



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Ervin & Associates, Inc.

File: B-275693

Date: March 17, 1997

John J. Ervin for the protester.

Richard A. Marchese, Esq., Department of Housing and Urban Development, for the agency.

Aldo A. Benejam, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Contention that agency improperly conducted a limited competition for equity monitoring services is denied where the record shows that agency reasonably determined that only a limited number of sources were capable of meeting the agency's urgent requirements and the urgency was not the result of a lack of advance planning.
 2. Allegation that agency improperly failed to solicit the protester in limited competition for equity monitoring services is denied where there is no evidence in the record that prior to issuing the solicitation, contracting officials either knew or should have known of the protester's capability or interest in performing the urgently required services.
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DECISION

Ervin & Associates, Inc. protests the decision by the Department of Housing and Urban Development (HUD) to limit the number of sources solicited under request for proposals (RFP) No. DU100C000018545 for equity monitoring services for the Federal Housing Administration (FHA). Ervin argues that HUD's need to limit the competition was the result of a lack of advance planning by the agency. The protester also maintains that since HUD knew of its capability to provide these services, HUD improperly failed to solicit the firm.

We deny the protest.

BACKGROUND

The purpose of the procurement is to obtain an equity monitoring contractor for the FHA's "Class B Trust Certificate" interests. The Trust is the result of a sale of what is referred to in the record as "partially-assisted" multifamily mortgages. This is a structured financing arrangement whereby HUD transferred 157 mortgages with an unpaid principal balance of approximately \$850 million to the Trust. The mortgages are formerly FHA-insured, fully amortizing mortgages at varying levels of delinquency, secured by first liens on multifamily properties. At the conclusion of the transaction, HUD retains a minimum of 30 percent of the beneficial interest in the Trust.

The agency states that in May 1995, FHA proposed a structured transaction to dispose of the portfolio of the mortgages involved here, modeled after a program conducted by the Resolution Trust Corporation (RTC), referred to as the RTC's "N-Series program." The record indicates that HUD had finalized its decision to proceed with the transfer of the mortgages to the Trust by the fall of 1995. At about the same time, HUD also determined that HUD's equity interest as a result of the transfer of the mortgages to the Trust would require monitoring.

In January 1996, HUD set mid-April as the date by which the partially-assisted note sale and, thus, the transfer of the mortgages to the Trust, would be completed. Since the RTC had recently undergone a similar process with the N-Series program, and since HUD had no prior experience with this type of transaction, HUD turned to the RTC for guidance with the transaction and for assistance in identifying the responsibilities and functions of an equity monitor. During February, HUD met with RTC program managers and with one of the RTC's current equity monitors to discuss the functions and responsibilities of an equity monitor. HUD states that as a result of those meetings, it became evident that there were only a limited number of sources experienced and qualified in providing equity monitoring services.

In March 1996, HUD determined that the equity monitor would have to be in place by the time the mortgage transfers were completed in order to ensure that HUD's equity interest was protected. In other words, the agency's goal was to complete the mortgage transfers concurrent with the award of a contract for the equity monitoring services. According to HUD, however, the agency would require 6-12 months to complete a procurement for an equity monitor using full and open competitive procedures. With the mortgage transfers rescheduled to be completed in June, less than 3 months away, the agency decided that a competitive procurement would not be feasible and explored several other approaches to meeting its requirement. In view of the RTC's recent experience with its "N-Series" program, HUD decided to request that the RTC identify firms experienced in equity monitoring work.

In response, the RTC identified nine firms that it believed capable of providing equity monitoring services. Seven of those firms had recently submitted technically acceptable proposals in response to an unrestricted solicitation for equity monitoring services for the RTC. The other two firms identified by the RTC had performed several equity monitoring contracts for the RTC. According to HUD, all firms identified were deemed by the RTC to have the requisite background, capability, and experience to perform the equity monitoring work required by HUD. Ervin was not one of the firms the RTC identified.¹

On June 25, 1996, HUD prepared a justification and approval (J&A) document based on a finding of urgent and compelling circumstances under the authority of 41 U.S.C § 253(c)(2) (1994). The J&A stated that due to the urgency of the procurement and the specialized nature of the required work, the competition would be limited to the nine firms identified by the RTC as being uniquely qualified to perform the work. The J&A also stated that future equity monitoring services would be procured using fully competitive procedures.

The RFP, issued on June 27, contemplated the award of a fixed-price contract for a 1-year period. The principal task under the RFP is to provide oversight to ensure that the Trust is managed consistent with the terms of the transaction documents, so that FHA receives the maximum recovery of its interest in the Trust.

