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**Comptroller General  
of the United States**

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

# Decision

**Matter of:** MTB Group, Inc.

**File:** B-295463

**Date:** February 23, 2005

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participated in the preparation of the decision.

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## **DIGEST**

Protest that conducting procurement using reverse auction format is impermissible because vendors' prices will be disclosed during the auction is denied; agency is conducting reverse auction under simplified acquisition procedures, which encourage use of innovative procedures and do not expressly prohibit disclosure of vendors' prices in implementing such procedures, and disclosure is not prohibited under the procurement integrity provisions of the Office of Federal Procurement Policy Act.

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## **DECISION**

MTB Group, Inc. protests that an online reverse auction (that is, an auction under which the lowest priced vendor will be issued a purchase order) being conducted by the Department of Housing and Urban Development (HUD), Real Estate Assessment Center (REAC), for housing inspection services, is improper because it requires the disclosure of vendors' prices during the auction.

We deny the protest.

HUD requires the rental housing units for which it is responsible to undergo annual physical inspections to ensure that they are fit for habitation. HUD is contracting for those services using an online reverse auction; indeed, HUD has issued a notice to potential participants indicating its intent to conduct reverse auctions for

330 properties within Georgia and Pennsylvania.<sup>1</sup> HUD is conducting the reverse auctions under the simplified acquisition procedures of Federal Acquisition Regulation (FAR) part 13. Using this process, HUD will notify potential participants of an upcoming auction, specifying the time that the auction will start and close. Those who choose to participate will submit quotations to the online auction website. During the auction, the website will display the property to be inspected, the current lowest quotation, and the time remaining in the auction. The website will not display the names of vendors, any other identifying information, or the time at which quotations were submitted. At the close of the auction, competing vendors will be able to view all submitted quotations, as well as the winning quotation, and a purchase order will be sent to the winning vendor. HUD will provide to unsuccessful vendors the name of the winning vendor and its quotation, but not the identity of the unsuccessful vendors. Contracting Officer's Statement at 2.

MTB asserts that the reverse auction process established by HUD violates the Office of Federal Procurement Policy Act, 41 U.S.C. § 423(a) (2000) (and the implementing provisions of the FAR, §§ 3.104-3, 3.104-4), by disclosing or requiring vendors to disclose their quoted prices.

Our Office has not previously considered the question of whether agencies properly may conduct procurements using reverse auction procedures under which participants' prices will be revealed during the auction. We find that the protester has not established—and that there is no other basis for concluding—that HUD's use of reverse auctions in conducting the procurements here is improper.

First, as a general matter, while the FAR does not expressly recognize reverse auctions as a permissible procurement vehicle for goods and services, neither does it expressly prohibit the government from using auctions, and FAR § 1.102(d) provides that a procurement procedure is permissible where not specifically prohibited. At the same time, HUD's use of reverse auctions is fully consistent with FAR part 13 and promotes the underlying purpose of that regulation. In this regard, FAR part 13, which is generally aimed at streamlining the procurement process, advises agencies to use simplified acquisition procedures where, as here, the value of the acquisition is below the simplified acquisition threshold, FAR § 13.002; to make simplified purchases in the most suitable, efficient, and economical manner based on the circumstances of the acquisition, FAR § 13.003(g); and to use innovative procedures to the maximum extent practicable. FAR § 13.003(h). In addition, agencies are encouraged to use electronic purchasing techniques, FAR § 13.003(d), and to maximize the use of electronic commerce when practicable and cost effective. FAR § 3.003(f). We thus find no basis to object generally to the agency's utilizing reverse auction procurement procedures.

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<sup>1</sup> HUD previously awarded six regional indefinite-delivery contracts for the inspection services using negotiated procurement procedures; MTB was the incumbent contractor for three of those contracts, which have now expired.

Regarding MTB's specific objection--that the reverse auction here is impermissible because it will result in disclosure of its price--we find no basis for objecting to the agency's approach. MTB is correct that the Act prohibits government officials and those acting on behalf of the government from knowingly disclosing contractor quotation or proposal information before award. 41 U.S.C. § 423(a). However, that prohibition is not absolute. Rather, the Act specifically provides that it does not "restrict the disclosure of information to, or its receipt by, any person or class of persons authorized in accordance with applicable agency regulations or procedures, to receive the information," 41 U.S.C. § 423(h)(1), and does not "restrict a contractor from disclosing its own quote or proposal information or the recipient from receiving that information." 41 U.S.C. § 423(h)(2).<sup>2</sup> We think the price disclosure under HUD's reverse auction procedures falls within the exception language, although we are aware of no judicial or other authoritative interpretation of these provisions. First, under the procedure the agency has established, vendors actually will disclose their own prices--albeit, as a condition of competing--by entering the prices on the auction website; as noted, a vendor's disclosing its own price is not prohibited under the Act.<sup>3</sup> Moreover, even if the price disclosure were considered to be by government officials due to its nature as a precondition to a vendor's competing, the disclosure is pursuant, and integral, to the reverse auction procurement procedures established by the agency; we thus would view the disclosure as being to persons authorized by agency procedures to receive the information, consistent with the exception language. See generally *DGS Contract Serv., Inc. v. United States*, 43 Ct. Cl. 227, 236 (1999); *Ocean Servs., LLC*, B-292511.2, Nov. 6, 2003, 2003 CPD ¶ 206 at 5 (neither the Act nor the FAR establishes an absolute prohibition against disclosure of price information, and both make clear that prices can be disclosed under certain circumstances).

