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**Comptroller General
of the United States**

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

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Decision

Matter of: Greenleaf Construction Company, Inc.

File: B-293105.21; B-293105.22; B-293105.23

Date: April 4, 2007

Margaret A. Dillenburg, Esq., Alexander Brittin, Esq., and Jonathan D. Shaffer, Esq., Smith, Pachter, McWhorter & Allen, for the protester.

James S. DeSordo, Esq., Argus Legal, L.L.C., for Chapman Law Firm Company, LPA, for the intervenor.

Kimberly Y. Nash, Esq., and Robert J. Brown, Esq., Department of Housing and Urban Development, for the agency.

David A. Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest asserting organizational conflict of interest is denied where contracting officer reasonably determined that owner of management and marketing (M&M) services contractor in Ohio had sold interest in closing agent contractor for Ohio, the activities of which the M&M contractor will oversee; mere fact that M&M owner initially was reluctant to forego further compensation for his interest in closing agent did not require contracting officer to question the veracity and reliability of notarized documents that indicated that there had been a complete cessation of any continuing financial ties between M&M owner and closing agent.

DECISION

Greenleaf Construction Company, Inc. protests the Department of Housing and Urban Development's (HUD) award of a contract to Chapman Law Firm Company, LPA (CLF), under request for proposals (RFP) No. R-OPC-22505, for single-family home management and marketing (M&M) services. Greenleaf primarily asserts that the award to CLF was precluded by an impermissible organizational conflict of interest (OCI).

We deny the protest.

BACKGROUND

The solicitation, issued August 6, 2003, contemplated the award of indefinite-delivery/indefinite-quantity, fixed-unit-price contracts in 24 geographic regions for M&M services in connection with the disposition of single-family homes. These properties are acquired or retained in custody by HUD pursuant to the Federal Housing Authority's (FHA) role in administering the single-family home mortgage insurance program. FHA insures approved lenders against the risk of loss on loans extended to home buyers; in the event of a default on a loan insured by FHA, the lender acquires title to the property through foreclosure or other procedure, and then conveys the title to HUD in exchange for the payment of insurance benefits. As a result of this program, HUD has a sizable inventory of single-family homes that it needs to maintain and dispose of through sale. The solicitation was issued to meet HUD's requirement to maintain and sell these properties.

At issue in this protest is the contract for the properties in the Ohio/Michigan area. For this area (as for 13 other areas), the RFP provided that the award of the contract would follow a cascading procedure under which any award would first be made on the basis of competition considering only eligible small business concerns. If adequate competition between small business concerns did not exist--that is, if there were not "[a]t least two competitive offers . . . received from qualified responsible business concerns at the tier under consideration," with award to be made at "fair market prices as determined in accordance with [Federal Acquisition Regulation (FAR) §] 19.202-6"--award then would be made on the basis of unrestricted competition. RFP § M.9.b. Award was to be made on a "best value" basis, with the technical factors combined being significantly more important than price. There were six technical factors (in descending order of importance): management capability/quality of proposed management plan, past performance, experience, proposed key personnel, subcontract management, and small business subcontracting participation.

The proposals of three offerors that certified themselves as small business concerns, including those of Greenleaf, CLF, and a third firm, were included in the initial competitive range. After a size status protest by CLF resulted in Greenleaf being determined to be other than small by the Small Business Administration (SBA), and HUD found that the third offeror (which eventually withdrew its proposal) lacked the capacity to perform, leaving only a single small business offeror, HUD cascaded the competition to the full and open, unrestricted tier. Having determined that Greenleaf's technically superior, low-priced proposal represented the best value to the government, HUD awarded a contract to Greenleaf on April 19, 2005. However, after CLF filed a protest with our Office, asserting that the procurement should not have been cascaded to the unrestricted tier, HUD terminated Greenleaf's contract and returned the procurement to the small business tier. HUD then requested CLF to furnish a certification that its proposal submitted January 20, 2005 remained valid, and documentation showing that a conflict of interest arising from CLF's ownership

of Lakeside Title & Escrow Agency--the HUD closing agent contractor for Ohio which CLF, as the M&M contractor for Ohio, was prohibited under the RFP from owning--had been mitigated. Letter from HUD to CLF, June 22, 2005, at 1. On September 30, after determining that CLF was responsible, with adequate staffing and equipment and no impermissible conflict of interest, Affirmative Determination of Responsibility, Philadelphia Area 2, Sept. 26, 2005, the contracting officer made award to CLF.