Of the nine firms solicited, only two responded to the RFP. Both firms made oral presentations to HUD; the agency conducted discussions with each firm immediately following their oral presentations; and requested and received best and final offers (BAFO) from both. The agency subsequently submitted written discussion questions to both firms and reevaluated BAFOs based on their responses to these items. On September 30, the agency awarded the contract to the firm of Alschuler, Melvoin and Glasser, L.L.P. for a 12-month period in the amount of \$700,000. This protest to our Office followed an agency-level protest which HUD denied.

PROTESTER'S CONTENTIONS

The protester argues that the urgency of the procurement was the result of a lack of advance planning by HUD contracting officials, and, thus, that the agency's decision to limit the competition was not justifiable. In this connection, Ervin contends that the agency either knew or should have known as early as

¹At a conference held in our Office, Ervin conceded that it has never submitted a proposal to the RTC for equity monitoring services; nor does the protester argue that the RTC should have included the firm in the list of sources it provided to HUD.

August 1994 that it required equity monitoring services. Ervin contends that HUD could have met its requirement for equity monitoring services on a fully competitive basis had it not delayed finalizing the functions and responsibilities of the equity monitor until March 1996, by which time it was too late to proceed on a competitive basis.

Ervin also contends that the agency improperly excluded it from the limited competition. In this connection, the protester states that for the last 6 years, it has performed numerous multifamily housing services contracts for HUD and asserts that Ervin is well known to HUD as an expert in all aspects of multifamily housing.

DISCUSSION

An agency may use other than competitive procedures to procure goods or services where its needs are of such an unusual and compelling urgency that the government would be seriously injured if the agency is not permitted to limit the number of sources from which it solicits proposals. 41 U.S.C. § 253(c)(2). When citing an unusual and compelling urgency, the agency is required to request offers from "as many potential sources as is practicable under the circumstances." 41 U.S.C. § 253(e); Federal Acquisition Regulation § 6.302-2(c) (FAC 90-31). An agency using the urgency exception may restrict competition to the firms it reasonably believes can perform the work in the available time. RSO, Inc., B-250785.2; B-250785.3, Feb. 24, 1993, 93-1 CPD ¶ 489. We will not object to the agency's determination to limit the competition based on an unusual and compelling urgency unless the agency's determination lacks a reasonable basis. Jay Dee Militarywear, Inc., B-243437, July 31, 1991, 91-2 CPD ¶ 105, recon. denied, B-243437.2, Oct. 24, 1991, 91-2 CPD ¶ 366.

We first consider the protester's contention that HUD's need to limit the competition was the result of a lack of advance planning on the part of procurement officials. In this regard, award of a contract using other than competitive procedures may not be made where the urgency cited as the justification was the result of a lack of advance planning by contracting officials. 41 U.S.C. § 253(f)(5); Magnavox NAV-COM, Inc., B-248501, Aug. 31, 1992, 92-2 CPD ¶ 143. Here, the record does not support the protester's assertion that HUD's need to limit the competition was the result of a lack of advance planning.

The record shows that in order to ensure that FHA's equity interests resulting from the partially-assisted note sale were adequately protected, HUD required that the equity monitoring contractor be in place concurrent with the transfer of the mortgages to the Trust, which was scheduled to be completed by June 1996. The record also shows, however, that the agency would require 6-12 months to complete a procurement on a full and open basis. The protester does not dispute the agency's conclusions in this regard.

Further, the record does not support the protester's contention that HUD first recognized the need for an equity monitor as early as August 1994. The protester asserts that because it was around that time that financial consultants first advised HUD on the details of the structured transaction (i.e., the mortgage transfers to the Trust), they should have informed HUD at that time of the need for a contractor to monitor its equity interests in the Trust.

Contrary to the protester's assertion, the record does not show that HUD's financial advisors informed HUD of the need for equity monitoring services in 1994. What the record does show is that HUD did not recognize the need for equity monitoring services until the fall of 1995, at the earliest, when it finalized its strategy to proceed with the mortgage transfers. The record further shows that once that decision was made, HUD officials took steps to identify the agency's specific needs and determine the functions and responsibilities of an equity monitor, using as a model the RTC's "N-Series" program. In an effort to gather information about the contemplated transaction, HUD officials met with RTC program managers and with a private firm under contract with the RTC to provide equity monitoring services. As a result of those meetings, HUD firmed up its strategy and finalized its requirement for the equity monitor services some time in March 1996. Since the services required here are highly specialized in nature and HUD had no prior experience procuring these services, we fail to see how HUD's actions reflect a lack of advance planning. To the contrary, HUD's approach appears to have been a reasonable one under the circumstances.

