Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Stewart Title of Orange County, Inc.

File: B-261164

Date: August 21, 1995

Serge E. Gaudry, Government Compliance Consultants, Inc., for the protester.
Mitchell S. Corriveau for First American Title Insurance Company, an interested party.
W. Graham Moses, Esq., Department of Housing and Urban Development, for the agency.
Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency reasonably selected the higher-rated, higher-priced offer for award under a best value procurement for real estate closing services, in accordance with the stated evaluation scheme in which technical factors were stated to be more significant than price, where the contracting officer determined that the awardee's higher-rated proposal reflected probable timely performance of the required closing services, while the protester's lower-rated proposal reflected probable untimely performance that would adversely impact the government's interests, and that this outweighed the protester's slight price advantage.

DECISION

Stewart Title of Orange County, Inc. protests the award of a contract to First American Title Insurance Company under request for proposals (RFP) No. 17-95-069, issued by the Department of Housing and Urban Development (HUD) for real estates sales closing services.

The protest is denied.

The RFP contemplated the award of a fixed-price, indefinite quantity contract for closing services for the sale of agency-owned, single-family real property in nine identified counties in central Florida for 1 base and 2 option years. The closing agent will be responsible for ensuring that sales of properties are promptly closed, that required schedules are met, and that the proceeds of sales are collected and

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transmitted to HUD within required deadlines. The RFP stated there would be a minimum of 100 closings and a maximum of 1,500 closings per year, and informed offerors that there were 1,192 closings conducted in fiscal year 1994 and 1,201 closings conducted in fiscal year 1993.

The RFP provided that award would be made on a best value basis and stated that technical merit was more significant than price in the overall evaluation of proposals. The following technical evaluation factors and associated maximum numerical values were stated:

1. Demonstrated prior and current experience in closing sales:

   (a) of single family properties. 15
   (b) FHA properties. 20
   (c) in the geographic location covered by the RFP. 15

2. 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. Understanding of the overall requirements and a reasonable plan for accomplishing all duties as specified in approximate quantities stated, and within the time frames required by the RFP 20

3. Demonstrated ability to review title information on single family properties and resolve any routine title issues (e.g., past due taxes and water bills). 15

4. Extent to which the proposal demonstrates:

   (a) a realistic plan to safeguard closing proceeds, ensure timely wire transfers, and forward closing packages in the manner prescribed in the solicitation. 30

   (b) sufficient internal controls to minimize the potential for misuse or theft of funds relating to the sale of HUD-owned properties.. 30

HUD received 10 proposals, of which three, including First American's and Stewart Title's, were found to be within the competitive range. Detailed discussions were conducted,[1] and best and final offers (BAFO) requested. BAFOs were evaluated as follows:

[1]Stewart Title was the only offeror to request and receive oral discussions, in addition to the agency's written discussion questions.

	Technical Score (of 145 maximum points)	Cost per Closing[2]
First American	137	$784
Offeror A	123	$946
Stewart Title	104	$717

First American's BAFO's higher rating reflected the agency's view that First American had demonstrated its experience and capability in performing closings in all nine counties, including having sufficient staff to perform timely closings in all counties and a well-documented plan for performance of all the contract requirements.[3] Stewart Title's significantly lower technical score reflected the numerous evaluated deficiencies in its proposal, including the agency's judgment that the protester had not demonstrated experience in performing closings in all the required counties; that Stewart Title had not demonstrated the capability to perform timely closings in all nine counties and in this regard did not appear to have sufficient offices or closers; and that Stewart Title, while relying upon a subcontractor for its closing procedures, had not adequately explained the procedures it would follow.

The contracting officer concluded that the higher rating of First American's BAFO reflected actual superiority vis-a-vis the technical merit of Stewart Title's BAFO that outweighed Stewart Title's lower price. In this regard, Stewart Title's price over 3 years was calculated to be only $67,944, or 8.5 percent, lower than First American's price. Award was made to First American, and this protest followed.

Stewart Title first protests that HUD's evaluation of its proposal is unreasonable and that the agency applied unstated evaluation criteria in evaluating its protest. In reviewing a protest challenging an agency's technical evaluation, we examine the record to ensure that the agency's evaluation was reasonable and consistent with the stated evaluation criteria. See Abt Assocs. Inc., B-237060.2, Feb. 26, 1990, 90-1 CPD ¶ 223.

Here, we have reviewed the evaluation documentation and considered the parties' arguments, and find no basis to question the agency's evaluation of Stewart Title's proposal. For example, the agency downgraded Stewart Title's proposal under evaluation subfactor 1(c), which sought to measure the offeror's experience in conducting closings in all nine counties, because Stewart Title had not provided evidence that it had closed sales in all nine counties and its proposal indicated it only had five offices in three of the nine counties. While Stewart Title objects to

[2]This is a 3-year average.

