



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Ervin & Associates, Inc.

File: B-279161.2

Date: October 13, 1998

John J. Ervin for the protester.

Virginia Kelly Stephens, 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. Allegation that agency improperly evaluated protester's proposal is denied where the record shows that the agency evaluated the proposal in accordance with the evaluation factors announced in the solicitation and record reasonably supports protester's overall lower technical score.
2. Protester's proposal was properly excluded from the competitive range as not having a reasonable chance of being selected for award in view of agency's receipt of significantly higher-rated, lower cost proposals.

DECISION

Ervin & Associates, Inc. protests the exclusion of its proposal from the competitive range under request for proposals (RFP) No. DU100C000018561, issued by the Department of Housing and Urban Development (HUD) for due diligence services¹ and other related work.

We deny the protest.

The RFP, issued November 21, 1997, anticipates the award of multiple indefinite-quantity task order contracts. RFP §§ B-1(b), B-2, I-16. The RFP guarantees a minimum order of \$250,000 per contract and a maximum of \$30 million per contract. RFP § B-3. Offerors were required to submit separate technical and business (cost) proposals. RFP § L-1. With respect to costs, offerors were instructed to provide information to support their proposed costs only for two sample tasks included in the solicitation. RFP §§ L-1, L-6.

¹Due diligence encompasses a wide range of services that facilitate the sale or restructuring of HUD-held and/or insured single-family and multifamily mortgages, as well as Title I home improvement and manufactured housing loans.

Section M-3 listed the following technical evaluation factors (maximum number of possible points under each factor shown in parenthesis): (1) documented evidence demonstrating the experience of the offeror in performing work that is the same as, or substantially similar to, that required under section C, the statement of work (SOW) (30); (2) demonstrated record (as confirmed by references) of successful past performance of the same or similar work as that to be required under the prospective contract within the last 2 years (20); (3) the qualifications of all proposed key personnel, as outlined only in their resumes (20); (4) demonstrated ability to effectively and efficiently manage the proposed contract (15); and (5) the extent to which the offeror's proposal presents efficient and realistic approaches to performing due diligence services under the sample task orders (included in section J of the RFP) (15). The RFP states that while cost would not be numerically scored, it would be considered in the overall evaluation, and that "proposed cost or price must be considered reasonable and must reflect the proposed technical approach." RFP § M-2. The RFP provides that award will be made to the offeror(s) whose proposal(s) are considered most advantageous to the government, cost and other factors considered. Id.

A technical evaluation panel (TEP) evaluated the proposals the agency received. Each member of the TEP assigned individual technical scores to each proposal under the evaluation factors. The TEP then met to discuss the merits of the proposals; arrived at a consensus score for each proposal; and determined which proposals were technically acceptable. Proposals were then ranked on the basis of consensus scores ranging from a total of 10 to 96 points. Several proposals with total scores of between 10 and 68 points were determined to be technically unacceptable; Ervin's proposal received a total of 76 points (out of 100 possible points) and was found technically acceptable.

The contract specialist then evaluated business proposals based on the costs proposed to perform the two sample task orders included in the RFP. The contract specialist's analysis shows that Ervin's total proposed cost for both sample task orders was from 40 to 62 percent higher than the total estimated costs proposed by several firms whose proposals were rated technically superior and were included within the competitive range.²

²We note that the highest-rated proposal included within the competitive range (which earned 96 points), was significantly higher in cost than several other proposals. The agency explains, however, that this proposal was included despite its high proposed costs because of its strong technical merit, and because the contracting officer believes that discussions could result in a more competitive proposal.

Based on the results of the technical and cost evaluations, the contracting officer concluded that Ervin's proposal did not have a reasonable chance for award, and eliminated the proposal from the competitive range. By letter dated May 15, 1998, the agency informed Ervin that based on the results of the TEP's evaluation, its proposal was no longer being considered for award. This protest to our Office followed a written debriefing by HUD.

In reviewing competitive range determinations, our Office will not independently reevaluate proposals; rather, we will examine the record to ensure that the evaluation is reasonable and in accordance with the solicitation's evaluation criteria. Mobility Sys. and Equip. Co., B-261072, Aug. 8, 1995, 95-2 CPD ¶ 66 at 4. A protester's disagreement with the agency's technical judgment does not show that such judgment was unreasonable. Id.; Mictronics, Inc., B-228404, Feb. 23, 1988, 88-1 CPD ¶ 185 at 3.

Based on our review of the evaluation record, including the protester's technical proposal and the agency's evaluation documentation, we conclude that HUD reasonably eliminated Ervin's proposal from the competitive range. The record shows that Ervin's low consensus score stemmed from several deficiencies the TEP identified in its proposal under all evaluation factors. Below, we summarize the most significant of the TEP's findings under the three most important evaluation factors.

