



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Nova Research Company

File: B-270092; B-270092.2

Date: February 8, 1996

Thomas L. McGovern III, Esq., and Timothy L. Schroer, Esq., Hogan & Hartson L.L.P., for the protester.

Douglas L. Patin, Esq., Spriggs & Hollingsworth, for The CDM Group, Inc., an intervenor.

Mike Colvin, Department of Health and Human Services, for the agency.

Christine F. Davis, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency did not conduct misleading discussions, where the protester unreasonably interpreted agency's remarks in a manner that was inconsistent with the solicitation requirements and reflected a fundamental misunderstanding of those requirements.

DECISION

Nova Research Co. protests the rejection of its proposal and the award of a contract to The CDM Group, Inc., under request for proposals (RFP) No. CSAT-95-0013, issued by the Department of Health and Human Services (HHS), Center for Substance Abuse Treatment (CSAT), for the development of substance abuse treatment protocols. Nova contends, among other things, that CSAT misled it during discussions, causing Nova to introduce a material deficiency into its otherwise acceptable proposal.

We deny the protest.

The RFP contemplated the award of a 4-year, cost reimbursement contract. The primary purpose of the contract is the development of Treatment Improvement Protocols (TIP), which are clinical and management guidelines for the treatment of substance abuse. The TIP guidelines are developed with the assistance of clinical, administrative, and research experts assembled by the contractor. The TIPs are ultimately used by various state agencies to improve their substance abuse treatment services. Individual TIPs under the predecessor contract ranged in length from 75 to 275 pages and covered topics such as "Pregnant Substance-Abusing Women" and "State Methadone Treatment Guidelines."

The statement of work (SOW) divided the contract effort into 18 tasks. Task Nos. 3 through 9 related to the primary contract objective of developing the TIPs. The contractor begins the TIP process by assembling an Advisory Committee of experts, who generate TIP topics. The RFP provided that the CSAT Government Project Officer (GPO) would approve approximately four TIP topics per year. For each of the four approved topics, the contractor writes a brief prospectus of the proposed TIP and then convenes a Resource Panel composed of federal agency representatives, who critique the prospectus and nominate experts for the consensus panel.

Under Task No. 7, the contractor convenes a consensus panel, composed of roughly 15 experts who meet for up to 5 days, "[f]or each of the approximately four (4) TIP topics per year." The consensus panel develops the TIP guidelines and drafts chapters or sections for use in the TIP document. Under Task No. 8, the contractor must "[p]roduce TIP for publication by the Government Printing Office." The RFP forecast that publication of the TIP would take at least 5 months after the consensus panel adjourned, considering the time needed to complete the writing and editorial work to produce a draft TIP document, to circulate the draft document among "field reviewers" and Panel members for review and revision, to gain content-clearance from CSAT, and to prepare a camera-ready copy for publication. After the TIP is published, Task No. 9 contains a requirement for evaluating its usefulness.

The RFP established a best value evaluation scheme, in which technical quality was of "paramount" importance. The RFP established five technical evaluation criteria and corresponding point-scores, as follows: (1) Understanding the Problem -- 25 points; (2) Technical Approach -- 25 points; (3) Management Plan -- 20 points; (4) Key Personnel -- 25 points; and (5) Facilities -- 5 points.

The agency received six initial proposals by the May 15 receipt date, including Nova's and CDM's. Nova's low-cost proposal (\$3.74 million) received the fourth-best technical score (87 points), while CDM's next low-cost proposal (\$3.99 million) received the second best technical score (92.8 points). CSAT included Nova's, CDM's, and three other proposals in the competitive range.

Nova, along with other offerors, proposed a constant level of effort over the 4 contract years. In its pre-negotiation memorandum, the agency questioned the validity of this approach because the new contractor would not assume any unfinished TIPs from the prior contractor and "there will unlikely be documents completed for publication in the first twelve months" of the new contract. On August 9, the GPO and contract specialist held oral discussions with Nova and raised the concern noted in the pre-negotiation memorandum. Nova's contemporaneous notes attribute the following remarks to the GPO: "Not inheriting any work from past contractor and no TIPs in Year 1." Nova's discussion notes also

reflect that it was informed that its editorial and writing staff was "not needed as much in Year 1." The agency has no contemporaneous notes of the oral discussions with Nova or any other offeror.

