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DECISION



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

FILE: B-201710

DATE: January 4, 1982

MATTER OF: Mutual of Omaha Insurance Company

DIGEST:

1. Allegation that agency failed to conduct price negotiations with protester is untimely under GAO Bid Protest Procedures, 4 C.F.R. § 21.1(b)(2) (1981), because not filed within 10 working days of notice of award from which information protester should have known basis for protest.
2. Although Presidential inauguration day is technically a Federal working day, it would be inequitable to consider it as such for purpose of computing timeliness under our Bid Protest Procedures because GAO and most other Federal offices in District of Columbia are closed on inauguration day. Therefore, protest due on inauguration day, but filed on day after, is timely.
3. Challenge to awardee's corporate authority under laws of State of incorporation, based on information in the public domain, is untimely because not filed within 10 working days of advice of award of contract. Moreover, the protester has suggested no reason why GAO should consider a question of Wisconsin law which, under State law, the protester could not raise in Wisconsin.
4. Contention that agency improperly conducted price negotiations with another offeror after receipt of best and final offers is based on misunderstanding of facts. Conduct of preaward survey prior to final completion of evaluation of proposals, which act led to misunderstanding, is not improper.

5. Protester's argument that evaluators should have considered information external to proposals is without merit because proposals must reflect offeror's capability.
6. Contention that experience was undervalued because it was considered as a separate evaluation factor rather than as part of each function within two other major factors is without merit. Whether experience is considered to be worth some proportion of the total evaluation score or the same proportion of the individual scores does not change the relative weight of experience as an evaluation factor. For the agency to have evaluated experience both as an independent evaluation factor and in conjunction with other factors would have exaggerated the importance of experience as an evaluation factor.
7. Contention that experience should have been of greater importance in the evaluation of proposals will not be considered. The solicitation clearly stated that experience was the least important of the three major technical evaluation factors. This contention, not raised until after receipt of best and final offers, is therefore untimely under our Bid Protest Procedures, 4 C.F.R. part 21 (1981). Furthermore, the protester has waived this objection by participating in the procurement without timely complaint.
8. Contention that agency improperly evaluated price proposals, even though possibly correct because of unclear language in solicitation, will not be considered because protester was not prejudiced. Protester's price still exceeds awardee's even if reevaluated as protester advocates. Agency, however, should clarify language to ensure that offerors know exactly how price is to be evaluated.
9. Protester's challenges to qualifications of agency personnel who evaluated proposals,

for which protester provides no basis other than speculation and suspicions, provide no basis for GAO to question agency's selection of evaluators.

10. GAO's review of source-selection documents shows evaluation generally to have been equitable and consistent with the evaluation criteria set out in the solicitation. Agency should, however, instruct evaluators that detailed criteria used in evaluation are to be used only as guidelines for evaluation. Also, agency should consider restructuring the evaluation of corporate experience to provide a more realistic and equitable assessment of an offeror's potential.

Mutual of Omaha Insurance Company (Mutual) protests the award of a contract to Wisconsin Physicians Service Insurance Corporation (WPS) by the Office of Civilian Health and Medical Program of the Uniformed Services (CHAMPUS). Mutual challenges the authority of WPS under its corporate charter to perform the services required by the contract and raises several objections to CHAMPUS's evaluation of proposals. We find Mutual's allegations to be either without merit or untimely under our Bid Protest Procedures, 4 C.F.R. part 21 (1981). We are recommending, however, that CHAMPUS consider corrective action to relieve certain problems we identified in the solicitation and the evaluation of proposals which, although they did not prejudice Mutual in this procurement, could potentially undermine the integrity of future procurements.

The contract is for the furnishing of administrative and claims handling services for health benefits provided under CHAMPUS auspices in a six-state region encompassing Arkansas, Kansas, Louisiana, Missouri, Oklahoma, and Texas. The request for proposals (RFP) underlying the contract provided that technical considerations were significantly more important than price in selecting the awardee. The principal technical factors were identified in order of relative importance as (1) Claim Processing, (2) General Administration, and (3) Corporate Experience/Performance.

