



Comptroller General  
of the United States

Washington, D.C. 20548

REDACTED VERSION\*

## Decision

**Matter of:** Pearl Properties; DNL Properties, Inc.  
**File:** B-253614.6; B-253614.7  
**Date:** May 23, 1994

Shelton H. Skolnick, Esq., Skolnick and Leishman, for Pearl Properties; and Sam Z. Gdanski, Esq., for DNL Properties, Inc., the protesters.  
Sharon Swain, Esq., Department of Housing and Urban Development, for the agency.  
Peter A. Iannicelli, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. Even though forms used by evaluation panel members to record point scores and narrative comments described an evaluation factor differently from the request for proposals (RFP), agency's technical evaluation was proper where the evaluation was conducted in a manner that was consistent with the RFP.
2. In reevaluating proposals pursuant to General Accounting Office recommendation, contracting agency properly considered protester's unsatisfactory performance under previous contracts where: (1) prior experience was incorporated into several evaluation factors set forth in request for proposals; (2) protester cited the two previous contracts and associated references in its proposal; and (3) contracting officials learned of protester's unsatisfactory previous performances during preaward survey conducted after agency's original evaluation of proposals.
3. In evaluating proposals, contracting agency properly may consider evidence from sources outside proposals, and where traditional responsibility criteria are incorporated into technical evaluation factors set forth in request for proposals, agency's technical evaluation may involve consideration of offerors' capabilities as well as their proposed approaches and resources.

\*The decision issued May 23, 1994, contained proprietary information and was subject to a General Accounting Office protective order. This version of the decision has been redacted. Deletions in text are indicated by "[DELETED]."

4. Where contracting agency reevaluates proposals pursuant to a General Accounting Office recommendation after contract has been awarded, contracting officials may properly consider awardee's performance on contract in period between award and reevaluation where request for proposals incorporated prior experience and contract performance into evaluation factors.

5. Where request for proposals stated that technical merit would be considered more important than cost or price, contracting agency properly determined that higher technically rated, lower-priced proposal represented the best value to the government and made award to that offeror.

6. Where solicitation contemplates award of a fixed-price contract, the contracting agency is not required to conduct a detailed cost or cost realism analysis.

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#### DECISION

Pearl Properties (Pearl) and DNL Properties, Inc. (DNL) protest the award decision of the Department of Housing and Urban Development (HUD) under request for proposals (RFP) No. DU203-92-R-0137 following HUD's reevaluation of proposals under that solicitation. Pearl and DNL had earlier protested HUD's award of a contract to Intown Properties, Inc. (Intown) pursuant to this RFP. Although we dismissed DNL's protest, we sustained Pearl's protest and the protest of another offeror, Crawford/Edgewood Managers, Inc., on the ground that HUD's technical evaluation and award decision were not adequately supported, and we recommended that HUD reevaluate best and final offers (BAFO).<sup>1</sup> HUD reevaluated and affirmed its original determination that Intown's BAFO represented the best value to the government. The present protests allege, among other things, that HUD's reevaluation was inconsistent with the RFP's evaluation scheme. We deny the protests.

#### BACKGROUND

Issued on November 12, 1992, the RFP solicited offers to provide real estate asset manager services relating to single family properties for HUD's Washington, D.C. field office. The RFP contemplated award of a firm, fixed-price, indefinite quantity contract for a basic period of 1 year with options for 2 additional years. The RFP stated that award would be made to the offeror(s) representing the best value to government, cost or price and other factors

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<sup>1</sup>See our decision, DNL Properties, Inc. et al., B-253614.2 et al., Oct. 12, 1993, 93-2 CPD ¶ 301, for a full discussion of the facts, protest arguments, and our rationale.

considered, and that technical merit would be considered more significant than cost or price. The RFP listed seven technical and management factors and the maximum attainable points for each (totaling 95 technical/management points).

Thirteen offers were received by the January 20, 1993, due date for receipt of initial proposals. After evaluation, the contracting officer determined that seven proposals, including Pearl's and DNL's, were in the competitive range. Discussions were held with and BAFOs received from competitive range offerors.<sup>2</sup> Upon evaluation of BAFOs, the final technical rankings and corresponding prices (for all three areas unless otherwise noted) which were at issue were:

<u>Offeror</u>	<u>Technical Score</u>	<u>Total Price</u>
DNL	[DELETED]	[DELETED] <sup>3</sup>
Intown	[DELETED]	\$2,062,133
Pearl	[DELETED]	[DELETED]

The contracting officer determined that the proposals of DNL and Intown were technically equal. The contracting officer calculated that separate awards of areas 2 and 3 to DNL and area 1 to Intown would cost the government [DELETED], while award of areas 1, 2, and 3 to Intown would cost only [DELETED]. Therefore, based upon the savings [DELETED], the contracting officer awarded a contract for all three areas to Intown on May 26. The initial protests of Pearl, DNL, and Crawford/Edgewood, another offeror, immediately followed.

