DECISION

THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-222364 **DATE:** June 13, 1986

MATTER OF: Mount Pleasant Hospital

DIGEST:

1. An offeror that is requested by the contracting agency to submit a "best and final" offer is responsible for assuring that it submits just such an offer and, thus, has no reason to expect there will be further negotiations after it submits its response.

2. No technical discussions need be held in a negotiated procurement where all the proposals submitted are found to be technically acceptable and contain no technical deficiencies or uncertainties.

3. Protester's objection to the agency's request for best and final price offers because of the possibility that someone in the agency could "leak" the initial price proposals to one of the offerors is based on mere speculation and provides no basis with which to challenge the propriety of the agency's conduct of the procurement.

4. Protest that procurement should have been conducted using sealed bidding instead of negotiation is untimely where it was not raised before the closing date for receipt of initial proposals.

5. Although the protester had the highest point-rated technical proposal, it was not unreasonable for the agency to make an award to another firm to take advantage of the awardee's lower cost proposal since the agency found the awardee's offer as acceptable as the protester's. Notwithstanding the fact that in an overall evaluation scheme price is of less importance than other evaluation criteria, price may

become the determinative consideration in making the award where the proposals are essentially equal technically.

Mount Pleasant Hospital (Mount Pleasant) protests the award of a contract to McLean Hospital under request for proposals (RFP) No. DTFA12-86-R-00007 issued by the Department of Transportation (DOT) for professional counseling services for the employees in the New England Region of the Federal Aviation Administration. We deny the protest in part and dismiss it in part.

DOT received technical and cost proposals from five offerors in response to the RFP. The offerors' technical proposals were evaluated in accordance with the RFP's technical evaluation scheme and all were found to be acceptable since all scored over 70 percent, which DOT determined represented an acceptable score. Because there was only a 7-percent range in the technical point scores, DOT determined that price would be the deciding factor in making the award. After limited discussions with the offerors regarding their cost proposals, DOT orally requested that best and final price offers be submitted in writing, to which all five of the offerors responded. Following a review of the best and final price offers, DOT found that McLean Hospital's price of $27,728 was the lowest. Mount Pleasant, which offered to perform at $28,445, filed its protest with our Office shortly after being notified by DOT of the impending award of a fixed-price contract to McLean Hospital.

Mount Pleasant protests the award without further discussions. The firm points out that at the same time that DOT requested a best and final price offer, the agency also requested an extension of the period for the acceptance of Mount Pleasant's offer. Mount Pleasant states that it sent a letter agreeing to the extension of the acceptance period believing that its technical proposal and its offered price would be discussed in detail during that time. Mount Pleasant emphasizes that it never made an actual best and final price offer because the company thought such an offer could only occur after detailed negotiations of the offeror's technical and cost proposals. According to the protester, it was completely surprised upon being informed shortly after having agreed to an extension of the acceptance period that an award would be made to another offeror.

In addition, Mount Pleasant argues that the agency's entire process of requesting best and final price offers

might have been "flawed" through leaks of the offeror's original proposed prices, in that one offeror likely could have a friend within the agency who would provide price information, thus allowing that offeror to submit a lower final price. Consequently, Mount Pleasant believes that DOT's requirements should be resolicited using a public opening of bids so that the price an offeror submitted at the public opening would be the final price.

Finally, Mount Pleasant questions DOT's method of evaluation for purposes of making an award. The protester points out that it had the highest rated technical proposal, and that the technical score for McLean Hospital's fourth-rated proposal was 10 points (out of a maximum score of 100) lower. Mount Pleasant argues that a 10-point spread in technnical scores should have been considered significant and, therefore, a factor in the award determination. Also, Mount Pleasant notes that McLean Hospital's final price was 20 percent lower than its initial proposed price and objects to the fact that DOT made no attempt to ascertain the impact of the lower final price on the quality of the firm's technical proposal.

DOT disputes Mount Pleasant's argument that the firm could reasonably assume that during the extended period for acceptance of offers, detailed technical and cost discussions would occur. DOT points out that the RFP informed prospective offerors that the government reserved the right to make an award without discussion of the proposals. DOT states that, in any event, some cost discussions were held with Mount Pleasant and the other offerors prior to the request for best and final offers, and that no technical discussions were held with the offerors because all the offeror's proposals were determined to be acceptable.

Further, DOT states that in requesting an extension of the offer acceptance period at the same time best and final offers were requested, it clearly informed all the offerors that the purpose of the request was simply to prevent the offers from expiring while the final evaluation for purposes of award could be made. As to Mount Pleasant's argument that DOT should have ascertained how McLean Hospital's best and final price offer affected McLean Hospital's technical proposal, DOT points out that it specifically informed each offeror that its best and final price offer was to be based on the initially submitted technical proposals, which DOT had found to be acceptable. DOT further points out in responding to the request for best and final price offers, no offeror advised the agency that its technical proposal was changed.