Nova submitted its best and final offer (BAFO) on August 18. Nova's BAFO reflected an assumption that "there will be no TIPs produced in Year 1 and, therefore, no Consensus Panel Meetings held in Year 1." Based upon this assumption, Nova eliminated the four consensus panel meetings in the first contract year. Nova's initial proposal, which introduced the consensus panels in the first year, offered 16 consensus panels over the life of the contract; Nova's BAFO, which introduced the consensus panels in the second year, offered twelve consensus panels over the life of the contract. Nova's BAFO also reduced or eliminated various contractor support services associated with the consensus panels in the first year, resulting in a 37-percent reduction in its first-year direct labor costs. Overall, NOVA's BAFO cost was \$2.99 million, which was 20 percent less than its initial proposal cost and 23 percent less than CDM's next low BAFO cost of \$3.9 million.

On September 12, CSAT found Nova's BAFO technically unacceptable because the deletion of the consensus panels in the first contract year constituted "a material deviation from . . . Task 7 of the solicitation." In the agency's view, the deletion of this "important task integral to this project" rendered Nova's technical proposal unacceptable and its costs unrealistically low. The agency decided it was not required to reopen discussions to allow Nova to correct the deficiency introduced into its BAFO. In particular, the agency found that the GPO's advice during oral discussions was not misleading, but was misinterpreted by Nova as unreasonable. CSAT denied telling Nova that "no TIPs would be produced or that no TIPs topics would be introduced" to the consensus panels in the first year, as Nova mistakenly assumed in its BAFO. The agency maintained that it alerted Nova to the improbability that any TIPs would be "published" during the first year. CSAT noted that other offerors had received the same advice as Nova, but only Nova misinterpreted the advice.

Nova protests that it would not have eliminated the first year consensus panels absent CSAT's assertedly misleading discussions. Nova claims, relying upon its contemporaneous notes, that the GPO said there would be "no TIPs in Year 1" and argues that it reasonably interpreted this remark to mean that "there will be no TIPs produced in Year 1 and, therefore, no consensus panel Meetings held in Year 1." Nova denies it was informed by the GPO that there would be no TIPs "published" in the first year, although Nova contends that even this advice might have misled a reasonable offeror to delete the consensus panels.

We find that, whether the GPO advised the protester that there will be "no TIPs in Year 1" or "no TIPs published in Year 1," Nova could not reasonably interpret this advice to mean that it could eliminate the consensus panels in the first year. In our

view, the protester's interpretation of the GPO's remarks reflects a fundamental misunderstanding of the solicitation requirements.

Task No. 7 of the SOW expressly stated, "[f]or each of approximately four (4) TIP topics per year, contractor will convene a [Consensus] panel." Nova argues, however, that the GPO's remark that there would be no TIPs in the first year logically means that there would be no consensus panels in the first year, since, in Nova's view, the consensus panels "actually will write the draft TIP" and "are convened only in the very latest stages of producing a TIP." This misstates the TIP process and the role of the consensus panels within it. The RFP delivery schedule estimates that the consensus panels would be convened during the final quarter of the first year and that publication of the TIP would take at least 5 months after a consensus panel adjourns. During this time, pursuant to Task No. 8 of the SOW, the contractor's staff "produce[s] a draft copy of the TIP," circulates it among field reviewers and Panel members for review and revision, gains content-clearance from CSAT, and prepares a camera-ready copy. The RFP delivery schedule estimates that the contractor would publish the TIPs during the first quarter of the second year. However, to remain on schedule, the contractor must convene the consensus panels in the first year. The protester's stated belief that the consensus panels are convened in the very latest stage of producing a TIP is belied not only by the SOW and the RFP delivery schedule, but also by Nova's initial proposal, which provides that Nova will spend two months after a consensus panel adjourns developing a draft TIP document.

