



Comptroller General  
of the United States

Washington, D.C. 20543

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## Decision

**Matter of:** National Medical Staffing, Inc.

**File:** B-259402; B-259402.2

**Date:** March 24, 1995

Dr. Gloria M. Bertacchi for the protester,  
C. Joseph Carroll, Esq., U.S. Department of Justice, Federal  
Bureau of Prisons, for the agency.

Susan K. McAuliffe, Esq., and Michael R. Golden, Esq.,  
Office of the General Counsel, GAO, participated in the  
preparation of the decision.

### DIGEST

Agency did not conduct meaningful and equal discussions where it failed to advise the protester during discussions of the noted weakness in the protester's proposal but advised two other offerors of the same weakness in their proposals.

### DECISION

National Medical Staffing, Inc. (NMS) protests the award of a contract to Surgical Staff, Inc. (SSI) by the U.S. Department of Justice, Federal Bureau of Prisons, under request for proposals (RFP) No. 122-0057 for X-ray technician services at the Federal Correctional Institution, Dublin, California. NMS contends that it was prejudiced by the agency's improper unequal discussions.

We sustain the protest.

The RFP, issued on August 30, 1994, contemplates the award of a firm, fixed-price contract for the provision of X-ray technician services through September 30, 1995. The RFP provides the following technical evaluation factors for award: professional qualifications (30 points), experience (20 points), and correctional or related experience/ability to work with inmates (10 points). Under the RFP's evaluation scheme, price is worth 40 points of the available total of 100 evaluation points.

Three proposals were received by the September 29 closing date. Written discussions were held with all three offerors by letters of October 4 and revised proposals were to be submitted by October 18. During discussions, the protester was told only that its proposal was within the competitive range, but that the price offered was higher than the government estimate; SSI was told that its proposal failed to include sufficient information regarding price, professional qualifications, experience, and correctional or related experience/ability to work with inmates; and the third offeror was advised that no correctional or related experience/ability to work with inmates was noted in its proposal.

After evaluation of revised proposals, only the NMS and SSI proposals remained in the competitive range. Best and final offers (BAFOs) were submitted by the two firms and were evaluated. SSI's BAFO received a total technical point score of 60 and NMS' BAFO received a score of 42. Under the correctional or related experience/ability to work with inmates evaluation factor, SSI's BAFO received the total 10 points available and NMS' BAFO received 0 points. SSI's BAFO received 25 points under the price evaluation factor; NMS' BAFO, the low-priced offer, received the maximum 40 points available under the price evaluation factor. SSI's BAFO's total (technical and price) evaluation point score was 85; NMS' BAFO's total score was 82. SSI, the incumbent contractor, was awarded a contract at its proposed total price of \$40,800 on November 4. By letter of November 7, NMS was notified of the award. The award notice sent to NMS stated that:

"[NMS was] not selected because the individual [NMS] selected for the . . . [t]echnical [e]valuation [p]anel to evaluate did not receive the highest maximum points on the technical evaluation criteria. [The individual] lacked correctional or related experience."

On November 16, following a debriefing by facsimile transmission from the agency the same day, which cited the weakness in the protester's proposal "in the area of correctional experience," NMS filed a protest with our Office objecting to the agency's failure to evaluate all of the individuals proposed by the protester for the position. In its comments on the agency's report on the

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<sup>1</sup>The agency has submitted its evaluation work sheets which demonstrate that the qualifications and experience of each of the protester's six technicians were in fact evaluated. The individual technician identified in the award notice

(continued...)

protest--which included copies of the discussion letters sent to all three offerors--NMS timely supplemented its protest to challenge the propriety of the agency's discussions. NMS contends that the agency held prejudicially unequal discussions since both of the other offerors were advised during discussions that their proposals lacked information demonstrating correctional or related experience/ability to work with inmates, but the protester was not advised of the same noted defect in its own proposal.