Ervin's proposal was downgraded primarily under the three most important technical evaluation factors listed in the RFP. The first factor concerned the experience of the offeror in performing work that is the same as, or substantially similar to, that required under the SOW.³ Under this factor, the agency was to assess the offeror's demonstrated experience as a business in performing due diligence on transactions with various listed criteria, including: representation of both buyers and sellers, including private and public entities; real estate or real estate based assets similar to those being offered; transactions substantially equivalent in structure to those contemplated under the contract (*i.e.*, whole loan sales, securitized transactions, "N-series" debt-equity transactions, single asset auctions, negotiated transactions, etc.); transactions substantially equivalent in

³The SOW stated that HUD is seeking due diligence services for the "sale, disposition, or restructuring of HUD-held mortgage assets and other related work and for the underwriting and insuring of certain projects through the issuance of Task Orders." RFP § C, Part I.B. The RFP also identifies the functional areas for which these services were sought, including: single-family mortgage loan sales; multifamily portfolio reengineering transactions; multifamily mortgage insurance and capital advance programs; and pool insurance risk sharing agreements. RFP § C. Section C of the RFP also discusses the various aspects of due diligence services that may be encompassed in typical task orders. RFP § C, Parts II-VII.

assets to those contemplated under the contract (i.e., transactions with multiple, complex, nonperforming, subperforming, and/or performing residential, single and multifamily, and commercial assets); and varying levels of rent subsidies and/or with substantial low and moderate income residents. RFP § M-3.

The TEP's consensus score for Ervin's proposal under this factor was 24 of 30 points. The TEP found that Ervin's proposal demonstrated "very good experience" in performing some tasks that are the same as or substantially similar to those required by the RFP. In this regard, the TEP found that Ervin has performed delegated processing (multifamily loan underwriting) for HUD in the past and has performed valuations of loans included in a HUD multifamily sale for a potential loan purchaser. In addition, the TEP found that Ervin's proposed subcontractor has demonstrated experience in multifamily and single-family loan underwriting and has performed due diligence services for the Resolution Trust Corporation (RTC) for a single-family loan sale and a "multi-product" loan sale. However, the TEP found that Ervin's proposal did not demonstrate any experience by either Ervin or its proposed subcontractor in performing comprehensive due diligence services for multifamily loan sales held by public entities. The TEP concluded that this was a significant deficiency in Ervin's proposal because such services are a major part of the SOW. The TEP also found that Ervin's proposal did not demonstrate experience providing due diligence services for either single or multifamily loan or property sales held by private entities, which also was to be assessed under this evaluation factor.

Although in its initial protest letter Ervin took issue with the TEP's evaluation under this factor, in its comments on the agency report responding to the protest, Ervin does not rebut any of the specific findings by the evaluators. In our view, the TEP's consensus score of 24 out of 30 points under this factor reasonably reflected the panel's concern with Ervin's lack of experience in providing the full range of services that are the same as, or substantially similar to, those required by the RFP.

Under the second most important technical evaluation factor, the TEP was to assess the offeror's demonstrated record (as confirmed by references) of successful past performance within the last 2 years of the same or similar work as that required under the RFP. Offerors were instructed to provide references, including contract number and description of services; contracting officer, project officer and their telephone numbers; federal agency or organization; dollar amount; and contract performance period. RFP § M-3.

The TEP's consensus score for Ervin's proposal under this factor was 11 of 20 points. The TEP noted that Ervin stated in its proposal that its proposed subcontractor has experience in performing multifamily and single-family loan underwriting and has performed comprehensive due diligence services for the RTC for single-family loan sales and a "multi-product" loan sale. However, the TEP was

unable to assess the subcontractor's past performance because Ervin failed to provide any references in its proposal for the firm as specifically instructed in the RFP. Moreover, the TEP found that Ervin's proposal indicated that the subcontractor's experience was for services performed more than 2 years ago, while the evaluation factor assessed experience within the last 2 years.

In connection with its evaluation of Ervin's past performance under the second evaluation factor, the TEP considered a "Notice of Termination for Default" issued to Ervin by HUD's Office of Procurement and Contracts on February 13, 1997, for a contract involving annual financial statement reviews for HUD's entire multifamily project portfolio.

The TEP concluded that the termination notice had only a small negative effect on Ervin's overall past performance rating, primarily because the terminated contract was similar to only a portion of the work expected to be performed under the multifamily loan sales part of the instant solicitation. Thus, the TEP found that Ervin merited a "reasonably high rating on past performance even with the default termination." TEP Report, June 1, 1998 at 29.

Ervin challenges the TEP's reliance on the termination notice, asserting that the notice was based on altered documents in the contract file, and that the basis for issuing the notice is under investigation by HUD's Inspector General (IG). In the absence of any findings by the IG, however, we cannot conclude that it was improper for the TEP to consider the notice in its evaluation. In any event, the record shows that the TEP did not attach great significance to the termination notice. In sum, based on the record before it, the TEP reasonably gave Ervin's proposal a consensus score of 11 of 20 points in this area.

