



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Sunbelt Properties, Inc.

File: B-249469; B-249713; B-249715; B-249746.2;
B-249984; B-249987; B-250120; B-250121; B-250122

Date: November 17, 1992

John Powell Walker for the protester.
Bradley E. Laxson, Esq., Michael D. Weaver, Esq., and
Kenneth A. Markison, Esq., Department of Housing and Urban
Development, for the agency.
Linda S. Lebowitz, Esq., and Michael R. Golden, Esq., Office
of the General Counsel, GAO, participated in the preparation
of the decision.

DIGEST

1. Solicitations adequately detail agency's requirements for real estate asset management and related services and provide sufficient information for offerors to intelligently prepare technical proposals and to submit prices which will take into account perceived performance uncertainties and risks.
2. Awards will not result in unauthorized personal services contracts where the agency will not, on any continuous basis, supervise or control the successful contractors in the performance of their contracts.
3. Evaluation factors are not objectionable where they are directly relevant to the offerors' performance of the contracts and, as such, provide the basis for the agency's determination of the most advantageous proposals.

DECISION

Sunbelt Properties, Inc. protests the terms of request for proposals (RFP) Nos. 004-92-118N, 065-92-653, 57-92-067, 103-92-01, 006-92-083, 007-92-083, 14-92-943, 15-92-943, and 16-92-943, issued by the Department of Housing and Urban Development (HUD) for real estate asset management services in various geographic regions of the United States.¹

¹The protester filed these protests just prior to the stated closing times for receipt of proposals under each solicitation. HUD has provided to our Office several solicitations which it states are representative of all of the protested
(continued...)

The protester basically contends that the solicitations are vague and lack sufficient information regarding the services to be performed to enable potential offerors to intelligently prepare proposals.

We deny the protests.

The above-referenced solicitations contemplated the awards of firm, fixed-price, indefinite-quantity contracts for a 1-year base period and two 1-year option periods and required successful contractors to perform what were characterized as "non-personal" management and related services for single family properties owned by or in the custody of HUD in various geographic regions of the United States. The solicitations required the successful contractors to furnish all necessary facilities, materials, supplies, equipment, and labor to perform approximately 40 separate tasks as specified in the statements of work.

The statements of work in each solicitation required, among other things, that successful contractors inspect properties on the initial listing "[w]ithin 14 days of contract commencement" and inspect newly assigned properties "[w]ithin 48 hours of assignment; thereafter as necessary"; secure properties to prevent unauthorized entry and damage by the elements "[w]ithin 5 days as conditions warrant"; winterize operating systems and equipment "[i]f conditions warrant"; order termite and other pest control inspections/services "[w]hen required"; ensure that grass and shrubbery are cut/trimmed in a professional-like manner "[a]s needed"; provide a listing of needed repairs, with cost estimates "[a]s required by HUD"; solicit bids for repairs "[w]ithin 5 days of notification by HUD"; inspect repairs "[w]ithin 24 hours of notification by repair contractors"; determine fair market rental value "[w]ithin 5 days of a request by HUD"; execute leases "[w]ithin 5 days of a request by HUD"; and sell properties on an "[o]ngoing basis" for HUD. The solicitations also provided that after award, pursuant to the Limitation of Property Assignments clause, HUD could "selectively assign properties . . . or . . . administratively revise the geographic area . . . if such action is determined to be in the best interest of HUD."

¹(...continued)

solicitations, including the allegedly defective provisions. The protester has not pointed out any material differences between these solicitations which would warrant separate discussion.

The solicitations stated that the awards would be made to the responsible offerors whose proposals, conforming to the solicitations, were most advantageous to the government, price and other factors considered. The solicitations each contained the same basic evaluation methodology. Technical proposals would be evaluated in accordance with the following technical and management evaluation factors:

- (1) documentation of the offeror's management plan to achieve HUD's objectives and the scheduling of tasks as listed in the solicitation's statement of work;
- (2) demonstration of successful experience in managing single family properties similar to those covered by the solicitation with a performance area similar in size;
- (3) demonstration of successful experience in developing listings of needed repairs, as required by HUD's minimum property standards, estimating the cost of repairs, soliciting repair bids, coordinating and overseeing repair work, and inspecting for satisfactory completion;
- (4) demonstration of an adequately trained staff (capable of carrying out duties specified in the solicitation) and adequately equipped office conveniently located or the ability to provide the same; and
- (5) demonstration of successful experience in the management of a rental program including rental collections from present and former tenants for single family properties and the ability to provide reports to the owners. Each evaluation factor was assigned a particular weighted value.

