



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Ervin and Associates, Inc.

File: B-278850

Date: March 23, 1998

John J. Ervin for the protester.

Michael J. Farley, Esq., Department of Housing and Urban Development, for the agency.

Tania L. Calhoun, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that task order improperly exceeds the scope of the contract originally awarded is sustained; while the types of accounting support services required under the contract and the task order are quite similar, the scope of services under the contract is reasonably limited to serving the purpose for which the contract was awarded, which was distinctly different from the purpose for which the task order was issued.

DECISION

Ervin and Associates, Inc. protests the Department of Housing and Urban Development's (HUD) decision to issue a task order to Gardiner, Kamy & Associates, P.C. under contract No. DU100C000018477, for accounting support services. Ervin argues that the task order is beyond the scope of Gardiner, Kamy's contract and that HUD should have conducted a competition for the acquisition.

We sustain the protest.

BACKGROUND

Gardiner, Kamy's Contract

On February 17, 1995, HUD issued request for proposals (RFP) No. DU100C000018424 as a set-aside for eligible firms under the Small Business Administration's (SBA) section 8(a) program.¹ The solicitation anticipated the

¹Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1994), authorizes the SBA to contract with government agencies and to arrange for the performance of such contracts by awarding subcontracts to socially and economically disadvantaged small businesses.

award of multiple indefinite quantity task order contracts that would be effective for a period of 24 months.

RFP § B-1 described the required services as "administrative, accounting, and analytical support services for a variety of planned or contemplated sales and/or restructuring of Federal Housing Administration (FHA) assets in accordance with [the RFP's statement of work (SOW)]." The SOW, set forth in section C of the RFP, bore the title "[FHA] Asset Sales Support Services."

The SOW's introductory section elaborated upon the description of services above by characterizing them as a "broad range" of such services. RFP § C.I. This characterization was followed by an example concerning a series of mortgage note sales from HUD's Single Family and Multifamily Mortgage Note Portfolios in the 1995-1996 time frame. Id. The contractor's services would "initially be required for activities which are involved in the conduct of a successful mortgage note sale" but, in addition, "restructuring and/or rehabilitation of projects in connection with sales to State Housing Finance Agencies may be required." Id.

The SOW's background section, RFP § C.II., provided a context for the required services:

Beginning in FY 1995, [HUD] will undertake a program of project mortgage sales to reduce the size of the HUD-held mortgage inventory. . . . Most sales will occur in competitive, sealed bid auctions, but some sales of subsidized mortgages, both performing and nonperforming, will be negotiated with State or local Housing Finance Agencies.

The services of a Contractor are needed to assist HUD in preparation for mortgage note sales transactions.

The Contractor shall be responsible for the performance of an array of support services in support of four key HUD Headquarter offices that will play an instrumental role in the planned note sales

As other types of asset sales materialize, the Contractor may be tasked to support other offices within the [FHA].

The SOW's requirements section, RFP § C.III., set forth seven categories of services, one of which was due diligence. RFP § C.III.B. Due diligence was defined as the process of confirming and validating agency representations concerning the financial status and loan history of "notes offered for sale to the public." Id. The solicitation clearly stated that "[a]ll due diligence services shall be provided under a

task order . . . in conjunction with a particular sale." The remaining paragraphs under the due diligence heading described the activities and requirements the contractor might be tasked to perform "in support of HUD's Single Family and/or Multifamily loan sale programs." These activities included such things as collecting and reviewing various documents related to projects for sale; conducting physical inspections, environmental reviews, and title searches of projects securing mortgages in auctions; providing services associated with borrower settlements in conjunction with a sale; assembling collected data into bid packages; and facilitating HUD's marketing of the loan sales, the recordation and analysis of bids, and loan sales closings. Id.

The last category of services was for the refinancing/restructuring of HUD-held and insured mortgages. RFP § C.III.G. Under this heading, the solicitation explained that, "[t]o facilitate the refinancing or restructuring (workout) of current and delinquent mortgages, due diligence services may be required to complete" various listed tasks. Id.

Offerors' proposals were to include responses to two sample task orders. The first of these was entitled "Sale of Multifamily Unsubsidized Non-Performing Mortgages in the Northeast," and the second was entitled "Sale of HUD-Held Single-Family Mortgages." The specific tasks under each sample task order related to mortgage sales. RFP Attachment J-5.

HUD awarded three contracts to the SBA under this solicitation, each of which was subcontracted to a different firm. The contract at issue here, with a maximum value of \$30 million, was subcontracted to Gardiner, Kanya effective July 28, 1995.

