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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: Greenleaf Construction Company, Inc.

File: B-293105.18; B-293105.19

Date: January 17, 2006

Margaret A. Dillenburg, Esq.; Alexander Brittin, Esq.; and Jonathan D. Shaffer, Esq., Smith, Pachter, McWhorter & Allen, for the protester.

James S. DeSordo, Esq., and Russell J. Gaspar, Esq., Cohen Mohr, for Chapman Law Firm Company, LPA, an intervenor.

R. René Dupuy, Esq., Department of Housing and Urban Development, for the agency.

David A. Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Department of Housing and Urban Development's evaluation of awardee's proposal for contract to provide single-family home management and marketing services was unreasonable where it was based on awardee's proposal of key personnel and an electronic monitoring system that awardee should have known--more than 2 months prior to final evaluation and award--would not be available, and awardee never advised agency of the material change in circumstances.
 2. Protest is sustained where Department of Housing and Urban Development failed to reasonably consider or evaluate potential organizational conflict of interest arising due to the fact that the owner of the management and marketing (M&M) services contractor in Ohio will be receiving payments from the owner of the closing agent contractor for Ohio, the activities of which the M&M contractor will oversee.
 3. Affirmative determination of awardee's financial responsibility was not reasonable where, despite knowing awardee had sold an affiliated company, contracting officer nevertheless based responsibility determination on financial capability assessment by Defense Contract Audit Agency that was based in significant measure on financial resources of company that had been sold.
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DECISION

Greenleaf Construction Company, Inc. protests the Department of Housing and Urban Development's (HUD) award of a contract to Chapman Law Firm Company,

LPA (CLF) under request for proposals (RFP) No. R-OPC-22505, for single-family home management and marketing (M&M) services. Greenleaf asserts that CLF materially misrepresented in its proposal the resources it would use in performing the contract, and that, in any case, award to CLF was precluded by an impermissible organizational conflict of interest (OCI). In addition, Greenleaf challenges HUD's affirmative determination of CLF's responsibility.

We sustain the protest.

BACKGROUND

The solicitation, issued August 6, 2003, 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. These properties are acquired or retained in custody by HUD pursuant to the Federal Housing Authority's (FHA) role in administering the single-family home mortgage insurance program. FHA insures approved lenders against the risk of loss on loans extended to home buyers; in the event of a default on a loan insured by FHA, the lender acquires title to the property through foreclosure or other procedure, and then conveys the title to HUD in exchange for the payment of insurance benefits. As a result of this program, HUD has a sizable inventory of single-family homes that it needs to maintain and dispose of through sale. The solicitation was issued to meet HUD's requirement to maintain and sell these properties.

At issue in this protest is the contract for the properties in the Ohio/Michigan area (Philadelphia Home Ownership Center area 2, or P-2). For this area (as for 13 other areas), the RFP provided that the award of the contract would follow a cascading procedure under which any award would first be made on the basis of competition considering only eligible small business concerns. If adequate competition between small business concerns did not exist—that is, if there were not “[a]t least two competitive offers . . . received from qualified responsible business concerns at the tier under consideration,” with award to be made at “fair market prices as determined in accordance with [Federal Acquisition Regulation (FAR) §] 19.202-6”—award then would be made on the basis of unrestricted competition. RFP § M.9.b.

The RFP further advised offerors that the agency would make award on a “best value” basis, considering both price and non-price factors, with the non-price factors being significantly more important than price. There were six non-price criteria (in descending order of importance): management capability/quality of proposed management plan, past performance, experience, proposed key personnel, subcontract management, and small business subcontracting participation.

Three offerors that certified themselves as small business concerns, including Greenleaf, CLF and a third firm, were included in the initial competitive range. After conducting discussions, HUD requested final proposal revisions (FPR) by early

May 2004. Based upon its evaluation of FPRs, HUD selected Greenleaf for award. However, before award could be made, a size status protest filed by CLF resulted in Greenleaf's being found other than small by the Small Business Administration (SBA). Thereafter, HUD reopened discussions with CLF and the third offeror. After obtaining new FPRs, HUD found that the third offeror (which eventually withdrew its proposal) lacked the capacity to perform. With only one offeror, CLF, remaining in the small business tier, HUD concluded that this single small business offer constituted inadequate competition to permit a small business award, and cascaded the competition to the full and open, unrestricted tier. Having determined that Greenleaf's technically superior, low-priced offer represented the best value to the government, HUD awarded a contract to Greenleaf on April 19, 2005.

