



Comptroller General
of the United States
Washington, D.C. 20548

10:6:73

Decision

Matter of: Gold Appraisal Company
File: B-259201
Date: March 15, 1995

Clint C. Gold for the protester.
Michael D. Weaver, Esq., Department of Housing and Urban
Development, for the agency.
Henry J. Gorczycki, Esq., and James A. Spangenberg, Esq.,
Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

1. Communication between a bidder and contracting agency personnel concerning historical bid prices was not a violation of either the Certificate of Independent Price Determination or the procurement integrity provisions of the Office of Federal Procurement Policy Act, 41 U.S.C. § 423 (1988 and Supp. V 1993).
2. A bidder's representation in its Organizational Conflicts of Interest Certification that it has no conflicts, when in fact it did, does not render the bidder ineligible for award where the misrepresentation was neither wilful nor made in bad faith, and did not materially influence the agency's award determination.

DECISION

Gold Appraisal Company protests an award to Mr. Doyle W. Clark under invitation for bids (IFB) No. H06S94007300000, issued by the Department of Housing and Urban Development (HUD), Fort Worth Regional Office, Region IV, for field review of appraisal services in six counties in Oklahoma. Gold alleges that Mr. Clark had improper communications with agency personnel and made a misrepresentation in his bid which should make him ineligible for award.

We deny the protest.

HUD issued the IFB on June 3, 1994, contemplating award of a fixed-price, indefinite quantity contract for 1 year with 3 option years. The IFB solicited fixed unit prices for both exterior reviews, and interior and exterior reviews. Total bid price was based on the unit prices bid and the

estimated quantities stated in the IFB. The IFB included the "Certificate of Independent Price Determination" at Federal Acquisition Regulation (FAR) § 52.203-2, and the "Certificate of Procurement Integrity" at FAR § 52.203-8. The IFB's proposal instructions included the provision at HUD Acquisition Regulation (HUDAR) § 2452.209-70, "Organizational Conflicts of Interest Notification," which stated:

"(a) It is the policy of [HUD] to avoid situations which place an offeror in a position where its judgment may be biased because of any past, present, or currently planned interest, financial or otherwise, that the offeror may have which relates to the work to be performed pursuant to this solicitation or where the offeror's performance of such work may provide it with an unfair competitive advantage.

"(b) Offerors shall provide a statement which describes in a concise manner all relevant facts concerning any past, present, or currently planned interest (financial, contractual, organization, or otherwise) relating to the work to be performed hereunder and bearing on whether the offeror has a possible organizational conflict of interest with respect to: (1) being able to render impartial, technically sound, and objective assistance or advice, or (2) being given an unfair competitive advantage. The offeror may also provide relevant facts that show how its organizational structure and/or management systems limit its knowledge of possible organizational conflicts of interest relating to other divisions or sections of the organization and how that structure or system would avoid or mitigate such organizational conflict. (Offerors should refer to FAR Subpart 9.5 and HUDAR Subpart 2409.5 for policies and procedures for avoiding, neutralizing, or mitigating organizational conflicts of interest.)

"(c) In the absence of any relevant interests referred to above, offerors shall complete the certification at [HUDAR §] 2452.209-71, Organizational Conflicts of Interest Certification.

"(d) No award shall be made until the disclosure or certification has been evaluated by the contracting officer. Failure to provide the disclosure or certification will be deemed to [be] a minor infraction and the offeror will be

permitted to correct the omission within a time frame established by the contracting officer.

"(e) Refusal to provide the disclosure or certification and any additional information as required, or the willful nondisclosure or misrepresentation of any relevant information shall disqualify the offeror.

"(f) If the [c]ontracting [o]fficer determines that a potential conflict exists, the selected offeror shall not receive an award unless the conflict can be avoided or otherwise resolved through the inclusion of a special contracting clause or other appropriate means. The terms of any special clause are subject to negotiation."

The Organizational Conflicts of Interest Certification referenced in HUDAR § 2452.209-70(c) was included in the IFB. This certification provided a space for the bidder to place a mark indicating that the bidder had no possible conflicts of interest.

The agency states that because it determined that the firms who would bid on this IFB were likely to have contractual relations with mortgage companies whose appraisals may be subject to review under this contract, the IFB included the following contract clause to neutralize and mitigate such possible conflicts of interest:

"ARTICLE H-1 - CONFLICT OF INTEREST

The contractor, including any of its employees, subcontractors, or consultants, shall not conduct reviews from any mortgage company which employs the contractor, or the contractor's employees, subcontractors, or consultants, on a full- or part-time basis. Should the contractor be assigned any review which results in an actual or apparent conflict of interest, the contractor shall take no action on the review, but shall refer it immediately to the [agency] for reassignment. Violation of this clause is grounds for termination and denial of all payments."

