

The Comptroller General
of the United States

Washington, D.C. 20548

Decision

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88-2 CPD 581

PR

Matter of:

California Properties, Incorporated ✓

File:

B-232323

Date:

December 12, 1988

DIGEST

Protest concerning agency's failure to solicit protester for appraisal services procured under small purchase procedures is sustained, where record shows that agency failed to obtain maximum practicable competition by not disclosing basic procurement information to protester and other solicited appraisers, and then proceeding with an expedited award based on single price quote received.

DECISION

California Properties, Incorporated (CPI), protests the award of a contract under an oral request for quotations issued by the Department of Housing and Urban Development (HUD) for appraisal services for the Geneva Towers Apartment building in San Francisco. CPI contends that HUD acted unreasonably in failing to allow CPI to compete for the appraisal contract.

We sustain the protest.

The facts according to HUD are as follows. On July 28, a HUD official conducted an oral request for quotes for an appraisal of the Geneva Towers complex using small purchase procedures, calling six appraisers from a list of known capable appraisers. HUD received a quote from a Ms. Farkas (\$5,000) and left messages for the other appraisers, including Rosenbusch. One of the firms with which HUD spoke was CPI, which had performed appraisal services for HUD previously, and recently had advised HUD by letter that it was interested in performing future appraisals for the agency. During the conversation, CPI requested information on the property (e.g., any physical defects, or whether the appraisal should be made as is), and reportedly stated that

PUBLISHED DECISION

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68 Comp. Gen. 146

it would not give a quote without "written specifications." The HUD official advised that no written specifications would be issued for this appraisal; rather, interested appraisers would have to come to the HUD offices or make a site inspection to obtain information on the project.

On the next day, July 29, Rosenbusch called in response to HUD's message and expressed interest in the project. Later that day, Rosenbusch came to the HUD offices and was given the general requirements for the appraisal; he stated that he would be interested in the project. On August 1, Ms. Farkas withdrew her quote. On August 4, the HUD's chief appraiser called CPI to determine if CPI wanted to submit a quote. CPI once more expressed interest, but repeated that it would need written specifications. The chief appraiser stated that CPI would have to come to the HUD offices for any information.

On August 5, after being advised by another HUD official that there were "compelling circumstances" requiring a prompt award, HUD's chief appraiser called Rosenbusch to get his quote for the appraisal; he quoted a price of \$7,250, and the chief appraiser proceeded to make an oral award. Rosenbusch then submitted a written acceptance of the contract on August 8. (Subsequently, the chief appraiser learned that he lacked authority to make award, and thus sought ratification of the contract by letters of August 19 and 26. A contracting officer subsequently ratified the contract.)

CPI's account of the facts is different from HUD's in several material respects. CPI states, for example, that it was first contacted by the HUD official on July 22 as to whether CPI was interested in quoting on the Geneva Towers appraisal. CPI expressed interest, but asked several questions about the project that the official could not answer; the official told CPI to call the chief appraiser. CPI called the chief appraiser on July 26, and was told that the information CPI wanted would be provided in the event HUD decided to use a private, rather than an internal HUD, appraiser. HUD's account of the facts does not mention this conversation.

CPI agrees that it spoke with the HUD official again on July 28, but its account of the conversation is different from HUD's: CPI repeated its July 22 request for answers to specific questions on the appraisal and the HUD official agreed to call CPI after obtaining the answers; he never called back with the answers. CPI's account of its August 4 conversation with HUD's chief appraiser also is different from HUD's: the chief appraiser advised CPI that HUD had not

yet decided whether to use a private appraiser, and that he would call CPI if HUD decided to use a private appraiser. CPI maintains it was never invited to the HUD offices for the information it wanted. CPI phoned HUD on August 11 and was advised that the award had been made to Rosenbusch. This protest ensued.

Small purchase procedures require agencies to promote competition to the "maximum extent practicable." 41 U.S.C. § 253(g)(4) (Supp. IV 1986). The regulations provide that, generally, the solicitation of three suppliers may be considered to promote competition to the maximum extent practicable. Federal Acquisition Regulation § 13.106, Gateway Cable Co., B-223157, et al., Sept. 22, 1986, 86-2 CPD ¶ 333.

