



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

REDACTED DECISION

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Matter of: Human Resource Systems, Inc.; Health Staffers, Inc.

File: B-262254.3; B-262254.4; B-262254.5

Date: December 21, 1995

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Jeffrey M. Cameron, for Nurse Works, Inc., an interested party.

John R. Osing, Jr., Esq., Department of the Navy, for the agency.

Mary G. Curcio, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where solicitation for registered nurses (RN) listed experience as an evaluation factor and specifically requested information concerning the numbers and types of personnel previously provided, agency reasonably evaluated whether offerors had specific experience providing RNs in the numbers contemplated by the solicitation.
2. The concept of unbalancing is not applicable in a negotiated procurement in which price is not the primary factor in the award decision.
3. Protest against award without discussions is denied where solicitation advised offerors of the agency's intent to award the contract without discussions, and agency reasonably determined that awardee's proposal was realistically priced and represented the best value to the government.
4. Agency properly may accept from the offeror already selected for award a post-closing modification to its proposed price.

DECISION

Human Resource Systems, Inc. (HRSI) and Health Staffers, Inc. protest the Naval Medical Logistics Command's award of a contract to Nurse Works, Inc., under request for proposals (RFP) No. N62645-95-R-0022, for registered nurse (RN) and operating room (OR) technician services. HRSI primarily challenges the evaluation of its technical and price proposals. Health Staffers challenges the evaluation of its

technical proposal and the agency's determination to make award on the basis of initial proposals.

We deny the protests in part and dismiss them in part.

The RFP contemplated the award of a firm, fixed-price contract for a base year with four 1-year option periods, to provide shifts of RN and OR technicians. Each contract year was divided into 10 base and option lots specifying the department or unit in which the personnel would be required; the lots were further divided into contract line items which specified when the services would be required and the number of shifts to be provided. For example, Lot 2 was for emergency department RNs, and within Lot 2, line item No. 0034AA specified 365 12-hour day shifts.

The RFP provided for award to be made to the responsible offeror whose offer provided the best value to the government, with technical factors considered slightly more important than price. The solicitation set forth three equally weighted technical evaluation factors: (1) implementation plan, (2) management policies and (3) experience. With respect to price, offerors were required to propose a firm, fixed price per shift for each contract line item, and to provide a supporting cost breakdown for each shift which included the average compensation rate, fringe benefit rate, fringe benefits, total personnel costs, management expenses, profit, and total price. Price was to be evaluated for reasonableness, realism, and completeness. The RFP stated that the Navy intended to award the contract on the basis of initial proposals.

The Navy received 24 offers. The technical evaluation team assigned to each evaluation factor and overall technical proposal one of four color/adjectival ratings: (1) blue (exceeds requirements/high probability of success); (2) green (satisfactory/good probability of success); (3) yellow (less than satisfactory/low probability of success); or (4) red (unacceptable). The cost evaluation team (CET) used each offeror's cost breakdown structure to calculate the offeror's weighted average for each component of the breakdown; the weighted average then was compared to the independent government cost estimate for the component and to the average price/cost of all offerors for the component to determine price realism and reasonableness.

Nurse Works, an incumbent contractor, submitted the fourth low price (\$52,188,732); its technical proposal was rated green for implementation and management plans, blue for experience and green overall. Health Staffers, another incumbent contractor, submitted the thirteenth low price (\$56,632,865); its technical proposal was rated green for each evaluation factor and green overall. Although HRSI submitted the [deleted] low price [deleted], its price was found to be

unrealistic; its technical proposal was rated green for implementation and management plans, yellow for experience and yellow overall.

The source selection advisory council (SSAC) recommended Nurse Works for award on the basis that its proposal was technically superior to the other proposals and that this technical superiority was worth the additional cost. The source selection authority (SSA) concurred and the agency was in the process of preparing the paperwork to award the contract to Nurse Works when Nurse Works submitted a modification to its proposal which lowered its price. The Navy reviewed the price modification and determined that Nurse Works' price proposal remained reasonable and realistic. The Navy awarded the contract to Nurse Works at the modified price and these protests followed.

