

**DECISION**



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

**FILE:** B-221459

**DATE:** April 23, 1986

**MATTER OF:** Topley Realty Co., Inc.

**DIGEST:**

1. A protest involving a questionable application of definitive responsibility criteria by the contracting agency raises an issue significant to the procurement system, 4 C.F.R. § 21.2(c)(2) (1985), and will be considered on the merits even though it is untimely filed.
2. Where a bidder is found to be responsible even though it does not meet definitive responsibility criteria requirements set out in the solicitation, and the agency deletes from subsequent solicitations the requirements for a specific minimum number of years of experience in the same areas of expertise, the definitive responsibility criteria in the first solicitation overstated the agency's minimum needs and unduly restricted competition.
3. Protest that firm lacks sufficient time to prepare its bid concerns an apparent impropriety in the solicitation and must be filed prior to bid opening in order to be timely.
4. Allegation that agency improperly relaxed specifications and sought to preclude protester from competition is rendered academic by award to protester.

Topley Realty Co., Inc. (Topley), protests the award of contracts by the Department of Housing and Urban Development (HUD) under invitation for bids (IFB) Nos. 02-85-033 (South Allegheny County area), 05-85-033 (Beaver County area), and 06-85-033 (McKean County area), and the solicitation of offers under IFB No. 04-85-033 (Westmoreland County area). These solicitations were issued by HUD to provide management broker services related to the

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inspection, repair, maintenance and disposition by sale or lease of HUD-acquired single family homes in Pennsylvania. We sustain the protest in part and deny it in part.

IFB No. 02-85-033

Under IFB No. 02-85-033, HUD solicited offers to provide management broker services for approximately 20 HUD-acquired homes in the South Allegheny County area, including certain wards of the City of Pittsburgh, Pennsylvania. The solicitation required the potential contractor to meet certain "special standards" of responsibility, including:

"1. CONSTRUCTION COST ESTIMATING TECHNIQUES

The contractor, or a member of his staff who has been in his/her employ for at least two years, must possess five years of verifiable experience in construction techniques and cost estimating which would qualify him/her to:

- a.) Prepare comprehensive repair specifications for 1 to 4 family structure
- b.) Coordinate and supervise repair work as required, including emergency repairs relative to health and safety hazards to tenants and/or the public
- c.) Arrange for maintenance and custodial services
- d.) Insure payment of utility and other service bills.

"2. Appraisal

The contractor must possess five years of verifiable experience in property appraisal which would qualify him/her to accurately determine the following values on 1 to 4 family properties:

- a.) 'As-is' fair market value
- b.) 'Repaired' fair market value

- c.) Fair market 'rental' value
- d.) Damage estimates."

HUD received offers from four firms. Phoenix Real Estate (Phoenix)--N. Jorinda Saunders, owner--submitted the low bid of \$197.50 per house, while Topley submitted the second low bid of \$225 per house. The contracting officer, making an affirmative determination of Phoenix's responsibility, made award to that firm on September 26, 1985. Topley initially protested the award to the agency and subsequently filed a protest with our Office.

The president of Topley alleges that he was informed by a contracting official that it was HUD policy to award the South Allegheny contract to a member of a minority group.

Topley argues that HUD, so as to assure that a minority firm received the contract, failed to apply the special responsibility standards set forth in the solicitation. It contends that the agency made award to Phoenix even though Saunders had been "in the real estate business" for only 3-1/2 years. Topley refers us to a September 13, 1985, article from a Pittsburgh newspaper stating that Saunders "has been in the real estate business for 3-1/2 years, the last 6 months as the broker of her own business, Phoenix Real Estate." Topley also alleges that Phoenix's successful bid was the "result of inside information."

HUD initially questions the timeliness of Topley's protest to our Office. We agree that there is a serious question as to the timeliness of Topley's protest to our Office. Our Bid Protest Regulations, however, provide that where a protest raises issues significant to the procurement system, we may consider that protest even if it was untimely filed. 4 C.F.R. § 21.2(c). Since it appears to us from the record of Topley's initial protest that a serious question is raised as to the application of definitive responsibility criteria which led to the award, we will consider the merits of its protest.

