



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Tripp, Scott, Conklin & Smith

File: B-243142

Date: July 9, 1991

Garry W. Johnson, Esq., Tripp, Scott, Conklin & Smith, for the protester.

Deborah D. Wellborn, Esq., Department of Housing and Urban Development, for the agency.

Richard P. Burkard, Esq., Andrew T. Pogany, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is sustained where, despite solicitation provisions indicating that some aspects of real estate closing services were required to be performed by an attorney, agency made award on the basis of a proposal which expressly stated that these services would not be performed by an attorney.

DECISION

Tripp, Scott, Conklin & Smith protests the award of a contract to First American Title Company under request for proposals (RFP) No. 7-91-069, issued by the Department of Housing and Urban Development (HUD) for real estate closing services for properties owned by HUD in central Florida. The protester argues that First American will not be able to perform certain requirements under the contract without engaging in the unauthorized practice of law.

We sustain the protest on the ground that First American's proposal failed to satisfy the RFP requirement that offerors provide certain services by a duly licensed attorney.

The RFP originally was issued on October 3, 1990, and contemplated the award of a fixed-price, indefinite-quantity contract for a base year and 2 option years. Award was to be made to the responsible offeror whose offer was most advantageous to the government, cost/price and other factors considered. The work statement section of the RFP required that the contractor perform, among other things, the following services: (1) upon HUD's acquisition of properties, review

title policy and recorded special warranty deed to ensure that both are clear for title approval; (2) conduct a title rundown, beginning with the date the property was deeded to HUD, and clear all routine issues that arise during this time period such as past due taxes, water bills, demolition liens, and association liens, in sufficient time to prevent delays in closing; (3) prepare deeds; (4) explain all closing papers and documents to purchaser; and (5) physically represent HUD at closings which are conducted by third party closers.

Following the issuance of the October 3 RFP, HUD held a preproposal conference to discuss the RFP with potential offerors. The conference was summarized by amendment No. 1 to the RFP, which stated that a major discussion at the conference concerned the inability of a title company to legally perform closings without issuing a title policy to the buyer. The amendment stated that when HUD explained that the contractor would be required to review title policies issued to HUD by mortgagees conveying property to HUD, all of the potential offerors agreed that, based on Florida law, a title company would be practicing law without a license. The amendment further advised that a "possible resolution" is for title companies to subcontract with an attorney for title review where a new title policy is not requested of the contractor and that prospective contractors should address this issue in their proposals.

The RFP was canceled after the agency determined that the three offers it received were seriously deficient. The current RFP was issued on December 4, 1990, and, except as noted below, was identical to the earlier RFP. HUD provided a cover letter with the RFP which explained that a solicitation for these requirements was issued on October 3, and that several potential offerors cautioned that Florida law provides that a title company can render an opinion of title only when issuing title insurance. The letter stated further:

"The title company may be required to perform closing services, including the title review; if the purchaser then decides not to purchase title insurance, the title company is in violation of state statute. We felt that a reasonable alternative was for the title company to use an attorney to do the title review, thus obviating any violation of state statute."

The letter stated that, as a result, the work statement provisions concerning title review and approval should be considered optional and that proposals will initially be evaluated and the competitive range determined "on the basis of performing all services excluding title review." The letter advised that after the competitive range has been

established, supplemental points will then be assigned for performing title review.^{1/} With respect to the supplemental points, section M of the RFP stated that proposals should demonstrate adequate compliance with the Florida law which provides that a title company must issue title insurance in order to be able to issue an opinion of title. The provision stated further that a title company's issuance of an opinion of title without issuing title insurance would constitute an unauthorized practice of law.

HUD received five offers by the January 9, 1991, closing date. Four firms were determined to be within the competitive range, and following discussions, the agency requested best and final offers (BAFOs) from those firms. All proposals included performing title review. First American's proposal stated that, in its view, the RFP's title review and approval requirements would not require First American to engage in the unauthorized practice of law even where the title company did not issue title insurance. Specifically, in its proposal, First American stated that:

"We have reviewed the title review requirements and a sample of the title review approval We do not feel that your review requirements, or the completion of the title review form, without the issuance of the insurance would constitute the unauthorized practice of law."