The solicitation of three or more suppliers, however, does not automatically mean that the maximum practicable competition standard has been met. In procurements expected to exceed \$10,000 but where less than two offerors are otherwise expected to respond to a solicitation, an agency is required to publish notice of the intended procurement in the Commerce Business Daily and make available a completed solicitation package to any business concern requesting it. 41 U.S.C. § 416 (Supp. IV 1986). This provision obviously requires an agency to do more than simply solicit a single known supplier. Further, the Small Business Act, as amended, 15 U.S.C. § 637b (1982), expressly requires that contracting agencies provide a copy of a solicitation to any small business concern upon request, and CPI apparently is a small business. While the publication requirement does not apply to the protested small purchase since it involves an amount under \$10,000, the point is that the procurement statutes and the Small Business Act obviously contemplate that, regardless of whether three suppliers are solicited, responsible sources requesting the opportunity to compete should be afforded a reasonable opportunity to do so. Gateway Cable Co., B-223157, supra.

In short, we view the requirement for maximum practicable competition to mean that an agency must make reasonable efforts, consistent with efficiency and economy, to give a responsible source the opportunity to compete, and cannot, therefore, unreasonably exclude a vendor from competing for an award. As we read the record, HUD did not meet the above standard.

The thrust of HUD's position is that it was aware of CPI's interest in the project, but understood CPI to have refused to give a quote without written specifications; since HUD did not plan on issuing written specifications, there was no

point in soliciting CPI again immediately before making the expedited award to Rosenbusch. CPI maintains, on the other hand, that it only requested answers, written or oral, to certain general questions, such as whether the appraisal was to be on an as is basis, and the schedule for completion. CPI states that it had recently completed four other HUD appraisals without written specifications, and thus would have had no reason to expect anything different on this project.

While it is not clear which party's understanding of the facts is the correct one, we think the record supports CPI's position that HUD failed to take reasonable, simple steps to maximize competition for this contract. We find particularly persuasive in this regard a July 28 memorandum (included in the HUD report), prepared to respond to the questions CPI posed during its July 28 conversation with the HUD official. The memorandum provides answers to eight questions, including the purpose of the appraisal; any relevant financing terms; whether the appraisal was to be made subject to repairs; a property description; the due date for the appraisal report; and the number of reports and copies required. (The memorandum stated that appraisers should conduct a site visit and research project records to get a current property description.)

This memorandum suggests to us that CPI had, as it contends here, merely asked for answers to these basic questions to determine if it would or could perform the job, and did not condition its giving a quote on the receipt of more detailed written specifications. In any case, even if HUD correctly understood CPI as requesting written specifications, the memorandum evidences the agency's understanding that CPI also desired answers to more basic questions. This being the case, it is unclear to us why the answers in the memorandum apparently were never transmitted to CPI; in this regard, there is no statement by HUD that CPI was given the answers, and CPI firmly denies ever receiving the information.

HUD's approach of giving no written or telephone information on the project to interested appraisers clearly did not serve to promote the maximum practicable competition. The questions CPI presented during the July 28 conversation (and later answered in the memorandum) generally were basic, not expansive, and we agree with the view CPI apparently expressed to HUD at the time that this information would be helpful, if not essential, to the firm in deciding whether to compete, and in preparing a price quote. Indeed, had this same information been furnished to all six of the

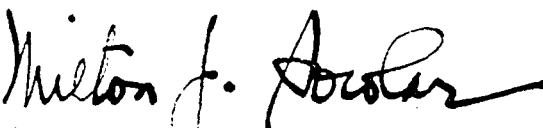
274

solicited appraisers at the outset, it is possible that HUD would have had more than one quote from which to choose when it made the award.

While the small purchase procedures do not require "full and open competition," as indicated above, they do require reasonable efforts to permit a responsible source to compete. Whether or not HUD understood that CPI had requested more information in writing, we do not think HUD met this requirement when it proceeded with an expedited award to Rosenbusch without first furnishing CPI with the answers it had requested (and which the HUD official apparently had agreed to furnish), and then giving the firm an opportunity to quote a price based on that information. Following such a course of action could have increased competition; would have imposed no significant administrative burden on HUD (it could have been done with a single phone call); and would not have prevented HUD from proceeding promptly with the award.

Although we therefore sustain the protest, corrective action is not practicable; HUD proceeded with performance of the Geneva appraisal notwithstanding CPI's protest, based on a determination that continued performance was dictated by urgent and compelling circumstances, see Bid Protest Regulations, 4 C.F.R. § 21.4 (1988), and the contract has been completed. By separate letter, however, we are advising the Secretary of our decision. We also find CPI entitled to recover its costs of filing and pursuing this protest. See 4 C.F.R. § 21.6(e).^{1/}

The protest is sustained.

for 
Comptroller General
of the United States

^{1/} CPI also requests recovery of unidentified "actual damages," presumably representing anticipated profits. It is well established, however, that anticipated profits are not recoverable even in the presence of wrongful agency action. Sonic, Inc., B-225462.2, ✓
May 21, 1987, 87-1 CPD ¶ 531.