



United States General Accounting Office  
Washington, DC 20548

Comptroller General  
of the United States

**DOCUMENT FOR PUBLIC RELEASE**

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

## Decision

**Matter of:** Cotton & Company, LLP

**File:** B-282808

**Date:** August 30, 1999

---

Alan M. Grayson, Esq., Ira E. Hoffman, Esq., and Brian T. Scher, Esq., Grayson & Associates, for the protester.

Virginia K. Ackerman, Esq., Department of Housing & Urban Development, for the agency.

Paul E. Jordan, Esq., Robert C. Arsenoff, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

---

### DIGEST

Contracting agency did not conduct meaningful discussions with the protester where the agency failed to clearly identify deficiencies in the protester's proposal in either the written or the oral discussions and failed to respond when, in the oral discussions, it became clear that the protester had misunderstood the agency's concerns.

---

### DECISION

Cotton & Company, LLP protests the award of a task order to KPMG Peat Marwick LLP under solicitation No. GF900000013, issued by the Department of Housing and Urban Development (HUD) for audit services. Cotton challenges the evaluation of its proposal, the application of allegedly unstated evaluation criteria, the conduct of discussions, and the source selection decision.

We sustain the protest.

### BACKGROUND

The solicitation was issued under the General Services Administration's Auditing Services & Financial Management Services Schedule to obtain an audit entitled: "Federal Housing Administration (FHA) Single Family Procurement and Disbursement Review." According to the statement of work (SOW) which was included in the solicitation, the FHA, under its mortgage insurance programs,

receives single-family properties from investors and loan service organizations in the normal course of settling insurance claims. Until they are sold, these properties are maintained by HUD staff under various contract arrangements with real estate asset managers (REAM). Most of these maintenance services, which include property repairs, landscaping, advertising, and appraisal, are obtained by HUD field office staff or REAMs through the use of indefinite-quantity contracts, and payment for the services is handled through a centralized disbursing contractor. The agency views the decentralized procurement of the services and centralized disbursement of funds to pay for them as distinct aspects of the audit to be performed under this contract.<sup>1</sup>

This distinction is set forth in the SOW's identification of the audit's objectives:

(a) assess the adequacy [of] FHA housing **procurement and asset management controls in a decentralized operational environment**; (b) review the **centralized contracted disbursement controls**; (c) determine the extent, if any, of fraud, errors and irregularities occurring in these functions using innovative forensic audit techniques, including automated matching[:]; and (d) provide sufficient, competent and relevant evidence for significant individual or group referrals to Federal investigators to determine whether Federal crimes or pattern of crimes have been committed. Nationwide financial transactions (Approximately 105,000 checks) issued to more than 50,000 vendors representing a few large national service indefinite quantity contracts with the bulk of the goods or services locally procured for individual FHA cases or properties.

SOW ¶ 5.0 (emphasis added).

Solicitation requirements included a review of the prior audit history and the Office of the Inspector General preliminary audit survey; a review of current housing and contractor policy, procedures and system controls; an assessment of the risk of fraud and management control weaknesses; the submission of a strategic audit plan; conduct of an audit; and a report on audit results. SOW ¶ 7.0. As amended, the SOW provided for an agency review of the strategic audit plan and reserved the right of the contracting officer to cancel further work on the audit without any additional cost, based upon the agency's evaluation of the strategic audit plan. SOW ¶ 7.4.

The solicitation provided the following evaluation factors: (1) demonstrated knowledge and understanding of the work (25 points); (2) soundness and viability of the proposed plan to successfully and timely complete the work (25 points);

---

<sup>1</sup> At the hearing conducted by our Office in connection with this protest, the technical evaluation panel (TEP) chair explained the unique nature of HUD disbursements being made through a private sector organization instead of the U.S. Treasury. Hearing Transcript (Tr.) at 100-01.

(3) innovative approaches to detect fraud or other noncompliance with laws and regulations governing the program operations to be audited (20 points); (4) demonstrated past performance, experience, and qualifications for the scope of the work described in the SOW (20 points); and (5) ability to commence work, plan and subsequently conduct multi-site audit within stated time frames (10 points). Award was to be made on the basis of these technical evaluation factors with price considered secondary.