Accordingly, First American did not propose the services of a duly licensed attorney for these legal services (except for preparing warranty deeds of conveyance). BAFOs were received by February 14, and an agency technical evaluation panel recommended award to First American. By letter dated February 22, HUD notified the protester that award was made to First American. This protest followed.^{2/}

In response to the protester's assertions that the awardee will be required under the contract to engage in the

1/ The RFP clearly contemplated that legal services, including title review and title rundown, would be an essential element of performance under the proposed contract. Offers were received and award was made on that basis. Thus, despite the optional nature of these requirements prior to the competitive range determination, these legal services were a firm performance requirement under the RFP as awarded.

2/ The agency has determined that performance of the contract, notwithstanding the pending protest, is in the best interests of the United States. See 4 C.F.R. § 21.4(b)(1) (1991).

unauthorized practice of law, the agency states that First American has assured HUD that it could perform the title review and approval requirements of the contract, without engaging in the unauthorized practice of law.

In negotiated procurements, any proposal that fails to conform to material terms and conditions of the solicitation should be considered unacceptable and may not form the basis of an award. Instruments S.A., Inc.; VG Instruments Inc., B-238452; B-238452.2, May 16, 1990, 90-1 CPD ¶ 476. Award must be based on the requirements stated in the solicitation, and an agency does not have discretion to disregard an offeror's failure to satisfy a material RFP requirement in its proposal. Ford Aerospace Corp., B-239676, Sept. 20, 1990, 90-2 CPD ¶ 239. When the government changes or relaxes its stated requirements, either before or after the receipt of proposals, it is required to issue a written amendment to afford all offerors an opportunity to respond to the revised requirements. ManTech Advanced Sys. Int'l, Inc., B-240136, Oct. 26, 1990, 90-2 CPD ¶ 336.

We find that by accepting the awardee's proposal which explicitly states that it will not use attorneys to perform the title review and approval requirements of the contract, where title insurance is not issued, HUD has relaxed a material solicitation requirement and has made an improper award. The RFP clearly expressed HUD's view that Florida law prohibited title companies from performing the title review and approval services without also issuing title insurance.^{3/} First, this opinion was expressly stated in the proposal's instructions of the RFP. Second, the RFP cover letter explained that title companies should use an attorney to do the title review where the company does not issue insurance. Third, the record shows that all offerors in the competitive range, other than the awardee, proposed the use of attorneys to perform the title review and approval requirements where

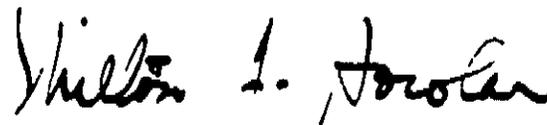
^{3/} As noted above, First American did propose to employ an attorney to prepare warranty deeds of conveyance. The RFP, however, clearly states that under Florida law title review requires an attorney. Preparing an accurate warranty deed is discussed as a separate duty under the solicitation work statement, and does not encompass such services as title review and approval which are at issue in this protest. In its proposal, the awardee expressly stated that a lawyer was not required to satisfy the RFP's title review requirements where title insurance is not issued, and the awardee did not propose a lawyer for this service.

title insurance would not be issued,^{4/} Finally, the record also shows that the background of the procurement, as indicated in the cover letter to the RFP, further highlighted the requirement that attorneys perform these services. Since the RFP reasonably advised offerors that attorneys were required to perform the title review and approval work where the offeror/title company would not issue title insurance, we find that First American was required to provide for the services of attorneys in these circumstances, and its failure to do so rendered its proposal unacceptable. We find that First American took a knowing exception to this requirement.

To the extent that the agency now accepts the awardee's opinion that a title company may perform all the required title services under the RFP even where it does not issue title insurance, we find that it should have amended the solicitation to advise all offerors of this "relaxed" requirement. Without such an amendment, the RFP was defective. See American Cyanamid Co., B-232200.2, June 23, 1989, 89-1 CPD ¶ 593.

We sustain the protest and recommend that HUD terminate the contract with First American and award the remainder of the contract to the protester if its proposal is determined to be the most advantageous to the government. Further, we find that Tripp, Scott, Conklin & Smith is entitled to the costs of filing and pursuing its protest, including attorneys' fees. 4 C.F.R. § 21.6(d)(1).

The protest is sustained.

for 
Comptroller General
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^{4/} Indeed, approximately 40 percent of the protester's price represented legal work of licensed attorneys for title approval work. Further, the protester states that it owns a title company but chose to have its law firm submit a proposal to avoid the unauthorized practice of law.