



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

WASHINGTON, D.C. 20410-0001

BOARD OF CONTRACT APPEALS

In the Matter of:	:	
	:	
TURNER LACEY,	:	HUDBCA No. 87-2422-D33
	:	(Docket No. 87-1129-DB)
Respondent	:	
	:	

Eric E. Vickers, Esquire VICKERS, MOORE & WIEST 5615 Pershing DeBaliviere Place St. Louis, Missouri 63112	For the Respondent
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Joseph James, Esquire HUD Kansas City Regional Office Professional Building 1103 Grand Avenue Kansas City, Missouri 64106-2496	For the Government
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DETERMINATION

OPINION OF ADMINISTRATIVE JUDGE SCHMIDT

August 3, 1987

Statement of the Case

By letter dated February 25, 1987, the Manager of HUD's St. Louis office issued a Temporary Denial of Participation (TDP) which barred Respondent as of that date from participating in that Region's Public Housing Program (Agency Exhibit (Exh.) I). The sanction was imposed for twelve months from February 25, 1987 on the basis that Respondent "knowingly and willfully submitted false statements in connection with ... [his] bid proposal to the Housing Authority of the City of Wellston, Missouri for the purpose of influencing the Housing Authority to award ... [him] a contract for the management of the Housing Authority's public housing program, a program which is funded by and under the jurisdiction of HUD." The false statement was identified in the TDP as the representation in Respondent's written proposal that a Ms. Martain and a Mr. Fuller were Deputy Director and Maintenance Supervisor, respectively, of Lacey Realty Company, Inc.

After an informal hearing was held pursuant to 24 C.F.R. §24.18(a) (5), the St. Louis HUD Office Manager affirmed the

sanction by letter of April 3, 1987 (Agency Exh. L). Pursuant to a timely appeal of April 8, 1987 from counsel for the Respondent, a hearing was held in St. Louis, Missouri on July 22 and 23, 1987.

Findings of Fact

1. A Request for Proposal (RFP) was issued by the Housing Authority of the City of Wellston, Missouri (Housing Authority) for the management of its low income public housing projects (Agency Exh. A). The RFP contained weighted evaluation criteria or award factors with evaluation points designated for each factor. Included under "Technical and Management" were the following factors with their assigned points (out of a total of 100):

	<u>Points</u>
(1) Demonstrated experience in Housing Management, property management and tenant services	20
(2) Demonstrated ability to assess problems and propose solutions for troubled housing authorities or demonstrated ability in work similar to that required for troubled Housing Authorities	15
(3) Demonstrated capability of the offeror's key personnel to perform (1) and (2) above	15

2. The RFP indicated that a "proposal shall consist of the technical and management submittal of the proposed work" and that evaluation of the technical and management submittal would be based "strictly on the basis of its merit." The RFP also required the submission, inter alia, of a project organization chart showing key personnel and the submission of brief resumes of key personnel along with the specific effort to be contributed and man-hours to be devoted to that effort. The RFP provided that proposals shall state that it is a 60-day firm offer. Under the subject of "Responsible Prospective Contractors", offerors were advised in the RFP that a contract would only be awarded to responsible contractors which was defined therein to require "the necessary experience, organization, technical qualifications, skills ... or have the ability to obtain them" Also contained under proposal instructions of the RFP was the notice to offerors that award may be made on initial offers received without any discussion. The RFP contained a model contract which did not contemplate the inclusion of key personnel. (Agency Exh. A.)

3. Lacey Realty Company, Inc. submitted a written proposal dated January 26, 1987 in response to the RFP under signature of Turner L. Lacey, President (Respondent). The proposal was a firm

90-day offer submitted "concordant with HUD's rules and regulations, the Board's requirements, the contract terms, and the stipulations of all the attachments thereto" and "with the full knowledge of the existing HUD rules and regulations and in accordance with the Authority's RFP requirements." (Respondent's Exh. 2.)

4. Section V of Respondent's proposal reflected an "Organizational Chart for Lacey Realty Company" which included Turner L. Lacey as Executive Director (top of chart), a Vivian Martain as Deputy Director, a Taylor Fuller, Jr. as Maintenance Supervisor, as well as other key persons. The resumes included in the proposal indicated that Vivian Martain was employed by the St. Louis Housing Authority from April 1983 to present and that Taylor Fuller, Jr. was self-employed from March 10, 1982 to present. (Respondent's Exh. 2.) The undated resumes were somewhat outdated, e.g., the personal information relating to Ms. Martain. Their testimony indicated that neither Ms. Martain nor Mr. Fuller were aware that their resumes were submitted as part of Respondent's proposal or that their names were used in the organization chart. These resumes were submitted some four years earlier by Ms. Martain for another project. (Agency Exh. H.) They never received employment from Mr. Lacey on an earlier project. Mr. Fuller could hardly recall ever meeting Mr. Lacey even after he was identified for him at the hearing. The salaries for these two persons set forth in Respondent's proposal under Section V (D.) were considered unacceptable by them.