With respect to prices, the solicitations required that prices be reasonable and reflect an offeror's proposed technical approach. In order to assist offerors in calculating their prices, the solicitations for each geographic region included the following information: the number of properties by category breakdown--HUD-owned, vacant lots, non-HUD owned, rental properties, and homeless properties--to be initially delivered to the successful contractors and "estimates" of the average inventory holding times of HUD-owned properties; the average number of closings per month; and the average number of properties, by category breakdown, to be assigned per month to the successful contractors. The solicitations for each geographic region also included a guaranteed minimum number of properties to be assigned to the successful contractors and included maximum property ordering limitations.

The solicitations provided that in determining the most advantageous proposals, technical and management quality would be considered more significant than price, but as proposals became more equal in their technical merit, price would become of primary importance in determining the most advantageous proposals. The solicitations stated that the awards could be made to other than the lowest priced offerors.

The protester, a former area management broker for HUD in Oklahoma, challenges the adequacy of the statements of work in each solicitation. The protester maintains that HUD's desire for the successful contractors to perform some of the services listed in the solicitations on an "as necessary," "as conditions warrant," et al. basis is vague and reflects HUD's inability to clearly express its objective. The protester maintains that because of these inadequately described requirements, offerors, in preparing their proposals, will be forced to assume business risks, particularly that they will perform some services without receiving specific, direct compensation. The protester also maintains that performance of some of the services listed in the solicitations on an "as necessary," "as conditions warrant," et al. basis and HUD's reservation of the right to "selectively assign properties or administratively revise geographic areas" constitutes unauthorized supervision and control by HUD over the successful contractors and effectively results in HUD's awarding prohibited personal services contracts.

An agency is responsible for drafting proper specifications to meet the government's minimum needs. In preparing for a procurement, the agency must develop specifications in such a manner as is necessary to achieve full and open competition in accordance with the nature of the property or services to be acquired. See 41 U.S.C. § 253 (1988). A solicitation must contain sufficient information to allow offerors to compete intelligently and on an equal basis. University Research Corp., B-216461, Feb. 19, 1985, 85-1 CPD ¶ 210. Specifications must not be ambiguous--that is, subject to more than one reasonable interpretation. See Toxicology Testing Serv., Inc., B-219131.2, Oct. 28, 1985, 85-2 CPD ¶ 469. However, there is no legal requirement that a competition be based on specifications drafted in such detail as to eliminate completely any risk or remove every uncertainty from the mind of every prospective offeror. A&C Bldg. and Indus. Maintenance Corp., B-230270, May 12, 1988, 88-1 CPD ¶ 451.

Here, contrary to the protester's assertion, we find that HUD has clearly stated its objective in issuing these competitive solicitations, that is, to award firm, fixed-price, indefinite-quantity contracts requiring successful contractors to perform non-personal management and related services, listed as approximately 40 separate tasks in the statements of work, for single family properties owned by or in the custody of HUD in the geographic regions covered by the solicitations. While requiring successful contractors to perform certain of these services on an "as necessary," "as conditions warrant," et al. basis entails some performance uncertainties and risks for offerors in

preparing their proposals, we find that HUD could not possibly eliminate all performance uncertainties and risks in drafting its specifications.

The record shows that property conditions are not uniform and that HUD expects the successful contractors, who will be responsible for managing the properties, to determine when and to what extent services must be performed on each individual property to satisfy the solicitation requirements. For many of the approximately 40 listed tasks in each solicitation, however, HUD has provided details concerning performance of these tasks. For example, while the detailed listing of services in the solicitations require the contractors to ensure that grass is cut in a professional-like manner "as needed," HUD further explains this requirement by stating that contractors are required to cut lawns to the property lines to a maximum of 2 inches with a conventional lawn mower, are required to maintain lawns to present a neat appearance at all times with no excessive growth, and are required to mow lawns a minimum of every other week in the growing season. Many of the other listed tasks are similarly detailed and precise. We think the solicitations give offerors a clear statement of HUD's requirements.

In our view, HUD's detailed listing and description of possible services to be performed depending on individual property conditions, HUD's inclusion of current property data, and HUD's statements of minimum guaranteed properties and maximum property ordering limitations adequately detail HUD's requirements for management and related services. We believe the solicitations provide sufficient information for offerors, including the protester, a former area management broker for HUD, to intelligently prepare technical proposals and to submit prices which take into account perceived performance uncertainties and risks, thus affording offerors the opportunity to compete on an equal basis.

