



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

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

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This version has been approved for public release.

Decision

Matter of: Diversified Capital, Inc.

File: B-293105.4; B-293105.8

Date: November 12, 2004

Joseph P. Hornyak, Esq., Sonnenschein Nath & Rosenthal, for the protester.

Margaret A. Dillenburg, Esq., for PEMCO, Ltd., an intervenor.

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

Paul E. Jordan, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest of alleged unbalanced pricing is denied where challenged prices were not significantly overstated and agency evaluated them as reasonable.

DECISION

Diversified Capital, Inc. (DCI) protests the award of a contract to PEMCO, Ltd. under request for proposals (RFP) No. R-OPC-22505, issued by the Department of Housing and Urban Development (HUD) for management and marketing services for single-family housing and other property owned by HUD. DCI asserts that the agency should have rejected PEMCO's proposal due to unbalanced pricing.

We deny the protest.

The solicitation contemplated the award of indefinite-delivery, indefinite-quantity, fixed-unit-price contracts in 24 geographic regions for management and marketing services in connection with the disposition of single-family homes owned by, or in the custody of, HUD. At issue in this protest is the contract for the Santa Ana Area 1, which covers properties located in 11 counties in Southern California. The RFP advised offerors that the agency would make award on a "best value" basis, considering price and specified non-price factors, with the non-price factors considered significantly more important than price.

Offerors were required to submit unit prices (expressed as a lump-sum fee, but payable in four equal monthly installments) for their property management fee and their vacant lot management fee (contract line item numbers (CLIN) 0001 and 0002);

a price for the firm's marketing fee (expressed as a percentage of the net sale price of a single-family home) (CLIN 0003); a monthly fee for maintenance of "held off market" properties, that is, properties which, due to unusual circumstances, are not being marketed by the contractor (CLIN 0004); and a monthly fee for maintenance of properties not owned, but held in custody, by HUD (CLIN 0005). For purposes of calculating the offerors' total evaluated prices, fixed unit prices were to be multiplied by the estimated quantities included in the solicitation. Prices also were to be evaluated for reasonableness.

Thirteen firms, including DCI and PEMCO, submitted proposals for the Santa Ana Area 1 requirement. After the initial evaluation and the establishment of a competitive range, the agency engaged in discussions and obtained final proposal revisions (FPR). Based on the FPR evaluation, the agency rated both DCI and PEMCO's proposals excellent with very low risk. The agency concluded that the two proposals were essentially technically equal, and thus made award to PEMCO based on its lower evaluated price--\$103,432,502.88 versus DCI's \$116,660,784. After a written debriefing, DCI filed this protest.

UNBALANCED PRICING

DCI asserts that PEMCO's prices were impermissibly unbalanced. Specifically, it maintains that PEMCO's price for CLIN 0001 (property management) was disproportionately high, and that its price for CLIN 0003 (marketing) was very low. DCI's Comments at 10. DCI infers that PEMCO improperly allocated a significant portion of its CLIN 0003 costs to its CLIN 0001 price. DCI maintains that, since the CLIN 0001 fee would be paid during the first 4 months of the contract, PEMCO's pricing was front-loaded and its proposal therefore should have been rejected.¹

Unbalanced pricing exists where the price of one or more CLINs is significantly overstated, despite an acceptable total evaluated price (typically achieved through underpricing of one or more other line items). Ken Leahy Constr., Inc., B-290186, June 10, 2002, 2002 CPD ¶ 93 at 2; see Federal Acquisition Regulation (FAR) § 15.404-1(g)(1). Unbalanced pricing does not automatically preclude award; rather, an agency lawfully may award a contract on the basis of a proposal with unbalanced pricing, provided it concludes that the pricing does not pose an unacceptable level of risk, and the prices the agency is likely to pay under the contract are not unreasonably high. FAR § 15.404-1(g)(2); Citywide Managing Servs. of Port Washington, Inc., B-281287.12, B-281287.13, Nov. 15, 2000, 2001 CPD ¶ 6 at 7.