CLF filed a protest with our Office, asserting that the procurement should not have been cascaded to the unrestricted tier; award instead should have been made to CLF as the only remaining small business offeror. In response to our request for its view in this regard, SBA advised that it viewed the three small business offers originally received as constituting adequate small business competition, such that, even though only CLF ultimately remained as a viable small business offeror, award should be made at the small business tier, that is, to CLF. HUD terminated Greenleaf's contract on June 17, returned the procurement to the small business tier and, by letter dated June 22, advised CLF that its proposal was "now being considered for award." Letter from HUD to CLF, June 22, 2005, at 1. HUD requested that CLF furnish "[c]ertification that your proposal submitted January 20, 2005 remains valid," and furnish documentation showing that a conflict of interest arising from CLF's ownership of Lakeside Title & Escrow Agency--the HUD closing agent contractor for Ohio which CLF, as the M&M contractor for Ohio, was prohibited under the RFP from owning--had been mitigated. Id.

Greenleaf thereupon filed suit in the United States Court of Federal Claims protesting HUD's return of the procurement to the small business tier and the selection of CLF for award. The court denied Greenleaf's protest, finding that the "reversal of the decision to cascade was correct," and that the fact that CLF ultimately was left as the only small business concern "did not compel a cascade to the unrestricted tier." Greenleaf Constr. Co., Inc. v. United States, 67 Fed. Cl. 350, 361 (2005). Thereafter, the agency evaluators amended the technical evaluation to recommend award to CLF; the source selection authority concurred with this recommendation on September 14. After determining that CLF was responsible, financially and otherwise, with no conflict of interest precluding award, and had adequate staffing and equipment to perform, Affirmative Determination of Responsibility, Philadelphia Area 2, September 26, 2005, the contracting officer made award to CLF on September 30. Greenleaf then filed this protest with our Office.

INACCURATE REPRESENTATIONS

Greenleaf asserts that the award to CLF was improper because CLF's proposal misrepresented the resources and staff CLF intended to use to perform the contract.

An offeror's material misrepresentation in its proposal can provide a basis for disqualification of the proposal and cancellation of a contract award based upon the proposal. A misrepresentation is material where the agency relied upon it and it likely had a significant impact upon the evaluation. Integration Techs. Group, Inc., B-291657, Feb. 13, 2003, 2003 CPD ¶ 55 at 2-3; Sprint Communications Co. LP; Global Crossing Telecommunications, Inc.--Protests and Recon., B-288413.11, B-288413.12, Oct. 8, 2002, 2002 CPD ¶ 171 at 4; AVIATE L.L.C., B-275058.6, B-275058.7, Apr. 14, 1997, 97-1 CPD ¶ 162 at 11.

Based on our review of the record, we find that HUD's evaluation of CLF's proposal was unreasonable because it was based on aspects of CLF's proposed resources and technical approach that, after the submission of CLF's FPR, and unbeknownst to the agency, materially changed such that the agency never evaluated the awardee's actual resources and technical approach as they existed at the time of award.

The [A]s

Greenleaf cites CLF's proposal of [Ms. A] and her spouse [Mr. A] as one of CLF's alleged misrepresentations. In this regard, in November 2004, HUD expressed concern during discussions that CLF lacked staffing and M&M experience. CLF responded in its January 20, 2005 FPR by adding staff, including Ms. [A] and Mr. [A] as two key personnel, and (with the assistance of the [A]s) by significantly rewriting its proposal. Specifically, CLF identified Ms. [A]'s role in contract performance as vice president for contract compliance, describing her responsibilities as follows:

[DELETED].

CLF FPR, Jan. 20, 2005, Response at 6.

CLF identified Mr. [A]'s role in contract performance as vice president for operations and contract teams support leader (CTSL) alternate, describing his responsibilities as follows:

[DELETED].

CLF FPR, Jan. 20, 2005, Response at 6. According to CLF's proposal,

[DELETED] and [Ms. A], along with [Mr. A], are members of the first-tier executive team that reports to and advises the CEO and company principal, Frank Chapman. [DELETED] and [DELETED] with their

focus on [DELETED], respectively, are the other executives who will function at this level of the company.

CLF FPR, Jan. 20, 2005, Response at 4. In addition, CLF included in its FPR resumes for Ms. [A] and Mr. [A] and an extensive narrative discussion of their experience. In this regard, the proposal stated that beginning in 1998, Ms. [A] had worked as a consultant to, and then the national training and broker oversight director for, an M&M HUD contractor. Likewise, Mr. [A] served as a marketing director and a consultant with respect to staff and facilities selection for an M&M contractor.