We do not believe Mount Pleasant's expectation that there would be technical and cost discussions after DOT's request for a best and final offer because the offer acceptance period also had to be extended was reasonable. It is inherent in a request to submit a "best and final" offer (Mount Pleasant does not deny that such a request was made by DOT here) that the offeror is responsible for assuring that it submits just such an offer and should not expect any further discussions once it has made a submission. Weinschel Engineering Co., Inc., 64 Comp. Gen. 524 (1985), 85-1 C.P.D. ¶ 574.

In any event, the record shows that cost discussions already had been conducted with Mount Pleasant. In DOT's evaluation of the hospital's initial proposed price of $52,595, it appeared that Mount Pleasant had submitted a price based on a longer period of performance time than that required by the RFP. Upon contacting Mount Pleasant about this, DOT discovered that the hospital had not understood the terms of the RFP's provision covering the option to extend the term of the contract. After being informed of the error, Mount Pleasant changed its price offer to $28,445. Thus, Mount Pleasant in fact was given the chance to revise its price offer. See National Veterans Law Center, 60 Comp. Gen. 223 (1981), 81-1 C.P.D. ¶ 58.

With respect to the fact that no technical discussions were held with Mount Pleasant or any of the other offerors during the course of the procurement, there were no technical deficiencies or uncertainties in any of the proposals that warranted discussions, since they all were found acceptable and none were found to be technically superior. Moreover, we have held that a request for best and final offers itself constitutes appropriate discussions where a proposal contains no technical uncertainties. Information Management, Inc., B-212358, Jan. 17, 1984, 84-1 C.P.D. ¶ 76.

Turning to Mount Pleasant's argument that there could have been leaks of the offerors' originally proposed prices during the process of obtaining best and final price offers, the Federal Acquisition Regulation (FAR), 48 C.F.R. § 15.413 (1984), specifically prohibits the disclosure of any proposal information prior to award. Mount Pleasant does not allege that there has been any actual disclosure of price information, but instead merely speculates that the confidentiality of the offerors' prices might have been compromised during the request for best and final offers. Our Office will not sustain a protest that

is based on pure speculation. R. P. Sita, Inc., B-217027, Jan. 14, 1985, 85-1 C.P.D. ¶ 39.

Mount Pleasant, in arguing that there should have been a public opening of price offers to prevent the possibility of an improper disclosure of prices, essentially is arguing for use of the sealed bidding procurement method, in which there is a public opening of bids. See FAR, 48 C.F.R. § 14.402 (1984). Here, the solicitation clearly indicated that the required services were to be obtained by negotiation, in which, as stated above, technical and cost information cannot be disclosed prior to award. We therefore dismiss Mount Pleasant's protest on this issue as untimely since it was raised after the procurement was completed. Under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1986), protests based upon alleged improprieties in a negotiated solicitation which are apparent prior to the closing date for receipt of initial proposals must be filed before that date.

Finally, we find no merit to the protester's contention that the 10-point difference between its technical score and McLean Hospital's technical score should have led to award to Mount Pleasant. We recognize that the RFP did provide that while award would be made to the offeror who could perform the contract in a manner most advantageous to the government, award would also be influenced by the proposal that promised the most value in terms of performance and technical competence rather than by the lowest price. Nevertheless, although technical point ratings are useful guides for intelligent decisionmaking in determining technical superiority, the particular facts and circumstances of each procurement dictate whether a given point spread between two competing proposals reveals a significant superiority of one over the other to justify award at the higher price. Lockheed Corp., B-199741.2, July 31, 1981, 81-2 C.P.D. ¶ 71. In this regard, we have upheld agency determinations that technical proposals were essentially equal despite an evaluation point-score differential of as much as 15.8 percent. See Wheeler Industries, Inc., B-193883, July 20, 1979, 79-2 C.P.D. ¶ 41.

As stated above, the Veterans Administration not only found all technical offers acceptable, but also determined that the range from the highest rated proposal to the lowest rated one--7 percent--was insignificant in terms of technical superiority. The protester, other than arguing that a 10-point difference should, as a general matter, be viewed as significant, proffers no substantive evidence to

show why it should have been found significant here. In these circumstances, we have no legal basis to conclude that it was unreasonable per se for DOT to decide to make an award to McLean Hospital to take advantage of that offeror's low price. When technical proposals are deemed to be essentially equal, price properly becomes the controlling factor in making an award notwithstanding the fact that in the overall evaluation scheme, price was of less importance than other evaluation criteria. Lockheed Corp., B-199741.2, supra.

The protest is denied in part and dismissed in part.

for Seymour Efros
Harry R. Van Cleve
General Counsel