Moreover, contrary to the protester's assertion, we find that HUD will not be awarding unauthorized personal services contracts. A personal services contract is characterized by the employer-employee relationship it creates between the government and the contractor's personnel. Federal Acquisition Regulation (FAR) § 37.104; Information Ventures, Inc., B-241641, Feb. 14, 1991, 91-1 CPD ¶ 173; Logistical Support, Inc., B-224592, Dec. 23, 1986, 86-2 CPD ¶ 709. Whether a contract gives rise to an employer-employee relationship must be judged in light of each contract's particular circumstances. Monarch Enters., Inc., B-233303 et al., Mar. 2, 1989, 89-1 CPD ¶ 222. The FAR provides that the "key question" in determining if a contract is for personal services is whether the government will exercise "relatively continuous supervision and control

over the contractor personnel performing the contract," FAR § 37.104(c)(2). The FAR also enumerates several other factors to be considered in making this judgment, including whether performance is on-site and whether the principal tools for contract performance are furnished by the government. FAR § 37.104(d).

In this case, we believe that HUD's requirement for performance of some of the services on an "as necessary," "as conditions warrant" et al. basis and HUD's reservation of the right to selectively assign properties and to redefine geographic areas do not constitute supervision and control by HUD over the successful contractors which would convert a non-personal services contract to one for personal services. The solicitations merely reflect HUD's expectation that the contractors will exercise their independent discretion and judgment in determining how best to fulfill their contractual obligations for the properties ultimately assigned to them. In this regard, the solicitations specifically state that successful contractors will be required to furnish all necessary facilities, materials, supplies, equipment, and labor to perform the listed management and related services. There is no evidence in the record which suggests that HUD, on any continuous basis, will be supervising or controlling successful contractors in the performance of their contracts.

The protester next complains that the application of the stated evaluation factors will result in a subjective evaluation of proposals. Subjective evaluations are not improper. Bunker Ramo Corp., 56 Comp. Gen. 712 (1977), 77-1 CPD ¶ 427. The evaluation of proposals may be based upon factors which are either objective or subjective nature; evaluation factors need only reflect the agency's actual needs. Here, in its consolidated agency report filed in response to these protests, HUD addressed its need to evaluate an offeror's management plan and an offeror's previous experiences in managing single family properties, handling property repairs, and managing rental programs in order to reasonably determine which offerors would be most qualified to satisfactorily perform HUD's current requirements in each geographic region. HUD explained that these evaluation factors were included in the solicitations as the basis upon which HUD would make its determination of the most advantageous proposal, from a technical and price standpoint, for each geographic region. In its consolidated comments filed in response to the agency's consolidated report, the protester merely reiterated its protest argument and did not rebut HUD's position. Thus, while judgments

under the criteria used here may be subjective, the stated evaluation factors appear to be directly relevant to the offerors' performance of the contracts and, as such, are not objectionable.²

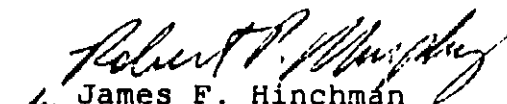
The protester finally objects that HUD has not specified realistic minimum and maximum quantities in the solicitations as required by FAR § 16.504 for indefinite-quantity contracts.

This issue and the arguments advanced are identical to the issue and the arguments advanced by the protester in Sunbelt Properties, Inc., B-249307, Oct. 30, 1992, 92-2 CPD ¶ _____. In that decision, we concluded that the solicitation, which contemplated the award of a firm, fixed-price, indefinite-quantity contract, was not defective because the government would be obligated to acquire management and related services for at least the minimum quantity of properties as stated in the solicitation and that payment for the work to be performed on the minimum quantity of properties was more than adequate consideration for a binding contract. We further concluded that the solicitation's maximum quantity of properties requiring management and related services was properly based on historical and current information. Since the issue raised and the arguments made in these protests are the same as in the protester's earlier protest, which was resolved by decision of October 30, we see no useful

²The protester argues that for these procurements, HUD should have used sealed bidding rather than competitive proposal procedures. FAR § 6.401(a) provides that contracting officers shall solicit sealed bids when certain conditions are met. One of these conditions requires the solicitation of sealed bids when the award will be made on the basis of price and other price-related factors. Here, the RFPs do not provide for awards solely on the basis of price factors, but instead, the RFPs state that technical and management factors will be more significant than price. Thus, for these procurements, HUD's use of competitive proposal procedures is appropriate under the FAR.

purpose to be served by our further consideration of this protest issue. RMS Indus., B-247465; B-247467, June 10, 1992, 92-1 CPD ¶ 506; Nova Group, Inc., B-245333, Dec. 20, 1991, 91-2 CPD ¶ 568.³

Accordingly, the protests are denied.


for James F. Hinchman
General Counsel

³We also point out that the protester's concern that HUD's exercise of any of the two 1-year options in any of the solicitations will not result in contracts for fixed terms is misplaced because the options in each solicitation are for definite, fixed periods of time.