



**Comptroller General  
of the United States**

Washington, D.C. 20548

# Decision

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**Matter of:** Occu-Health, Inc.

**File:** B-270228.3

**Date:** April 3, 1996

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Brian A. Bannon, Esq., and Margaret A. Dillenburg, Esq., Dyer Ellis & Joseph, for EHG National Health Services, Inc., an intervenor.

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## DIGEST

The procuring agency improperly failed to notify offerors that it no longer intended to exercise or evaluate the solicitation's options where it knew this fact prior to the receipt of best and final offers.

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## DECISION

Occu-Health, Inc. protests the award of a contract to EHG National Health Services, Inc. under request for proposals (RFP) No. S2202A-95-R-0001, issued by the Defense Contract Management Command, Northeast District, Defense Logistics Agency (DLA), for occupational health and industrial hygiene services.

We sustain the protest.

The RFP, issued April 25, 1995, sought occupational health and industrial hygiene services for the Northeast District's headquarters health clinic in Boston, Massachusetts and 41 field sites. The RFP provided for the award of a fixed-price contract for 1 base year with 4 option years, and included the standard "Evaluation of Options" clause, set forth at Federal Acquisition Regulation (FAR) § 52.217-5, which informed offerors that the government would evaluate offers by adding the price for the base period and options years, unless the government determined, in

accordance with FAR § 17.206(b), that evaluation of option quantities was not in its best interests.<sup>1</sup>

A best value basis for award was stated, and the following evaluation factors identified: quality, management, and price. Offerors were informed that the quality factor was more important than the management factor, and that both the quality and management factors were significantly more important than price. The RFP incorporated FAR § 52.215-16, Alternate III, which states that the government intends to make award without conducting discussions.

DLA received proposals from Occu-Health and EHG, the incumbent contractor, by the closing date for the receipt of proposals. Occu-Health offered the lowest total price (base and option years included) of [DELETED] while EHG offered a total price of [DELETED]. On August 3, DLA made oral inquiries to Occu-Health regarding several aspects of its proposal. Discussions were not conducted with EHG, and best and final offers (BAFO) not requested. The agency determined that EHG's proposal represented the best value to the government and made award to EHG on August 31, with performance to commence on October 1.

Occu-Health protested the award to our Office on September 19, asserting that DLA improperly conducted discussions with EHG and that the source selection was not reasonably based. This protest was dismissed on October 2 after DLA decided to take corrective action by conducting discussions and requesting BAFOs.<sup>2</sup> On October 5, DLA initiated negotiations with the offerors. Following discussions, on October 24, DLA requested BAFOs to be submitted by November 1.

During this same time frame, a recommendation of the Base Realignment and Closure Commission (BRAC) to close the Defense Contract Management Command's South District and consolidate functions under the Command's West

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<sup>1</sup>FAR § 17.206(b) provides that:

"The contracting officer need not evaluate offers for any option quantities when it is determined that evaluation would not be in the best interests of the [g]overnment and this determination is approved at a level above the contracting officer. An example of a circumstance that may support a determination not to evaluate offers for option quantities is when there is a reasonable certainty that funds will be unavailable to permit exercise of the option."

<sup>2</sup>Performance was not stayed in connection with Occu-Health's protest, and DLA elected to leave the EHG award in place during the reopening of the competition.

District and Northeast District became final. Specifically, BRAC recommended closing the South District on July 1, 1995; the President approved the BRAC's recommendation and submitted it to Congress on July 15; and the recommendation became final on October 1. On October 27, prior to the receipt of BAFOs under the RFP, the Northeast District determined, in a meeting including the procuring contracting officer, that it would not exercise the options under the contract because "it would be better to prepare a solicitation to provide health services to all of the newly configured District in fiscal year 1997, than to rely on options."

BAFOs were received from both EHG and Occu-Health by the November 1 closing date.<sup>3</sup> EHG reaffirmed its initial offer of [DELETED] ([DELETED] for the base year and [DELETED] for the option years), while Occu-Health reduced its price to [DELETED]. EHG's BAFO was rated slightly higher ([DELETED]) than Occu-Health's BAFO ([DELETED]), based upon the agency's view that the [DELETED] offered by EHG was better qualified than the [DELETED] offered by Occu-Health.

On November 17, the contracting officer determined that EHG's BAFO represented the best value to the government because EHG's offer received the higher technical point score and the price differential between the offerors--considering only their proposed prices for the base year--was insignificant. In his selection decision, the contracting officer determined that given the reorganization of the Defense Contract Management Command it was very unlikely that options in the contract would be exercised; accordingly, the contracting officer concluded, in accordance with FAR § 17.206(b), that it was not in the government's best interests to include the option year prices in the evaluation of offers for award purposes. The offerors were informed that EHG's offer was again selected for award and that EHG's contract would "remain in effect." This second protest by Occu-Health followed on November 30.<sup>4</sup>

Occu-Health objects to the agency's failure to inform offerors of the agency's changed needs. Occu-Health argues that the agency should have amended the RFP prior to the receipt of BAFOs to inform offerors that the contract options would not likely be exercised and that option year pricing would not be evaluated. Occu-Health asserts that it could have significantly reduced its base year price by

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<sup>3</sup>EHG protested the agency's reopening of discussions, but withdrew its protests after again being selected for award.

<sup>4</sup>The agency initially determined that urgent and compelling circumstances warranted continued performance of the contract, but subsequently decided that it need not make this determination because it had made award on August 31 and had not stayed performance.

restructuring how it intended to obtain and provide required health care, industrial hygiene, and computer equipment.