First, HUD denies that Topley was the victim of racial discrimination. The agency believes that Topley may instead be misinterpreting the agency's Minority Business Participation Plan for the Pittsburgh office,

pursuant to which the agency encourages the participation of minority firms by providing copies of solicitations. HUD notes that the solicitation was provided to Phoenix not under the Minority Business Participation Plan, but rather in response to a request from Phoenix. In addition, HUD defends the determination that Phoenix met the special responsibility standards set forth in the solicitation.

As for compliance with the special responsibility standards, we note that our Office will review an agency's affirmative determination of responsibility only if possible fraud on the part of contracting officials is shown or if the solicitation contains definitive responsibility criteria which allegedly have not been applied. Definitive responsibility criteria are specific and objective standards established by an agency for use in a particular procurement for the measurement of a bidder's ability to perform the contract. These special standards of responsibility limit the class of bidders to those meeting specified qualitative and quantitative qualifications necessary for adequate contract performance. We have previously found requirements that a contractor possess specific experience in a particular area to constitute definitive responsibility criteria. See Vulcan Engineering Co., B-214595, Oct. 12, 1984, 84-2 C.P.D. ¶ 403 (requirement that contractor have experience in successfully installing six specific foundry process systems); Urban Masonry Corp., B-213196, Jan. 3, 1984, 84-1 C.P.D. ¶ 48 (requirement that installer have 5 years experience in the erection of precast concrete units similar to those required under solicitation).

The scope of our review is limited to ascertaining whether evidence of compliance has been submitted from which the contracting officer could reasonably conclude that the definitive responsibility criteria had been met. Although we have indicated that the relative quality of the evidence is a matter for the judgment of the contracting officer, we have insisted upon the presence of objective evidence from which the contracting officer could find compliance with the definitive responsibility criteria, Vulcan Engineering Co., B-214595, *supra*, 84-2 C.P.D. ¶ 403 at 7, and we have sustained protests against affirmative determinations of responsibility where such evidence is lacking. *Id.*; Ampex Corp., B-212356, Nov. 15, 1983, 83-2 C.P.D. ¶ 565; Power Systems, B-210032, Aug. 23, 1983, 83-2 C.P.D. ¶ 232.

In her submission to the contracting officer, Saunders indicated that Phoenix had been in business since March 30, 1985. Saunders informed the contracting officer in regard to the first special responsibility standard, that either the contractor or a staff member in the contractor's employ for at least 2 years must possess 5 years of experience in construction cost estimating techniques, that a licensed salesperson employed by her, Steven Forbes, had a separate business providing contracting services, had been in business for 5 years, and possessed the required experience in construction cost estimating techniques. In regard to the second special responsibility standard, that the contractor possess 5 years of experience in property appraisal, Saunders cited her own experience and further indicated that she employed a licensed salesperson who had been licensed since 1978 and who had served as an appraisal assistant for 3 years. Saunders went on to add, however, that:

"my real estate experience was gained from the following periods of apprenticeship;

1981 General Development Corporation-  
Interstate Land Sales

1982-1983 Quality Real Estate-Residential,  
Commercial Sales

1983-1984 Allegheny Landmark Realty-Residen-  
tial, Commercial Sales Extensive  
Experience

1984-Until Opening of Phoenix-Northern Shore  
Realty-Residential, Commercial Sales,  
Rentals Development Packaging.

I have V. A. and HUD sales experience from all of these agencies I was affiliated with."

The contracting officer emphasizes that in making an affirmative determination of Phoenix's responsibility, he determined that the "backgrounds and experience of Ms. Saunders and her staff in its totality" (emphasis added) met the responsibility standards, that Phoenix "has the qualifications to fulfill its contract," and that "satisfactory performance of the HUD contract requirements can be reasonably expected" from the firm.