The Portfolio Reengineering/Mark-to-Market Program

HUD, through the FHA, insures mortgages on both single-family homes and multifamily rental housing properties for lower- and moderate-income households. In addition to mortgage insurance, many FHA-insured multifamily properties receive rental subsidies linked to multifamily apartment units (project-based subsidies) for low-income families under HUD's section 8 program. Long-standing problems exist with the segment of the insured multifamily portfolio that both has FHA-insured mortgages and receives project-based section 8 rental subsidies.² In May 1995, HUD proposed to address these problems through a process it called "mark-to-market." This process involved resetting (marking) rents to market levels and reducing mortgage debt if necessary, terminating FHA's mortgage insurance, and replacing

²A detailed discussion of these problems and HUD's Mark-to-Market/Portfolio Reengineering Program can be found in Multifamily Housing: Effects of HUD's Portfolio Reengineering Proposal (GAO/RCED-97-7, Nov. 1, 1996).

project-based section 8 subsidies with portable tenant-based subsidies. Multifamily Housing: Effects of HUD's Portfolio Reengineering Proposal (GAO/RCED-97-7, Nov. 1, 1996) at 19; see generally Multifamily Housing: HUD's Mark-to-Market Proposal (GAO/T-RCED-95-230, June 15, 1995). In April 1996, HUD modified its mark-to-market proposal and renamed the process "portfolio reengineering."

Section 210 of the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act of 1996 authorized HUD to initiate a demonstration program designed to explore various approaches for restructuring the financing of projects in its insured section 8 portfolio. Pub. L. No. 104-134, 110 Stat. 1321, 1321-257, 1321-285-1321-288 (Apr. 26, 1996). This demonstration program was to be initiated between October 1, 1995 and October 1, 1997. *Id.* Sections 211 and 212 of the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act of 1997 repealed the previously authorized demonstration program and authorized the conduct of a new one. Pub. L. No. 104-204, 110 Stat. 2874, 2895-2904 (Sept. 26, 1996). The Mark-to-Market/Portfolio Reengineering Demonstration Program authorized by the first Act was implemented on July 2, 1996, 61 Fed. Reg. 34,644 (1996), and the Portfolio Reengineering Demonstration Program authorized by the second Act was implemented on January 23, 1997. 62 Fed. Reg. 3,566 (1997).

Task Order Number 5

On July 25, 1997, two days before the expiration of Gardiner, Kamy's contract, HUD issued task order number 5, for "Due Diligence (DD) services to support HUD's Mark-to-Market Demonstration Program." The task order was for a not-to-exceed amount of approximately \$15 million over a 1-year period.

The task order's SOW bore the title "Due Diligence Services for Portfolio Reengineering/Mark-to-Market Program." The SOW's background, at section I, explained that:

[HUD] is conducting a Demonstration Program to restructure mortgages insured by FHA for projects that receive above-market rental assistance under Section 8 in response to direction from Congress.

The Demonstration Program is intended to test approaches that reduce the cost of the ongoing Federal subsidy for FHA-insured, Section 8-assisted housing, while preserving this critical affordable housing resource in good physical and financial condition, to the maximum extent practicable. After the restructuring, the debt service

and operating expenses, including adequate reserves, attributable to the multifamily projects can be supported.

The Contractor will provide its services for up to 1,500 assets secured by projects throughout the United States. . . . [HUD] will assign the assets to the Contractor over a [1] year period of time, although not necessarily proportionally over the time period. . . . [T]here is no assurance that the Contractor's services will be required for the maximum number of assets provided in this task order.

The SOW's scope of services, at section II, stated that "[t]he Due Diligence Contractor for the selected assets contemplated by this [SOW] shall provide all due diligence and support services . . . in order to assist HUD or its Designee in the design and execution of the assets." The SOW's work requirements, at section III, listed the contractor's due diligence responsibilities. The specific tasks are very similar to those listed under the RFP, as described above, but lack the references to sales and include a new requirement related to section 8 subsidies. Section III.8.

PROTEST

Prompted by rumors he had heard, on October 9 Ervin's president telephoned the Director of the Program Support Division in HUD's Office of Procurement and Contracts to determine what task order Gardiner, Kanya was currently performing under this contract. His October 10 follow-up letter states that he did not get an answer to his question and was instructed, instead, to file a Freedom of Information Act request. His October 10 letter included a request for the task order. By letter dated October 31, Ervin's president advised the Director that he thought he might have heard from her after their telephone conversation the prior week regarding the requested information, but he had not. Moreover, his October 30 and 31 voice mail messages to her had not been returned. He explained that he was hoping to obtain clarification on the matter prior to filing an agency-level protest.