HRSI PROTEST

Technical Evaluation

HRSI protests that the Navy used unstated evaluation criteria to evaluate its technical proposal. Specifically, HRSI argues that its proposal improperly was downgraded under the experience factor on the basis that HRSI did not have specific experience providing RNs in the numbers called for by the solicitation; the protester contends that the agency could not reasonably consider its lack of specific experience a weakness because the solicitation stated the agency would evaluate whether an offeror had the same "or similar" experience.

We disagree. First, there was nothing improper in the agency's evaluation approach under the experience factor. Generally, where a solicitation indicates that experience will be evaluated, the procuring agency properly may consider an offeror's specific experience with the subject matter of the procurement. See FMS Corp., B-255191, Feb. 8, 1994, 94-1 CPD ¶ 182; AWD Technologies, Inc., B-250081.2; B-250081.3, Feb. 1, 1993, 93-1 CPD ¶ 83. Here, section M of the solicitation, "Evaluation Factors For Award," provided for the evaluation of "directly related or similar experience in providing nursing services," and required offerors to specify, among other information, the "numbers and types of personnel provided under the contract[s]" listed in their proposals. The solicitation thus clearly contemplated that in evaluating proposals under the experience factor, the agency would consider whether an offeror had experience providing RNs in the numbers requested by the solicitation. It is implicit in an experience evaluation that a proposal may be downgraded depending on the agency's assessment of the relevance and amount of an offeror's experience in relation to the experience it reasonably determines is necessary for successful performance; in other words, the agency is not precluded from rating a proposal less than acceptable (green) just because a proposal shows some similar experience.

Further, the Navy's rating of HRSI's proposal under the experience factor was reasonable. (The evaluation of technical proposals is primarily within the discretion of the procuring agency. We will review a technical evaluation only to determine whether it was reasonable and consistent with the stated evaluation criteria. LJC Mechanical Contractors, Inc., B-250792, Feb. 1, 1993, 93-1 CPD ¶ 85.) The record shows that the agency determined that HRSI's prior experience was so dissimilar to the work under the contemplated contract as to represent a significant weakness. The solicitation contemplated award of a contract to provide up to 185 RNs. HRSI had previously provided nursing services under only one contract, which called for only one nurse. The other contracts listed in its proposal required HRSI to provide different health care professionals (such as dieticians and pharmacists) in very small numbers--one or a few. The only contract which required HRSI to provide a substantial number of personnel was a contract for the U.S. Postal Service, but this contract required the services of engineers, not medical professionals, and also called for only 80 personnel to be provided. We conclude that, given HRSI's lack of experience providing similar numbers of medical professionals, the agency reasonably rated its proposal yellow for experience. Further, in light of the critical importance to patient health care of assuring an adequate supply of qualified nursing staff, we think the agency could reasonably determine that the weakness in this area was sufficient to offset HRSI's green ratings under the other two factors, and justify a yellow rating for its proposal overall.

Price Realism Evaluation

HRSI challenges the Navy's determination that its price was unrealistic. To evaluate price realism, the Navy developed its own independent estimate for each component of the proposed price, including direct compensation, fringe benefit rate, salary escalation rate, management effort, and profit. Using the supporting cost breakdown provided by each offeror, the CET then calculated a weighted average of the offeror's costs across all of the line items for each component of each labor category and compared that average to the government estimate. A low direct compensation rate could be offset by a higher fringe benefit rate and a low fringe benefit rate could be offset by a higher direct compensation rate. The Navy found that HRSI's price proposal was unrealistic based on: a proposed direct compensation of [deleted] for OR technicians, compared to the government estimate of \$13.49 and an average of \$14.23 for all offerors; a fringe benefit rate of [deleted] percent, compared to a government estimate of 22.39 percent and an average of 21.17 percent for all offerors; and an annual escalation rate of [deleted] percent, compared to a government estimate of 3 percent and an average of 2.67 percent for all offerors. HRSI contends that the Navy estimate was based on erroneous and outdated information.