[3]First American is the incumbent contractor for these closing services.

this evaluation, we find from our review of Stewart Title's proposal that the protester provided conflicting information concerning the location of its offices for conducting closings and did not demonstrate that it had experience in conducting closings in all nine counties.

HUD also judged Stewart Title's proposal to provide only two closers for all nine counties to be a deficiency under evaluation factor 2 (adequate staff), inasmuch as the agency did not believe that Stewart Title could timely perform closings in all counties with only two closers. The protester admits that it only proposed two closers, but argues that other staff named in its proposal could serve as back-up closers to the contract and that, in any event, it was unreasonable for HUD to expect an offeror to dedicate more closers to the contract when the contract only guaranteed a minimum of 100 closings per year. We find that the agency reasonably assessed Stewart Title's offer of only two closers as a deficiency. While the protester now asserts that other named staff–which Stewart Title proposed for other contract functions–were available as back-up closers, this was not mentioned in its proposal.[4] It was also unreasonable for the protester to assume that its proposed contract capability would be assessed against the minimum 100 closings guaranteed in the RFP when the solicitation informed offerors that up to 1,500 closings could be ordered and that closings over the last 2 fiscal years exceeded 1,000 closings per year.

Stewart Title's proposal was also downgraded under evaluation factor 2 (reasonable performance plan) because although the firm stated that it would utilize a subcontractor's established procedures for conducting HUD closings, it failed to detail those procedures.[5] While the protester objects to this evaluation assessment, we find from our review of Stewart Title's proposal that the firm failed to detail the procedures it would follow in performing the contract, as required by the RFP. Rather, Stewart Title's proposal promised that the firm's subcontractor would be present at the beginning of the contract to assist in processing HUD files and would provide contract administration support throughout the contract. While Stewart Title supplied some of its subcontractor's closing forms with its proposal, this did not satisfy the RFP's requirement for a detailed explanation of the closing procedures to be used.

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[4]It is an offeror's obligation to prepare an adequately written proposal that can be evaluated in accordance with the criteria set forth in the RFP. Miltope Corp.; Aydin Corp., B-258554.4 et al., June 6, 1995, 95-1 CPD ¶ 285.

[5]The protester asserts that HUD downgraded its proposal because of its offer to use a subcontractor in performing the contract. The record belies this assertion. Stewart Title's proposal was not downgraded for offering a subcontractor, but for proposing to use the subcontractor's closing procedures without detailing what those procedures were.

Stewart Title also protests that HUD evaluated its proposal against unstated evaluation criteria. Specifically, Stewart Title complains that in the agency's unsuccessful offeror notification to Stewart Title, HUD stated the firm's

> "proposal does not provide any details on these [management] reports or programs. Therefore, the [evaluation] panel found that there was no demonstrated plan for ongoing monitoring to assure accurate and timely accomplishment of the work, identifying and resolving problems, how or when directions or changes would be implemented, assurance that staff would be kept up to date."

The protester asserts that these evaluated deficiencies are outside the scope of the identified evaluation criteria. We disagree. The RFP provided that the offeror's "reasonable plan for accomplishing all duties specified in approximate quantities stated, and within the timeframes required" would be evaluated. The deficiencies identified in HUD's letter represent the agency's judgment as to the adequacy of the firm's plan for accomplishing the contract work and not the application of unstated evaluation criteria. See Marine Animal Prod. Int'l, Inc., B-247150.2, July 13, 1992, 92-2 CPD ¶ 16.

Stewart Title also protests that the agency did not conduct meaningful discussions with it concerning eight of the deficiencies identified in its proposal.

Federal Acquisition Regulation (FAR) § 15.610(c)(2) requires that a contracting agency "[a]dvise the offeror of deficiencies in its proposal so that the offeror is given an opportunity to satisfy the [g]overnment's requirements." Although discussions need not be all-encompassing, discussions are required to be meaningful; that is, an agency is required to point out weaknesses, excesses, or deficiencies in a proposal unless doing so would result in technical transfusion or technical leveling. FAR § 15.610(c) and (d); E.L. Hamm & Assocs., Inc., B-250932, Feb. 19, 1993, 93-1 CPD ¶ 156. This does not mean that offerors are entitled to all-encompassing discussions or that an agency must "spoon-feed" an offeror as to each and every item that must be revised, added, deleted, or otherwise addressed to improve a proposal; rather, an agency must only lead offerors into areas of their proposals considered deficient. SeaSpace Corp., B-252476.2, June 14, 1993, 93-1 CPD ¶ 462.