Greenleaf then filed a protest with our Office challenging the September 2005 award to CLF. In our decision Greenleaf Constr. Co., Inc., B-293105.18, B-293105.19, Jan. 17, 2006, 2007 CPD ¶ 19, we sustained Greenleaf's protest on three grounds. First, we found that HUD's evaluation of CLF's proposal was unreasonable because it was based on aspects of CLF's proposed resources (employees) and technical approach (electronic monitoring system) that, shortly after CLF certified to HUD on June 22 that its January 2005 final proposal revision (FPR) remained valid, had materially changed. We concluded that CLF was required to advise the agency of the material changes in its proposal. Because CLF failed to do so, the agency never evaluated CLF's actual resources and technical approach as they existed at the time of award and the evaluation, therefore, was unreasonable.

Second, we found that HUD had not reasonably considered or evaluated a potential OCI on the part of CLF. In this regard, the RFP generally provided that "[t]he Contractor shall not engage in or permit any conflict of interest," and specifically identified the following as one prohibited conflict:

M&M Contractors may not serve as contractors or subcontractors that perform contract monitoring, oversight or other services related to any of the tasks in this PWS. Excluded contract services include but are not limited to . . . Closing Agents

RFP §§ H.8, I.14(b).

At the time CLF submitted its initial proposal, Mr. Chapman, the owner of CLF, also owned Lakeside, which is HUD's closing agent contractor for the state of Ohio.¹ Consistent with the above prohibition, CLF agreed in its proposal to transfer "full ownership" of Lakeside to another escrow and title attorney. CLF FPR, Jan. 20, 2005, at 6. At HUD's request, CLF furnished a notarized stock transfer agreement indicating that all shares in Lakeside had been sold by Frank Chapman to Dennis O'Brien, and an affidavit executed by Mr. Chapman stating that the "sale of all shares

¹ Closing agents obtain title information about properties that HUD seeks to sell so that HUD can convey clear and marketable title; meet with buyers and buyers' brokers to have closing documents executed; and receive funds for closings on behalf of HUD and then, after the closing, transmit those funds to HUD.

of Lakeside Title . . . has been completed and I no longer have any ownership interest or control over Lakeside Title.” CLF Letter to HUD, June 22, 2005. Subsequently, HUD learned that the purchase agreement for Lakeside, dated June 20, 2005, provided for a purchase price consisting of \$[REDACTED]. Purchase Agreement for Lakeside Title, June 20, 2005, § 3.1.

The contracting officer advised Mr. Chapman that his continued receipt of profits, as provided for under the purchase agreement, presented a conflict that had to be resolved. Mr. Chapman responded by submitting an amendment to the purchase agreement that deleted the above provisions and substituted a clause providing that the purchase price would be \$[REDACTED], to be paid at the rate of \$[REDACTED]. Amendment to Lakeside Purchase Agreement, Sept. 2, 2005, § 3.1. The contracting officer concluded that, because this amendment provided for a final fixed price under which CLF would receive no future profits, it resolved the OCI. Affirmative Determination of Responsibility, Philadelphia Area 2, Sept. 26, 2005, at 3.

We disagreed with the contracting officer’s determination, finding that he had failed to reasonably consider or evaluate the potential OCI arising from the fact that the owner of CLF would be receiving payments from the owner of the closing agent, the activities of which CLF would be overseeing. Specifically, it appeared that CLF’s judgment and objectivity in performing the contract could be impaired if its performance could potentially affect the ability of the owner of the closing agent contractor to make the payments owed to CLF’s owner.

Finally, we sustained Greenleaf’s protest on the basis that the contracting officer’s determination of CLF’s responsibility—specifically, that CLF possessed adequate financial resources to perform the contract—was based on information that the contracting officer knew was inaccurate. In this regard, despite knowing that Mr. Chapman had sold Lakeside, the contracting officer based her responsibility determination on a financial capability assessment by the Defense Contract Audit Agency that was based in significant measure on financial resources of Lakeside.

We recommended that HUD reevaluate CLF’s proposal, ascertaining and taking into account whether the proposal otherwise represented the resources that CLF would use in performing the contract. We also recommended that the agency consider, and document its findings with respect to, the potential OCI discussed above. We further recommended that the contracting officer make a new determination of CLF’s responsibility, taking into account the fact that Mr. Chapman had sold Lakeside, as well as any changes in the resources that CLF would have available to perform.