The third evaluation factor concerned the qualifications of all proposed key personnel, as reflected only in their resumes. The TEP's consensus score under this factor was 15 out of 20 points. The TEP found that except for one individual, none of the key personnel's resumes demonstrated actual experience in performing tasks as part of due diligence transactions for residential real estate asset sales of the magnitude required by the RFP. For example, the TEP found that the proposed Engagement Director has multifamily loan underwriting experience, but does not have any experience in performing due diligence services for residential real estate asset sales. In addition, the TEP found that while one of the proposed project managers has designed financial strategies for institutions specializing in asset securitizations and whole loan sales, and has traded whole loans while employed by two different brokerage houses in New York City, her resume does not demonstrate any experience in performing due diligence services for residential real estate asset sales. The protester does not rebut the TEP's conclusions in this regard. In view of this factor's focus on the qualifications of key personnel, and in light of the TEP's findings, we have no basis to object to the evaluation of Ervin's proposal under this factor.

With respect to costs, the RFP stated that the agency would evaluate proposed costs of performing due diligence services under two sample task orders included in section J of the RFP. One task order is for the sale of HUD-held subsidized multifamily mortgages. The second task order is for the sale of HUD-held single-family mortgages. The RFP stated that while cost would not be numerically scored, it would be considered in the overall evaluation. RFP § M-2.

The contract specialist's analysis shows that Ervin's proposal, with a consensus score of 76 points, had total proposed costs of performing the two sample task orders that were from 40 to 62 percent higher than five other firms whose proposals earned consensus scores ranging from 83 to 95 points, and was considered unreasonably high by comparison. While the protester argues that HUD has included high cost proposals in the competitive range under other solicitations, each procurement action is a separate transaction and the action taken in one procurement is not relevant to the propriety of the action taken under another procurement. Komatsu Dresser Co., B-251944, May 5, 1993, 93-1 CPD ¶ 369 at 4. Thus the fact that HUD may have included higher cost proposals in the competitive range under other solicitations does not render improper its determination here, given that Ervin's estimated costs were found to be unreasonably high when compared to other higher-rated proposals.

The basis for the exclusion of Ervin's proposal was the agency's determination that, overall, it was not among the most highly rated offers being considered for award, and its proposed costs were considered significantly higher compared to several higher-rated proposals. As a result, the contracting officer determined that Ervin's proposal had no reasonable chance of being selected for award. An agency may properly determine whether to include a proposal within the competitive range by considering the proposal's relative standing. A proposal that is technically acceptable need not be included in the competitive range when, relative to other acceptable offers, it is determined to have no reasonable chance of being selected for award. Coe-Truman Techs., Inc., B-257480, Sept. 12, 1994, 94-2 CPD ¶ 136 at 3. We will not disturb a determination to exclude a proposal from the competitive range unless the record indicates the determination was unreasonable. Intown Properties, Inc., B-250392, Jan. 28, 1993, 93-1 CPD ¶ 73 at 3. Here, the agency's evaluation of Ervin's technical proposal was reasonable, as discussed above, based on the deficiencies the TEP found in the protester's proposal. Given that there were several other competitive range proposals that received higher technical ratings and were lower in proposed costs, the exclusion of Ervin's proposal from the competitive range is unobjectionable.

The protester also argues that various events at HUD over the last few years and the elimination of its proposal from the competition here show that HUD is retaliating against Ervin for its "whistleblowing" activities against the agency, and that HUD officials have acted in bad faith to deny Ervin an opportunity to compete

fairly for this contract.⁴ When making such an allegation, the protester must establish not only that the procuring agency acted with a malicious and specific intent to injure the protester, Industrial Data Link Corp., B-246682, Mar. 19, 1992, 92-1 CPD ¶ 296 at 4, but also that the alleged agency bias translated into action that unfairly affected the protester's competitive position. Shel-Ken Properties, Inc., B-277250, Sept. 18, 1997, 97-2 CPD ¶ 79 at 6. In its protest letter, Ervin took issue with virtually all of the TEP's findings with respect to its proposal. The agency responded fully to the protester's allegations, including a complete record of the TEP's evaluation of Ervin's proposal. In its comments on the agency report, however, Ervin essentially abandoned its claim of an improper evaluation. Instead, the protester's comments consist of a recitation of events spanning several years which purport to show bias against Ervin, or corruption and dishonesty on the part of HUD personnel. Ervin has provided no argument or credible evidence, however, to show that the alleged agency bias or dishonesty translated into action that unfairly affected its competitive position in this procurement. On the contrary, since the record reasonably supports HUD's evaluation of Ervin's proposal and its exclusion from the competitive range, and Ervin has not rebutted any of the TEP's findings, we have no basis to conclude that any alleged agency bias unfairly affected Ervin's competitive position in this procurement.

The protest is denied.

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⁴Ervin has lawsuits pending which include 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, some of which are referenced in this protest. Ervin and Assocs., Inc. v. Helen Dunlap, Civil Action No. 96-CV1253 (D.D.C. filed June 5, 1996) and Ervin and Assocs., Inc. v. United States, No. 96-504C (Fed. Cl. filed Sept. 24, 1997). To the extent that Ervin's reference to HUD's bad faith with respect to Ervin concerns these allegations, our Office generally will not consider any protest when the matter involved is the subject of litigation before a court of competent jurisdiction. 4 C.F.R. § 21.11(b) (1998); Robinson Enters.--Request for Recon., B-238594.2, Apr. 19, 1990, 90-1 CPD ¶ 402 at 2.