Ten bids were received by the July 21 bid opening. Mr. Clark submitted the low bid of \$54,295 (\$25 per exterior review/\$30 per interior and exterior review for all years of the contract). Mr. Clark certified in his bid that he had no possible conflicts of interest. Gold submitted the second low bid of \$113,440 (\$50/\$60 for the base and first option years; \$55/\$65 for the final 2 option years).

On July 22, HUD informed Mr. Clark that his bid was much lower than the other bids and requested verification of his bid price. Mr. Clark verbally confirmed that his unit prices of \$25 and \$30 were correct and formally verified his bid by letter of July 26. HUD then conducted a pre-award survey and determined that Mr. Clark was a responsible bidder. On September 6, HUD awarded the contract to Mr. Clark.

After receiving the notice of award on September 14, Gold's president called Mr. Clark on September 19. Gold states that Mr. Clark expressed displeasure at "leaving too much money on the table" and doubt that the contract would return any profit. Gold states that Mr. Clark explained that prior to submitting his bid Mr. Clark spoke with "a friend" at HUD in Fort Worth and requested past contract prices for these services. Gold states that Mr. Clark indicated that he was told that the historical unit prices were \$30 and up, and that Mr. Clark relied on this figure in preparing his bid. Gold also states that Mr. Clark disclosed having appraisal contracts with three mortgage companies--all of which could possibly perform appraisals which would be subject to review under Mr. Clark's contract.

Following this conversation, Gold protested the award to HUD on September 27. After HUD denied Gold's protest by letter of October 21, Gold protested to our Office on November 2.

Gold alleges that the communication between Mr. Clark and HUD concerning historical pricing violated the terms of the Certificate of Independent Price Determination or was otherwise a procurement integrity violation; that Mr. Clark intentionally misrepresented potential conflicts of interest and is thus ineligible for award, and that HUD's determination that Mr. Clark is a responsible bidder was unreasonable.

First, neither Gold's allegations nor anything in the record evidences a violation of either the terms of the Certificate of Independent Price Determination or the procurement integrity provisions of the Office of Federal Procurement Policy Act, 41 U.S.C. § 423. The communication between Mr. Clark and the "friend" at HUD involved what HUD considered to be publicly available historical prices. The Certificate concerns only improper communications between bidders, not communications between a bidder and agency personnel as alleged here. See FAR § 52.203-2.¹ Thus, the

¹The Certificate of Independent Price Determination, FAR § 52.203-2 states in pertinent part:

(continued...)

communication between Mr. Clark and HUD personnel did not violate the terms of the Certificate.

The prohibition against disclosing information imposed by the procurement integrity provisions does not apply to previous bid prices and other information that is already available to the public. The implementing regulations of these provisions specifically exclude information that is available to the public and only prohibits disclosure of bid prices prior to bid opening. FAR §§ 3.104-4(j)(3); 3.104-4(k)(2)(i). Thus, the agency's disclosure of what was considered to be historical contract prices already available to the public, and Mr. Clark's request for such information, were not violations of the procurement integrity provisions.

The historical prices which Mr. Clark allegedly received from HUD were reportedly grossly understated. To the extent Gold alleges that the alleged inaccurate communication should somehow disqualify Mr. Clark's bid, this is an insufficient basis to disturb the award, since Mr. Clark was responsible for preparing (and being bound by) his own bid, using his own business judgment, and there is no prohibition against a bidder's submitting, or an agency's accepting, an unreasonably low or below-cost bid for a fixed-price

¹(...continued)

"(a) The offeror certifies that--

"(1) The prices in this offer have been arrived at independently, without, for the purpose of restricting competition, any consultation, communication, or agreement with any other offeror or competitor relating to (i) those prices, (ii) the intention to submit an offer, or (iii) the methods or factors used to calculate the prices offered;

"(2) The prices in this offer have not been and will not be knowingly disclosed by the offeror, directly or indirectly, to any other offeror or competitor before bid opening . . .; and

"(3) No attempt has been made or will be made by the offeror to induce any other concern to submit or not to submit an offer for the purpose of restricting competition." [Emphasis added.]

contract.² See Intown Properties, Inc., B-256742, July 11, 1994, 94-2 CPD ¶ 18.

In response to Gold's allegation that Mr. Clark's affiliations with three mortgage companies represent possible conflicts of interest, which should have been disclosed in the Organizational Conflicts of Interest Certification in Mr. Clark's bid, HUD asserts that Mr. Clark's failure to disclose these affiliations was not a misrepresentation because the possibility of any conflict of interest arising from Mr. Clark's affiliations is neutralized/mitigated by Article H-1 of the IFB, which requires Mr. Clark to recuse himself from reviewing appraisal services performed by these mortgage companies.