Three offerors, including Cotton and KPMG, submitted proposals which were reviewed by a three-person TEP.<sup>2</sup> The TEP found KPMG's proposal technically acceptable and Cotton's proposal unacceptable but susceptible of being made acceptable. Both proposals were included in the competitive range. The TEP identified various weaknesses in Cotton's proposal under the first three factors and, in preparation for discussions, sent Cotton the following discussion questions:

1. . . . Knowledge and Understanding of the Work--The offeror appears to be proposing to sample from a population of procurement contracts and to perform a number of procurement related assessments, such as, workload projections, defining minimum need and whether the specifications meet mission requirements, etc. Does the offeror understand that the vast bulk of procurements are made in the separate field jurisdictions or by contract asset managers who purchase a high volume of goods and services of a low dollar value? . . .
2. . . . Innovative Approaches to Detecting Fraud or Other Potential Noncompliance--The offeror proposes to utilize Financial Crime Investigator (FCI) an artificial intelligence software. Can the offeror describe how the numerous characteristics shown on Page 13 [of Cotton's proposal] can be applied to the conditions described in the Task Order and Attachments?
3. . . . Proposed Plan to Complete the Work within the Delivery Times Requested--It appears that the offeror plans to subcontract both with the Deputy Project Manager's firm, [deleted] as well as [Company A] in order to adequately staff the field site portion of the review. Are both firms Certified Public Accountants and why were [there] no resumes included from [Company A]? Have both firms received a recent quality assurance review under the AICPA program?

Agency Report, Tab H, Review of Technical Proposals – Cotton & Co.

Oral discussions were conducted between the TEP chair and one of Cotton's partners (Mr. Cotton). In these discussions, which lasted approximately 20 to 30

---

<sup>2</sup> The third offeror's proposal was evaluated as technically unacceptable and was not considered for award. Accordingly, this decision will discuss only the offers of Cotton and KPMG.

minutes, the TEP chair began with the written questions quoted above and included related inquiries about Cotton's staffing and proposed software. Tr. at 15, 19-20, 130.<sup>3</sup>

At the agency's request, Cotton submitted a revised proposal in which it responded to the written discussion questions. In the revised proposal, Cotton reiterated its understanding of the sampling and audit process; provided more detail on the operation of the FCI software; identified an additional subcontractor and furnished one additional resume; and included copies of peer reviews for all subcontractors. After reviewing the offeror's revised proposal, the TEP evaluators met to discuss their individual findings and reach a consensus. The TEP found that Cotton's revised proposal was not sufficiently responsive to the concerns raised in discussions, and therefore did not change Cotton's proposal scores. The final evaluations for the two offerors were as follows:

| <b>Factors (points)</b> | <b>KPMG</b> | <b>Cotton</b> |
|-------------------------|-------------|---------------|
| Factor 1 (25 )          | 21.7        | 19            |
| Factor 2 (25)           | 23          | 17.3          |
| Factor 3 (20)           | 16.3        | 14.7          |
| Factor 4 (20)           | 17.7        | 14            |
| Factor 5 (10)           | 10          | 9.3           |
| Total Score (100)       | 88.7        | 74.3          |
| Proposed Cost           | \$444,476   | \$296,345     |

Agency Report, Tab O, Memorandum from the Chair, TEP, to the Contracting Officer attach. 2 (Feb. 16, 1999).

The TEP concluded that KPMG's proposal was technically acceptable and the most highly rated of the proposals. Despite certain strengths, the TEP concluded that Cotton's proposal remained technically unacceptable because it failed to address important aspects of the evaluation factors. In its memorandum to the contracting officer (Id. at 2), the TEP concluded the following about Cotton:

The project manager and the primary firm appear well qualified to perform the work described. The experience focuses more on procurement fraud than other phases of the work. The proposal appears to rely heavily on the staffing of several subcontractors whose experience and qualifications were not clearly demonstrated. It could be that further discussions could clarify how the subcontractor

---

<sup>3</sup> The hearing conducted by our Office was undertaken largely because the parties disagreed as to the extent to which the agency raised certain issues during the oral discussions. In some instances, the written transcript of the hearing contained errors, which we have corrected based upon our review of the video transcript made during the proceeding.

coordination and experience would lend itself to successfully perform this type of performance audit.