Even accepting the protester's recollection of discussions, the statement--"no TIPs in Year 1"--does not address or affect the consensus panel requirements contained in Task No. 7, requiring the contractor to convene a consensus panel for each of approximately four TIP topics per year. On the contrary, the GPO's alleged statement--"no TIPs in Year 1"--rationally relates to the requirements contained in Task No. 8, which requires the contractor to "produce [the] TIP for publication." Had the protester properly understood the RFP requirements, it could not have interpreted the GPO's remarks in the manner which it did.¹

¹Nova claims that it asked the GPO during the oral discussions to elaborate what she meant by the statement--"no TIPs in Year 1"--but the GPO declined to do so. Although we find that Nova should not reasonably have been misled by the GPO's statement, we think the agency should have explained its statement in response to Nova's requested clarification. Although discussions need not be all-encompassing to be meaningful, they should be as specific as practical considerations will permit. SRS Technologies, B-254425.2, Sept. 14, 1994, 94-2 CPD ¶ 125; Son's Quality Food Co., B-244528.2, Nov. 4, 1991, 91-2 CDP ¶ 424.

We also do not agree with Nova that the RFP, by stating "approximately four" consensus panels would be convened per year, authorized the contractor to propose no consensus panels in a given year. Although the RFP contemplates that the contractor might convene more or less than four annual consensus panels depending upon the agency's needs and the contractor's performance, a proposal like Nova's, which eliminates the work necessary to meet anticipated annual requirements, is patently inconsistent with the RFP requirements. We note that the RFP's estimated requirements are for 16 consensus panels and thus 16 TIPs over the life of the contract. Nova's BAFO, by eliminating the first-year consensus panels, provides for only 12 TIPs over the life of the contract.

Discussions, when they are conducted, must be meaningful and must not prejudicially mislead offerors. See Federal Acquisition Regulation § 15.610(c); Aydin Vector Div., B-243430, July 22, 1991, 91-2 CPD ¶ 79. In this case, we find that the oral discussions were not misleading, but that the protester's interpretation of the agency's remarks stemmed from its own misunderstanding of the solicitation requirements. See Peckham Vocational Indus., Inc., B-257100, Aug. 26, 1994, 94-2 CPD ¶ 81; 12th & L Sts. Ltd. Partnership, B-247941.3, Oct. 9, 1992, 92-2 CPD ¶ 233.

Nova's elimination of the first year consensus panels, which was a significant RFP requirement, provided a proper basis for deeming Nova's BAFO technically unacceptable.² See Armament Eng'g Co., B-230204, May 27, 1988, 88-1 CPD ¶ 505. Because Nova introduced the deficiency into its BAFO, the agency was not obligated to reopen discussions to allow Nova to cure it. See id.; ABB Power Co. T & D, Inc., B-246249, Feb. 6, 1992, 92-1 CPD ¶ 157. Although the protester argues that the agency should have reopened discussions when it realized that Nova's understanding of the consensus panel requirements differed from the other offerors', there is no evidence that CSAT treated offerors unequally during discussions. Rather, the record shows that Nova uniquely misinterpreted the agency's advice.

²Nova claims that, instead of finding its proposal technically unacceptable, the agency should have added back the costs of the first year consensus panels in evaluating Nova's probable cost. This argument is without merit. Nova did not propose to convene the first year consensus panels, and the government could not obligate it to do so simply by making probable cost adjustments to its proposal. See Crown Logistics Servs., B-253740, Oct. 19, 1993, 93-2 CPD ¶ 228.

The protester raises numerous other challenges to the agency's evaluation and selection decision. Because we find that Nova's proposal was properly rejected as technically unacceptable, there is no need for our Office to resolve these remaining issues. See PRI, Inc., B-210714, Mar. 26, 1984, 84-1 CPD ¶ 345.

The protest is denied.

Comptroller General
of the United States