The record establishes that with regard to seven of the eight deficiencies identified by Stewart Title the firm was led into the areas of its proposal requiring amplification. For example, regarding Stewart Title's failure to identify offices for conducting closings in the nine counties required by the RFP, HUD requested that Stewart Title provide "information on closings to be performed at locations other than the Orlando office" and that Stewart Title "specifically address plans for closings in the following counties: St. Lucie, Indian River, Lake, Volusia, and

Osceola." Similarly, regarding Stewart Title's offer of only two closers for the nine county area, the agency advised the firm:

> "[i]t is not clear whether the staff you proposed is supposed to be used full time, or for only a percentage of the time, on the HUD contract. Please indicate a percentage of time to be dedicated to this contract for each person identified. Please coordinate personnel to workload requirements (averaging 90 closings per month). Also include a workplan, position titles and duties as well as resumes for all staff involved in this work. The workplan should include anticipated time frames for accomplishing work as stated in the solicitation." [Emphasis added.]

The agency did not inform Stewart Title of one deficiency–that one of the sample closing documents provided with Stewart Title's proposal indicated that closings in certain areas would only be performed on certain days. The agency explains that its evaluators did not recognize this problem in Stewart Title's initial proposal, that no points were deducted from Stewart Title's BAFO for this deficiency, and that the deficiency had no effect on the award selection. The evaluation documents confirm that no points were deducted from Stewart Title's technical score for this deficiency, which had no effect on the relative standing of the offerors; in fact, there is no mention of this deficiency in the contracting officer's cost/technical tradeoff documentation. Thus, we find that Stewart Title was not prejudiced by the agency's failure to inform the firm of this deficiency. See Diverco, Inc., B-259734, Apr. 21, 1995, 95-1 CPD ¶ 209.

Stewart Title also protests the agency's cost/technical tradeoff, asserting that the agency did not specifically determine that the price premium associated with First American's proposal was justified.[6]

In a negotiated procurement, the government is not required to make award to the lowest-priced, technically acceptable offeror unless the RFP specifies that price will be determinative. General Servs. Eng'g, Inc., B-245458, Jan. 9, 1992, 92-1 CPD ¶ 44. Source selection officials have broad discretion to determine the manner and extent to which they will make use of the technical and cost evaluation results in negotiated procurements. Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1

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[6]Stewart Title contends that the RFP is silent as to whether a cost/technical tradeoff would be performed. This argument is without merit. The RFP provided for award to the offeror whose conforming offer was determined to be most advantageous to the government, price and other factors considered; that the government may make award to other than the lowest-priced offer; and that the stated technical factors were more significant than price–this scheme contemplates that a cost/technical tradeoff will be performed.

CPD ¶ 325. In deciding between competing proposals, cost/technical tradeoffs may be made; the propriety of such trade-offs turns not on the difference in technical scores or ratings per se, but on whether the source selection official's judgment concerning the significance of that difference was reasonable and adequately justified in light of the RFP evaluation scheme. DynCorp, B-245289.3, July 30, 1992, 93-1 CPD ¶ 69. In a best value procurement, an agency's selection of a higher-priced, higher-rated offer compared to a lower-priced, lower-rated acceptable offer should be supported by a specific, documented determination that the technical superiority of the higher-priced offer warrants the additional cost involved, even where, as here, price is stated to be the least important factor. Sturm, Ruger & Co., Inc., B-250193, Jan. 14, 1993, 93-1 CPD ¶ 42.

Here, the record supports the contracting officer's decision to select First American's technically superior proposal, notwithstanding Stewart Title's slightly lower price.[7] As noted above, First American's higher technical score reflected the agency's judgment that First American had fully demonstrated its capability of timely performing all the HUD closing services required in the nine county area; the agency concluded that Stewart Title's proposal, on the other hand, evidenced that the firm likely could not perform all the required closing services in a timely manner. The contracting officer considered the impact of delays in the closing process, which the contracting officer concluded would adversely affect the government (and its economic investment in the properties and settlement proceeds), the purchaser (who often wishes to immediately move into the property), the selling broker (who seeks a commission check), and the management services contractor (who is responsible for the security and condition of the property until closing). Against the impact of the likely untimely performance presented by Stewart Title's proposal, the contracting officer weighed the $67,944 price advantage offered by Stewart Title over the 3-year contract, and concluded that the superior performance reflected in First American's proposal outweighed Stewart Title's slight price advantage. While Stewart Title disagrees with this assessment, it has not demonstrated that the contracting officer's judgment is unreasonable.

The protest is denied.

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[7]Stewart Title also contends that we should not consider the contracting officer's "post hoc" explanation of his cost/technical tradeoff. We disagree. While we accord greater weight to contemporaneous source selection materials than documents prepared in response to a protest, we consider the entire record, including statements made in response to a protest, in reviewing an agency's evaluation and source selection. See DynCorp, 71 Comp. Gen. 129 (1991), 91-2 CPD ¶ 575; Hydraudyne Sys. and Eng'g B.V., B-241236; B-241236.2, Jan. 30, 1991, 91-1 CPD ¶ 88.

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