Realism ordinarily is not considered in the evaluation of proposals for the award of a fixed-price contract because these contracts place the risk of loss upon the contractor. However, an agency may provide, as here, for the use of a price realism analysis in a solicitation for the award of a fixed-price contract for the purpose of measuring an offeror's understanding of the solicitation's requirements or to assess the risk inherent in an offeror's proposal. PHP Healthcare Corp., B-251933, May 13, 1993, 93-1 CPD ¶ 381. In this regard, the risk of poor performance when a contractor is forced to provide services with an undercompensated workforce is a legitimate concern in the evaluation of proposals. Trauma Serv. Group, B-242902.2, June 17, 1991, 91-1 CPD ¶ 573. Comparison of offerors' prices with each other and with a government estimate may provide a basis for a price realism determination in the absence of evidence that either the estimate or its application to a particular offeror is unreasonable. PHP Healthcare Corp., *supra*.

The agency's realism analysis was based on information from the United Nurse's Association of California and the University of California at San Diego Hospital, showing an hourly compensation range of \$12.16 to \$13.95 for OR technicians. HRSI argues that its proposed rate for staff OR technicians was realistic because it was higher than the rate (\$8.19) which the solicitation indicated would be paid to OR technicians directly employed by the contracting agency, and was consistent with the compensation for Medical Assistants listed in the United States Department of Labor (DOL), Bureau of Labor Statistics's Occupational Compensation Survey for the San Diego Metropolitan Area (between \$6 and \$13.50 per hour). However, there is no basis for concluding that the rate to be paid federal employees hired as OR technicians is a valid benchmark against which to measure compensation rates of private companies, given the absence of equivalent job security and retirement benefits at such companies. Rather, in light of these differences, compensation at government-equivalent levels reasonably could be deemed insufficient to recruit and retain quality OR technicians meeting the specific requirements of the solicitation. As for the lower rates in DOL's survey, it is not clear that the Medical Assistant category under that survey is equivalent to the OR technician category in the solicitation. While some of the duties are the same, the solicitation requires OR technicians who can assist the anesthesiologist, supervise and assist OR technician students, and prepare a patient for surgery, duties not listed for the Medical Assistants in the DOL survey. Indeed, the fact that the average rate of compensation proposed by all offerors exceeded the survey range for the Medical Assistant category tends to support the conclusion that the categories are not comparable. We conclude that the rates used in the agency's analysis were reasonable.

HRSI argues that the government's fringe benefit rate estimate was high compared to its own, because the government rate included holiday and vacation pay, which HRSI instead included in its direct compensation rate. This argument is without merit. Whether vacation and holiday pay was properly included under direct

compensation or fringe benefits, HRSI's price was substantially below the government's estimates for direct and fringe rates. Thus, evaluating HRSI's price with vacation and holiday pay under its direct compensation rate instead of under its fringe benefits rate at best would have improved the realism of its fringe rate, while rendering its direct rate even more unrealistic. Consequently, there is no basis to conclude that this would have affected the realism analysis.

HRSI argues that a 3-percent escalation rate was unrealistic and did not reflect current market conditions. However, the agency's estimated 3-percent annual labor escalation rate was based on the Hospital Salary and Benefits Report published by the Hospital and Healthcare Compensation Service and Modern Health Care, an industry magazine. The protester has furnished no evidence in support of its position, and its mere disagreement does not establish that the Navy's rate was unreasonable.

Given the significant disparity between the agency's reasonable estimate of the current and future compensation for qualified staff and HRSI's lower proposed compensation, we find that the Navy reasonably determined HRSI's prices to be unrealistic and present a risk that HRSI will be unable to recruit and retain qualified personnel.¹

Price/Technical Tradeoff

HRSI argues that, given its price advantage and the fact that the technical factors were weighted only slightly more important than the cost factor, a reasonable price/technical tradeoff would have resulted in an award to HRSI.