5. The testimony of the then Chairman of the Wellston Housing Authority indicated that he did not give offerors evaluation points for their proposed key personnel as the RFP provided, but merely scored the experience and reputation of each offeror's firm. He was unaware how other members of the Housing Authority scored key personnel. The Housing Authority interviewed each firm as part of the selection process.

6. Respondent's proposal scored the highest in the evaluation and the Housing Authority submitted Respondent's firm to HUD for approval (Agency Exh. G). Testimony at the hearing indicated that approval prior to award was not a requirement of HUD, but the Housing Authority sought to avoid any problem or question surfacing after award concerning their selection. HUD did not approve Wellston's selection and initiated TDP action against Respondent which effectively blocked the award of the contract to Lacey Realty. An award under the RFP had not been made as of the time of the hearing. The former Chairman of the Housing Authority still considered Respondent at the time of the hearing the most qualified to perform the work.

7. Respondent acknowledged at the hearing that he did not have an understanding with or commitment from either of the two key personnel in question, but does not consider that he did

anything improper in submitting resumes and using their names as he did. Moreover, he would not fault a competitor for doing the same and states that it is commonly done on competitive solicitations for such management services. He testified that he only considers the content of the contract awarded as binding, the other portions of his proposal, not incorporated into the resulting contract as merely a sales presentation. He believed he could offer some of his management fee earned under the contract as a salary supplement as an enticement for these individuals to accept employment. He believed that there would be adequate time after selection to obtain their services.

8. The Manager of the St. Louis HUD office acknowledged at the hearing that he overlooked the fact that both resumes of the key personnel in question did not reflect current employment with Respondent or his realty firm, but that he considered the resumes unclear as to current employment since both resumes were undated. In any event, he testified that he would have taken the same TDP action even if he had noticed the resume included employment "at present" since he considered that the information pertaining to the proposal taken as a whole gave the impression that they were employees of Lacey Realty, particularly since the organization's chart was headed "for Lacey Realty Company."

Discussion

At the hearing, Government counsel in his opening statement argued that Respondent knew or should have known that the Wellston Housing Authority relied on Respondent's representation that the two key personnel in question were either employed by Respondent (or his firm) or had committed themselves to work for him and that the Housing Authority awarded points to him for these persons in their competitive evaluation process.

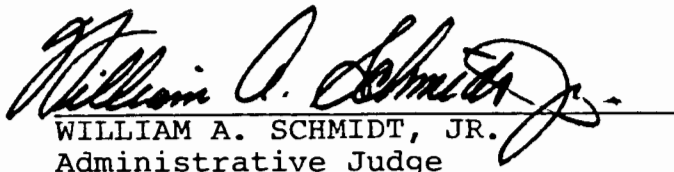
While Respondent knew that the Housing Authority would rely on Respondent's representation of key personnel included in his written proposal or offer, the proposal taken as a whole does not state or represent that these two individuals were in fact employees of Respondent or his firm. The resumes did not indicate current employment with Respondent at the time they were submitted. The fact that the resumes were undated does not change this conclusion. The organization chart was that proposed for the project, and was not the organization chart of Respondent's firm. Since the TDP was specifically based on an alleged false statement by Respondent that the two key personnel in question held current positions with Lacey Realty, I need not look beyond this issue. To do so would be a denial of due process. The Government had the burden of proving by adequate evidence that the TDP was properly based upon one of the causes enumerated in 24 C.F.R. §24.18, and the cause relied upon must be substantiated by a preponderance of the evidence. Under the circumstances of this case, it has not been done.

It is most disturbing, however, that Respondent has an admitted practice of including statements or representations in his proposals for which he may not have a firm, or at least a reasonable, basis to do so, and that he feels that such statements are merely a sales presentation not contractually binding unless incorporated in the contract. Since the procurement of the services was on a negotiated basis, he actually was not in the position at the time he prepared his proposal to know what would or would not be included in the resulting contract even with the inclusion of a model contract in the RFP. In any event, he knew that the representations would affect the scoring of his proposal to the detriment of his competitors, i.e., it gave him an improper advantage in the scoring process. Hence, such a practice seems unfair to both the procuring agency involved as well as competitors. The procuring agency, in this case the Wellston Housing Authority, which justifiably relied on the representations made in Respondent's proposal, would not be receiving what it contemplated in selecting Respondent and for which its RFP scoring system gave credit. This practice undermines the competitive selection system. It clearly goes beyond mere sales "puffing." Moreover, such type of misrepresentation does not allow parties to negotiate in good faith.

The action by Respondent was done deliberately as an inducement to the Housing Authority to do business with him. It cannot be condoned whether practiced by Respondent alone or by other offerors. Either way, it is inimical with full and free (open) competition. However, in light of the notification requirements relating to the imposition of any sanction, I cannot sustain the TDP here in issue.

Conclusion

The Temporary Denial of Participation issued by the St. Louis HUD office on February 25, 1987 cannot be sustained and shall be rescinded immediately. The Manager of HUD's St. Louis office is hereby directed to immediately lift the sanction imposed in his letter of February 25, 1987, and so notify Respondent.


WILLIAM A. SCHMIDT, JR.
Administrative Judge