Evaluation of the first two of these factors was to focus on the ability of the proposed system to handle the work described in the RFP; the third category was more retrospective with emphasis on an offeror's demonstrated qualifications based on, in order of importance, prior CHAMPUS, Medicare, or other Government health program experience, or similar private sector experience. Experience, the least important of the three factors, was still to be considered significant. Mutual was the lowest rated and highest priced of the four offerors in the competitive range.

On December 18, 1980, the Deputy Director of CHAMPUS advised Mutual by telephone of the award of the contract to WPS. This informal advice was confirmed by a letter which Mutual received on December 31, 1980. CHAMPUS gave Mutual a debriefing on January 6, 1981.

Mutual filed its initial protest with our Office on January 8, 1981, challenging the legal capacity of WPS to enter into this contract under WPS's corporate charter and the laws of Wisconsin, WPS's state of incorporation. On January 21, 1981, Mutual supplemented its protest to incorporate objections to CHAMPUS's conduct of the procurement based on information gained in CHAMPUS's January 6 debriefing of Mutual. In this latter submission Mutual contests the propriety of CHAMPUS's conduct of negotiations, contends that CHAMPUS improperly instructed its proposal evaluators to confine their evaluation to the offerors' proposals and not consider their personal knowledge of the competitors, argues that CHAMPUS failed to give experience significant weight, and asserts that CHAMPUS did not evaluate the price proposals in accordance with the solicitation. Mutual also questions the qualifications of CHAMPUS's evaluators.

Timeliness of Protests

CHAMPUS contends that Mutual's protests are untimely under our Bid Protest Procedures, 4 C.F.R. part 21 (1981), because Mutual did not file its protests within 10 working days of when Mutual knew or should have known of the bases for protest. 4 C.F.R. § 21.2(b)(2) (1981). Mutual states that it did not learn of the bases for its challenge to WPS's corporate authority until it examined WPS's corporate documents

with Wisconsin counsel on January 2, 1981. Mutual asserts that this challenge is timely because it was filed only 6 days after it learned of this basis for protest. We agree with CHAMPUS that Mutual's objections to WPS's corporate capacity are untimely.

Mutual relies on public information, WPS's corporate charter, as the basis for its challenge to WPS's authority to enter into this contract. We think that the 10 working days allowed under our Bid Protest Procedures, 4 C.F.R. part 21 (1981), provide adequate time for a protester to ascertain the basis for and file a protest based on information in the public domain. Consequently, Mutual's protest, filed 12 working days after Mutual was advised of the award of the contract to WPS, is untimely. 4 C.F.R. § 21.2(b)(2) (1981). Moreover, we note that the State of Wisconsin limits both the parties who may raise the question of whether a corporation's acts exceed its authority and the situations in which the question may be raised. (WSA §§ 613.07(2), 18.05); see Associated Hospital Service, Inc. v. City of Milwaukee, 13 Wis.2d 447, 109 N.W. 2d 271 (S.Ct. Wis. 1961). It is our reading of Wisconsin law that Mutual is not an appropriate party to challenge WPS's corporate authority and Mutual has suggested no reason why we should consider a question of Wisconsin law which Mutual could not raise in Wisconsin.

Mutual's contention that CHAMPUS failed to conduct price negotiations with Mutual is untimely. Although Mutual attempts to base this contention on a remark made during the debriefing, concerning which the record is unclear, we think that whether CHAMPUS conducted price negotiations or not should have been apparent to Mutual by no later than December 18, 1980, the date of advice to Mutual of the award of the contract to WPS. Since this contention was not raised until after expiration of the 10-working-day limit established under our Procedures, it is untimely and not for consideration. We note also that Mutual neither contests nor denies CHAMPUS's assertion that 6 of CHAMPUS's 37 written negotiating questions provided to Mutual concerned price.

In a letter dated October 5, 1981, Mutual belatedly raised objections to CHAMPUS's evaluation of proposals and conduct of negotiations as well as challenges to the

solicitation based on information "* * * disclosed to Mutual for first time at page 2 of [CHAMPUS's] September 8, 1981, letter" concerning another protest. In this regard, Mutual asserts that CHAMPUS had a preference for advanced systems that was not disclosed to Mutual either by the solicitation or during discussions. We received CHAMPUS's letter on September 9, 1981, and have no reason to believe that Mutual did not also receive this letter on that date or shortly thereafter. Since Mutual did not raise these objections within 10 working days of learning of the bases for these objections, these arguments are untimely and will not be considered in this protest. 4 C.F.R. § 21.2(b)(2) (1981). We note, moreover, that contrary to Mutual's assertions of nondisclosure, both the instructions to offerors and the evaluation factors for award in the solicitation clearly and explicitly provide that the "state-of-the-art" of the offeror's proposed system is to be described in detail and evaluated.