HUD evaluated CLF's proposal of the [A]s as a strength. According to the Technical Evaluation Panel's (TEP) report, CLF's proposal of Ms. [A] as vice president for contract compliance and Mr. [A] as vice president for operations was "a strength as both [A]s have extensive knowledge of the workings of an M&M contract as both were either employed by a former M&M contractor or worked as a consultant for a former M&M contractor." TEP Report at 75, 84, 87, 89. According to the TEP, and citing the [A]s as a specific example, CLF's proposal offered "a very low risk of unsuccessful performance relative to key personnel" as a result of the fact that "[m]any key personnel are long-time employees of a current M&M contractor and have recent experience performing work that is the same or similar to most of the required tasks." *Id.* at 89. Likewise, according to the TEP, it was a strength under the subcontract management evaluation factor that Ms. [A] and Mr. [A] "have been employed by a former M&M contractor and are familiar with the oversight and management of subcontractors." *Id.* at 90. Indeed, according to the TEP, while Greenleaf's technical proposal overall was marginally superior to CLF's, CLF's staffing plan was superior to Greenleaf's because, unlike for Greenleaf, all key CLF personnel were clearly qualified for their positions. *Id.* at 97-98.

Greenleaf asserts that, while CLF's proposal included the [A]s in its "first-tier executive team," CLF was on notice months before the September 30, 2005 award that, in fact, the [A]s were unwilling to participate in CLF's performance of the Ohio/Michigan M&M contract. The record, including testimony taken at a hearing our Office conducted in this matter, supports this argument.

CLF's January 2005 FPR included certifications executed by Ms. [A] and Mr. [A] (on November 11, 2004) stating that "[w]hen a contract is awarded, I am committed to pursuing the position for which my resume is proposed." In addition, the protest record includes a separate "Contingent Employment, Non-Compete & Non-Disclosure Agreement" for each of the [A]s (also executed on November 11, 2004), which provided for CLF's "At Will Employment" of Ms. [A] (as a consultant) and Mr. [A], contingent upon CLF's receiving award of the M&M contracts for Ohio/Michigan and/or Illinois/Indiana.

Shortly after CLF certified to HUD on June 22 that its January 2005 FPR remained valid, and more than 2 months prior to the agency's final evaluation of CLF's offer

and the subsequent award to CLF (on September 30), CLF was put on notice that the [A]s in fact would not be willing to work for CLF to perform the contract. In this regard, on March 4, 2005, HUD issued a solicitation for closing agent services in several states, including North and South Carolina. According to the testimony of Ms. [A] and Mr. [A], prior to submitting proposals for North and South Carolina, they inquired of Mr. Chapman, the owner of CLF and (at that time) Lakeside Title, whether he would be competing against them for those contracts. Mr. Chapman advised that he would not compete, and agreed to the [A]s' submitting his resume with their offers. Following the submission of proposals (but before award), the [A]s learned from Mr. Chapman that Lakeside Title had in fact submitted proposals for North and South Carolina. At that point, according to Ms. [A], Mr. Chapman reassured the [A]s that "[i]f we win the Carolinas, it's for you." Hearing Transcript (Tr.) at 146-53, 212, 323-24. (Likewise, Mr. [A] testified that Mr. Chapman reassured the [A]s prior to award of the North and South Carolina contracts that "if we get this, you guys can have a part of this and we'll still go forward with doing something together." Tr. at 324; see Tr. at 364.)

When HUD informed the [A]s by letter dated July 1 that award for the North and South Carolina closing agent requirements had been made to Lakeside Title, Ms. [A] called Mr. Chapman to follow up on Mr. Chapman's earlier representations that the [A]s would nevertheless benefit from an award to Lakeside Title. The record indicates that Mr. Chapman advised Ms. [A] that he had sold Lakeside Title and that, therefore, the [A]s and their company would not participate in the North and South Carolina contracts. According to Mr. Chapman, he informed Ms. [A] that, while it was true that he "had promised her a job," "it's also true that I told you that that was if we did not win the M&M, and we have won the M&M, so we will be working at the M&M and that [DELETED] owns the title company." Tr. at 637-38, 640-41. (In response to a subsequent question as to "[w]hat kind of commitments, if any, did you give the [A]s with respect to the contract in North Carolina/South Carolina," Mr. Chapman gave a different answer, stating that he had "told them that if we didn't win the M&M, that I would hire [Mr. A] to be a manager" in North Carolina. Tr. at 648-49.)