On November 3, Ervin filed an agency-level protest in which he stated he had learned that HUD may have issued a task order to Gardiner, Kanya under its due diligence contract to perform services related to the Portfolio Reengineering/Mark-to-Market program. He explained that he had tried to confirm rumors to this effect with the contracting officer, but his calls had not been returned and he had no alternative but to file a protest. HUD denied the agency-level protest on December 3, and Ervin filed essentially the same protest in our Office on

December 12. Ervin primarily alleges that the task order improperly exceeds the contract's scope of work.³

DISCUSSION

Timeliness

HUD argues that Ervin's protest should be dismissed as untimely because it failed to set forth all the information establishing its timeliness and because Ervin knew or should have known the basis for its protest more than 10 days before filing its agency-level protest. We disagree.

Protests based on other than alleged solicitation improprieties must be filed within 10 days of the time the basis is known or should have been known. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (1997). If an agency-level protest was previously filed, any subsequent protest to our Office filed within 10 days of actual or constructive knowledge of the initial adverse agency action will be considered, provided that the agency-level protest was filed within 10 days of the time the basis was known or should have been known. *Id.* at § 21.2(a)(3). Our Office retains the discretion to dismiss a protest that fails to include all information establishing its timeliness. *Id.* at §§ 21.1(c)(6); 21.2(b). When timeliness disputes arise, we will resolve any reasonable doubt in favor of the protester. Eastern Trans-Waste of Maryland, Inc., B-250991, Mar. 2, 1993, 93-1 CPD ¶ 192 at 2-3.

There is no dispute that Ervin's protest to our Office was filed within 10 days of HUD's denial of its agency-level protest, and that this fact was apparent from the face of its protest here. In addition, Ervin's protest to our Office included its October 31 letter to HUD indicating that the firm had requested information on the task order to no avail; its November 3 agency-level protest stating that it had heard about the task order and attempted to confirm this rumor with the contracting officer, to no avail; and HUD's December 3 denial of Ervin's protest, which did not dispute its timeliness but addressed its merits. In our view, Ervin's protest to our Office contained sufficient information to establish its timeliness under our Bid Protest Regulations.

HUD is incorrect when it asserts that Ervin's October 10 letter is evidence that the firm knew its basis of protest by that date. The letter is evidence of nothing more than Ervin's earlier attempt to ascertain the basis for its protest, and underscores both the firm's diligent efforts to obtain this information from HUD and HUD's

³In view of our conclusion that the task order does improperly exceed the contract's scope of work, we need not address Ervin's remaining allegations.

failure to provide this information expeditiously. HUD's belief that Ervin possessed the basis of its protest when it learned rumors regarding this task order is mistaken. A protest grounded upon mere speculation or rumor provides no basis for questioning the propriety of a procurement. See King-Fisher Co., B-256849, July 28, 1994, 94-2 CPD ¶ 62 at 3. That Ervin was eventually forced to file a protest based upon these rumors because HUD did not provide it with more concrete information does not make the protest untimely.

Ervin's Argument

Ervin argues that the task order—for due diligence services in support of HUD's Portfolio Reengineering/Mark-to-Market Demonstration Program—is beyond the scope of the contract for FHA asset sales support services. Ervin asserts that since HUD was in the midst of planning its mark-to-market proposal at the time the solicitation was issued, if HUD had intended for the contract's support services to extend to this program, it would have said so in the solicitation. Ervin contends that HUD is improperly utilizing the contract's reference to requiring a "broad range" of support services to fit whatever work HUD wants under the contract.

HUD's Argument

HUD argues that Ervin has failed to analyze the similarities between the due diligence services required under both the contract and the task order and is erroneously focusing on the programs such services support. Citing the solicitation's requirement for a "broad range" of services to support "both HUD's 'planned or contemplated sales **and/or** restructuring of [FHA] assets,'" Agency Report at 12; RFP §§ B-1, C-I, and its more specific requirement for restructuring, RFP § C.III.G., HUD argues that the contract clearly anticipated the performance of due diligence services in support of a program to restructure assets, such as the Portfolio Reengineering/Mark-to-Market Demonstration Program.

Analysis

The Competition in Contracting Act (CICA) requires "full and open competition" in government procurements as obtained through the use of competitive procedures. 41 U.S.C. § 253(a)(1)(A) (1994). Once a contract is awarded, GAO generally will not review modifications to that contract, such as a task order, because such matters are related to contract administration and are beyond the scope of GAO's bid protest function. 4 C.F.R. § 21.5(a); MCI Telecomms. Corp., B-276659.2, Sept. 29, 1997, 97-2 CPD ¶ 90 at 7. An exception to this rule is where it is alleged that the task order is beyond the scope of the original contract, since the work covered by the task order would otherwise be subject to the statutory requirements for competition (absent a valid determination that the work is appropriate for procurement on a sole source basis). Indian and Native Am. Employment and

Training Coalition, 64 Comp. Gen. 460, 461 (1985), 85-1 CPD ¶ 432 at 2; MCI Telecomms. Corp., *supra*; Data Transformation Corp., B-274629, Dec. 19, 1996, 97-1 CPD ¶ 10 at 6.

