

Van Schaik

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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Fjellestad, Barrett and Short

File: B-248391

Date: August 21, 1992

Michael A. Gordon, Esq., Holmes, Schwartz & Gordon, for the protester.

John P. Opitz, Esq. and Kenneth A. Markison, Esq., Department of Housing and Urban Development, for the agency. John Van Schaik, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency improperly failed to exercise a contract option is dismissed since it involves a matter of contract administration outside the scope of the bid protest function.

2. Protest that agency improperly modified contracts by reassigning to those contracts work that would have been performed under protester's contract option, had it been exercised, is denied since the reassigned work resulted in no change in the purpose or nature of the contracts and the increased workload under those contracts was permitted by the terms of those contracts.

DECISION

Fjellestad, Barrett and Short (FBS) protests the decision of the Department of Housing and Urban Development (HUD) not to exercise an option under the firm's contract for property management services in the Phoenix, Arizona metropolitan area. FBS also argues that HUD's decision to assign to other property management contracts work that it would have performed had the option been exercised was an improper modification of those contracts.

We deny the protest in part and dismiss it in part.

HUD issued request for proposals (RFP) No. 10-91-123, to solicit proposals for contracts to manage single family properties owned by or in the custody of HUD in the Phoenix area. Under those contracts, which are referred to as real estate asset management (REAM) contracts, the contractors

inspect the properties, maintain and secure vacant properties, notify police and taxing authorities of HUD ownership and hire and monitor contractors for repair and maintenance work. The solicitation divided the Phoenix area into 19 geographic areas and contemplated multiple awards. Offerors were permitted to compete for more than one area.

On May 1, 1991, HUD awarded eight REAM contracts under the solicitation, including one to FBS for areas 11, 12 and 14. Each of the contracts was for 1 year with 2 option years. FBS' contract, like the others awarded, guaranteed that a minimum of 50 and a maximum of 300 properties would be assigned to it. Also, all of the contracts included a Limitation of Property Assignments clause which stated in relevant part:

"HUD reserves the right to selectively assign properties in this area or to administratively revise the geographic area in accordance with the changes clause of the contract, if such action is determined to be in the best interest of HUD."

HUD terminated one of the eight contracts as a result of declining inventories in the assigned geographic area. In addition, HUD explains that in February 1992, as a result of reduced HUD contract administration staff, increased duties and declining housing inventory, it no longer needed the services of all seven remaining contractors. Accordingly, HUD declined to exercise the first year option on one contract because of poor performance and also decided not to exercise the option on the FBS contract because that contract had required significant staff time to administer. (HUD had issued two cure notices to FBS for faulty performance and, according to the agency, that firm's property inventory required more agency follow-up than was necessary under many of the other contracts.)

HUD exercised the options on five of the other REAM contracts. Subsequently, HUD stopped assigning new properties to FBS and reassigned properties managed by the firm to two of the remaining contractors, G.E. Capital Asset Management Corporation and Nichols Real Estate, Inc. This was accomplished by reassigning the geographic areas managed by FBS to those contractors pursuant to the Limitation of Property Assignments clause.

As a preliminary matter, HUD argues that this Office does not have jurisdiction to consider FBS' protest since the decision to exercise or not exercise an option is a matter of contract administration, within the discretion of the contracting agency.

In response, FBS argues that the general rule--that we do not consider protests against the failure to exercise an option--should not be applied in this case. FBS argues that we should consider its protest against the decision not to exercise the option because that decision was based on a form of limited competition. In this respect, FBS argues that consistent with our decisions Honeywell, Inc., B-244555, Oct. 29, 1991, 91-2 CPD ¶ 390 and Mine Safety Appliances Co., 69 Comp. Gen. 562 (1990), 90-2 CPD ¶ 11, we will consider a protest against the failure to exercise an option when the agency conducts a competition to decide which options in a number of similar contracts should be exercised.