In response to our decision, HUD initially commenced the reevaluation, but then canceled the original solicitation with the intention of resoliciting the requirement. On April 27, 2006, CLF filed suit in the United States Court of Federal Claims challenging HUD’s actions, and HUD decided to reinstate CLF’s contract and request a revised proposal from only CLF, as the only remaining small business firm.

However, the prior determination by SBA that Greenleaf was not a small business had been reversed by SBA's Office of Hearings and Appeals on February 16, 2006 and, considering this fact, the court rejected HUD's proposed corrective action and held that the agency instead should reopen discussions and request updated proposals from both CLF and Greenleaf.

In response to the court's ruling, HUD amended the solicitation and requested FPRs from both CLF and Greenleaf by July 17. A second round of FPRs was received on November 8, which HUD evaluated as follows:

	Greenleaf	CLF
Technical Factors		
Management Capability	Excellent	Good
Past Performance	Good	Good
Experience	Excellent	Good
Key Personnel	Excellent	Excellent
Subcontract Management	Excellent	Excellent
Small Business Subcontracting	Excellent	Excellent
Overall Technical Rating	Excellent	Good
Price	\$(REDACTED)	\$132,303,150

The SSA concluded that, while Greenleaf's proposal was technically superior to CLF's, with a very low risk of unsuccessful performance versus CLF's low risk, Greenleaf's technical superiority was not worth a \$(REDACTED) (or [REDACTED] percent) price premium. In addition, the contracting officer determined that CLF was a responsible contractor, with adequate financial resources and no impermissible OCI. Upon learning of the new award to CLF, Greenleaf filed this protest with our Office.

We have reviewed all of Greenleaf's timely arguments and find that none furnishes a basis for questioning the award to CLF. We discuss several of the arguments below.

OCI

Greenleaf asserts that HUD's OCI inquiry following our prior decision--to ensure that there was no continuing relationship between Mr. Chapman and CLF and Lakeside--was too limited and thus unreasonable.

The Federal Acquisition Regulation (FAR) instructs agencies to identify potential OCIs as early as possible in the procurement process, and to avoid, neutralize, or mitigate significant conflicts before contract award so as to prevent unfair competitive advantage or the existence of conflicting roles that might impair a contractor's objectivity. FAR §§ 9.501, 9.504, 9.505; PURVIS Sys., Inc., B-293807.3, B-293807.4, Aug. 16, 2004, 2004 CPD ¶ 177 at 7. The responsibility for determining whether a contractor has a conflict of interest and should be excluded from competition rests with the contracting officer, who must exercise "common sense, good judgment and sound discretion" in assessing whether a significant potential

conflict exists and in developing appropriate ways to resolve it. FAR §§ 9.504, 9.505; Aetna Gov't. Health Plans, Inc.; Foundation Health Fed. Servs., Inc., B-254397 et al., July 27, 1995, 95-2 CPD ¶ 129 at 12. We find no abuse of discretion by the contracting officer here.

Following our decision sustaining Greenleaf's protest, in part, on the basis of CLF's potential OCI, CLF submitted a letter to HUD, signed by Mr. Chapman, stating that Mr. Chapman had agreed to suspend payments for the sale of Lakeside, and had further agreed that, upon CLF's resuming M&M contract operations, he would modify the Lakeside sales contract to renounce all future payments. CLF Letter to HUD, Jan. 27, 2006, at 9. However, the new HUD contracting officer (who replaced the prior contracting officer for this procurement) determined CLF's response to be inadequate on the basis that it did not establish that the payments had been "completely ameliorated"; according to the contracting officer, CLF was not eligible for award until it resolved the OCI. OCI Memorandum, Nov. 3, 2006, at 1. On October 16 and 19, at the request of the contracting officer, CLF furnished HUD: (1) an amendment to the Lakeside sales agreement releasing Lakeside and its purchaser from any obligation to make further payments towards the unpaid balance of the sales price; and (2) a sworn declaration executed by Mr. Chapman and the purchaser (Mr. O'Brien), stating as follows:

[Mr. Chapman] does not hold any reversionary or any remainder interest in Lakeside Title and all financial ties have been completely and irreversibly severed and there are no circumstances under which Chapman has a repurchase right as to all or a portion of the ownership of Lakeside Title or a right to receive any interest or any other type of earnings from Lakeside Title or any principal of Lakeside Title.

