

Arsenoff



The Comptroller General  
of the United States

Washington, D.C. 20548

# Decision

**Matter of:** United HealthServ Inc.

**File:** B-232640; B-232642; B-232643

**Date:** January 18, 1989

## DIGEST

1. Agency was under no obligation to consider that awardee might be proposing to use employees of the protester since the solicitation did not require offerors to identify specific individuals in their proposals and, in any event, offerors are not precluded from proposing to hire employees of other concerns.

2. Record indicates that agency acted reasonably in concluding that awardees' proposed staffing levels were in line with government estimates and therefore acceptable.

3. There is no legal basis for concluding that awards to firms submitting lower prices than the protester were improper or that awardees could not meet their contractual obligations to pay wages at rates determined pursuant to the Service Contract Act of 1965, as amended.

4. Protester's objection to the agency's evaluation of the credentials of the awardee's proposed Director of Housekeeping is without merit since the solicitation provisions concerning qualifications for that position were contract performance requirements and not preconditions to award as alleged; accordingly, whether the awardee satisfies the requirements is a matter of contract administration which the General Accounting Office will not review.

5. There is no indication that the agency participated in any alleged misuse of the protester's proprietary data by the awardee; accordingly, the protester's allegation concerning such misuse is a private dispute appropriate for resolution by the courts.

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## DECISION

United HealthServ Inc. protests the award of three fixed-price contracts under request for proposals (RFP) Nos. F33600-88-R-0072, 0074 and 0076, issued by the United States Air Force to obtain Hospital Aseptic Management System (HAMS) services at the Air Force Academy Hospital, the Keesler Air Force Base Hospital and at the Joint Military Medical Command hospitals. The protester alleges that the evaluation of proposals was defective.

We deny the protests.

The solicitations were issued on March 1, 1988, and were identical except for the particular work requirements of each hospital involved--matters which are not at issue. According to each solicitation, award was to be made to the lowest priced, technically acceptable offeror. Proposals were to be reviewed by a technical evaluation panel to determine whether or not they were acceptable based on six evaluation factors: corporate experience; quality program; staffing and scheduling methodologies; corporate management support; training program; and supplies and equipment. The RFPs did not contemplate any relative ranking of acceptable offers--only a determination of technical acceptability or unacceptability with respect to each offeror. Resulting contracts were subject to wage determinations issued pursuant to the Service Contract Act of 1965, as amended (SCA). 41 U.S.C. §§ 351 et seq. (1982).

Initial proposals were received on May 2 and reviewed by the technical evaluation panel which found all of the nine offers received to be technically acceptable. Clarification requests were issued on May 18 and best and final offers (BAFOs) were received on June 28. The technical panel reviewed the BAFOs and determined that all offers remained technically acceptable. On September 8, contracts were awarded under RFPs 0072 and 0074 to Hospital Housekeepers of America, Inc. for HAMS services at the Air Force Academy and Keesler. Hospital Housekeepers was the low offeror under each RFP--its price for the Academy was \$2,131,260, compared to the protester's offer of \$2,245,542; its price for Keesler was \$6,225,780, compared to the protester's offer of \$7,528,912. On September 9, a contract was awarded under RFP 0076 to Marriott Facilities Management Corporation for HAMS services at the Joint Military Medical Command hospitals. Marriott was the low offeror at \$28,735,638, while the protester's offer was \$32,343,147. The protests were filed on September 16; on September 26, the Air Force determined that the awardees' continued performance

notwithstanding the protests was in the government's best interests pursuant to 31 U.S.C. § 3553(d)(2)(A)(i) (Supp. IV 1986).

#### Awards to Hospital Housekeepers

United's protests of the awards to Hospital Housekeepers are premised on three arguments. First, the protester alleges that Hospital Housekeepers based its offers on the proposed use of managerial personnel then-currently employed by United under contractual agreements which were known to the agency and which precluded the individuals from working for the awardee; accordingly, it is argued that the Air Force erred in its evaluation of the awardee's proposals by failing to verify the firm's ability to use the employees it proposed. Next, the protester maintains that the Air Force overlooked Hospital Housekeepers' proposed staffing levels to perform the contracts, which the protester regards as insufficient. As a benchmark, the protester mentions, but does not detail, staffing levels allegedly disclosed to it in the past as being acceptable by Air Force officials, presumably in the course of its performance as the incumbent contractor for HAMS services or in connection with some previous HAMS procurement. Finally, United alleges that Hospital Housekeepers' prices were so low that, in the protester's estimation, the awardee cannot be paying the required SCA wage rates.

