

DOCUMENT RESUME

08121 - [C3388460]

[Protest against Award of Health Insurance Contract]. B-190312.
November 29, 1978. 13 pp.

Decision re: Ohio Medical Indemnity, Inc.; by Robert P. Keller,
Deputy Comptroller General.

Contact: Office of the General Counsel: Procurement Law II.
Organization Concerned: Department of Defense: Office of
Civilian Health and Medical Program of the Uniformed
Services; Mutual of Omaha Insurance Co.

Authority: Freedom of Information Act (5 U.S.C. 552). 55 Comp.
Gen. 244. 53 Comp. Gen. 553. A.S.P.R. 3-508.4. E-184194
(1978). B-190963 (1978). B-191797 (1978). E-191162 (1978).
B-191577 (1978). =4 C.F.R. 20.

The protester objected to the award of a contract to a higher bidder. GAO has no authority to determine what information must be disclosed by Government agencies under the Freedom of Information Act. The agency's evaluation that the protester's proposal was deficient was correct because it did not detail how services would be provided in one of the two States covered by the contract and because the required resumes of key personnel were not included. Offerors were responsible for requesting copies of documents referenced in the solicitation with which they were not familiar. Selection of the higher cost proposal was not objectionable since cost was established as the least important evaluation factor.
(Author/SC)

L. Crowley
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DECISION



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

8460

FILE: B-190312

DATE: November 29, 1978

**MATTER OF: Ohio Medical Indemnity, Inc.
(Blue Shield of Ohio)**

DIGEST:

1. GAO has no authority under Freedom of Information Act to determine what information must be disclosed by Government agencies.
2. Protest filed within 10 days of debriefing is timely under GAO Bid Protest Procedures since basis for assertion that agency did not accept proposal most advantageous to Government was derived from debriefing rather than from earlier agency letter advising protester of award to competitor.
3. Where health benefits claims processing services are to be provided for two states, agency's view of proposal, which does not detail how services will be provided in one of the states, as deficient is reasonable when there has been no showing that what will work in one state will suffice for the other.
4. Where request for proposals requires offerors to furnish resumes of key personnel "to be assigned for direct work on the project," proposal which states that separate unit will be established to perform contract work but does not include resumes of personnel to be associated with that unit is properly downgraded by agency evaluators.

5. Solicitation which identified various manuals and regulations bearing on contract performance and indicates their availability upon request was not defective for failure to indicate that one document had effect of modifying another. Offerors had responsibility for requesting copies of documents with which they were not familiar.
6. Where cost is established as least important evaluation factor, selection of higher cost proposal is not objectionable, particularly where proposal offering lower cost was evaluated as technically inferior to more costly proposal.
7. Evaluators' refusal to consider "discount" included in proposal is proper where "discount" is not certain either as to amount or enforceability.

Ohio Medical Indemnity, Inc. (Blue Shield of Ohio) (OMI), protests the award of a contract to Mutual of Omaha Insurance Company (Mutual) by the Office of Civilian Health and Medical Program of the Uniformed Services, Department of Defense (OCHAMPUS), for implementation and operation in Ohio and West Virginia of a CHAMPUS Fiscal Intermediary System as the result of request for proposals (RFP) MDA906-77-R-0030, issued August 26, 1977.

BACKGROUND

Briefly, CHAMPUS is a health benefits program administered by the Secretary of Defense. The fiscal intermediary contractor provides services necessary to receive, adjudicate and pay health benefit claims from eligible beneficiaries and providers of services to beneficiaries of the program on an area basis, usually a single state or group of states. The contractor is required to perform substantial administrative and automated data processing (ADP) tasks.

Five proposals were received as a result of the solicitation. They were reviewed by a Source Selection Evaluation Board and then by a Source Selection Advisory

Council. On December 12, 1977, the Council recommended to the Source Selection Authority, Director, OCHAMPUS, that Mutual be awarded the contract, which he approved on December 15, 1977.

By letter dated December 21, 1977, the contracting officer notified the unsuccessful offerors of the award to Mutual, the prices at which the contract was awarded for the contract period and the reasons why each offeror's proposal was not accepted. The contract was executed by the contractor on January 4, 1978 and by the contracting officer on January 5, 1978.

