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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

# Decision

**Matter of:** DIY, Inc.

**File:** B-293105.9

**Date:** December 20, 2004

Malcolm L. Pritzker, Esq., for the protester.
John H. Horne, Esq., Powell Goldstein Frazer & Murphy, for National Home Management Solutions of New York, an intervenor.
Rachael Blackburn, Esq., Department of Housing & Urban Development, for the agency.
Jacqueline Maeder, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

**DIGEST**

Protest that agency improperly failed to provide protester with discussion questions similar to those provided other offerors, and therefore treated protester unequally, is denied where record shows that protester's proposal was eliminated from competitive range, so agency was not required to hold discussions with protester.

**DECISION**

DIY, Inc. protests the award of a contract to National Home Management Solutions of New York (NHMS) under request for proposals (RFP) No. R-0PC-22505, issued by the Department of Housing and Urban Development (HUD) for management and marketing (M&M) services in connection with the disposition of single-family homes and other property owned by HUD. The protester maintains that the agency treated DIY in a disparate manner because it failed to provide it with detailed discussion questions similar to those provided other offerors.

We deny the protest.

The solicitation contemplated the award of indefinite-delivery, indefinite-quantity, fixed-unit-price contracts in 24 geographic regions for M&M services in connection with the disposition of single-family homes owned by, or in the custody of, HUD. At issue in this protest is the contract for Philadelphia Area 3, which covers properties located in New York and New Jersey. The RFP advised offerors that the agency would make award on a "best value" basis, considering price and several technical

evaluation factors. Price was significantly less important than the technical factors, which were rated using an adjectival scale of excellent, good, fair, marginal, and unacceptable.

The agency received numerous proposals, including DIY's and NHMS's. Based on the evaluation of all proposals, HUD determined that the five firms whose proposals were the most highly rated would be included in the competitive range. The agency found that DIY's proposal, with an overall fair rating, was technically unacceptable and, by letter dated April 30, notified DIY that its proposal was eliminated from the competitive range and from further consideration for contract award. Award was made to NHMS on July 30. Following a post-award debriefing, DIY filed a protest with HUD challenging the evaluation of its proposal; after that protest was denied, it filed this protest with our Office.

DIY argues that it received unequal treatment in the procurement, since HUD sent other offerors "4 to 5 pages of questions on April 30, 2004 requesting clarification of 'significant weaknesses,'" while asking "DIY . . . only a single question on January 21, 2004, not related to clarifying perceived weaknesses." Protest at 1. DIY maintains that it should have been provided the same detailed discussions as other offerors.

This argument is without merit. DIY never received discussion questions simply because, as discussed above, DIY's proposal was not included in the competitive range. The purpose of a competitive range determination is to select those offerors with which the agency will hold written or oral discussions. PeopleWorks, Inc., B-257296, Sept. 2, 1994, 94-2 CPD ¶ 89 at 3. Contracting agencies are not required to retain a proposal in the competitive range where the proposal is not among the most highly rated or where the agency otherwise reasonably concludes that the proposal has no realistic prospect of being selected for award. Federal Acquisition Regulation § 15.306(c)(1); Americom Gov't Servs., Inc., B-292242, Aug. 1, 2003, 2003 CPD ¶ 163 at 3. Once an offeror's proposal has been excluded from the competitive range, the agency has no obligation to conduct discussions with the offeror. SOS Interpreting, Ltd., B-287505, June 12, 2001, 2001 CPD ¶ 104 at 12. Since DIY's proposal was not in the competitive range, DIY was not entitled to discussions; there thus is no basis for concluding that the agency accorded DIY unequal treatment, or otherwise acted improperly.

In its comments on the agency report, DIY for the first time challenges the elimination of its proposal from the competitive range, arguing generally that HUD included other proposals in the competitive range that were more technically deficient than DIY's. Protester's Comments at 2. Our Bid Protest Regulations provide that a protest must be filed no later than 10 days after the basis of protest was known or should have been known. 4 C.F.R. § 21.2(b) (2004). DIY's competitive range argument is untimely because it is based on information of which DIY was aware when it filed its original protest. Specifically, DIY's assertion that its proposal had fewer deficiencies than the proposals of competitive range offerors is based on a comparison of the deficiencies in its own proposal with the contents of the detailed

discussion letter on which its unequal treatment argument was based.[1] Since DIY's competitive range argument is based on the same information as its unequal treatment argument, there is no reason why it could not have been raised in DIY's original protest. Since DIY first raised this issue in its November 1 comments, its protest on this ground is untimely and will not be considered.

DIY maintains that its competitive range argument is timely because it was in fact raised in its initial protest. We do not agree. The only specific allegation raised in DIY's initial protest concerned HUD's alleged disparate treatment of DIY, discussed above; the protest lacked any reference whatsoever to the elimination of DIY's proposal from the competitive range. DIY asserts that its competitive range argument "can at the very least be inferred and understood by the wording" in its initial protest. DIY Submission, Nov. 4, 2004, at 2. However, DIY does not point to any specific language supporting such an inference and, again, we find none. DIY's competitive range argument is distinct from its original assertion of unequal treatment, and thus had to independently satisfy our timeliness rules.

The protest is denied.

Anthony H. Gamboa
General Counsel

[1] DIY states in its November 4 submission that it never actually saw the discussion letter, and that its knowledge of the detailed discussion questions came from oral conversations. The period for determining the timeliness of a protest commences when the basis of protest was (or should have been) known, not when written documentation is received. 4 C.F.R. § 21.2(b). Thus, the period for filing DIY's competitive range protest ran from the time the protester received the oral information, prior to the filing of its original protest.