Ahearn

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Empire State Medical, Scientific and Educational Foundation, Inc.

File: B-238012

Date: March 29, 1990

Gerald H. Werfel, Esq., Arent, Fox, Kintner, Plotkin & Kahn, for the protester.
Kenneth B. Weckstein, Esq., Epstein, Becker & Green, P.C., for Island Peer Review Organization, an interested party.
Sharon M. Johnson, Esq., and Lloyd M. Weinerman, Esq., Office of the General Counsel, Department of Health and Human Services, for the agency.
M. Penny Ahearn, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging evaluation preference given to awardee's proposal is denied where, even if protester is correct that awardee should not have received the 100 point evaluation preference, protester was not prejudiced since protester's evaluation score still would be 225 points lower than awardee's; in any case, record indicates agency reasonably relied on awardee's representation that it was a physician-sponsored organization entitled to the evaluation preference.

2. Protest that agency failed to investigate alleged disclosure of proprietary information by protester's former employees to competitor during the course of a procurement as a violation of procurement integrity legislation, i.e., section 27(c) of the Office of Federal Procurement Policy Act, is denied since the Act (which currently is suspended) does not cover the type of disclosure alleged and, in any case, the record contains no evidence to show any improper disclosure.

DECISION

Empire State Medical, Scientific and Educational Foundation, Inc. (Foundation), the incumbent contractor, protests the

award of a contract to the Island Peer Review Organization (IPRO) under request for proposals (RFP) No. HCFA-89-076-PG, issued by the Department of Health and Human Services (HHS), for medical peer review services for the State of New York.1/ The protester contends that the agency improperly evaluated the awardee's proposal and failed to investigate a possible procurement integrity violation.2/

We deny the protest.

The RFP contemplated the award of a fixed-price contract to the responsible offeror whose proposal, conforming to the solicitation, was determined most advantageous to the government in terms of technical merit, cost, and other factors. With regard to the technical evaluation criteria, offerors were advised that technical merit and price would be approximately equal in weight and that only physician-sponsored or physician-access organizations would be eligible for award. An offeror demonstrating qualification as a physician-sponsored organization would receive 100 technical bonus points, as allowed by the agency's regulations. See 42 C.F.R. § 462.102 (1988).

Only Foundation and IPRO submitted offers in response to the RFP. Initially, each proposal was determined to be technically unacceptable, but susceptible of being made acceptable. After two rounds of discussions and evaluation of best and final offers, the evaluation panel determined that the awardee's proposal, with a technical score of 1,117, was technically acceptable, but that Foundation's proposal, with a score of 792, remained "unacceptable, but capable of being made acceptable." Additionally, IPRO's offered price, $50,073,171, was lower than Foundation's

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1/ Peer review organizations review both the quality and utilization of health care resources and services which are provided to Medicare beneficiaries.

2/ The protester's second protest on this procurement, contesting the evaluation of its own proposal, was dismissed by our Office as untimely in Empire State Medical, Scientific and Educational Foundation, Inc., B-238012.2, Mar. 9, 1990, 90-1 CPD ¶ ___.

price of $56,434,724. Award was made to IPRO based on its superior technical proposal and low price.3/

Foundation argues that HHS improperly awarded IPRO the 100 bonus points available for physician-sponsored organizations. An organization was to be considered physician-sponsored if it included 20 percent of the physicians practicing in the review area (or if it demonstrated through other means that it was representative of the review area). Foundation maintains that IPRO's proposal showing at least 20 percent membership was based on an understatement of the total number of physicians practicing in New York State, the review area, and that its membership in fact constitutes less than 20 percent of the correct number of physicians; IPRO therefore should not have received the 100 point bonus.