In this case, FBS argues that HUD effectively conducted a limited competition among the REAM contractors. According to FBS, this competition was based on a comparison of each contractor's performance under the base year, rather than on price, which had been the key evaluation factor under the original competition. In addition, FBS maintains that HUD's "selection" of G.E. Capital Asset Management and Nichols Real Estate was unreasonable since its base year performance was far better than the performance of those firms.

We agree with HUD that FBS' protest concerns a matter of contract administration outside the scope of our bid protest function. 4 C.F.R. § 21.3(m)(1); Young-Robinson Assocs., Inc., B-242229, Mar. 22, 1991, 91-1 CPD ¶ 319. A contracting agency is not required to exercise an option under any circumstances. See Federal Acquisition Regulation §§ 17.201 and 17.207. We will not consider the matter even where the protester argues that the agency's decision not to exercise an option was made in bad faith. See Xperts, Inc., B-244761.2, Sept. 6, 1991, 91-2 CPD ¶ 215.

FBS reliance on our decisions Honeywell, Inc., supra, and Mine Safety Appliances Co., supra, is misplaced. In those decisions, we found inapplicable the rule that we generally will not review protests of the agency's refusal to exercise a contract option, because in those cases the agencies in effect conducted competitions in order to determine which contractor's option would be exercised.¹ In this case, on

¹In Mine Safety Appliances Co., supra, in accordance with the solicitation, the agency convened a technical evaluation panel to score the performance of prototype devices produced under two parallel development contracts in order to decide which contractor option would be exercised. In Honeywell, Inc., supra, two contractors were permitted to submit best and final offers including revised prices for option quantities and the contractors were made aware that low

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the other hand, no competition was conducted among the REAM contractors for the option year. Rather, HUD simply declined to exercise the options in the contracts of FBS and another contractor as a result of concerns about the performance of those firms, while it chose to exercise the options in five other contracts.

FBS nonetheless argues that, even if the failure to exercise FBS' option is a matter of contract administration, HUD improperly modified the contracts of G.E. Capital Asset Management and Nichols Real Estate by assigning to those firms properties that were under FBS' contract.

As a general rule, our Office will not consider protests of contract modifications, as they too involve matters of contract administration that are the responsibility of the contracting agency. 4 C.F.R. § 21.3(m)(1) (1992). We will, however, review an allegation that a modification went beyond the scope of the contract and should have been the subject of a new procurement since such a modification could be viewed as an attempt to circumvent the competitive procurement statutes. Cray Research, Inc., B-207586, Oct. 28, 1982, 82-2 CPD ¶ 376. To determine if a particular modification is beyond the scope of the contract, generally we consider whether the original purpose or nature of the contract has been so substantially changed by the modification that the contract for which the competition was held and the contract to be performed are essentially different. Id.

Here, the G.E. Capital Asset Management and Nichols Real Estate contracts were not substantially changed by HUD's reassignment of the geographic areas that were previously managed by FBS. There has been no change in the purpose or nature of those contracts since under all eight REAM contracts, the contractor was to provide the same management services for single family properties. In addition, although the reassignments increased the number of properties to be managed under those two contracts, such an increase is specifically permitted by the terms of those contracts. Each of the REAM contracts included the Limitation of Property Assignments clause which reserved the right to HUD to revise geographic areas under the contracts. We think that HUD's reassignment of the geographic areas from the FBS contract to the other contracts was consistent

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price would be substantially determinative with respect to the exercise of the options. In both of these cases, the contracting agency announced the terms under which a limited competition would be conducted to determine which option it would exercise.

with the Limitation of Property Assignments clause.² Under the circumstances, we conclude that there was no improper modification of those contracts.

The protest is dismissed in part and denied in part.


for James F. Hinchman
General Counsel

²FBS notes that each contract was limited to 300 properties and maintains that it was managing 187 properties when its properties were reassigned to the G.E. Capital Asset Management and Nichols Real Estate contracts. Although FBS argues that the reassignment was beyond the scope of those contracts, we have been informed by HUD that after the reassignment, both G.E. Capital Asset Management and Nichols Real Estate were managing less than 300 properties.