In response, the Air Force states that Hospital Housekeepers has, in fact, staffed its contracts with qualified personnel, and notes that this was all that was required by the RFPs; further, the agency argues that, even if the awardee had proposed to hire individuals then-currently employed by the protester, this would not be a legal impediment to the awards. Next, the agency submits that its technical evaluators examined the staffing levels proposed by Hospital Housekeepers and determined them to be acceptable in comparison to the government's own staffing estimates. Finally, the Air Force states that it has no evidence that the awardee is not paying its employees the required SCA wage rates and argues that, should any such problems occur in the future, they would be matters of contract administration.

At the outset, we note that it is not the function of this Office to evaluate technical proposals. Rather, we will examine an agency's evaluation only to insure that it was fair and reasonable and consistent with the evaluation criteria stated in the RFP. The determination of the merits of proposals, particularly with regard to technical considerations, is primarily a matter of administrative

discretion which we will not disturb unless it is shown to be arbitrary. Systems & Processes Engineering Corp., B-232100, Nov. 15, 1988, 88-2 CPD ¶ 478. A protester's disagreement with the agency's judgment is itself not sufficient to establish that the agency acted arbitrarily. Instruments & Controls Service Co., B-230799, June 6, 1988, 88-1 CPD ¶ 531.

The protester's first argument--that the Air Force erred in its technical evaluation of Hospital Housekeepers' proposals because the agency knew that they were premised on the use of specific individuals who would be unavailable to perform because of their employment with United--is based on the inaccurate assumption that offerors were required to, and that the awardee did, in fact, propose the use of specific individuals when offers were submitted. The RFPs did not require offerors to identify individuals they proposed to employ prior to award, nor did they indicate that proposals would be evaluated on this basis. While the protester states that its proposals identified specific individuals, since this was neither an RFP requirement nor a listed evaluation factor, and since it does not appear that the awardee's proposals contained any references to specific individuals, there is no basis to object to the agency's evaluation as suggested by the protester.

Moreover, even if it had been shown that the awardee proposed to hire the protester's employees, this would not have constituted a valid basis for the rejection of its proposals since offerors are not precluded under procurement law principles from proposing to hire employees of other concerns and since disputes arising from allegedly conflicting employment commitments are matters for resolution by the courts, not by this Office. See Ling Electronics, Inc., B-194590, July 20, 1979, 79-2 CPD ¶ 46. Finally in this regard, to the extent that the protests may be viewed as challenging the agency's assessments that Hospital Housekeepers could perform the contracts, they relate to affirmative determinations of responsibility which we will not review absent a showing of possible agency fraud or bad faith or the alleged failure to properly apply definitive evaluation criteria. Bid Protest Regulations, 4 C.F.R. § 21.3(m)(5) (1988); ALM, Inc., B-225679.3, May 8, 1987, 87-1 CPD ¶ 493. The protester has not suggested that either circumstance applies concerning this issue and we find nothing to the contrary in the record. We note that, according to the Air Force, the awardee has been performing with qualified personnel.

Likewise, the protester's second argument--that the agency overlooked inadequacies in Hospital Housekeepers' proposed

staffing levels--is not supported by the record. While the adequacy of staffing approaches was included within a factor for evaluation, the RFPs did not specify any minimum acceptable levels. The agency did, however, develop its own estimates regarding the number of full time equivalents (FTEs) appropriate to successful performance at each hospital. Our comparison of the FTE levels contained in the awardee's proposals to the government's estimates discloses no basis to object to the reasonableness of the Air Force's conclusion that the proposals were in line with agency estimates and therefore acceptable.

The protester's third argument--that Hospital Housekeepers' low prices preclude the discharge of its obligation to pay SCA wage rates--is also unconvincing. In the face of similar challenges, we have held that there was no legal basis to object to even a below-cost award if the offeror was otherwise responsible. See State Technical Institute at Memphis, B-229695 et al., Feb. 10, 1988, 67 Comp. Gen. \_\_\_\_\_, 88-1 CPD ¶ 135; Grace Industries, Inc., B-212263.3, Feb. 22, 1984, 84-1 CPD ¶ 212. Here, we have been presented with nothing more than the protester's opinion concerning the potential inability of the awardee to adequately perform at the awarded prices. Since there is no basis upon which to question the agency's determinations of Hospital Housekeepers' responsibility, and in view of the fact that the contracts will require the firm to pay the wages and benefits contained in the applicable SCA wage determinations, we have no basis upon which to object to the evaluations and awards.

#### Award to Marriott

At the outset, we note that the protester has repeated two of its objections to the Hospital Housekeeper awards in its protest concerning the award to Marriott--it is alleged that Marriott's staffing levels were unacceptably low and that its price precluded payment of SCA wage rates. We have reviewed the evaluation record as it pertains to Marriott and, for the same general reasons discussed above, these aspects of the protests against the award to Marriott are also denied.