Indeed, HUD's efforts here are in marked contrast to those taken in various situations where we sustained protests because the agency failed to take the appropriate steps to plan for the procurement. Eg., TLC Servs., Inc., B-252614, June 22, 1993, 93-1 CPD ¶ 481; Laidlaw Envtl. Servs. (GS), Inc.; Int'l Technology--Claim for Costs, B-249452; B-250377.2, Nov. 23, 1992, 92-2 CPD ¶ 366; Service Contractors, B-243236, July 12, 1991, 91-2 CPD ¶ 49. In each of the cases cited, it was clear that the agency either knew or should have known of its requirement well in advance, such that with proper planning, it had sufficient time to conduct a competitive procurement. Here, given the limited amount of time between when HUD first recognized the need for the equity monitor services (fall 1995) and when HUD had planned to have the equity monitor in place (June 1996), and in light of the agency's efforts during that relatively short period, there is simply no basis to conclude that the limited competition approach was the result of a lack of advance planning.

Ervin also points out that the J&A states that HUD required that the equity monitor be in place by June 1996, but that HUD delayed the award until September, allegedly showing that the "urgency" cited in the J&A as a justification for limiting the competition did not actually exist.

As explained above, although a determination was made in March 1996 that the equity monitor contract should be in place by June, in fact the RFP was not issued until late June. The record shows that the delay in issuing the RFP was due to HUD's efforts to identify firms capable of providing the required services, not to any change in the perceived urgency of the need for the services. Similarly, while the award was not made until September 30, any delays in the evaluation process--for example, the agency decided to reopen discussions with both offerors who responded to the RFP--were due to circumstances that arose during the evaluation and selection process which the agency could not have foreseen. Accordingly, given the reasons for the delay in making award until September, there simply is no basis in this record to conclude that the delay shows that the agency's need for these services was not urgent.

Ervin contends that HUD officials should have known of Ervin's interest and capability to provide the equity monitor services, and, thus, should have solicited the firm. In this connection, the protester asserts that for the last several years, it has performed numerous multifamily housing services contracts for HUD, which should have alerted contracting officials to the firm's interest and capability of performing the equity monitoring services required here. The protester asserts that its president is a certified public accountant (CPA) and that at the time of this procurement, Ervin employed several CPAs and other individuals with financial and real estate experience, all of whom are capable of performing the contract.

HUD explains that the work Ervin has performed under its multifamily housing services contracts is essentially different from the specialized work required under the equity monitoring contract. For instance, the principal task of the equity monitor is to provide administrative oversight to ensure that the Trust is managed consistent with the terms of the transaction documents so that FHA receives the maximum recovery of its interest in the Trust. The contractor is to review operating statements, budgets, audits and other reports, and other financial information required to be submitted under the terms of the Trust. The equity monitor is to perform cash as well as asset monitoring and management, and is also responsible for reviewing the servicing and legal files related to the underlying collateral business plans, budgets, operating statements, balance sheets, audit reports, tax reports, and other information issued by the Trust.

By contrast to the tasks listed above, Ervin's prior contracts were to provide technical assistance in the areas of multifamily real estate finance, mortgage loan servicing, and property management, including property acquisition and disposition. Ervin was also responsible for evaluating the likelihood of bringing defaulted mortgages current, and for conducting detailed inspections of the conditions of the various buildings, grounds, and mechanical systems.

Based on our review of the record, including the statements of work of the contracts Ervin has performed in the past, we conclude that HUD contracting officials had no reason to have known that Ervin was either qualified or interested in performing the equity monitoring services. While some tasks that Ervin has performed arguably overlap with the responsibilities of the equity monitor (e.g., reviewing annual financial statements), overall, the expertise required to perform the equity monitoring contract is specialized in nature in that it primarily calls for extensive analyses of complex financial transactions. The fact that Ervin employees possessed professional degrees in accounting and real estate financing does not change the fact that the tasks required here differ significantly from those Ervin has performed under the multifamily housing services contracts, which primarily involve property management (i.e., physical inspections, property disposition, etc.). Thus, we fail to see why HUD knew or should have known that Ervin was capable of providing the services required here and accordingly, we have no basis upon which to object to the agency's failure to solicit Ervin.

Finally, the protester maintains that the reason HUD did not solicit the firm for this contract was because it was retaliating against Ervin for its efforts to uncover alleged procurement irregularities at HUD. Since the record reasonably supports the agency's decision to not solicit Ervin for this procurement, we need not reach the question of whether HUD contracting officials were biased against Ervin.²

The protest is denied.

Comptroller General
of the United States

²We note that Ervin has a lawsuit pending, Ervin and Associates, Inc., et al. v. Helen Dunlap, et al., Civil Action No. 96-CV1253, which includes allegations that HUD is retaliating against Ervin by "blackballing" the firm from competing for HUD contracts, as well as allegations of bias, bad faith, and procurement irregularities at HUD. The equity monitoring services contract that is the subject of this protest is not directly at issue in the lawsuit.