The TEP recommended award to KPMG based on its technically superior proposal and Cotton's technically unacceptable proposal. The contracting officer considered Cotton's lower proposed cost, but based on the TEP's analysis that KPMG's proposal represented the best value, awarded the contract to KPMG. Through a post-award debriefing, Cotton was informed that the agency had identified, as a deficiency in the firm's proposal, an overemphasis on procurement fraud compared to disbursement aspects of the SOW; as a significant weakness, the failure to clearly define the experience and qualifications of its subcontractors; and, as a significant weakness and deficiency, the failure to provide staff with certain identified credentials. Agency Report, Tab S, Debriefing Letter from the Contracting Officer to Cotton (May 14, 1999). After receiving the debriefing letter, Cotton filed this protest. Because Cotton's protest was not filed within 5 days of its debriefing, the agency did not stay contract performance.

## ANALYSIS

Cotton argues that the agency relied on undisclosed evaluation factors in downgrading its proposal in the three areas identified at the debriefing (and set out above). The agency views all three areas as within the solicitation's evaluation criteria.

Solicitations must inform offerors of the basis for proposal evaluations, and the evaluation must be based on the factors set forth in the solicitation. Federal Acquisition Regulation (FAR) §§ 15.304(d), 15.305(a). However, while agencies are required to identify the major evaluation factors, they are not required to identify all areas of each factor which might be taken into account, provided that the unidentified areas are reasonably related to or encompassed by the stated criteria. Techsys Corp., B-278904.3, Apr. 13, 1998, 98-2 CPD ¶ 64 at 9; Bioqual, Inc., B-259732.2, B-259732.3, May 15, 1995, 95-1 CPD ¶ 243 at 4.

Here, we believe that the issue of subcontractor qualifications and staff credentials clearly are encompassed by the solicitation's evaluation criteria. Less clear is the connection between those criteria and the agency's emphasis on the disbursement aspects of the audit (which the agency views as distinct from the procurement aspects). If we assume, for purposes of our analysis, that all three matters are encompassed by the solicitation's evaluation criteria (and thus legitimate bases for downgrading Cotton's proposal), we still need to consider whether the agency conveyed its concerns regarding these matters during discussions.

Cotton argues that the agency failed to meaningfully discuss any of the three areas of the agency's concern, which the firm states it first learned at the debriefing. The agency maintains that its written and oral discussions were sufficient to lead the protester into the areas of concern. To have done more, the agency submits would

constitute “spoon-feeding” the protester. See Applied Cos., B-279811, July 24, 1998, 98-2 CPD ¶ 52 at 8. We agree with Cotton.

In discussions, an agency “shall . . . indicate to, or discuss with, each offeror still being considered for award, significant weaknesses, deficiencies, and other aspects of its proposal (such as cost, price, technical approach, past performance, and terms and conditions) that could, in the opinion of the contracting officer, be altered or explained to enhance materially the proposal’s potential for award.” FAR § 15.306(d)(3). As an initial matter, discussions are not meaningful where the agency does not inform an offeror of the central deficiency in its proposal. Voith Hydro, Inc., B-277051, Aug. 22, 1997, 97-2 CPD ¶ 68 at 3. It is a fundamental precept of negotiated procurement that discussions, when conducted, must be meaningful and must not prejudicially mislead offerors. SRS Techs., B-254425.2, Sept. 14, 1994, 94-2 CPD ¶ 125 at 6; Ranor, Inc., B-255904, Apr. 14, 1994, 94-1 CPD ¶ 258 at 4. Specifically, an agency may not mislead an offeror--through the framing of a discussion question or a response to a question--into responding in a manner that does not address the agency’s concerns; misinform the offeror concerning a problem with its proposal; or misinform the offeror about the government’s requirements. Price Waterhouse, B-254492.2, Feb. 16, 1994, 94-1 CPD ¶ 168 at 9-11; DTH Management Group, B-252879.2, B-252879.3, Oct. 15, 1993, 93-2 CPD ¶ 227 at 4.

The first area of major concern to the evaluators was Cotton’s failure to address the disbursement aspects of the task order while overemphasizing the procurement aspects. As noted above, the task order differentiates between these two areas. SOW ¶ 5.0. Cotton’s proposal discussed the audit work primarily in terms of procurement fraud, treating disbursements as one aspect of the procurement process. While the agency argues that its first two written questions by themselves constituted adequate discussions on this matter (Agency Post-Hearing Comments at 5), we conclude that neither question disclosed the agency’s actual view that Cotton had failed to adequately address the disbursement aspects of the work.