In our view, Mr. Clark did misrepresent in his bid possible conflicts of interest. Since Mr. Clark could be assigned to review appraisals provided by/for mortgage companies with which Mr. Clark has an ongoing contractual relationship, it is apparent that Mr. Clark had possible organizational conflicts of interest under this contract, as defined by the IFB. Yet, Mr. Clark's Certification misrepresents that Mr. Clark had no possible conflicts of interest.

Where an offeror has made an intentional misrepresentation that materially influenced the agency's consideration of its proposal, the proposal should be disqualified and a contract award based upon the proposal canceled. Informatics, Inc., 57 Comp. Gen. 217 (1978), 78-1 CPD ¶ 53; Universal Technologies Inc.; Spacecraft, Inc., B-248808.2 et al., Sept. 28, 1992, 92-2 CPD ¶ 212; Moorman's Travel Servs., Inc.--Recon., B-219728.2, Dec. 10, 1985, 85-2 CPD ¶ 643. However, even where our Office determines that a misrepresentation was intentional, we will not find an offeror ineligible for award where the correct representation reasonably would not alter the agency's award decision and the misrepresentation was not made in bad faith. See Moorman's Travel Servs., Inc.--Recon., supra; Universal Technologies Inc.; Spacecraft, Inc., supra.

Here, HUD anticipated that bidders would likely be affiliated with some mortgage companies performing appraisal services, and thus included Article H-1 in the IFB to neutralize/mitigate such possible conflicts of interest. HUD states that it would not have disqualified Mr. Clark, even if Mr. Clark had initially disclosed his mortgage company affiliations since HUD always intended to address

²HUD states that no one in the contracting office recalls handling any requests for historical prices for these services and that other HUD offices could have been the source of the erroneous information.

such matters during contract administration.³ HUD does not regard Mr. Clark's relationship with the three mortgage companies as materially inhibiting Mr. Clark's ability to successfully perform the contract work.⁴ Accordingly, we cannot conclude that the agency acted unreasonably in determining Mr. Clark's failure to disclose the possible conflicts in its certification need not bar award to that individual. Id.

The record also does not suggest that Mr. Clark's misrepresentation in its Certification was wilful or in bad faith. Mr. Clark freely discussed his affiliations with Gold, and after Gold opined to Mr. Clark that the affiliations should be disclosed, Mr. Clark immediately informed HUD of the affiliations and HUD took steps to ensure that Mr. Clark would not be assigned reviews of services performed by firms for which Mr. Clark performed appraisals or related services. Mr. Clark's openness about his affiliations suggests that Mr. Clark did not intend to act contrary to Article H-1 of the IFB, and the record does not otherwise show that the misrepresentation was wilful or made in bad faith.

Since the agency determined that Mr. Clark was eligible for award and the misrepresentation did not mislead the agency in making this determination, Mr. Clark's misrepresentation did not render Mr. Clark ineligible for award.⁵ See id.

Gold finally challenges HUD's affirmative determination that Mr. Clark was responsible. A determination that a bidder or offeror is capable of performing a contract is based, in

³An agency is not required to reject bidders who have conflicts of interest, but can include in the contract appropriate provisions that allow avoidance or mitigating of the conflicts. See FAR § 9.504(e); Columbia Research Corp., 61 Comp. Gen. 194 (1982), 82-1 CPD ¶ 8.

⁴Apparently, HUD has the flexibility to otherwise review appraisals involving these mortgage companies.

⁵Gold alleges that, since the provision at HUDAR § 2452.209-70(e) specifically requires disqualification of an offeror making an intentional misrepresentation, HUD must disqualify Mr. Clark. However, it is well established that such mandatory solicitation language does not necessarily require the disqualification of a bidder where it does not materially affect bidder responsibility or bid responsiveness. See Edward Kocharian & Co., Inc., 58 Comp. Gen. 214 (1979), 79-1 CPD ¶ 20; Gardner Zemke Co., B-238334, Apr. 5, 1990, 90-1 CPD ¶ 372.

large measure, on subjective judgments which generally are not susceptible to reasoned review. Thus, an agency's affirmative determination of a contractor's responsibility will not be reviewed by our Office absent a showing of possible fraud or bad faith on the part of procurement officials, or that definitive responsibility criteria in the solicitation may have been misapplied. 4 C.F.R. § 21.3(m)(5) (1995); King-Fisher Co., B-236687.2, Feb. 12, 1990, 90-1 CPD ¶ 177. Where, as here, there is no showing of possible fraud or bad faith, or that definitive responsibility criteria have been misapplied, we have no basis to review the determination.

The protest is denied.

 *Paul Liberman*
Robert P. Murphy
General Counsel