Despite the contracting officer's conclusion, since Saunders was employed by another firm prior to Phoenix's commencement of business in March 1985, Forbes presumably had not been in the employ of either Phoenix or Saunders for the 2 years specified under the first special responsibility standard. Further, since Saunders indicated that her real estate experience commenced in 1981, she apparently lacked at the time of award 5 years of experience in either construction cost estimating techniques or property appraisal. Thus, although we find no basis for the protester's allegation that the determination of Phoenix's responsibility was racially motivated, it appears that Phoenix in fact did not meet the definitive criteria established in this procurement.

Where, however, a bidder is found to be responsible even though it does not meet definitive responsibility criteria set out in the solicitation, such criteria may be deemed to exceed the agency's minimum needs and to be unduly restrictive of competition. See Haughton Elevator Division, Reliance Electric Co., 55 Comp. Gen. 1051 (1976), 76-1 C.P.D. ¶ 294; International Computaprint Corp., B-185403, Apr. 29, 1976, 76-1 C.P.D. ¶ 289. We note that not only did the contracting officer here make an affirmative determination of Phoenix's responsibility, thereby waiving the definitive responsibility criteria, but in subsequent solicitations for management broker services he deleted the requirements that the contractor or a member of his staff possess a specific minimum number of years of experience in construction cost estimating techniques and property appraisal and that a staff member be in the contractor's employ for a specific prior period of time. This convinces us that the definitive responsibility criteria in the South Allegheny solicitation overstated the agency's minimum needs and unduly restricted competition. On that basis, we sustain Topley's protest as it relates to the South Allegheny contract.

We do not recommend a resolicitation here since there is no indication that Phoenix and Topley would have bid different prices on the basis of lesser experience requirements. Since Topley was led to compete on the basis of an agency's statement of its needs which was in excess of what it actually required, however, we find that Topley should be allowed to recover its costs of filing and pursuing this protest before our Office and of preparing its bid in response to the South Allegheny solicitation. 4 C.F.R. § 21.6(d)(e). Topley should submit its claim for such costs directly to HUD. 4 C.F.R. § 21.6(f).

IFB Nos. 05-85-033 and 06-85-033

Under IFB Nos. 05-85-033 and 06-85-033--issued as small business set-asides on November 14, 1985--HUD solicited offers to provide management-broker services for an estimated 21 HUD-acquired houses in the Beaver County area (05-85-033) and one HUD-acquired house in the McKean County area (06-85-033).

Since the proposed contract actions were not expected to exceed \$10,000, HUD was exempt from the requirement to synopsise the procurements in the Commerce Business Daily. See 41 U.S.C.A. § 416 (West Supp. 1985); Federal Acquisition Regulation (FAR), § 5.201 (FAC No. 84-5, Apr. 1, 1985). The agency instead posted notices of the proposed contract actions at the main post office in Pittsburgh and at HUD's Pittsburgh area office, and mailed copies of the solicitation to all firms on the bidder's mailing list. Seven firms were solicited for Beaver County and five firms for McKean County.

By bid opening at 2 p.m. on December 16, HUD had received two bids in response to the Beaver County solicitation and one bid in response to the McKean County solicitation. Topley did not submit a bid for either area.

Shortly after bid opening, however, Topley filed this protest at our Office. Although its protest letters were dated December 10 and December 11, they were received by us at 3:10 p.m. on December 16. Notwithstanding Topley's protest, the contracting officer subsequently made award to the low bidder under the Beaver County solicitation--Ed Shields Realtor--and to the only bidder under the McKean County solicitation--Scott and Chase Real Estate Agency.

Topley contends that as a result of its dispute with the contracting officer over the award of the South Allegheny contract, the contracting officer attempted to preclude the firm from bidding for the Beaver County and McKean County areas.

In its initial protest to our Office, Topley contended that although the contracting officer knew of Topley's interest in responding to solicitations for management broker services in all areas, he did not send the firm a copy of the solicitations. In particular, the protester alleged that it was "already too late to bid on

the Beaver or McKean contracts which we did not receive [bid] packages for."