In this regard, the first written question began with a statement of the evaluators’ impression of Cotton’s approach (sampling from a population of procurement contracts and performance of procurement-related assessments). It then asked Cotton if it understood that the “vast bulk” of procurements are made in the field jurisdictions. The agency maintains that this question sought clarification of the firm’s understanding that the vast bulk of work “did not involve procurement related assessments.” Agency Post-Hearing Comments at 5. We do not read the question as conveying the agency’s view that disbursement issues are not procurement-related. Instead, in our view, based on the question’s phrasing, it was reasonable for Cotton to understand the question, as it did, to focus on Cotton’s understanding of how the subjects of audit are chosen. In oral discussions, Cotton made clear that it understood HUD’s focus was on a universe of disbursements instead of contracts. Tr. at 78. While Cotton recognized disbursements as the focus of the audit sample and knew of the use of a central disbursement contractor, it continued to view

disbursements as the end result of procurements (rather than as separate and distinct from procurements). Tr. at 80, 90.

The second written question dealt with Cotton's proposed use of a particular type of computer software and asked it to describe how the proposal's list of procurement fraud schemes (on which the software could provide guidance for detection and analysis) could be applied to the conditions identified in the task order. While the agency states that it intended this question to deal with Cotton's lack of disbursement fraud information, in our view it does not reasonably convey this concern. As phrased, Cotton reasonably understood this question to focus on how the software would assist in performing the audit, and not as an indication of an overemphasis on procurement fraud. In this regard, during oral discussions, the protester explained how the software operated (Tr. at 32) and provided a more detailed description in its proposal revision. Agency Report, Tab I, Letter from Cotton to the Contracting Officer 2 (Jan. 22, 1999).

HUD also asserts that the oral discussions clearly led the protester into the area of the agency's concerns. In this regard, the TEP chair testified that he discussed his distinction between procurement and disbursement fraud and the scope of the review. Tr. at 123-24. Mr. Cotton did not recall any such discussions. Tr. at 30-31. In any case, while the TEP chair appears to have attempted to make clear his distinction in the types of fraud, the record makes plain that he was aware that he was unsuccessful. The following hearing colloquy between the TEP chair and the GAO hearing officer is illustrative:

GAO: Based on your give and take with Mr. Cotton at this point, what was your impression. Did you have the idea that he understood where you were trying to lead him and that you would see something more in writing?

TEP Chair: I got the impression that Mr. Cotton believed that disbursements were incidental to the procurement process, that the end result of a procurement is writing a check to pay for the goods or services, and that he seemed determined [that] his . . . planning approach to this audit was to go from the procurement side of the transaction and only look for fraud - where he found fraud . . . from a procurement standpoint, then examine the checks involved to see whether there was proof that whoever perpetrated a fraud did get the government's funds.

GAO: Having gotten that impression after listening to him there, did you then say, "Mr. Cotton, I think you're missing a portion of this. You need to tell us some more. We're not convinced that you know what we're really looking for."

TEP Chair: I don't think I made that statement, no.

\* \* \* \* \*

TEP Chair: I guess my view of the discussions were--is that I had given him some written questions. We had some discussions on my distinction between procurement and disbursement fraud and the scope of the review. And I felt like I didn't want to engage in an argument with him, if that's what his approach was, and he felt that that approach was a successful approach . . . at other government agencies.

Tr. at 122-24.

Later the TEP chair testified:

I felt I spelled out as much as I could, the differences, orally, to expound upon this understanding of the work area without actually having told him his answers in his proposal were not addressing the issues of concern.

Tr. at 127.

In view of Cotton's opportunity to revise its proposal, the oral discussions, and the provisions of the SOW, the TEP chair concluded that it was not his place to challenge Cotton's approach. Tr. at 124-25. However, his conclusion ignores the reality of the conduct of the oral discussions. While oral discussions can serve as a valuable negotiating tool, agency negotiators need to keep in mind that their reaction, or failure to react, to an offeror's position during oral discussions risks misleading the offeror. See, e.g., Voith Hydro, Inc., *supra* (agency failed to advise offeror of major weakness in proposal despite being specifically asked during oral discussions whether the agency had concerns in that area). Here, in light of the obliqueness of the agency's written and oral communications on the matter (as well as the unusual nature of the distinction that the agency was making between disbursements and procurements), it was reasonable for Cotton to conclude, at the end of the oral discussions, that it had addressed the agency's concern. Yet, in those discussions, the TEP chair recognized that the offeror had not understood the agency's concern about the firm's proposal and had, instead, conveyed its intention to continue to propose an audit approach which would not satisfy the agency. While agency negotiators are not required to repeat concerns once they have been clearly laid out or to "spoon-feed" an offeror, see Applied Cos., *supra*, here the TEP chair's silence essentially misled the firm; at the least, the agency had an obligation to advise Cotton that the firm's response had not addressed the agency's concern. Here, we conclude that the agency's conduct of the oral negotiations with Cotton did not constitute meaningful discussions.