In our October 12 decision on the protests, we concluded that the technical evaluation was not adequately supported and, therefore, was not reasonable. The evaluation record contained only consensus reports stating the evaluation board's overall adjectival rating and a total point score for each proposal for each evaluation factor. There were no scoresheets, narratives, notes, or any other documents showing what the individual evaluators thought of each proposal. Without adequate support for the technical evaluation, we also concluded that the award determination was not adequately supported and could not have been made properly. We recommended that HUD reevaluate BAFOs in

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<sup>2</sup>One offer was withdrawn.

<sup>3</sup>Total price for supplying services to areas 2 and 3 only and contingent on award of both areas; separate award of either area would result in higher prices [DELETED].

accord with the RFP's evaluation scheme and document the evaluation with contemporaneous narrative explanations from all evaluators describing the strengths, weaknesses, and risks associated with each BAFO.

In November, in response to our recommendation, HUD reconvened the original evaluation panel and conducted a de novo evaluation of all BAFOs, resulting in the following new technical ratings which are at issue here:

<u>Offeror</u>	<u>Technical Score</u>
Intown	[DELETED]
DNL	[DELETED]
Pearl	[DELETED]

The evaluation board added the scores DNL received for individual evaluation factors incorrectly and, therefore, erroneously credited DNL's BAFO as having received [DELETED] total technical points. Notwithstanding the error, the evaluation board determined that DNL's and Intown's BAFOs were "technically equivalent." The evaluation board affirmed its original recommendation to award the contract to Intown for all three geographical areas because Intown's prices represented a savings of approximately [DELETED] over a split award to both Intown and DNL.<sup>4</sup> The mathematical error was discovered and reported to the contracting officer and the head of the contracting activity; HUD decided that the minor mistake did not affect the evaluators' determination that the proposals were technically equal or the decision to award to Intown on the basis of its lower price.

Upon notification of HUD's determination, Pearl and DNL filed the present protests with our Office.

**PEARL'S PROTEST**

In its initial protest letter following HUD's reevaluation, Pearl argued only in very general terms that its proposal was "most advantageous" and represented the "best value" to the government and that, therefore, HUD's affirming of its award to Intown was improper. Subsequently, in its comments on the agency's protest report, Pearl provided a more detailed discussion concerning why it believes HUD's reevaluation was inconsistent with the RFP's evaluation scheme.

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<sup>4</sup>A split award would have been necessary because DNL's offer was for only two of the three areas covered by the contract.

Evaluating the relative merits of competing proposals is a matter within the discretion of the contracting agency since the agency is responsible for defining its needs and the best method of accommodating them. Simms Indus., Inc., B-252827.2, Oct. 4, 1993, 93-2 CPD ¶ 206. In reviewing an agency's evaluation, we will not reevaluate proposals but instead will examine the agency's evaluation to ensure that it was reasonable and consistent with the stated evaluation criteria. Id.

The RFP listed seven technical and management evaluation factors and associated point values as follows:

- (1) Experience in the management of single family properties similar to and in the general area covered by this solicitation (25 points);
- (2) Experience in documenting findings upon property inspection and developing listings of needed repairs, and estimating the cost of such repairs. (15 points);
- (3) Experience in soliciting repair bids, coordinating and overseeing repair work and inspecting for satisfactory completion (10 points);
- (4) Experience in managing a rental program, including establishing and collecting rent for single family properties (10 points);
- (5) Evidence of adequately staffed, trained, and equipped office (or the ability to establish such) reasonably located so as to provide convenient service to HUD and its clients in the area to be served, and to carry out all duties specified (15 points);
- (6) Experience in complying with a system of financial reporting and accountability (10 points); and
- (7) Ability to manage employees and subcontractors on past or current projects (10 points).

Pearl argues that HUD changed evaluation factor 1 in a significant way without amending the RFP to reflect the change. Pearl points out that forms provided to evaluators for the reevaluation rewrote evaluation factor 1 as:

"FACTOR 1: DEMONSTRATED BUSINESS PERFORMANCE: Demonstrated business performance, volume, and prior experience in managing single-family properties, similar to those in the geographic location covered by this solicitation."