Two arguments remain with respect to the agency's evaluation of Marriott's proposal. First, the protester alleges that Marriott proposed an individual for the position of Director of Housekeeping who did not meet the experience and education requirements contained in the RFP's Performance Work Statement (PWS). Second, the protester suggests that Marriott may have used materials which were allegedly proprietary to United in the preparation of its proposal and

argues that the Air Force erred in awarding a contract which it knew Marriott could not legally perform.

The Air Force initially reported that Marriott had submitted a certification of experience and education for an individual submitted as Director of Housekeeping and, as of the time the agency submitted its report to this Office, that the certification was being evaluated consonant with the terms of the awardee's contract. We have since been advised by the agency that the credentials of another individual were submitted by the awardee and that he began his employment at the beginning of November. The agency argues that whether or not any individual proposed by Marriott meets the contract requirements is a matter of contract administration. With regard to the protester's second allegation--concerning Marriott's alleged use of data proprietary to United--the Air Force states that it has no evidence of any such use and that, in any event, private disputes over the alleged misuse of such data are matters appropriate for resolution by the courts.

In its comments on the agency report, United argues that the agency's admission that it was still evaluating the credentials of an individual identified as Director of Housekeeping by the awardee indicates that the evaluation was improperly conducted as all such matters were to be resolved prior to award; further, it is suggested that Marriott's offer was unacceptable for failure to meet the RFP's qualification requirements or that the awardee could be viewed as nonresponsible for failure to adequately address those requirements. With respect to the proprietary data issue, the protester maintains that it is in no position to verify the assertion that the agency has no evidence on the matter, and requests that we review the evaluation and scoring materials submitted to this Office to determine whether there is any mention of Marriott's proposal containing items or data found in the protester's proposal.

United's argument that the Air Force improperly evaluated Marriott's proposal with respect to whether the awardee's proposed Director of Housekeeping met the specific experience and education requirements contained in the PWS is misplaced. The PWS defines how and by whom the contract work is to be performed. Contrary to the basic premise of the protester's argument, the provisions concerning the qualifications of the Director of Housekeeping relate to duties of the "contractor"; they do not provide that all offerors must address the requirements in their proposals. The qualification provisions thus are a part of the contract

performance provisions rather than preconditions to award. Motorola Communications and Electronics, Inc., B-225613, Jan. 27, 1987, 87-1 CPD ¶ 91. In fact, the solicitation does not contain an evaluation factor which measured the relative qualifications of the Director of Housekeeping. By submitting a proposal that took no exception to the requirements of the RFP, Marriott obligated itself to provide a Director of Housekeeping with the required qualifications. Its proposal was therefore acceptable for award in this regard.<sup>1/</sup> Whether Marriott actually performs under its contract with an individual possessing the qualifications set forth in the PWS is a matter of contract administration which we will not review. Id. Finally, with respect to the protester's suggestions that Marriott's proposal was unacceptable or that the awardee was nonresponsible in that it failed to comply with a definitive responsibility criterion for allegedly failing to propose a qualified Director of Housekeeping, we note that the contract performance requirements contained in the PWS are matters separate and distinct from the types of considerations mentioned by United--which are preconditions to award. See Johnson Controls, Inc., B-200446, Feb. 20, 1981, 81-1 CPD ¶ 120.

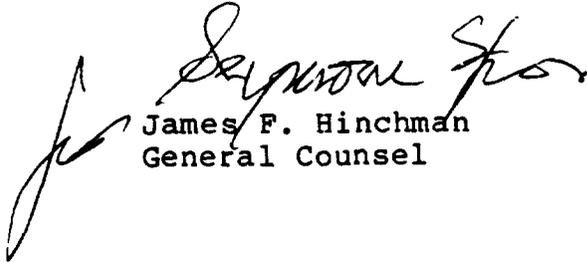
Regarding the issue concerning proprietary data, our review of the evaluation and scoring materials as requested by the protester does not disclose any mention of Marriott's proposal containing information or data found in the protester's proposal, much less any indication that the agency was aware that United's proprietary data may have been misused. Since the record contains no evidence that the agency played any role whatsoever in any alleged misuse of proprietary data, this complaint is nothing more than a potential dispute between private parties, appropriate for

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<sup>1/</sup> The protester cites our decision in Maschoff, Barr & Assocs., B-228490, Jan. 26, 1988, 88-1 CPD ¶ 77, for the proposition that awards should not be based on unverified promises to comply with RFP requirements. That case is distinguishable because it involved the insufficiency of an unsupported blanket offer of compliance with an RFP staffing requirement which was to be evaluated in making the award decision; here, the employee qualifications questioned by United were not contained in a listed evaluation factor. Moreover, Maschoff involved a circumstance where the protester's proposal in essence took exception to an RFP requirement; Marriott's proposal took no such exception.

resolution by the courts, not by our Office. Gallegos  
Research Group, B-227037, May 8, 1987, 87-1 CPD ¶ 496.

The protests are denied.



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General Counsel