MTB asserts that the reference in the exception language to "any person or class of persons authorized in accordance with applicable agency regulations or procedures" does not envision disclosures to competing vendors--such as under the reverse auction procedures here--but, rather, refers only to agencies' disclosure of pricing

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<sup>2</sup> FAR § 3.104-4 similarly restricts the disclosure of price information except, in accordance with applicable agency regulations or procedures, to persons authorized by the agency head or the contracting officer to receive such information, and also recognizes that a contractor may disclose its own information.

<sup>3</sup> The agency argues that disclosing a price without the vendor's name is not a disclosure at all within the meaning of the Act. We agree that it is questionable whether revealing a price alone constitutes a disclosure under the Act and regulations. However, in light of our conclusion that, in any case, the disclosure under HUD's procedures here does not violate the Act, we do not reach this question.

and other procurement information to contractor personnel assisting the agency in proposal evaluation and other related activities. This argument is without merit. While MTB refers to support for its interpretation in the legislative history of other legislation, it cites nothing in the Act itself or the Act's legislative history--and we find nothing--to support its assertion. In fact, MTB ultimately acknowledges that neither the legislative history of the Act, nor the regulatory history of FAR § 3.104(a), explains the purpose or scope of the exception. Protester's Comments at 21. MTB's interpretation is all the more untenable in light of the Act's underlying purpose--to prevent government officials from disclosing sensitive procurement information in exchange for gratuities or future employment opportunities. See 134 Cong. Rec. 32156 (Oct. 20, 1988) (Comments of Senator Glenn summarizing the purpose of the Act); H.R. Rep. No. 100-911, at 18 (1988). This purpose would in no way be served by applying the Act to preclude HUD from conducting procurements using its reverse auction procedures. Given all of these considerations, we find no basis for objecting to HUD's use of reverse auction procedures here.<sup>4</sup>

MTB maintains that HUD's dividing its overall requirement for inspection services--which previously was met under large regional procurements--into procurements for only one or a few inspections violates FAR § 13.003(c)(2). This provision requires procuring agencies to use simplified acquisition procedures to the maximum extent practicable for acquisitions that will not exceed the simplified acquisition threshold (generally \$100,000) or the micro-purchase threshold (generally \$2,500). In the language to which MTB is referring, the provision also admonishes agencies not to divide requirements aggregating work valued above the threshold amounts into several purchases below the threshold amounts solely to permit use of the simplified procedures or to avoid requirements applicable to purchases exceeding the thresholds. MTB asserts that HUD is violating this prohibition by dividing its single

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<sup>4</sup> MTB maintains that it considers its price information confidential and that revealing its price will effectively reveal its labor, overhead and profit rates. However, we fail to see--and the protester does not explain--how this differs from any other procurement. In particular, whenever a firm submits a sealed bid, its price--and all information that can be derived from its price--is revealed at the public opening. MTB also complains that, although the quotations here will be anonymous, due to the nature of the market for inspectors, vendors will be able to deduce which quotations were submitted by which vendors and will be able to use that information in developing their prices in future auctions. Again, however, this same result obtains under any competitive procurement; in negotiated procurements, the successful offeror's price is revealed and can be used by competing vendors in future procurements, and, as noted above, in sealed bid procurements, all bidders' prices are revealed at the public opening. The disclosure of prices--and any competitive advantage that inures to competitors as a result--is simply an inherent feature of the transparency in any public competition for a federal contract award.

requirement for inspection services into several smaller requirements, all below the threshold amounts.

This argument is without merit. The record shows that HUD's motivation is not to avoid competition requirements, but to expand the field of competition to include all interested inspectors--including those who desire to compete for single inspections--instead of effectively limiting the competition to the few companies, such as MTB, that are able to compete to perform large numbers of inspections in a specific region. The agency will achieve this aim by, as discussed above, publicizing each separate requirement and giving all interested vendors an opportunity to submit quotations on any or all of those requirements through the reverse auction procedures. Agency Report at 3, 8. The agency reports that prior auctions for smaller requirements have resulted both in adequate competition and in lower prices for inspections. Id. at 3-4. In any case, the record does not show that the protester has suffered any prejudice as a result of the agency's new multiple procurement approach; MTB does not allege, and there is no reason to assume, that it will be precluded from competing for any of the requirements. MTB's mere preference that HUD continue to procure its inspection services as it has in the past is not a valid basis of protest. See Frasca Int'l, Inc., B-293299, Feb. 6, 2004, 2004 CPD ¶ 38 at 3.

The protest is denied.

Anthony H. Gamboa  
General Counsel