What occurred after Mr. Chapman advised Ms. [A] that the [A]s would not be participating in the North and South Carolina closing agent contracts is in some dispute. Ms. [A] testified that, having concluded that Mr. Chapman was unreliable, the [A]s decided that they would not relocate from Texas (where they had entered into a contract to sell their home) to Cleveland, Ohio to work with CLF on the Ohio/Michigan M&M contract. According to Ms. [A], she advised Mr. Chapman during a telephone call (apparently on July 6) that the [A]s "could not trust him," and "felt that our business reputation would be at risk" if (as they had heard he intended to do) he deviated from the CLF proposal by using a different computer software company than proposed, and that the [A]s therefore would not come to Cleveland to perform the M&M contract, or otherwise work with him. Tr. at 159-60. Although Mr. [A] was not on the telephone call, he testified that he was at home with Ms. [A]

during the call, and that she advised him of the contents of the call, including her statement that the [A]s would not work with Mr. Chapman. Tr. at 325-26.

Mr. Chapman conceded in his testimony that the [A]s “were mad at me about the North Carolina closing agent contract, and they had asked for more money,” but denied that they stated that they would not come to work for him on the M&M contract. Tr. at 637-44.

Based on our review of the record, including the demeanor of the witnesses, we find that Mr. Chapman (and thus CLF) was on notice that the [A]s would not participate in performing the M&M contract. In particular, we find Ms. [A]’s testimony persuasive. Ms. [A]’s testimony was corroborated not only by the testimony of Mr. [A], but also by the subsequent communications with Mr. Chapman. On July 6, after the above telephone conversation with Ms. [A], Mr. Chapman sent Ms. [A] an e-mail in which he advised her that “[a]s you are aware, CLF is the intended awardee” for the M&M contract, and “[u]pon the release of this contract, which could be as early as next week, you will be asked to fulfill your contract which is contingent upon award to CLF as written without modification.” E-mail from Frank Chapman to [Ms. A], July 6, 2005, 11:03 a.m. Shortly thereafter, Ms. [A] replied that “I’m sorry Frank, but our confidence in you has been breached in a very hurtful way. We do not respond well to ultimatums, and do not regard that type of relationship as a workable one for the future.” E-mail from [Ms. A] to Frank Chapman, July 6, 2005, 1:43 p.m. Later that day, Mr. Chapman responded as follows:

I have done nothing but fulfill every promise I’ve ever made

My e-mail was not intended as an ultimatum, but to remind you that, pursuant to that agreement, you have an obligation to work for us when award is made. Your repeated references to “renegotiating” your contract and your non-committal attitude about reporting to work in Cleveland, as well as implied threats of working for foreclosure.com, a related business, have caused me great concern. That is why I feel it necessary to remind you that we expect that you will honor your previous agreement to come and work on the M&M when the stay is lifted.

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As we will have to hit the ground running when the stay is lifted, if you no longer have any intention of honoring your agreement, I would ask that you advise us at your earliest opportunity.

E-mail from Frank Chapman to [Ms. A], July 6, 2005. In our view, Mr. Chapman’s repeated references to Ms. [A]’s obligation to fulfill the “at will” employment agreement she had signed regarding employment on the M&M contract suggests that Mr. Chapman had been given reason to question her and Mr. [A]’s plans in this regard, and thus corroborates Ms. [A]’s persuasive testimony that she in fact had

advised Mr. Chapman that the [A]s would not work with him on an Ohio/Michigan M&M contract.

The record indicates that the [A]s, believing that the agreements they had signed were only for “at will” employment and that, in any case, their intention not to work on the M&M contract had already been conveyed to Mr. Chapman, did not specifically respond to Mr. Chapman’s request in his July 6 e-mail for notice that they “no longer have any intention of honoring your agreement.” Tr. at 223-24, 374-77. However, to the extent that any uncertainty as to the [A]s’ intentions could have remained after Ms. [A]’s previous express refusal to work for Mr. Chapman on the M&M contract, we find that any such uncertainty could not reasonably have survived the subsequent notice to Mr. Chapman of the [A]s’ relocation to North Carolina, rather than to Ohio as originally planned, after selling their home in Texas. In this regard, Mr. Chapman testified that at one point in his earlier conversations with Ms. [A], she had stated that “when she came back from Texas . . . she could either go north or south on I-77.” Tr. at 878. In an e-mail to Mr. Chapman dated July 18, sent in response to his e-mail that “I miss you. We should talk or email, not about money but about the future,” Ms. [A] wrote about having moved into an apartment in North Carolina. E-mail from [Ms. A] to Frank Chapman, July 18, 2005, 12:52 p.m. Ms. [A] did offer in her response that “[i]f there is a way to make things right re the [North Carolina/South Carolina] contracts, we are interested in talking about that. Seems setting that situation straight is a first step.” *Id.* However, Mr. Chapman did not explain how, nor is there any basis in the record to conclude that, he then made any attempt to “make things right” regarding the North Carolina/South Carolina closing agency contracts. In these circumstances, we conclude that Mr. Chapman (and thus CLF) was on notice more than 2 months prior to the agency’s final evaluation and award of the M&M contract that, contrary to the provisions of CLF’s final FPR, the [A]s would not be available to work on the M&M contract.