Subsequently, OMI requested and received a debriefing, which took place on February 2, 1978. By letter dated February 10, 1978, received by this Office on February 13, 1978, OMI protested the award to Mutual.

OMI contends that the evaluation of proposals was faulty and that the contract was not properly awarded for the following reasons:

1. OMI's proposal provided for approximately \$152,000 less in costs to OCHAMPUS during the contract year than did Mutual's prices and OMI offered an additional savings of approximately \$404,566 on hospital claims because of discounts available through Blue Cross reimbursement contracts (which OCHAMPUS disregarded in the evaluation) for a total savings to the Government of approximately \$1.6 million dollars during the contract year and two option years.
2. OCHAMPUS unjustly criticized OMI for failing to identify with specificity how it would verify provider licensure and accreditation in West Virginia.
3. OCHAMPUS improperly criticized OMI for failing to demonstrate how the utilization and peer review programs will benefit CHAMPUS.
4. OCHAMPUS' concern that OMI would be unable to train persons to administer the "complex" CHAMPUS contract was unjustified.

5. OCHAMPUS' downgrading of OMI's proposal for failure to reference the "CHAMPUS Interim Instruction" was unfair.

FREEDOM OF INFORMATION ACT REQUEST

OMI also protests OCHAMPUS' refusal at the debriefing to permit it to examine "its own evaluation file" and to disclose "the criteria used in evaluating" OMI's proposal. OMI contends that it will be unable to ascertain if additional grounds to protest exist until it has such information.

In response, the contracting officer states that Defense Acquisition Regulation/Armed Services Procurement Regulation (DAR/ASPR) 3-508.4(c) (1976 ed.) prohibits disclosure of point by point comparison between the technical and management proposals of offerors which would have occurred had OMI been allowed to examine the evaluation file. He points out that a copy of the Memorandum for the Source Selection Authority prepared by the Source Selection Advisory Council has been provided OMI and that the Memorandum contains the relative ranking of each offeror by the Source Selection Evaluation Board and Source Selection Advisory Council for the four major technical areas evaluated in the proposals as well as the total combined evaluation points awarded by the Council to each offeror for both its technical and price proposal. The contracting officer also asserts that the criteria used in evaluating OMI's proposal constitutes "an intra-agency memorandum relating to internal practices * * * and is exempt from disclosure" and that disclosure would significantly "hinder and have an adverse effect on" future OCHAMPUS procurements. (The "criteria" referred to by both OMI and OCHAMPUS apparently refer to what is included in the initial, detailed statements of the evaluators; the actual award criteria were listed in the RFP).

OMI has filed a Freedom of Information Act (FOIA) (5 U.S.C. 552 (1976)) request with OCHAMPUS for this information. OMI requests this Office to intervene with OCHAMPUS in regard to its FOIA request. However,

"we have no authority under FOIA to determine what information must be disclosed by

Government agencies to the public, DeWitt Transfer and Storage Company, 53 Comp. Gen. 553 (1974), 74-1 CPD 47, and thus there is no basis for us to review [the contracting agency's] FOIA decision or to furnish the technical evaluation record to [the protester]." University of New Orleans, B-184194, May 26, 1978, 78-1 CPD 401. See also E-Systems, Inc., B-190963, March 28, 1978, 78-1 CPD 236.

OMI's remedy is through initiation of appropriate legal action in a U.S. District Court, if warranted. 5 U.S.C. 552(a)(3) (1976); DeWitt Transfer and Storage Company, supra.

TIMELINESS OF PROTEST

OCHAMPUS takes the position that OMI's protest as it concerns the difference in price between OMI's and Mutual's proposals is untimely filed under our Bid Protest Procedures, 4 C.F.R. Part 20 (1978), because the protest was filed more than "10 days after the basis for protest is known or should have been known, whichever is earlier." 4 C.F.R. 20.2(b)(2). OCHAMPUS states that while the protest was not filed until February 13, 1978, OMI was aware of the difference in price in the proposals after receipt of the letter, dated December 21, 1977, notifying OMI that the contract had been awarded to Mutual.