CLF Letter to HUD, Oct. 16, 2006; CLF Letter to HUD, Oct. 19, 2006.

In addition, the record indicates that the contracting officer reviewed the personnel working on Lakeside's Ohio closing agent contract to determine whether any of the persons listed in CLF's M&M contract were playing key roles in performing Lakeside's contract. The contracting officer noted that the individual proposed by CLF as its [REDACTED] ([REDACTED]) had been identified as attorney and general counsel for Lakeside. However, in response to the contracting officer's inquiry as to [REDACTED]'s financial ties to Lakeside, CLF responded (and furnished a sworn declaration from [REDACTED] to the effect) that [REDACTED] had withdrawn from representation of Lakeside in all legal matters (and, indeed, no longer represented Lakeside in any capacity), had no financial ties to Lakeside, and had never had an ownership interest in Lakeside. CLF Letter to HUD, Oct. 19, 2007; Contracting Officer's Statement, Feb. 8, 2007, at 10; Agency Report at 17. Based on CLF's responses, the contracting officer determined that CLF no longer had any apparent financial ties to Lakeside that would impair its objectivity in overseeing Lakeside's closing agent contract. OCI Memorandum, Nov. 3, 2006, at 4.

In its challenge to the agency's OCI determination, Greenleaf essentially asserts that it was unreasonable for the contracting officer to accept without further investigation the amended sales agreement for Lakeside, and the sworn declaration of Messrs. Chapman and O'Brien. Greenleaf maintains that the contracting officer was required to investigate whether Mr. Chapman was obtaining Lakeside funds by some other means, such as payments to his children.

This argument is without merit. Greenleaf has not demonstrated, nor is it otherwise apparent from the record, that the contracting officer was on notice of material information that reasonably would have brought into question the veracity and reliability of the notarized documents that indicated that there had been a complete cessation of any continuing financial ties between Mr. Chapman and Lakeside. The mere fact that, as noted by the protester, Mr. Chapman initially was reluctant to forego further compensation for his interest in Lakeside did not require the agency to proceed as if the arrangement between Mr. Chapman and Lakeside which severs Mr. Chapman's financial ties with Lakeside was, essentially, an artifice. Nor do we believe the agency was required to assume that the prior relationship between Mr. Chapman/CLF and Lakeside was unchanged. In this regard, while the record indicates that Mr. Chapman and CLF's office manager audited Lakeside's books until approximately September 2006, and that the CLF office manager prepared documents and assisted at closings for Lakeside through the summer of 2005, Declaration of CLF Office Manager, Feb. 15, 2007; Declaration of Frank Chapman, Feb. 15, 2007, at 4-7, these interactions occurred prior to October 2006, when Mr. Chapman finally renounced all current and future interest in Lakeside. Greenleaf has not shown, nor does the record otherwise indicate, that Mr. Chapman's subsequent actions were inconsistent with his October 2006 renunciation of all current and future interest in Lakeside.

Greenleaf asserts that the contracting officer unreasonably failed to consider the fact that CLF had proposed to hire Lakeside personnel to perform the M&M contract. We disagree. As discussed, the record shows that the contracting officer did examine the personnel working for Lakeside and the persons proposed for CLF's M&M contract. The contracting officer found that CLF proposed only one key employee-- [REDACTED]--who was involved in the Lakeside contract. Again, however, the contracting officer ascertained that [REDACTED] had withdrawn from representation of Lakeside in all legal matters, no longer represented Lakeside in any capacity, and had no financial ties to Lakeside. While a number of other personnel proposed by CLF had worked for Lakeside, the contracting officer did not view the employment of former Lakeside employees as calling into question CLF's objectivity in performing the M&M contract. Contracting Officer's Statement, Feb. 8, 2007, at 7. We find no basis for questioning the contracting officer's position, since there was no indication in the available information--and Greenleaf has not shown here--that the Lakeside employees would continue to work for Lakeside after being hired by CLF.

We conclude that the agency reasonably determined that CLF did not have an impermissible OCI.