Dynamic Quest Software

Greenleaf asserts that CLF’s proposal also misrepresented the software package and software company it was planning to use to perform the contract. Our review of the record confirms that CLF determined more than 2 months prior to the agency’s final evaluation and award of the Ohio/Michigan M&M contract to use a different software package and software company than those on which its proposal was based.

The solicitation PWS required the contractor to maintain a complete file for each property using a secure, electronic, web-based Electronic Monitoring System (EMS) accessible to employees of both the contractor and HUD. The statement of work (SOW) set forth detailed performance requirements for the EMS to ensure that it would adequately serve HUD’s information needs under the PWS, including requirements that the system: (1) provide a daily posting of complete electronic records of actions taken for mortgagee compliance and the management and marketing of a property; (2) display electronic images of all property-related

documents and color photographs of properties not later than 24 hours following receipt or creation by the contractor; (3) index information in a way that provides access to an individual property file or to information from all files based on document type or action performed; and (4) prepare various reports regarding the status of the properties. SOW § C.5.1.1, attach. 9.

In its January 2005 FPR, CLF proposed to meet the EMS performance requirements through the use of the TEAMS electronic monitoring system developed and implemented by Dynamic Quest, Inc. CLF's proposal described in detail the proposed TEAMS EMS system and listed two owners of Dynamic Quest as "key subcontract partner[s]." CLF FPR, Jan. 20, 2005, at 24-44, Resumes. As described in CLF's proposal, TEAMS would not only generate the reports required under the PWS, but would also generate additional reports--such as a vendor evaluation report, a listing broker benchmark report, an asset maintenance inventory report, a communications responsiveness report, and conveyance reports--to assist the M&M contractor in better meeting the PWS requirements regarding managing and marketing the properties. Id. at 30; Tr. at 70-71.

HUD evaluated CLF's proposal of the TEAMS EMS system and on-line bidding system as "demonstrat[ing] a strong IT [information technology] approach to handling the functions in the PWS." TEP Report at 74. In particular, the TEP noted that the TEAMS EMS would provide not only the required reports, but also additional reports "that will assist the contractor in meeting the requirements of the RFP." Id. at 75. Likewise, the agency noted that CLF had proposed to "enter the information into TEAMS using technology to replace the current mode of faxing forms between the M&M and mortgagees," thereby "add[ing] efficiency to the process by allowing the offeror and the mortgagee instant information on an individual claim or property." Id. at 80.

Shortly after CLF certified to HUD on June 22, 2005 that its January 20 FPR remained valid, and more than 2 months prior to the agency's final evaluation and award to CLF, CLF decided to replace its proposed TEAMS EMS with an EMS [DELETED]. In this regard, on June 23, [DELETED], one of the owners of Dynamic Quest, conducted an on-line demonstration of TEAMS for Mr. Chapman and [DELETED] (CLF's proposed IT manager for the M&M contract), with Ms. [A] also connected to the demonstration. Tr. at 396-97, 591-93. The development status of the software and the course of the June demonstration are in some dispute. Mr. Chapman and Mr. [DELETED] testified that the June 23 demonstration, like an earlier November 2004 demonstration (before TEAMS was included in CLF's proposal), amounted to little more than a series of screen shots, with Mr. [DELETED] being unable to enter data or create reports. Tr. 388-89, 393-410, 609-12. In contrast, Mr. [DELETED] and Ms. [A] testified that the ability to enter data and generate reports was included in the TEAMS software when first demonstrated for other potential M&M offerors, when later demonstrated for CLF in November 2004, and when demonstrated on June 23, 2005. Tr. at 102-06, 112-13, 507-33, 560-76, 589-93.

In any case, it is undisputed that, shortly after the June 23 demonstration of the TEAMS EMS, CLF arranged for a demonstration of an EMS developed by [DELETED] and used by several other M&M contractors. According to the testimony of Mr. Chapman and Mr. [DELETED], based on the results of that demonstration, (held on or about June 26), CLF decided to replace TEAMS with the [DELETED] system. Tr. at 469-72, 622-23, 872. Although CLF maintains that the [DELETED] system meets the minimum requirements set forth in the PWS for the required EMS, it concedes that the [DELETED] system did not include all of the additional capabilities that CLF's proposal indicated would be provided by TEAMS. Tr. at 470-72, 622-23; CLF Comments, Dec. 13, 2005, at 11-12.

