

11/14/85
R-T

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-219730

DATE: November 14, 1985

MATTER OF: CoMont, Inc.

DIGEST:

1. Under the Competition in Contracting Act of 1984, the General Accounting Office's bid protest authority extends to procurements by the Department of Housing and Urban Development for management of properties acquired through insurance of mortgages or loans under the National Housing Act.
2. Where a material change occurs after issuance of a solicitation for area management broker services, the procuring agency, i.e., the Department of Housing and Urban Development, is required to issue a written amendment to the solicitation so that bidders are properly apprised of the change. Oral advice at prebid conference and/or at bid opening is not sufficient for this purpose.

CoMont, Inc., protests the Department of Housing and Urban Development's (HUD) award of a contract for area management broker services^{1/} to James T. Ewing Real Estate Management Company. The services are required in connection with property acquired by HUD through its insurance of mortgages or loans under the National Housing Act, 12 U.S.C. § 1701, et seq. (1982). CoMont contends that there were numerous irregularities in the procurement process, including a failure by HUD to notify potential bidders of a material modification to the solicitation.

We find that our Office has jurisdiction over this procurement, and we sustain the protest.

^{1/} Management brokers inspect and secure property that has been assigned or on which mortgages have been foreclosed. They contract for necessary cleaning and repair, assist in selling or leasing the property, and provide other services as may be required.

Jurisdiction

A threshold issue involves our authority to consider this protest. Before the January 15, 1985, implementation of the bid protest provisions of the Competition in Contracting Act of 1984 (CICA), 31 U.S.C.A. §§ 3551-3556 (West Supp. 1985), we decided bid protests based upon our authority to adjust and settle government accounts and to certify balances in the accounts of accountable officers under 31 U.S.C. § 3526 (1982).

The enactment of CICA both strengthened and, for the first time, expressly defined our bid protest authority: we are to decide protests concerning alleged violations of procurement statutes or regulations. 31 U.S.C.A. § 3552. This bid protest authority is not related to account or claim settlement authority over the contracting agency involved.

Before CICA, we declined to consider protests of procurement actions under the National Housing Act. See, for example, Edward H. Pine Insurance, B-211065, Apr. 11, 1983, 83-1 CPD ¶ 377; Hanson Realty Co., B-186033, July 8, 1976, 76-2 CPD ¶ 23. Our position was based on a statutory provision authorizing the Secretary of HUD to make such expenditures as are necessary to carry out the disposal of property and other functions without regard to any other provisions of law governing the expenditure of public funds. 12 U.S.C. § 1702. In view of this extraordinary authority, we concluded that there was no legal basis for us to question expenditures of funds under the National Housing Act.

Under CICA, however, we conclude that protests of National Housing Act procurements are subject to our authority. HUD and, specifically, the Secretary's authority under the National Housing Act are clearly included within the definition of "federal agency" in the bid protest provisions of CICA, which is given the same meaning as that given by section 3 of the Federal Property and Administrative Services Act of 1949 (FPASA) (40 U.S.C. § 472). 31 U.S.C.A. § 3551(3). That definition includes any "executive agency," which is in turn defined to mean any "department . . . in the executive branch of the Government, including any wholly owned Government corporation." The Secretary, when carrying out duties and powers related to the Federal Housing Administration Fund, which are at issue here, is among the entities defined as

wholly owned government corporations under the Government Corporation Control Act, 31 U.S.C. § 9101(3)(L).^{2/}

Since the solicitation in question was issued June 6, 1985, after the effective date of the bid protest provisions of CICA, we will consider the merits of CoMont's protest.^{3/}

CoMont's Protest

The HUD's field office in Santa Ana, California, issued the solicitation, No. HC-3-85-046, seeking bids to provide real estate management broker services in the Santa Ana area for 3 years. CoMont, as the incumbent contractor, had been furnishing photographs of properties comparable to those for which, as part of its contractual duties, it had provided HUD with estimated fair market values. CoMont had not been paid separately for these photographs.

On June 11, officials at HUD's Washington, D.C., headquarters notified field offices that all area management broker contracts must in the future require photographs of comparable properties and stated that HUD would pay \$10 to \$15 for each form 9516 (filed for each property assigned to the contractor) for this service. The agency states that the contracting officer advised the attendees at a prebid conference, including CoMont, that the successful contractor would have to provide the photographs and would be compensated for the additional effort. While CoMont acknowledges that the contracting officer informed prospective bidders of the new requirement, it contends that she did not indicate that HUD would provide separate compensation until bid opening on July 8. At bid opening, Ewing was low bidder, and CoMont was second low.

^{2/} Although the term "wholly owned Government corporation" is not itself defined in the FPASA, we read it to include organizations so designated in the Government Corporation Control Act. See Monarch Water Systems, Inc., B-218441, Aug. 8, 1985, 64 Comp. Gen. ____, 85-2 CPD ¶ 146; aff'd sub nom. Tennessee Valley Authority--Reconsideration, B-218441.2, Sept. 25, 1985, 85-2 CPD ¶ 335.

^{3/} HUD states that it believes that we may still lack jurisdiction over National Housing Act procurements, and that it is continuing to study the question. The agency does not contest our jurisdiction in this case, but states that it may do so in later cases. Our opinion is, therefore, reached without the benefit of the agency's views on the issue.