Foundation's argument does not provide a basis for sustaining the protest. Prejudice is an essential element of a viable protest, and where it is alleged that an award was based on a deficient evaluation, we will not disturb the award where no prejudice from the alleged deficiency is shown or otherwise evident. See American Mutual Protective Bureau, Inc., B-229967, Jan. 22, 1988, 88-1 CPD ¶ 65. We agree with the agency that the protester has not shown, and that it is not otherwise evident, that Foundation was prejudiced by the awarding of bonus points to IPRO. In this regard, even if IPRO had not received the 100 point evaluation preference, the firm's proposal still would be rated 225 points higher and be priced $6,350,301 lower than Foundation's proposal. As the alleged evaluation deficiency, therefore, did not result in an award that otherwise would not have been made, this argument provides no basis for disturbing the award.

In any event, the record indicates that the agency reasonably relied on IPRO's representation that it was a physician-sponsored organization entitled to the evaluation preference. An agency may reasonably rely on an offeror's representations to the effect that it is a physician-sponsored organization, and therefore is entitled to an evaluation preference contained in an RFP, unless there is reason to believe the representations are inaccurate. Medical Care Dev., B-235299, Aug. 17, 1989, 89-2 CPD ¶ 149.

3/ Although the agency now contends that Foundation's proposal was technically unacceptable, the summary of negotiations in the contract file states that "it was determined that both proposals should be included in the competitive range."

Here, IPRO's proposal indicated that the number of New York State practicing physicians used in the firm's 20 percent calculation was obtained from the 1988 to 1989 volume of the Medical Directory of New York State. Although Foundation's proposal indicated a higher number of New York State practicing physicians, thus presenting HHS with an inconsistency in the two proposals, its proposal, unlike IPRO's, did not indicate the authority for the number used. It thus appears HHS had no reason to question IPRO's representation that it qualified as a physician-sponsored organization.

Foundation further complains that IPRO's superior rating under the quality review criterion may have resulted from the firm's access to proprietary information concerning Foundation's method of operation. The protester speculates that information in this regard was disclosed to IPRO by two former Foundation employees, now employed by IPRO. The protester believes the alleged disclosure may have violated procurement integrity legislation, i.e., section 27(c) of the Office of Federal Procurement Policy Act, 41 U.S.C.A. § 423(c) (West Supp. 1989). Foundation included this allegation in its proposal, and complains that the agency improperly failed to review the allegation for possible further action, as required under Federal Acquisition Regulation (FAR) § 3.104-11.

We find no basis for this argument, since the alleged disclosure here is not of a type covered by the statute. 4/ The Act prohibits the disclosure of proprietary procurement information to any person other than those authorized by the head of the agency or contracting officer to receive such information. 41 U.S.C.A. § 423(c). However, proprietary information is defined as information in a bid or proposal, cost or pricing data, or any other information submitted to the government by a contractor and designated as proprietary. 41 U.S.C.A. § 423(n)(6); FAR § 3.104-4(j). As the proprietary information here allegedly was disclosed by former employees, and not from documents submitted to the government, there was no apparent violation of the Act that obligated the contracting officer to investigate the matter. Rather, this allegation concerns a dispute between private parties, over which our Office does not take

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4/ We note that although section 27 of the Act was in effect under this solicitation, that provision and its implementing regulations were suspended for 1 year as of December 1, 1989. Ethics Reform Act of 1989, Pub. L. No. 101-94, § 507, 103 Stat. 1716, 1759 (1989), 54 Fed. Reg. 50,718 (1989), effective December 1, 1989; see also Harsco Corp., B-236777, Dec. 13, 1989, 89-2 CPD ¶ 551.

jurisdiction; such matters are for resolution by the courts, if necessary. Sublette Elec., Inc., B-232586, Nov. 30, 1988, 88-2 CPD ¶ 540. (In fact, there is no evidence in the record supporting Foundation's speculation that information concerning the company's proposal was released by any party; the former employees in question have submitted affidavits denying that they disclosed any proprietary information concerning Foundation or were involved in preparing IPRO's proposal.)

The protest is denied.

James F. Hinchman
General Counsel