We conclude that there was a material change in the awardee's proposed staffing and EMS approach that occurred after CLF certified that its January 2005 FPR remained valid, but more than 2 months prior to the agency's final evaluation and award of the M&M contract. Under these circumstances, CLF was required to advise the agency of the material change in its proposed resources and technical approach, in order to ensure that the evaluation was based on consideration of the staffing and EMS that CLF actually intended to use in performing the contract. See Dual, Inc., B-280719, Nov. 12, 1998, 98-2 CPD ¶ 133 at 3-6, as recently explained in SAMS El Segundo, LLC, B-291620, B-291620.2, Feb. 3, 2003, 2003 CPD ¶ 44 at 19-20. Because CLF failed to do so, the agency never evaluated CLF's actual employees and EMS approach as they existed at the time of award; as a result, the evaluation--and, it follows, the award determination that was based on the results of the evaluation--were unreasonable. Dual, Inc., supra, at 6. To allow such an award to stand would call into question the integrity of the competition. Accordingly, we sustain the protest on this basis.

OCI

Greenleaf also asserts that HUD failed to reasonably consider or evaluate a potential organizational conflict of interest that will be created by award to CLF. In this regard, the RFP generally provided that "[t]he Contractor shall not engage in or permit any conflict of interest," and specifically identified as one potential, prohibited conflict of interest the following:

M&M Contractors may not serve as contractors or subcontractors that perform contract monitoring, oversight or other services related to any of the tasks in this PWS. Excluded contract services include but are not limited to . . . Closing Agents

RFP §§ H.8, I.14(b).

At the time CLF submitted its initial proposal, Mr. Chapman, the owner of CLF, also owned Lakeside Title, which is HUD's closing agent contractor for the state of Ohio.¹ Consistent with the above prohibition, CLF agreed in its proposal to transfer "full ownership" of Lakeside to another escrow and title attorney. CLF FPR, Jan. 20, 2005, at 6. In its June 22 letter advising Mr. Chapman that CLF was being considered for award, HUD noted that "[y]our firm agreed to sell shares of Lakeside Title to mitigate the conflict of interest in servicing both the M&M and closing agent contracts." Letter from HUD to CLF, June 22, 2005. HUD specifically requested the submission of documentation showing that the OCI had been mitigated. In response, CLF furnished a notarized stock transfer agreement indicating that all shares in Lakeside Title had been sold by Frank Smith to [DELETED], and an affidavit executed by Mr. Chapman stating that the "sale of all shares of Lakeside Title . . . has been completed and I no longer have any ownership interest or control over Lakeside Title." CLF Letter to HUD, June 22, 2005.

Subsequently, during the Court of Federal Claims litigation with respect to this procurement, HUD learned that the purchase agreement for Lakeside Title, dated June 20, 2005, provided for a purchase price consisting of \$[DELETED], plus all monies paid to Lakeside Title for 2004 and 2005, plus 50 percent of any profits of Lakeside Title through December 31, 2005. Purchase Agreement for Lakeside Title, June 20, 2005, § 3.1. The contracting officer advised Mr. Chapman by letter of September 2 that "[t]he fact that you will still be receiving profits continues to present a conflict. This conflict must be resolved." On September 2, Mr. Chapman responded by submitting an amendment to the purchase agreement that deleted the above provisions and substituted a clause providing that the purchase price shall be \$[DELETED], to be paid at the rate of \$[DELETED] per week for [DELETED] weeks. Amendment to Lakeside Purchase Agreement, Sept. 2, 2005, § 3.1. The contracting officer concluded that, because this amendment provided for a "final fixed price under which Chapman would receive no future profits," it resolved the OCI. Affirmative Determination of Responsibility, Philadelphia Area 2, Sept. 26, 2005, at 3.

Greenleaf asserts that CLF's OCI with respect to Lakeside Title was not resolved by the amended purchase agreement. According to the protester, the fact that the purchaser of Lakeside was required to make significant weekly payments to Mr. Chapman continued to pose an unacceptable OCI.