The agency contends that NMS was not competitively prejudiced by the agency's discussions with the other offerors. The agency argues that even though SSI was advised during discussions that its proposal lacked information regarding correctional or related experience/ability to work with inmates, the notification to SSI was intended to inform the firm of its failure to provide sufficient information to be evaluated which, the agency contends, is different from notifying SSI of a specific defect regarding a lack of correctional experience. The agency also states that the third offeror (which had offered a price slightly higher than the protester's low price but lower than the awardee's price) was excluded from the competitive range after discussions. The agency contends that the protester therefore cannot show actual competitive prejudice arising from the discussions with that firm.

Agencies are generally required to hold meaningful discussions with all competitive range offerors, Department of the Navy--Recon., 72 Comp. Gen. 221 (1993), 93-1 CPD ¶ 422, and this obligation to conduct meaningful discussions is not satisfied where an agency misleads an offeror or conducts prejudicially unequal discussions. Peter N.G. Schwartz Cos. Judiciary Square Ltd. Partnership, B-239007.3, Oct. 31, 1990, 90-2 CPD ¶ 353.

Although the agency contends that it did not conduct improper or unequal discussions, the impropriety is self-evident from a comparison of the discussions held with the three offerors. Two of the three offerors were told during discussions that their proposals lacked information regarding correctional or related experience/ability to work with inmates. The third, NMS, was never advised during discussions of its proposal's lack of information regarding such experience, even though the protester's proposal received 0 points from each evaluator under this evaluation

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<sup>1</sup>(...continued)  
received the highest technical score of NMS' proposed alternates.

criterion, due solely to the lack of such information. By pointing out to the other two offerors the exact weakness found in the protester's proposal, while failing to advise the protester of that weakness, the agency conducted discussions which were neither meaningful nor equal.

Where improper discussions were held, we will resolve any doubts concerning the prejudicial effect of the agency's actions in favor of the protester; a reasonable possibility of prejudice is a sufficient basis for sustaining the protest. See Ashland Sales & Serv., Inc., B-255159, Feb. 14, 1994, 94-1 CPD ¶ 108. In other words, once an impropriety in the conduct of discussions is found, it must be clear from the record that the protester was not prejudiced in order to deny the protest. Id.

NMS has stated during its protest that it can demonstrate the desired correctional or related experience/ability to work with inmates since the firm has been awarded other correctional institution contracts. The awardee apparently received the full 10 points based on its statement in its BAFO that "[it] has been staffing the Federal Correctional Institution with [x-ray] technicians . . . since 1991." Since there was only a 3-point difference in the overall BAFO scores, only a slight improvement in NMS' substantially lower-priced proposal's technical evaluation score is all that would have been necessary to place NMS in line for award under the RFP's evaluation scheme. Accordingly, we believe the record shows at least a reasonable possibility of prejudice to the protester as a result of the agency's failure to raise the matter with NMS, and we sustain NMS' protest.

Contract performance has been stayed pending the outcome of this protest. We recommend that the agency provide NMS an opportunity to submit a revised BAFO responding to the agency's noted weakness of the lack of correctional or related experience/ability to work with inmates, reevaluate the proposal, and reconsider its source selection decision accordingly. See Ashland Sales & Serv., Inc., supra. If, as a result of this process, NMS is in line for award, we recommend that SSI's contract be terminated and award be made to NMS. We also find that NMS is entitled to be reimbursed for its costs of pursuing this protest, including

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<sup>2</sup>Although NMS also contends that the agency's unequal discussions represent improper technical transference by the agency during discussions, the record does not support the contention since there has been no government disclosure of technical proposal information resulting in improvement of a competing proposal. Federal Acquisition Regulation § 15.610(e)(1).

reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.6(d) (1995). NMS should submit its claim for such costs, detailing and certifying the time expended and the costs incurred, directly to the contracting agency within 60 working days of its receipt of this decision. 4 C.F.R. § 21.6(f).

\s\ James F. Hinchman  
for Comptroller General  
of the United States