 31 U.S.C. § 9304 et seq. (1988), requires that firms comply with its various conditions prior to being approved as corporate sureties. Under Federal Acquisition Regulation § 28.202(a)(1), all corporate sureties offered for bonds furnished with contracts to be performed in the United States must appear on the list contained in Treasury Department Circular 570 which identifies those sureties approved pursuant to the Surety Act. See American Asbestos Abatement, Inc., B-237613, Nov. 29, 1989, 89-2 CPD ¶ 504.

Finally, as for the RFP provision relied on by the protester, the record shows that the agency received acceptable offers from the three awardee firms which all had proposed Treasury-approved sureties; consequently, the provision is inapplicable since that provision, by its own terms, only is operative in the event HUD did not receive any offers from firms proposing to use Treasury-approved sureties.

The protest is denied.


for James F. Hinchman
General Counsel