The Federal Acquisition Regulation (FAR) instructs agencies to identify potential OCIs as early as possible in the procurement process, and to avoid, neutralize, or

¹ Closing agents obtain title information about properties that HUD seeks to sell so that HUD can convey clear and marketable title; they meet with buyers and buyers' brokers to have closing documents executed; and they receive funds for closings on behalf of HUD, and then after the closing, transmit those funds to HUD. Tr. at 763-64.

mitigate significant conflicts before contract award so as to prevent unfair competitive advantage or the existence of conflicting roles that might impair a contractor's objectivity. FAR §§ 9.501, 9.504, 9.505; PURVIS Sys., Inc., B-293807.3, B293807.4, Aug. 16, 2004, 2004 CPD ¶ 177 at 7. The responsibility for determining whether a contractor has a conflict of interest and should be excluded from competition rests with the contracting officer, who must exercise "common sense, good judgment and sound discretion" in assessing whether a significant potential conflict exists and in developing appropriate ways to resolve it. FAR §§ 9.504, 9.505; Aetna Gov. Health Plans, Inc.; Foundation Health Fed. Servs., Inc., B-254397 et al., July 27, 1995, 95-2 CPD ¶ 129 at 12. Situations that create potential conflicts of interest are identified and discussed in FAR subpart 9.5, and they include situations in which a contractor's performance of contract requirements may affect the contractor's other activities and interests. See FAR §§ 9.505, 9.508. That is, a contractor's judgment and objectivity in performing the contract requirements may be impaired if the substance of its performance has the potential to affect other activities and interests of the contractor. Id.; Science Applications Int'l Corp., B-293601 et al., May 3, 2004, 2004 CPD ¶ 96 at 4.

We find that HUD failed to reasonably consider or evaluate the potential OCI arising due to the fact that the owner of CLF (the M&M contractor in Ohio) will be receiving payments from the owner of the closing agent contractor for Ohio, the activities of which CLF will oversee. Specifically, it appears that CLF's judgment and objectivity in performing the contract requirements could be impaired if its performance could potentially affect the ability of the owner of the closing agent contractor to make the payments owed to CLF's owner.² Further, while the contracting officer was aware of

² In this regard, HUD's Deputy Director of the Office of Single Family Asset Management explained that the M&M contractor could not be the same entity as the closing agent for that jurisdiction because

some of [the M&M's] duties include oversight of closing agent activities. They work very closely with the closing agents, and monthly the M&Ms prepare a report that comes to HUD that identifies closing agent performance, both positive and negative. They review invoices for closing agent fees for the services that they charge and approve those invoices, and the M&Ms also review HUD-1 settlement statements on which all of the funds that are involved in a transaction are recorded.

Tr. at 764-65. Likewise, according to the Deputy Director, an M&M's entitlement to a portion of the closing agent's profits would be a matter of concern because the "M&M contractor does have the ability to influence the financial viability of the closing agent by failing to report poor performance, by overlooking irregularities, by approving invoices that are not appropriate." Tr. at 793. The Deputy Director

(continued...)

the potential OCI from having CLF's owner receive a share of Lakeside Title's profits, and proceeded properly to have CLF eliminate that OCI, it is clear that the contracting officer failed to consider the OCI implications of the amended version of the purchase agreement--whether the magnitude of the payments was such as to call into question whether CLF's judgment and objectivity were likely to be impaired, or whether there were suitable mitigation measures required to address the scope of the potential conflict of interest.³ In these circumstances, we sustain the protest on the basis that HUD failed to reasonably consider or evaluate a potential OCI that may result from an award to CLF.

RESPONSIBILITY

Greenleaf challenges the contracting officer's determination of CLF's responsibility on several grounds, including the determination that CLF possessed adequate financial resources to perform the contract.

Contracts may only be awarded to responsible prospective contractors. FAR § 9.103(a). In making a responsibility determination, the contracting officer must determine, among other things, that the contractor has "adequate financial resources to perform the contract, or the ability to obtain them." FAR § 9.104-1(a).

Because the determination that an offeror is capable of performing a contract is largely committed to the contracting officer's discretion, our Office will generally not consider a protest challenging an affirmative determination of responsibility except under limited, specified exceptions. Verestar Gov't Servs. Group, B-291854, B-291854.2, Apr. 3, 2003, 2003 CPD ¶ 68 at 3. One specific exception is where a protest identifies serious concerns that a contracting officer, in making an affirmative determination of responsibility, failed to consider available relevant

(...continued)

further testified that, for the same reason, it also would be a concern if the closing agent owed the M&M contractor a substantial debt upon which the closing agent was obligated to make fixed payments over time; in this regard, the Deputy Director explained that "if the closing agent doesn't have any income, it can't pay its debts," and the amount of income the closing agent has could depend on how well the M&M contractor performs its duties. Tr. at 794.