In determining whether a task order is beyond the scope of the contract originally ordered, GAO looks to whether there is a material difference between the task order and that contract. MCI Telecomms. Corp., *supra*; see AT&T Communications, Inc. v. Wiltel, Inc., 1 F.3d 1201, 1205 (Fed. Cir. 1993). Evidence of such a material difference is found by reviewing the circumstances attending the procurement that was conducted; examining any changes in the type of work, performance period, and costs between the contract as awarded and as modified by the task order; and considering whether the original contract solicitation adequately advised offerors of the potential for the type of task order issued. Indian and Native Am. Employment and Training Coalition, *supra*; Data Transformation Corp., *supra*. The overall inquiry is "whether the modification is of a nature which potential offerors would reasonably have anticipated." Neil R. Gross & Co., Inc., 69 Comp. Gen. 292, 294 (1990), 90-1 CPD ¶ 212 at 3, cited in AT&T Communications, Inc. v. Wiltel, Inc., *supra*, at 1207.

The FHA asset sales support services solicitation makes no mention of the possibility of performing due diligence services in support of the Portfolio Reengineering/Mark-to-Market Demonstration Program. While the types of services required under both the due diligence portion of the RFP and the task order are quite similar, potential offerors could reasonably anticipate that the scope of services under the contract would be limited to serving the purpose for which the contract was awarded. The RFP makes it clear that the contractor would be supporting a program of project mortgage sales to reduce the size of the HUD-held mortgage inventory, and that its services were needed to assist in the preparation of mortgage note sales transactions. The RFP specifically stated that all due diligence services would be provided under a task order in conjunction with a particular sale and, moreover, the specific due diligence tasks were couched solely in terms of note sales.

The RFP makes no reference whatsoever to the Portfolio Reengineering/Mark-to-Market Demonstration Program, or even to the general issue of the insured section 8 portfolio. This is not surprising, since HUD's formal proposal on the matter post-dated the issuance of the solicitation, and since the demonstration program the task order is designed to support was not even authorized at the time the contract was awarded. We do not believe that the asset sales support services contract contemplated providing support for the demonstration program; certainly there was nothing in the RFP which reasonably advised offerors of this possibility.

In this regard, we are not persuaded by HUD's assertion that the solicitation's requirement for a "broad range" of services to support "a variety of planned or contemplated sales and/or restructuring of FHA assets," and its specific requirement

for restructuring services, were sufficient to put offerors on notice that the contract's support services would be extended to cover this demonstration program which, undisputedly, involves restructuring.

HUD cannot rely upon the contract's "catch-all" phrases—such as a "broad range" of services or a "a variety" of sales and/or restructuring—in order to justify a modification which could not reasonably have been anticipated by the potential offerors. In addition, the references to restructuring must be read in the context of the solicitation as a whole. As discussed above, HUD issued this solicitation for the express purpose of obtaining asset sales support services, and the few references to restructuring in the solicitation appear wholly in the context of asset sales support. As a result, the only reasonable reading of the language cited by HUD is that the solicitation requires restructuring services in support of asset sales. See Indian and Native Am. Employment and Training Coalition, *supra*, 64 Comp. Gen. at 465, 85-1 CPD ¶ 432 at 8-9; Sprint Communications Co., B-278407.2, Feb. 13, 1998, 98-1 CPD ¶ _ at 8. A contracting agency cannot extract isolated words and phrases—such as restructuring—from a contract or stretch such contract's "explicit flexibility" in order to justify a modification whose nature would not reasonably have been anticipated by potential offerors; to countenance such a justification "would eviscerate CICA." CCL, Inc. v. U.S., No. 97-721C, 1997 Fed. Cl. LEXIS 297, at *16 (Fed. Cl. Dec. 23, 1997).

We recommend that HUD terminate the Gardiner, Kamyra task order and conduct a competitive acquisition to meet its needs for these services.⁴ We also recommend that the protester be reimbursed the reasonable costs of filing and pursuing its protest, including attorneys' fees. 4 C.F.R. § 21.8(d)(1). Ervin's certified claim for such costs, detailing the time expended and the costs incurred, must be submitted directly to the agency within 60 days after receipt of this decision.

The protest is sustained.

Comptroller General
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⁴It appears that HUD is presently conducting competitive acquisitions for these and other due diligence services under RFP Nos. DU100C000018561 and DU100C000018600.