Pearl contends that HUD improperly deleted prior experience in the Washington, D.C. metropolitan area from evaluation factor 1 to the advantage of Intown, which had no Washington, D.C. experience, and to the disadvantage of Pearl, which did have such experience. We disagree.

While the language used by HUD on the forms provided to evaluation panel members for their point scores and narrative comments was not exactly the same as the language set forth in the RFP, the record shows that proposals were, in fact, reevaluated consistent with the RFP's description of evaluation factor 1 and did consider local experience. Intown's proposal listed an impressive array of prior experiences, described how those experiences were relevant to the present requirement, and acknowledged that the firm would be new to the Washington, D.C. area. The evaluators were aware of and were positively influenced by Intown's prior successful experience under several contracts with HUD involving approximately 1,500 properties in 8 different states. The evaluators also considered positively Intown's experience in HUD's Philadelphia field office--the only region they considered to have a housing inventory similar to the Washington, D.C. area inventory. The evaluation panel also considered Intown's lack of local experience to be a negative factor and downgraded Intown's proposal on this factor and on factor 5 (evidence of adequately staffed office). Balancing Intown's broad national experience against its dearth of local contracts, the evaluation panel rated Intown's proposal as excellent and gave it a very high, but not perfect, score for evaluation factor 1. We conclude that HUD properly evaluated BAFOs under factor 1. See The Parks Co., B-249473, Nov. 17, 1992, 92-2 CPD ¶ 354.

Pearl next argues that HUD was required to limit its reevaluation to the materials presented in the BAFOs. Pearl contends that HUD improperly considered information concerning offerors' past performance on HUD contracts even when such information was not contained in the BAFO but was obtained from other sources. In particular, Pearl believes that HUD should not have evaluated information the agency obtained from HUD field offices to the effect that Pearl had performed poorly on previous contracts, because the information was obtained as part of a preaward survey dealing with Pearl's responsibility. Pearl states that it is a small business and that, therefore, any matters that reflect negatively on its responsibility must be referred to

the Small Business Administration (SBA) for resolution under its certificate of competency procedures.

In evaluating proposals, the contracting agency may consider evidence from sources outside the proposals. See Continental Maritime of San Diego, Inc., B-249858.2 et al., Feb. 11, 1993, 93-1 CPD ¶ 230 and cases cited. Indeed, for a procuring agency to ignore extrinsic evidence that comes to its attention indicating that an offeror cannot perform consistent with the technical evaluation of its proposal would be unfair to the agency and to other competitors. Id.; G. Marine Diesel; Phillyship, B-232619 et al., Jan. 27, 1989, 89-1 CPD ¶ 90.

Where an agency uses traditional responsibility criteria to assess technical acceptability, the technical evaluation may involve consideration of offerors' capabilities as well as their proposed approaches and resources. See Continental Maritime of San Diego, Inc., supra (protest sustained where the agency failed to consider information obtained in a preaward survey); see also G. Marine Diesel; Phillyship, supra (protest sustained where the agency did not consider the awardee's prior contract performance referenced in the awardee's proposal). Where an agency requests references regarding offerors' performance on similar contracts, and offerors' present/past contract performances are integrally related to one or more evaluation criteria, an agency may properly and reasonably contact the references and consider their responses in evaluating proposals. Questech, Inc., B-236028, Nov. 1, 1989, 89-2 CPD ¶ 407. Further, traditional responsibility factors may be used for the comparative evaluation of proposals in relevant areas and where a proposal is determined to be deficient pursuant to such an evaluation, the matter is not one which requires referral to the SBA. Advanced Resources Int'l, Inc.-- Recon., B-249679.2, Apr. 20, 1993, 93-1 CPD ¶ 348.

In the present procurement, Pearl listed several prior contracts and associated references in its proposal. After HUD's original evaluation of BAFOs in May 1993, the agency began conducting a preaward survey to determine Pearl's responsibility in case HUD decided to award the contract to Pearl. Two of the contracts cited by Pearl in its proposal were real estate asset management contracts with HUD's Connecticut and Ohio regional offices. When contracting officials checked these references, they received very negative reports from both field offices concerning Pearl's performance. Among other things, the references reported that Pearl [DELETED]. These performance deficiencies were discovered after the original evaluation which resulted in Pearl's relatively high technical rating of [DELETED] points. However, upon reevaluating Pearl's BAFO in accord with our recommendation, the evaluators took into account

the negative references given Pearl by HUD's own field offices. The evaluators also considered the fact that the inventories in the Connecticut and Ohio contracts were considerably smaller than the inventory in the present statement of work. Because six of the RFP's seven evaluation factors specifically related to the offeror's past and present experience on similar type contracts, the evaluators downgraded Pearl's BAFO on these six factors (factors 1, 2, 3, 4, 6, and 7), resulting in a new total technical score of just [DELETED]. In accord with the above-cited General Accounting Office (GAO) decisions, HUD properly considered the negative information received from HUD personnel in the field offices concerning Pearl's unsatisfactory performance on recent HUD contracts. The evaluation panel thus reasonably downgraded Pearl's technical score based on this "new" contract performance information.