¹ DCI also notes that PEMCO's CLIN 0003 percentage price is lower than the agency's estimate, and DCI asserts that it is not feasible for performance. However, low prices (even below-cost prices) are not improper and do not themselves establish (or create the risk inherent in) unbalanced pricing. See Islandwide Landscaping, Inc., B-293018, Dec. 24, 2003, 2004 CPD ¶ 9 at 3.

PEMCO's prices were not unbalanced, since any overstatement of its CLIN 0001 price was not significant. PEMCO's CLIN 0001 price was only 23 percent higher than the government's estimate; this is not an amount significant enough to require that the offer be considered unbalanced. Cf. Baxter Healthcare Corp.; Abbott Labs.–Recon., B-253455.3, B-253455.4, May 10, 1994, 94-1 CPD ¶ 301 at 4, n.2 (base year price 44 percent above option year prices did not constitute impermissible frontloading). In any case, the agency fully discussed the CLIN 0001 pricing with PEMCO, and ultimately determined that it was reasonable; this satisfied the agency's obligation to ensure that the pricing did not pose an unacceptable risk. See PharmChem, Inc., B-291725.3 et al., July 22, 2003, 2003 CPD ¶ 148 at 8.²

OTHER ISSUES

In its initial protest, DCI asserted that HUD unreasonably failed to downgrade PEMCO's proposal under the first and third technical factors because PEMCO allegedly lacked the knowledge, connections with local listing brokers, and experience in the Southern California real estate industry necessary to meet the RFP's requirements. Protest at 4.

Our Bid Protest Regulations, 4 C.F.R. § 21.1(c)(4) and (f) (2004), require that a protest include a detailed statement of the legal and factual grounds for protest, and that the grounds stated be legally sufficient. These requirements contemplate that protesters will provide, at a minimum, either allegations or evidence sufficient, if uncontradicted, to establish the likelihood that the protester will prevail in its claim of improper agency action. Robert Wall Edge–Recon., B-234469.2, Mar. 30, 1989, 89-1 CPD ¶ 335. Here, DCI provided nothing to support its challenge to the evaluation of PEMCO's proposal. In this regard, it had no access to PEMCO's proposal and there is no evidence that PEMCO's proposal failed to meet the RFP's requirements. Instead, DCI's assertions were based solely on its alleged general familiarity with the local real estate industry and its speculation about the contents of PEMCO's proposal. DCI's speculation that PEMCO could not meet the RFP's

² Moreover, there is no evidence that PEMCO improperly allocated CLIN 0003 marketing costs to its CLIN 0001 property management price. While PEMCO's FPR indicated that a portion of the fee to be paid its listing agents was allocated under CLIN 0001, this was because PEMCO's approach was based on having listing agents perform duties associated with property management under CLIN 0001. AR, Tab 7. According to PEMCO, while it proposed to have CLIN 0001 and 0003 services performed by the same persons, it allocated the costs of performing these different services under the appropriate line items. PEMCO Supplemental Comments at 4. Nothing in the RFP prohibited offerors from structuring their performance or their prices in this manner.

requirements is insufficient to form a valid basis for protest. ECG, Inc., B-277738, Oct. 20, 1997, 97-2 CPD ¶ 153 at 10.

DCI also asserted in its protest that the agency treated it and PEMCO unequally with regard to CLIN 0003 pricing and that, during discussions, HUD misled DCI into raising its price for CLIN 0003. Protest at 4. The agency provided a detailed response to these aspects of the protest in its report to our Office and, in its comments responding to the report, DCI did not rebut the agency's position. Where, as here, an agency submits a detailed response to protest arguments, and the protester makes no further mention of an issue, or merely references an issue but does not substantively reply to the agency's detailed position, we deem the issues abandoned. Citrus College; KEI Pearson, Inc., B-293543 et al., Apr. 9, 2004, 2004 CPD ¶ 104 at 8.

The protest is denied.

Anthony H. Gamboa
General Counsel