¹HRSI also argues that in performing the price realism analysis, the Navy treated HRSI and Nurse Works inconsistently because the agency did not find Nurse Works's price proposal unrealistic even though the proposed prices for a number of individual line items were below the benchmark set by the Navy for a realistic price. As noted above, however, in performing the price realism analysis, the Navy did not compare the components of each line item against the corresponding component of the government estimate; instead, it used an offeror's cost breakdown structure to determine a weighted average of the offeror's costs across all of the line items for each component of each labor category and compared that average to the government estimate for that component for that labor category. The record indicates that, contrary to HRSI's assertion, HRSI and Nurse Works were treated consistently in this regard.

The extent to which price and technical considerations may be offset against each other in a tradeoff is governed by the test of rationality and consistency with the stated evaluation criteria. Award may be made to a higher-priced/higher technically rated offeror where the decision is consistent with the evaluation factors and the agency reasonably determines that the technical superiority of the higher-priced proposal is worth the additional expense. Information Spectrum, Inc., B-256609.3; B-256609.5, Sept. 1, 1994, 94-2 CPD ¶ 251.

The SSA relied on the recommendation of the SSAC, which determined that Nurse Works's proposal was technically superior because it offered strengths not found in the other proposals and showed an exemplary record of past performance (as an incumbent contractor and elsewhere) under difficult conditions. In contrast, the SSAC did not believe that HRSI, which had never furnished more than one RN, had the breadth and depth of experience that would ensure successful performance. Further, the fact that the SSAC considered HRSI's price unrealistic and indicative of potential staffing problems negated much or all of any advantage HRSI would have enjoyed in the tradeoff by virtue of its nominally lower price; the SSAC did not believe the risks inherent in HRSI's proposal were offset by its lower cost. Given the superiority of Nurse Works's proposal relative to HRSI's under the more important technical evaluation factors--in particular the contrast between Nurse Works's record of exemplary past performance of contracts for similar services and HRSI's lack of relevant experience, and the risk of staffing problems from HRSI's unrealistically low proposed compensation--there is no basis to question the agency's determination that Nurse Works's proposal represented a better value to the government than HRSI's.

Unbalanced Offer

HRSI contends that Nurse Works's proposal was impermissibly unbalanced, and could not form the basis for award, because its prices for the option quantities of services in each of the contract years were higher than its prices for the base quantities in each year.

The concept of unbalancing generally applies where bids are solicited and concerns whether an award to the bidder offering the lowest price to the government will in fact result in the lowest price to the government. See Residential Refuse Removal, Inc., 72 Comp. Gen. 68 (1992), 92-2 CPD ¶ 444. Since the government's primary concern in a negotiated procurement is not with obtaining a contract at the lowest overall cost, we will apply the concept of unbalancing only where price is the primary basis for the source selection decision. See Ogden Gov't Servs., B-253350, Sept. 14, 1993, 93-2 CPD ¶ 161; Signal Corp., B-241849 et al., Feb. 26, 1991, 91-1 CPD ¶ 218. The award decision here was not based primarily on price. To the contrary, and as discussed above, technical considerations were more important than price in the evaluation, and the record establishes that in the final analysis the agency was

primarily concerned with the strengths of the awardee's technical proposal and the fundamental weakness of HRSI's proposal, rather than the differences in price. In light of the agency's concerns, there simply is no reason to believe that the possibility of a somewhat higher cost if all of the option quantities were not exercised would have affected the award decision.

HEALTH STAFFERS PROTEST

Technical Evaluation

Health Staffers primarily protests the Navy's evaluation of its proposal under the experience factor. Health Staffers argues that, as an incumbent contractor for more than 7 years, and as the only contractor with experience in providing at one time the number of nurses required by the solicitation (185), it should have received a blue (superior), rather than a green (satisfactory), rating under experience.