Pearl next argues that HUD improperly did not consider Intown's prior performance on other contracts when it reevaluated Intown's BAFO. However, the record simply does not support Pearl's assertion. As noted above, Intown listed a number of prior and current contracts for the same or similar type of work. HUD considered Intown's satisfactory performance on these contracts and also considered the fact that Intown had been performing the current contract in a satisfactory manner for about 6 months. Consequently, this protest argument is without merit.

Pearl contends that Intown's performance on the current contract should not have been considered by HUD in reevaluating BAFOs since there was no reference to it contained in Intown's BAFO. We do not agree. When a contracting agency reevaluates proposals pursuant to a GAO recommendation, contracting officials may not reasonably ignore performance by the awardee under a major, ongoing contract where the RFP evaluation scheme sets forth prior experience and contract performance as evaluation factors. See G. Marine Diesel, 68 Comp. Gen. 577 (1989), 89-2 CPD ¶ 101. Here, the evaluators rated Intown very high on all evaluation factors based upon Intown's BAFO and its broad experience with a number of relevant contracts before Intown was awarded the present contract. In reevaluating Intown's BAFO after Intown had performed satisfactorily on the current contract, the evaluators noted that Intown "had done what it said it would." The agency's reevaluation therefore was proper and reasonable.



## DNL's PROTEST

Basically, DNL alleges that HUD's award of the contract to Intown was not in accord with the RFP's evaluation scheme. The protester asserts that it alerted HUD to the fact that Intown was performing unsatisfactorily on another HUD contract, but that HUD ignored that pertinent information when reevaluating Intown's proposal. The protester states that its offer was the highest technically rated, and, because the RFP stated that technical merit would be considered more significant than cost or price, that HUD's "failure to award to DNL violated the evaluation process."

There is no evidence in the record showing that DNL alerted cognizant HUD contracting officials that Intown was performing poorly on a similar, contemporaneous contract prior to or during the reevaluation process. The only evidence of contact between DNL and HUD prior to HUD's reevaluation of proposals concerning Intown's performance on another contract is a September 23, 1993, letter from DNL to a different HUD regional office requesting information under the Freedom of Information Act (FOIA) concerning possible poor performance by Intown under a real estate asset manager services contract for the Birmingham, Alabama region. In this connection, DNL has provided no detail to show what it learned as a result of its FOIA request or what, if anything, it communicated to HUD contracting officials involved with the present procurement.

DNL's unsupported allegation provides no basis to sustain the protest. See Systems & Defense Servs. Int'l, B-254254.2, Feb. 9, 1994, 94-1 CPD ¶ 91. Furthermore, as stated above, the record shows that HUD's evaluators were aware of Intown's satisfactory performance of similar work under several other HUD contracts and that Intown had performed satisfactorily on the present contract for about 6 months. Thus, even if DNL's speculation that Intown experienced performance problems on one contract were true, as the record contains substantial support for the evaluators giving Intown high ratings on factors relating to prior contract performance and experience, there would be no reason for our Office to question the reasonableness of HUD's evaluation.

In arguing that it should have been awarded the contract, DNL incorrectly presumes that its BAFO received the highest technical score. In fact, as noted above, when BAFOs were reevaluated, Intown's BAFO received the highest technical score ([DELETED] points) while DNL's received the second highest score ([DELETED] points).

In any case, technical point ratings are useful as guides for intelligent decisionmaking but too much reliance should not be placed on them; whether a given point spread between two competing proposals indicates a significant superiority of one proposal over another depends upon the facts and circumstances of each procurement. See RCA Serv. Co., B-208871, Aug. 22, 1983, 83-2 CPD ¶ 221. Award should not be based on the difference in technical merit score alone, but should reflect the procuring agency's considered judgment of the significance of that difference. Id. In other words, the selection official must determine what a difference in technical point scores might mean in terms of performance and what it would cost the government to take advantage of it. Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD ¶ 325. We have upheld source selection officials' determinations that technical proposals were essentially equal even where there was an evaluation point score differential of as much as 15.8 percent. See Grey Advertising, Inc., supra, and cases cited.