In its protest, CoMont contends that in orally modifying the solicitation to require the contractor to provide the photographs, HUD failed to disclose that the contractor would be paid \$10 for each assigned property and that this amount would be in addition to the contract price for management broker services. CoMont states that in calculating its bid for the new contract, it had included costs for the photographs that it planned to continue to provide to the agency. Had it known of the separate payment before bid opening, CoMont states, it would not have done so, and its bid therefore would have been low.

CoMont argues that HUD's oral modification of the solicitation violated the Federal Acquisition Regulation (FAR), 48 C.F.R. § 14.208 (1984), which requires agencies to make amendments to invitations for bids in writing, using standard form 30, and to provide the amendments before bid opening to everyone to whom invitations have been furnished.

The protester also argues that HUD improperly failed to provide it with a copy of the solicitation 30 days before bid opening; that when it was provided, the solicitation was illegible, incomplete, and ambiguous; and that the contracting officer sought to discourage bids by operating management companies and expressed a preference for newly formed companies. In addition, CoMont asks that we not consider matters presented in the agency's administrative report, since it was not filed within the 25-day period specified in our Bid Protest Regulations, 4 C.F.R. § 21.2(c) (1985).

HUD responds that the solicitation contained a number of provisions indicating that, upon government request, the contractor would be expected to obtain or arrange for such services as test reports concerning the condition of the properties (e.g., soil, foundations, and roofs), pest inspections, and certain repairs. In each case, the solicitation stated that these services would be "at government expense." The only photographs required by the solicitation, however, were those of the properties being managed. HUD acknowledges that photographs of comparable properties were not among the reimbursable expenses listed in the solicitation, but seems to argue that since similar costs would be reimbursed, bidders could have assumed that the required photographs of comparable properties would also be at government expense.

GAO Analysis

HUD has broad procurement authority under the National Housing Act. See 40 U.S.C. § 474(11); 12 U.S.C. §§ 1710(g), 1713(1), 1748b(h), 1749hh, and 1750(f). Nevertheless, absent a determination by HUD that the procurement procedures set forth in the regulations implementing the FPASA would impair or affect the carrying out of National Housing Act programs, those requirements are applicable. See 45 Comp. Gen. 277, 278-9 (1965) (discussing the regulations applicable to the Federal Housing Administration in exercise of the National Housing Act authorities that currently reside in the Secretary of HUD); cf. Monarch Systems, Inc., supra (when Tennessee Valley Authority has not advised us that it has determined not to follow the FAR, we will apply it in deciding a protest). Therefore, we will apply the FAR provisions in deciding CoMont's protest.^{4/}

We do not agree that bidders reasonably should have assumed that they would be reimbursed for the photographs in question. Some, like CoMont, may have included an amount in their bid prices sufficient to cover these photos--in which case the government, by reimbursing them, would in effect be paying twice for the same photographs.

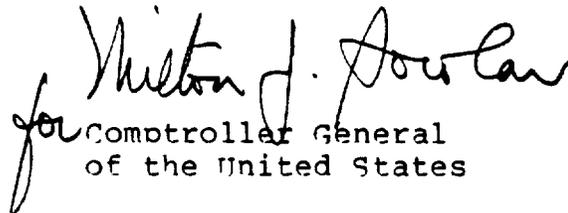
As the protester points out, the FAR requires written solicitation amendments. In addition, it specifically cautions agencies that the "fact that a change was mentioned at a pre-bid conference does not relieve the necessity for issuing an amendment." FAR, 48 C.F.R. § 14.208(a). This requirement for a written amendment serves to avoid the very type of dispute that has arisen here; it ensures that bidders compete on an equal basis by responding to the same terms and conditions, so that the government's needs can be met at the lowest price. See Informatics, Inc., 56 Comp. Gen. 388 (1977), 77-1 CPD ¶ 152. Consequently, we have sustained protests where protesters deny that they were orally advised of material changes in solicitations. Id.; I.E. Lovick and Associates, B-214648, Dec. 26, 1984, 84-2 CPD ¶ 695.

^{4/} HUD adopted the Federal Procurement Regulations, predecessor to the FAR, for application to National Housing Act procurements in its Property Disposition Handbook, Contracting (4320.1, May 1973). We understand that the agency plans to revise this policy to incorporate the FAR.

Here, the contracting officer estimates that the requirement for photographs will result in payment of \$4,500 to the contractor; CoMont, however, estimates that the additional payment will be \$9,000. Even if we use the lower amount, it is not clear from the record that the relative standing of bidders would not change or that CoMont's bid would only have been second low if it had known of the additional payment for the photographs. HUD has not suggested that CoMont's bid would not have been low or provided information on this point; for whatever reason, its report does not even include an abstract of bids. Consequently, we consider the amendment of the solicitation to have been material.

Because HUD's failure to issue a written amendment resulted in prejudice both to the protester and to the agency, corrective action is warranted. By separate letter of today, we are recommending to the Secretary of HUD that the management broker services subject to this protest be resolicited and that the current contract with Ewing be terminated for the convenience of the government. In view of our recommendation that corrective action be taken, we need not address the other issues in CoMont's protest.

The protest is sustained.


for Comptroller General
of the United States