We would agree with the OCHAMPUS position if the protest allegation were simply that OMI was entitled to award merely because of its lower priced proposal. We do not read the allegation that way, however. Rather, we view the allegation as an inherent part of OMI's overall protest posture which is that the award was not the most advantageous one that could have been made, price and other factors considered, as required by the RFP. In this regard, the RFP indicated that price was the least important evaluation factor. Thus, the significance of the price advantage of OMI's proposal would depend both on the extent of the price advantage and on the relative assessment of OMI's proposal vis-a-vis other proposals in the more heavily weighted evaluation areas. OMI's other allegations indicate its belief that OCHAMPUS erred in the technical evaluation

of its proposal, and that if that portion of the evaluation were properly done, the cost differential would point to an overall advantage in favor of OMI. Details concerning the evaluation of OMI's technical proposal were not provided to OMI until it received the debriefing on February 2, 1978. It was only then that OMI was in a position to determine the relevance, under the established evaluation criteria, of the cost differences. Thus, the protest allegation concerning cost, when viewed in this light, clearly was timely filed. Resdel Engineering Corporation, B-191797, June 29, 1978, 78-1 CPD 465; Metropolitan Contract Services, Inc., B-191162, June 14, 1978, 78-1 CPD 435.

EVALUATION

Section D of the RFP set forth the evaluation criteria in descending order of importance with technical considerations listed before price. Technical proposals were to be evaluated in four major categories, Administration, Utilization/Peer Review, Claims Processing and Payment, and Management Capability, in that order of importance. Subcriteria under each major category were listed but not in any specific order of importance. Paragraph D-1 of the RFP advised potential offerors that technical "proposals shall be evaluated on the basis of the offeror's demonstrated performance or its plan for accomplishment of each function, with greater weight being accorded to actual performance criteria."

The record shows that there were substantial differences between the evaluations by the Source Selection Evaluation Board and the Source Selection Advisory Council of the technical proposals. The Board ranked OMI second and Mutual third while the Council ranked OMI fifth or last and Mutual first.

The Council's relative ranking of the five offerors, combining technical and price factors, was as follows:

<u>OFFEROR</u>	<u>RANK ORDER</u>	<u>TOTAL POINTS</u>
Mutual	1	650
Blue Cross of S.W. Va.	2	607

Blue Cross/Blue Shield of Central W. Va.	3	593
Union Fidelity Life Ins. Co.	4	576
OMI	5	574

Mutual received a score of 512 on its technical proposal and a score of 138 for the price evaluation. OMI scored 416 on its technical proposal and received 158 points for price. (We note that the points given for the price proposal of Mutual are based on the "best and final" offer without consideration of a late proposal which provided the actual prices incorporated into the contract at time of award.)

In its memorandum recommending Mutual for award, the Council stated:

"The Source Selection Advisory Council's final technical rank order placed Ohio Medical Indemnity in the number 5 position whereas the Source Selection Evaluation Board placed them in the number 2 position. The basic difference is attributed to (1) the offeror's almost complete absence of discussion re the handling of West Virginia claims, providers, and beneficiaries, and the related aspect of hospital reimbursement and utilization and peer review. In addition, the offeror's experience in administering a Government benefits program was very limited (100,000 per annum) and the offeror's understanding of the complexity of the CHAMPUS program was also questioned. Finally, Ohio Medical Indemnity Inc. proposed a cost reimbursement methodology for inpatient care and claimed savings in 1976 totaling \$404,000. These savings do not meet the criteria stipulated in Section D-2.C. since they are not enforceable by law or contract and therefore were not considered in the ranking of prices."

OMI's technical proposal did make some reference to West Virginia. For example, it stated that "[i]nformation received from the physicians will be validated

with the State Medical Boards in Ohio and West Virginia and will be reaffirmed periodically [by] reports from those Boards." The technical proposal also stated: "Before a claim for any new provider is processed, the Provider Affairs Department [of OMI] will check with the applicable certification board, state licensing bureau, or West Virginia licensing bureau to determine if the proper licenses and/or certificates are possessed." The proposal, however, contained very little else in the way of specific information concerning services to be provided in West Virginia. The agency's position in this regard is stated as follows:

"The protester alleges that Ohio Medical's proposal was unjustly criticized for failing to identify with specificity how it would verify provider licensure and accreditation in the State of West Virginia. Section C-22 b.2(e) of the RFP required the offeror to include a discussion of a plan to administer a provider relations information and service program which would, inter alia, insure that providers possess State licenses and certification as required and that they have not been disqualified by OCHAMPUS. Ohio Medical's proposal contains an adequate discussion of its plan for provider relations in the State of Ohio but is virtually silent concerning such activities in the State of West Virginia. The Contracting Officer could not assume for purposes of evaluation of the proposal that a provider relations program in the State of West Virginia was included in the proposal.
* * *

"The protester alleges that Ohio Medical's proposal was criticized for failing to demonstrate how its peer and utilization review programs will benefit CHAMPUS and further alleges that a review of the proposal will demonstrate that these matters are clearly spelled out. Reviews and evaluations conducted prior to the award of the proposal revealed an adequate description of a proposed methodology for implementing and operating

peer and utilization review. However, the proposal is directed entirely toward the State of Ohio with only a brief statement concerning the State of West Virginia. That statement is to the effect that similar arrangements would be developed for West Virginia upon award of the contract. As there were no statements as to how and within what time frame the arrangements would be made, the proposal was considered weak as to performance of peer and utilization review for CHAMPUS claims arising in the State of West Virginia. * * *

From our reading of the record, it appears that the criticism by OCHAMPUS in these two areas was reasonable. Clearly the OMI technical proposal is based upon OMI's experience in Ohio and its association with several Ohio Blue Cross plans. The OMI proposal does not discuss any experience in West Virginia or present any detailed plans for how services will be provided there. What OMI did was to detail the steps it would take, refer to its experience and prior arrangements in Ohio, and leave OCHAMPUS to assume that OMI would be just as able to service OCHAMPUS in West Virginia as in Ohio. For example, OMI's proposal indicated that OMI had established "effective working relationships with medical societies in all 88 Ohio counties" and had "constant liaison" with county groups and others; there was no indication at all regarding what relationships, if any, OMI had with West Virginia organizations, and no indication as to how OMI would set up procedures in that state or with whom. Since there may well be differences in what can be done in West Virginia vis-a-vis what was done in Ohio, and since OCHAMPUS could properly concern itself, in effect, with an offeror's particular experience (here with respect to West Virginia) as it would impact on the ability to provide required services, we do not find OCHAMPUS' concern to be without a reasonable basis.

The OCHAMPUS concern with OMI's ability to train personnel (a concern not specifically mentioned in the Council memorandum but made known to OMI at the debriefing) stems from the absence from OMI's proposal of statements concerning the personnel to be directly involved in performing the contract. Section C-22 of the RFP required a submission of a "[s]tatement of key personnel to be

assigned for direct work on the project" and "[r]esumes * * * that clearly present the qualifications relative to the particular effort. Special mention should be made of the relevant experience of the personnel."

OMI asserts that its proposal included resumes "of our key personnel, including those who would have assumed direct operational responsibility for the program," but did not include information on "clerical personnel specifically assigned to the CHAMPUS Program" because OMI has no such personnel since it is "not currently a CHAMPUS contractor."

OMI's proposal did contain a listing, by education and experience, of several individuals, including the Senior Vice President, Operations and the Vice President, Claims. These individuals were identified as those "directly responsible for the primary functions" of the CHAMPUS program. However, the proposal also stated that "a separate CHAMPUS Administrative Unit within the Federal Programs Section has been established for CHAMPUS claim processing the management personnel specifically selected." Other than brief identification of the supervisor of the "Federal Programs Unit," the proposal contained no apparent mention of those who would be associated with the "CHAMPUS Administrative Unit." Thus, we think OCHAMPUS reasonably could downgrade OMI's proposal for failure to identify the "key personnel * * * assigned direct work on the project."

The remaining technical evaluation issue concerns the protester's failure to reference the CHAMPUS Interim Instructions in its proposal. The RFP listed various documents (the CHAMPUS Operations Manual, CHAMPUS Memorandums, a Department of Defense Regulation, and the Interim Instructions) bearing on OCHAMPUS operations which were available upon request. OMI requested and received the CHAMPUS Operations Manual, but did not request the Interim Instructions. No mention of the requirements of those instructions was made in the OMI proposal. Consequently, OCHAMPUS reports, the OMI proposal was viewed as evidencing OMI's "lack of familiarity * * * with CHAMPUS law, regulations, policies and program instructions" and OMI was informed at the debriefing that its proposal "might have been improved" had the Interim Instructions been referenced. OMI asserts, however, that the RFP did not put offerors on notice

as to the importance of those instructions--that they alter the provisions of the Operations Manual--and that OCHAMPUS did not inform it that the program manuals which it requested in the course of preparing its proposal "were incomplete."