³ When asked during the hearing whether she considered the stream of payments owed by the owner of Lakeside Title to the owner of CLF to represent a conflict of interest, the contracting officer answered that she did not, because the underlying purchase price was a fixed price. Tr. at 714-15. However, the contracting officer admitted that she was unaware of where [DELETED] would obtain the resources to make the required payments to Mr. Chapman, and also unaware of what if any impact there would be on the stream of payments if Lakeside Title were found to have failed to perform under its HUD contract. Tr. at 686, 716.

information or otherwise violated statute or regulation. Bid Protest Regulations, 4 C.F.R. § 21.5(c) (2005). This exception was intended to encompass protests, for example, that include specific evidence that the contracting officer may have ignored information that, by its nature, would be expected to have a strong bearing on whether the awardee should be found responsible. See 67 Fed. Reg. 79,833-34 (2002).

Here, the contracting officer requested that the Defense Contract Audit Agency (DCAA) perform a financial risk assessment with respect to CLF. Indeed, according to the contracting officer, the determination that CLF had adequate financial resources to perform the contract was made by DCAA. Tr. at 693. DCAA's findings with respect to CLF's financial responsibility were set forth in the affirmative determination of CLF's responsibility which was signed by the contracting officer. That determination indicated that in reporting that CLF had adequate financial resources to perform the contemplated contract, DCAA considered the "consolidated key financial ratios of Mr. Frank Chapman's three related companies: Chapman Law Firm, Lakeside Title & Escrow Company, and MacDonald National Mortgage Company." Affirmative Determination of Responsibility, Philadelphia Area 2, Sept. 26, 2005, at 1-2. In this regard, DCAA reported that "CLF had minimal revenues in [fiscal year] 2004 (approximately \$[DELETED]). Therefore, most of the sales from Mr. Chapman's three related companies came from the Lakeside Title & Escrow Company, which had revenues of nearly \$[DELETED] in [fiscal year] 2004." Id. at 2.

As noted by Greenleaf, however, the contracting officer had always understood that, pursuant to the OCI provisions in the RFP, Mr. Chapman would be required to sell his interest in Lakeside Title. Tr. at 695, 699. Indeed, the contracting officer was aware that Mr. Chapman had already sold his interest in Lakeside Title by the time he signed the affirmative determination of CLF's responsibility. The contracting officer, however, never advised DCAA that Mr. Chapman was required to sell Lakeside Title. Tr. at 702. Further, when asked whether the determination that CLF had adequate financial resources might have been different if the resources of Lakeside Title had not been considered, the contracting officer responded as follows:

A. I can't make that determination. I don't know.

Q. Why not?

A. Because I relied on DCAA, the audit agency, who is the expert in that area to assist me with that.

Tr. at 699.

Based on this record, we find that the determination of CLF's financial responsibility was based on information that the contracting officer knew to be inaccurate.

Further, since Lakeside Title apparently generated nearly all of the income earned by Mr. Frank Chapman's three related companies, Mr. Chapman's sale of Lakeside Title on an installment basis for payments to be received over 320 weeks clearly was material to a determination of his financial ability to commence and continue performance of the contemplated M&M contract. In these circumstances, we find that the contracting officer simply ignored information that, by its nature, would be expected to have a strong bearing on whether CLF should be found financially responsible, and we sustain the protest on this basis. Cf. Southwestern Bell Telephone Co., B-292476, Oct. 1, 2003, 2003 CPD ¶ 177 at 10-11 (contracting officer's affirmative determination of the awardee's responsibility is not reasonably based where, despite having general awareness of misconduct by some of awardee's principals and parent company, the contracting officer did not obtain sufficient information about or consider the awardee's record of integrity and business ethics in making his responsibility determination).

RECOMMENDATION

We recommend that the agency reevaluate the merits of CLF's proposal in light of our finding that, contrary to the provisions of the proposal, CLF will not use Mr. and Ms. [A], or the TEAMS EMS system, in performing the contemplated contract. In addition, the agency should ascertain and take into account in its reevaluation whether CLF's proposal otherwise inaccurately represents the resources that CLF will use in performing the contract. We also recommend that the agency consider, and document its findings with respect to, the potential OCI that will be created by the fact that Mr. Chapman is owed significant payments over time by the purchaser of Lakeside Title. We further recommend that the contracting officer make a new determination of CLF's responsibility which takes into account the fact that Mr. Chapman has sold Lakeside Title, as well as any changes in the resources that CLF will have available to perform the contemplated contract. If, as a result of this reevaluation, the agency determines that CLF's proposal is not the best value, the agency should terminate CLF's contract and make award in accordance with the evaluation results. Finally, we recommend that Greenleaf be reimbursed its costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(2)(1). In accordance with 4 C.F.R. § 21.8(f)(1), the protester's certified claim for such costs, detailing the time expended and costs incurred, must be submitted directly to the agency within 60 days after receipt of this decision.

The protest is sustained.

Anthony H. Gamboa
General Counsel