MISREPRESENTATION

Greenleaf asserts that CLF's proposal misrepresented the availability of a proposed consultant. In this regard, CLF's November 7, 2006 FPR listed Mr. Robert Kolitz, President of Golden Feather Realty Services, Inc., as an M&M quality assurance consultant; according to the proposal, "Mr. Kolitz has agreed to be readily available to [CLF] as a consultant regarding any issues that may arise in the transition and operations of the M&M contract." CLF Technical Proposal at 135. Greenleaf's assertion of a misrepresentation is based on a January 25, 2007 declaration in which Mr. Kolitz stated as follows:

Some time ago, I made the business decision that I would not commit my services, or the services of my company to act as an employee or a subcontractor on any other HUD M&M contract, other than the contracts that my company was performing as the prime contractor.

I cannot recall having any discussions with Mr. Frank Chapman during the last year about my company assisting his company in any manner with any HUD M&M contract.

I have not signed any document that would indicate my willingness to act as an employee or a subcontractor to any other company.

Declaration of Robert Kolitz, Jan. 25, 2007.

An offeror's material misrepresentation in its proposal can provide a basis for disqualifying the proposal and canceling a contract award based on the proposal. A misrepresentation is material where the agency relied on it and it likely had a significant impact on the evaluation. Integration Techs. Group, Inc., B-291657, Feb. 13, 2003, 2003 CPD ¶ 55 at 2-3; Sprint Communications Co. LP; Global Crossing Telecommunications., Inc.--Protests and Recon., B-288413.11, B-288413.12, Oct. 8, 2002, 2002 CPD ¶ 171 at 4; AVIATE L.L.C., B-275058.6, B-275058.7, Apr. 14, 1997, 97-1 CPD ¶ 162 at 11.

There is no basis for finding a material misrepresentation here. As an initial matter, we note that, in response to Greenleaf's protest, CLF has furnished a January 18, 2005 letter in which Mr. Kolitz, on behalf of Golden Feather, wrote as follows:

In connection with your bid for the HUD [M&M] Contract in Area P2 [--Ohio and Michigan--] (as well as any other area in which you have submitted a bid and may be awarded), this letter serves to confirm that Golden Feather would be interested in exploring a relationship as a consultant or subcontractor for your company as your needs may arise.

In addition, CLF has furnished a declaration in which Mr. Chapman states that his discussions with Mr. Kolitz culminated in Mr. Kolitz's letter of January 18, 2005, and that Mr. Kolitz thereafter never advised CLF that he was no longer willing to serve as a consultant or subcontractor. Declaration of Frank Chapman, Feb. 15, 2007, at 12-13. Further, we afforded Greenleaf an opportunity to explain the apparent discrepancy between Mr. Kolitz's declaration and his January 18 letter. Greenleaf provided no further explanation and specifically replied that Mr. Kolitz was unavailable to address any discussions with Mr. Chapman concerning participation in performing any M&M contract CLF might receive.

Furthermore, we find no basis to question HUD's assertion that the inclusion of Mr. Kolitz in CLF's proposal was not material to the evaluation. In this regard, as noted by the agency, neither Golden Feather nor Mr. Kolitz, who was listed in CLF's proposal as one of nine brokers or consultants, was referenced in the final technical evaluation panel (TEP) report or in the source selection decision (SSD). We conclude that Greenleaf has failed to establish that CLF misrepresented Mr. Kolitz's availability.

EVALUATED WEAKNESSES

Greenleaf maintains that the agency improperly failed to take into account two evaluated weaknesses in CLF's technical proposal. In this regard, CLF's proposal was assigned a significant weakness under the management capability evaluation factor on the basis that [REDACTED]. TEP Report at 70. In addition, CLF's proposal was assigned a significant weakness under the experience factor on the basis that [REDACTED]. *Id.* at 79.

This argument is without merit. Contrary to Greenleaf's assertion, the record shows that the agency reasonably accounted for both weaknesses in the final evaluation and source selection. Both the TEP report and the SSD explain Greenleaf's higher rating of excellent (versus CLF's rating of only good) under the management capability factor as being based in part on [REDACTED]. SSD at 1-2; TEP Report at 90. Likewise, it is evident from the evaluation documentation that the difference between Greenleaf's excellent rating under the experience factor and CLF's good rating was due in significant part to [REDACTED]. SSD at 2; TEP Report at 90. Thus, the agency did in fact consider CLF's weaknesses regarding [REDACTED] and [REDACTED].

In sum, we have no basis to question the agency's selection decision.

The protest is denied.

Gary L. Kepplinger
General Counsel