We find little merit in OMI's contentions. The RFP listed what were clearly documents relevant to handling CHAMPUS claims. Offerors were free to request any or all of the documents. OMI offers no explanation as to why it believed it should be familiar with the Operations Manual but not the Interim Instructions. We believe the listing of the documents that offerors might want to be familiar with, along with the statement of their availability, satisfied any obligation of the agency to place potential offerors on notice of the documents making up CHAMPUS "law." Consequently, we do not find the RFP to be defective because it did not indicate the effect of the Interim Instructions on the Manual and we perceive no basis for objecting to how OCHAMPUS viewed the OMI proposal.

With respect to the price evaluation, OCHAMPUS did take into account the lower price associated with OMI's proposal--as indicated earlier, OMI received 158 evaluation points for price, while Mutual received 138 points. Since price, however, was subordinate to the other evaluation factors established for this procurement, the price advantage of OMI's proposal was outweighed by the perceived technical superiority of the Mutual proposal. Bell Aerospace Company, 55 Comp. Gen. 244 (1975), 75-2 CPD 168, and cases cited therein.


Nonetheless, OMI contends that the price advantage of its proposal was not adequately taken into account because OCHAMPUS erroneously failed to consider the "discount" offered by OMI. Subparagraph C, paragraph D-2 of the RFP stated that "[d]iscounts may be considered" but "[s]avings must be enforceable by law or by contract." OMI indicated in its proposal that savings were possible through its affiliation with Ohio Blue Cross plans, explaining that for fiscal year 1977 billed hospital charges exceeded reimbursements on a cost basis for seven of the Blue Cross plans in Ohio by approximately 4 percent for a net savings of approximately \$404,000 to CHAMPUS.

OCHAMPUS did not consider the "discount" because OMI's proposal "did not firmly commit the hospital discount," and "[i]t offered only a projected figure which could not be considered in price evaluation as there was no showing [in the proposal] that such discounts were enforceable by law or by contract." OMI contends in its protest that the discounts are "enforceable through the contract arrangements between each of the Ohio Blue Cross plans and their member hospitals. Through existing agency agreements and share of expense agreements between Ohio Medical Indemnity and each of the plans, these hospital discounts are fully applicable to all lines of business, including the CHAMPUS Program." OMI states that the discounts, which vary among Blue Cross plans, are required by state law to be part of the reimbursement contract between each Blue Cross plan and its member hospital, and that Ohio Blue Cross plans which administered the hospital portion of the CHAMPUS program in Ohio have agreed to continue to fulfill this function under OMI's proposal on this RFP. OMI calculates that "[b]ased on actual CHAMPUS hospital claims charged in Ohio for fiscal year 1977 (\$8,178,261), savings due to hospital discounts were calculated to be \$404,666" or approximately 5 percent of hospital claims.

We agree with OCHAMPUS that the "discount" was properly excluded from the evaluation of OMI's cost proposal. The proposal did not commit OMI to any specific discount figure, and it did not show that the "discount" was "enforceable by law or by contract." Although OMI asserts that the "discount" is so enforceable, it makes no claim that OCHAMPUS should have known that in the absence of a statement to that effect in OMI's proposal, and it is clear that OMI's proposal itself did not offer a discount enforceable by the Government. Rather, what was offered was the "possibility" of lower claims costs, which would depend on various factors not under the control of the Government or OMI. This is significantly different from a situation, for example, where an offeror "guarantees" a particular cost limitation and the guarantee is a contractual commitment. See RCA Global Communications, Inc.--Reconsideration, B-191577 October 23, 1978, 78-2 CPD 292. Therefore, OCHAMPUS

properly excluded this proposed "discount" when considering OMI's cost proposal.

The protest is denied.


Deputy Comptroller General
of the United States