In its administrative report responding to this protest, however, HUD denied that the contracting officer sought to preclude Topley from bidding. The contracting officer reported that after discussing the procurements with Topley on December 10, he had sent Topley a copy of the solicitation for Beaver County on December 11 and the solicitation for McKean County on December 12.

We note that Topley, in its comments on the administrative report, now expressly admits that it received a copy of the Beaver County bid package 2 days before bid opening. It nevertheless maintains that this allowed "insufficient time to investigate, prepare and submit a bid." In addition, it impliedly admits that it also received the McKean County bid package, stating that "[a]gain, two days is insufficient time to bid on such a project."

A protest that a firm lacks sufficient time to prepare its bid concerns an apparent impropriety in the solicitation and must be filed prior to bid opening in order to be timely. See P&P Brothers General Services, B-219678, Oct. 22, 1985, 85-2 C.P.D. ¶ 438 (copy of solicitation received 1 day prior to bid opening). Topley, however, did not file its protest at our Office until shortly after bid opening on December 16. Although in its comments on the administrative report Topley states that "[t]he protest was filed immediately, verbally on the date of bid openings and in writing to HUD through" Topley's congressional representatives, oral protests are no longer provided for under the FAR and Topley's letters to its congressional representatives concerned the South Allegheny procurement, not the Beaver and McKean Counties procurements. Topley's protest as it relates to these two areas is therefore untimely. In any case, it lacks merit.

In order to promote efficiency and economy in contracting and to avoid unnecessary burdens for agencies and contractors, the Competition in Contracting Act of 1984 provides for the adoption of simplified procedures for small purchases not exceeding \$25,000. 41 U.S.C.A. § 253(g)(1) (West Supp. 1985). Although agencies must nevertheless "promote competition to the maximum extent practicable," 41 U.S.C.A. § 253(g)(4), they need not synopsise proposed contract actions not expected to exceed \$10,000, 41 U.S.C.A. § 416, and solicitation of at least

three sources generally may be considered to promote competition to the maximum extent practicable. FAR, § 13.106(b)(5) (FAC No. 84-5, Apr. 1, 1985).

As indicated above, HUD solicited seven firms for the Beaver County procurement and five firms for the McKean County procurement, receiving two bids for the former and one bid for the latter. Further, Topley apparently received copies of the solicitations 2 days prior to bid opening. We note in this regard that HUD reports that Topley's office is only approximately 10 miles from HUD's Pittsburgh office and that the firm submitted a bid for the Westmoreland County area the day after the agency had sent it a copy of that solicitation.

The contracting officer determined that the low bids offered fair and reasonable prices. Although only one bid was received for the McKean County area, the bid price was the same as the price under the prior contract even though the agency had expected a 10 percent increase to account for inflation. See FAR, § 13.106(c). In any case, Topley has not alleged that the bid prices were unreasonable.

Topley has failed to demonstrate that HUD made a deliberate or conscious attempt to preclude the protester from competing. In view of these circumstances, we conclude that Topley has not shown that the agency failed to act so as to promote competition to the maximum extent practicable. Cf. S.C. Services Inc., B-221012, Mar. 18, 1986, 86-1 C.P.D. ¶ \_\_\_\_.

IFB No. 04-85-033

Topley alleges that HUD improperly relaxed its usual special responsibility standards when drawing up the solicitation--IFB No. 04-85-033--for management broker services for the Westmoreland County area and that the agency sought to preclude Topley from bidding for this area. Since, however, HUD has awarded the contract for Westmoreland County to Topley, its protest in this regard is academic and will not be considered on the merits. See Lion Brothers Company, Inc., B-220576, Oct. 10, 1985, 85-2 C.P.D. ¶ 402.

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The protest is sustained in part and denied in part.

*for* *Sheldon J. Aveter*  
Comptroller General  
of the United States