Here, the entire evaluation board analyzed the scores received by Intown's and DNL's offers for each of the seven evaluation factors. The board recognized that DNL's proposal was slightly superior on factor 1 because it demonstrated experience in managing single family properties in the geographic area covered by the RFP's statement of work. The board noted that the offers were evenly rated on factors 2, 3, and 4, relating to property inspections and developing lists of needed repairs, experience in soliciting repair bids, and managing a rental program. The board also recognized that Intown's proposal was rated slightly higher on factors 5, 6, and 7, relating to office staffing, experience with financial reporting and accountability systems, and ability to manage employees and subcontractors.

As previously noted, the RFP stated that technical merit would be considered more important than cost or price. The evaluators rated Intown's BAFO as the best on technical merit, approximately [DELETED] percent higher than DNL's rating. Furthermore, the agency calculated that award to Intown for all three areas would result in modest monetary savings. Consequently, we believe that HUD properly determined that Intown's proposal represented the best value to the government.

DNL also contends that it brought several matters concerning Intown's responsibility to the contracting officer's attention, but that HUD officials acted in bad faith in failing to investigate or otherwise pursue these matters. Among other things, DNL charges that one of Intown's officers had previously been convicted of a felony, Intown performed poorly on a different HUD contract, and Intown had a [DELETED] tax lien filed against it.

We will review an affirmative determination of responsibility where it is shown that it may have been made fraudulently or in bad faith. See Bid Protest Regulations, 4 C.F.R. § 21.3(m)(5) (1994). A finding of bad faith requires evidence that contracting officials intended to injure the protester. See Oliver Prods. Co., B-245762.2, Apr. 28, 1992, 92-1 CPD ¶ 501. Here, the contracting officer determined that Intown was a responsible offeror prior to award on May 26, 1993, based upon Intown's prior and continuing good performance under several HUD contracts and based upon Intown having sufficient financial assets. The record shows that DNL did not even begin to question Intown's responsibility based on the above charges until September 1993--approximately 4 months later. Thus, there is no indication that HUD was aware of DNL's assertions but ignored them in finding Intown responsible. As there is no evidence of fraud or that HUD officials acted in bad faith, this allegation is without merit.

In any event, HUD reports that the criminal conviction cited by DNL occurred more than 20 years ago, Intown has performed and is performing well on a number of HUD contracts, and Intown has adequate financial resources to perform on the present contract. Furthermore, contrary to DNL's assertions, the matters raised by DNL do not require a finding of nonresponsibility. See, e.g., Universal Technologies, Inc. et al., B-248808.2 et al., Sept. 28, 1992, 92-2 CPD ¶ 212 (contractor properly found responsible in spite of a criminal conviction); Darby Marine & Supply, Inc., B-228653, Aug. 7, 1987, 87-2 CPD ¶ 140 (federal tax lien does not mandate finding of nonresponsibility); Security Am. Servs., Inc., B-225469, Jan. 29, 1987, 87-1 CPD ¶ 97 (awardee's filing for bankruptcy does not require nonresponsibility determination).

Finally, DNL alleges that the award to Intown was improper because HUD failed to conduct a proper cost analysis. DNL asserts that a proper cost analysis would have revealed that Intown's proposed prices are lower than the actual costs of performing the work.

Where, as here, the RFP contemplates award of a fixed-price contract, the contracting agency is not required to conduct a detailed cost or cost realism analysis. See PHR Healthcare Corp; Sisters of Charity of the Incarnate Word, B-251799 et al., May 4, 1993, 93-1 CPD ¶ 366; see also Milcom Sys. Corp., B-255448.2, May 3, 1994, 94-1 CPD ¶ \_\_\_\_. The agency did, however, conduct a price analysis as required in FAR § 15.805-1(b), using some of the price analysis techniques set forth in FAR § 15.805-1. The agency compared Intown's prices to the independent government estimate based upon historical pricing information from contracts for similar services. The agency also determined

that it had obtained adequate price competition and compared Intown's prices to the prices submitted by the other five offerors. Based upon these comparisons, HUD concluded that Intown's prices were realistic, fair, and reasonable. We have no reason to question HUD's determination. In this regard, we have held that an agency may properly make a determination on the reasonableness of prices based solely upon comparison with the government's estimate. Bay Cities Refuse Serv., Inc., B-250807, Feb. 17, 1993, 93-1 CPD ¶ 151. Our examination of proposals reveals that Intown's prices for areas 2 and 3 alone differ from DNL's prices for those areas by approximately [DELETED] percent. We conclude that HUD's price analysis techniques were proper.

The protests are denied.

Robert P. Murphy  
Acting General Counsel