The evaluation of Health Staffers's proposal was reasonable and consistent with the stated evaluation criteria. The solicitation provided for a green rating to be given to a proposal which was satisfactory and evidenced a good probability of successful performance; a blue rating was to be given to a proposal that exceeded the performance requirements of the solicitation in a way beneficial to the Navy and indicated a high probability of successful contract performance. In evaluating Health Staffers's proposal under the experience factor, the agency found that while Health Staffers had experience providing the same numbers and types of RNs required under the contemplated contract and was capable of successfully performing the contract, Health Staffers's performance as an incumbent did not indicate that Health Staffers's performance under the contemplated contract would exceed the requirements of the solicitation in a way that would be beneficial to the Navy. (In contrast, the agency reports that Nurse Works's blue rating under the experience factor reflected its exemplary performance under difficult conditions, including commencing full performance 3 days after award and quickly providing additional staffing in response to the assignment of numerous members of the nursing staff to duty on a deploying hospital ship.) Based on the record before us, we have no basis to question the reasonableness of the agency's determination that Health Staffers's prior performance was satisfactory, but not exceptional. We thus have no basis to question the green rating assigned Health Staffers's proposal under the experience factor.²

²In comments submitted on October 3, Health Staffers raised additional arguments with respect to the agency's evaluation under the experience factor. Since these arguments were raised more than 10 working days after September 12, the date on which Health Staffers received the agency report containing the information which
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Discussions

The solicitation stated that the Navy would seek clarification of suspected unrealistic pricing during discussions. Health Staffers asserts that because Nurse Works's proposed prices for the option items were lower than its prices for the base items, Nurse Works's proposal was based on unrealistic pricing which the agency was required to clarify and resolve during discussions.

This argument is based on the flawed premise that Nurse Works's price was unrealistic. The Navy determined Nurse Works's pricing to be realistic. Again, in evaluating price realism, the agency did not evaluate offers on a line item-by-line item basis, an approach that would have taken the lower option prices into account; rather, the agency used an offeror's cost breakdown structure to determine a weighted average of the offeror's costs across all of the line items for each component of each labor category and compared that average to the government estimate for that component for that labor category. The agency therefore had no reason to discuss price realism with Nurse Works. It follows that, since the solicitation advised offerors of the agency's intent to award the contract without discussions, and in view of our conclusion that the Navy reasonably determined that Nurse Works's proposal represented the best value to the government, the agency properly could award the contract to Nurse Works without holding discussions. See JWK Int'l, B-256609.4, Sept. 1, 1994, 95-1 CPD ¶ 166.³

Health Staffers argues that the agency could only perform an adequate price realism analysis by comparing Nurse Works's proposed price for each line item against the government estimate. This is an untimely challenge to the methodology used to determine price realism. Health Staffers learned that the Navy used an average of

²(...continued)

formed the basis of these protest issues, the new arguments are untimely. See 4 C.F.R. § 21.2(c) (1995); Management Technology, Inc., B-257269.2, Nov. 8, 1994, 95-1 CPD ¶ 248.

³Health Staffers also argues that the Navy was required to hold discussions before it accepted Nurse Works's modified price proposal. Under FAR § 52.215-10, a procuring agency may accept a late modification of an otherwise successful proposal where that modification results in terms more favorable to the government. Here, the Navy had already determined that Nurse Works was the successful offeror and was in the process of preparing the contract when Nurse Works submitted its price modification. Consequently, the Navy could accept Nurse Works's modified price proposal, which reduced the contract price, without holding discussions and requesting best and final offers. Asgard Technology, Inc., B-215706, Aug. 13, 1984, 84-2 CPD ¶ 171.

proposed prices to assess realism from the agency report which it received on September 12. Since Health Staffers did not protest the agency's approach until October 3, more than 10 working days later, this aspect of Health Staffers's protest is untimely. See 4 C.F.R. § 21.2(c); Management Technology, Inc., supra.

The protests are denied in part and dismissed in part.

Comptroller General
of the United States