Similarly, the agency failed to provide meaningful discussions with respect to its concerns regarding the qualifications and experience of Cotton's proposed staff.

While the solicitation's evaluation criteria made clear that the agency would evaluate each offeror's demonstrated experience and qualifications, it did not specify any level of detail or require the submission of resumes or any other information. The only requirements specified were in the SOW provision to submit a strategic audit plan (SAP), 30 days after award of the task order. SOW ¶¶ 7.4, 8.1. In response to the written and oral questions regarding the absence of resumes, Mr. Cotton explained that their submission at that time would be premature and that resumes for staff would be included in the SAP. Tr. at 24, 136. In its revised proposal, Cotton provided more information and outlined the basic qualifications of its subcontractors (Tr. at 23-24, 51-52, 133), but provided only one resume. Agency Report, Tab I. It appears from the record that Cotton's failure to submit resumes for other personnel with its revised proposal was a primary reason that the agency found the proposal weak in the area of subcontractor/staffing qualifications.

As with the distinction between procurement and disbursement aspects of the audit, we believe that the agency failed to conduct adequate discussions in this area. While the TEP chair discussed with Cotton HUD's concerns about the need for adequate and qualified personnel, the TEP chair realized that Cotton believed that resumes were not yet due. Tr. at 130-33. In fact, the TEP chair's notes from the discussion session contain the entry "Premature--submit w SAP" in reference to discussion question 3, which concerned staffing issues. Tr. at 155; Agency Report, Tab T, Notes of the Chair, TEP. The TEP chair did not, however, follow-up with a specific request that Cotton submit the documents sooner or otherwise alert the offeror to the agency's concern. Tr. at 137, 140, 150, 155. As with the procurement/disbursement issue, the TEP chair was faced with an offeror who clearly indicated that it did not believe that it was expected to submit the requested documents with its revised proposal, in (perhaps erroneous) reliance on the SOW, an intent at odds with the agency's view of an acceptable proposal. Under these circumstances, the TEP chair's silence essentially misled Cotton regarding this central deficiency in its proposal.

Here, it is plain that Cotton was prejudiced by the agency's failure to conduct meaningful discussions. Mr. Cotton testified that had the agency made clear its concerns, Cotton could have submitted additional resumes, augmented its proposal with regard to disbursement audits, and provided information regarding staff qualified as certified fraud examiners or equivalent, and EDP and statistical sampling specialists (Tr. at 26, 29-31, 35, 47).<sup>4</sup> In view of the evaluators' own assessment that Cotton's "project manager and the primary firm appear[ed] well qualified to perform the work described," (Agency Report, Tab O, at 2) it is likely that the technical evaluation would have been closer. When coupled with the fact that KPMG's

---

<sup>4</sup>While the TEP chair testified that the issue of forensics experience was not an issue with the evaluation team (Tr. at 203), nonetheless, the debriefing letter stated that Cotton's proposal was "deficient and significantly weak in this element." Agency Report, Tab S, at 1. Yet these specific qualifications also were not brought up in the discussions (Tr. 184).

proposed cost was approximately 50 percent higher than Cotton's, there is a substantial chance that Cotton would have received the award. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3.

The protest is sustained.<sup>5</sup>

#### RECOMMENDATION

The agency has advised our Office that it does not intend to exercise the option to have KPMG complete the audit. Under these circumstances, no useful purpose would be served in reopening negotiations. Since contract performance is essentially complete, we recommend that the agency reimburse the protester for its proposal preparation costs. 4 C.F.R. § 21.8(d)(2) (1999).

We also recommend that Cotton be reimbursed the reasonable costs of filing and pursuing the protest, including attorneys' fees. Id. § 21.8(d)(1). The protester should submit its certified claim for such costs, detailing the time expended and the costs incurred, directly to the contracting agency within 60 days after receipt of this decision.

Comptroller General  
of the United States

---

<sup>5</sup> Cotton also challenges its score under factor 4 (demonstrated past performance, experience, and qualifications) and the agency's source selection decision. Based on our decision to sustain the protest due to the lack of meaningful discussions and the fact that contract performance is essentially complete, no useful purpose would be served by addressing either of these issues.