DLA does not dispute Occu-Health's arguments concerning the firm's statement that it would have reduced its base year pricing, but argues that the agency has the discretion under FAR § 17.206(b) not to evaluate the options in making an award, whenever the agency becomes aware that the option quantities will not be required. In this regard, the agency notes that the RFP informed offerors that option years pricing would not be evaluated where it was determined that not evaluating options was in the government's best interest.

It is true that FAR § 17.206(b) provides an agency with authority to not evaluate option quantities in making an award, even where the solicitation informed bidders or offerors that options would be evaluated, where the agency properly determines that evaluation of options is not in the best interests of the government. Thus, we have previously held that a determination not to evaluate options, made after receipt of bids, did not preclude an award on the basis of base bid items and, by implication, did not require the receipt of new bids. See Foley Co., 71 Comp. Gen. 148 (1992), 92-1 CPD ¶ 47. This, however, does not resolve this case. The FAR, at section 17.208(c)(4), also provides that a contracting agency may include the standard "Evaluation of Options" clause, as included in this RFP, only where a determination has been made that there is a reasonable likelihood that the option(s) will be exercised. Thus, an RFP that includes this clause informs offerors that the government's reasonably anticipated needs include the option quantities, the prices for which are intended to be evaluated. This notice is important because vendors may structure their bids/proposals differently depending upon whether the exercise of an option is likely.

It is fundamental that the government select for award the offer that is most advantageous to the government, considering price and other evaluation factors identified in the solicitation. 10 U.S.C. § 2305(b)(4)(B)(1994). It is also a fundamental requirement that the government apprise offerors of its actual needs in a manner designed to achieve full and open competition and so that offerors may fairly compete on an equal basis. 10 U.S.C. § 2305(a)(1)(A); Unisys Corp., 67 Comp. Gen. 512 (1988), 88-2 CPD ¶ 35. Accordingly, where the government's needs change, a procuring agency is required to notify offerors of its changed needs, affording offerors the opportunity to make and the government to obtain the most advantageous offer in response to the government's actual needs. FAR § 15.606; EEV, Inc., B-261297; B-261297.2, Sept. 11, 1995, 95-2 CPD ¶ 107; Dept. of State-Recon., B-243974.4, May 18, 1992, 92-1 CPD ¶ 447.

Here, we find, given the statutory requirements that an agency inform offerors of its actual needs and select the most advantageous offer to the government, that DLA improperly failed to inform offerors of its changed needs. Although FAR

§ 17.206(b) permits agencies to not evaluate option prices and the RFP, through the clause at FAR § 52.217-5, informed offerors of the possibility that the government might not evaluate options, we think that, in light of the statutory requirements set forth in 10 U.S.C. §§ 2305(a)(1)(A) and (b)(4)(B), an agency may not rely on this FAR provision without requesting revised proposals when the agency knows, at least prior to the receipt of BAFOs, its needs have materially changed, so that it will not be evaluating options. To read FAR § 17.206(b) as broadly as DLA suggests—as granting an agency essentially unfettered discretion to decide not to evaluate options without advising offerors of this change under circumstances when the agency could reasonably provide that advice—would be inconsistent with the agency's fundamental obligations to allow offerors the opportunity to respond to the government's actual needs and to obtain the offer that is most advantageous to the government. See Management Sys. Designers, Inc., et al., B-244383.4, et al., Dec. 6, 1991, 91-2 CPD ¶ 518.

This concern is very much highlighted by this case. As noted above, the competition between EHG and Occu-Health was very close. Although EHG was given a higher rating in the more important evaluation factors, the contracting officer made his best value determination in part upon the fact that the offerors' base year price differential was "insignificant." The protester's president has demonstrated in a sworn declaration how it would have changed its approach to performing the contract requirements to significantly reduce its base year price, if Occu-Health had been aware of the agency's changed requirements, that is, its elimination of the needs represented by the option items. Specifically, Occu-Health states that if it had been aware that only the base period would be performed, it would have [DELETED]. In total, Occu-Health's base-year price would assertedly have been reduced by almost [DELETED]. The agency and intervenor do not challenge the protester's assertion that it could lower its base year pricing if it had been aware of the agency's actual needs. Moreover, the intervenor does not assert that it could or would have similarly lowered its base year pricing if it had been apprised of the government's changed needs. Thus, it reasonably appears that Occu-Health was prejudiced by the agency's failure to announce its changed needs and that the agency might have precluded receipt of a more advantageous offer. Accordingly, we sustain Occu-Health's protest on this basis.<sup>5</sup>

We recommend that, if feasible, the agency reopen the competition, issue an amendment reflecting its changed needs, and permit the offerors to submit revised proposals. If Occu-Health is determined to be entitled to award, then DLA should terminate EHG's contract and make award to Occu-Health, if otherwise appropriate.

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<sup>5</sup>Occu-Health also protests the agency's evaluation of the experience of its proposed [DELETED] under the quality and management evaluation factors. We have reviewed these allegations and find them to be without merit.

We recommend that in the event that the agency determines that reopening the competition is not feasible, Occu-Health be reimbursed its costs of proposal preparation. Bid Protest Regulations, § 21.8(d)(2), 60 Fed. Reg. 40,737, 40743 (Aug. 10, 1995) (to be codified at 4 C.F.R. § 21.8(d)(2)). We also recommend that Occu-Health be reimbursed its costs of filing and pursuing the protest. Bid Protest Regulations, § 21.8(d)(1). The protester should submit its certified claim for costs to the contracting agency within 90 days of receiving this decision. Bid Protest Regulations, § 21.8(f)(1).

The protest is sustained.

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of the United States