Whether Mutual's remaining grounds for protest are timely depends on whether the Presidential inauguration day, Tuesday, January 20, 1981, was a Federal working day under our Bid Protest Procedures. Although inauguration day is not a national holiday, and Federal offices around the country are generally open, it is a holiday in the District of Columbia, and Federal offices in the city, including our Office, were generally closed. While we recognize that inauguration day is technically a Federal working day, see, e.g., 36 Comp. Gen. 478 (1956), we are persuaded that it would be inequitable to enforce this time limit on a day in which it would have been impossible for Mutual to have filed its protest with our Office. Consequently, we find Mutual's remaining objections to CHAMPUS's conduct of the procurement to be timely.

Conduct of Negotiations

Mutual contends that CHAMPUS improperly continued negotiations with WPS after receipt of best and final offers. CHAMPUS attributes Mutual's assertion to a misunderstanding of advice conveyed during Mutual's debriefing that the contracting officer visited WPS on December 10-12, 1980, to negotiate change orders with WPS under a different CHAMPUS contract. The contracting officer decided to combine this trip with a preaward

survey because a substantially completed review of best and final proposals on December 9 indicated that WPS was still the highest rated offeror. CHAMPUS denies that it conducted any negotiations during this visit with WPS concerning the contract we are considering here and, in support of its position, points out that both WPS's contract and WPS's best and final offer reflect the same price. Mutual offers no other evidence in support of its contention.

We find CHAMPUS's explanation of events to be totally plausible. Furthermore, given the contracting officer's expressed concerns about possible delays and a limited travel budget, we find it neither unreasonable nor improper for the contracting officer to conduct the preaward survey as he did, despite Mutual's suggestions to the contrary. Compare Security Assistance Forces & Equipment International, Inc., B-194876, May 5, 1980, 80-1 CPD 320; Adam David Company, B-186053, July 28, 1976, 76-2 CPD 88.

Technical Evaluation

Mutual contends that CHAMPUS's instruction to its evaluators to disregard their personal knowledge of the offerors and evaluate only the contents of the proposals was prejudicial to Mutual because of its good past performance record.

We find CHAMPUS was correct in directing its evaluators to disregard their personal knowledge of the offerors and to rely for their evaluation on the information in the proposals. Any offer, whether or not from an incumbent, must demonstrate compliance with the essential requirements of the RFP. There is no basis for favoring incumbents with presumptions merely on the basis of prior performance. See PRC Computer Center, Inc., et al., 55 Comp. Gen. 60 (1975), 75-2 CPD 35. If a proposal does not clearly reflect the offeror's capability to meet the requirements of the solicitation, then that offeror should not expect to be considered for award. See Informatix, Inc., B-194926, July 2, 1980, 80-2 CPD 8; Helmut Guenschel, Inc., B-189397, September 20, 1977, 77-2 CPD 205; Comten-Comress, B-183379, June 30, 1975, 75-1 CPD 400. All offerors should have an equal opportunity to write

and submit proposals. To do what Mutual advocates would foster unequal competition through an unwarranted preference for incumbents.

Mutual also contends that CHAMPUS failed to follow the stated evaluation criteria in the solicitation by not according an offeror's performance history the weight required. Paragraph M-1 of the solicitation, in pertinent part, states:

"All technical proposals received by OCHAMPUS shall be evaluated by a panel of qualified Government personnel for the purpose of selecting the offerors with whom negotiations may be conducted. These proposals shall be evaluated on the basis of the offeror's plan of accomplishment of each function with significant weight given to the offeror's performance history * * *." (Emphasis supplied.)

Mutual reads this paragraph to require that an offeror's prior performance history be considered in conjunction with the evaluation of each of the 20 or so elements of the first two evaluation factors, Claim Processing and General Administration, rather than treated as a separate evaluation factor. Mutual contends that CHAMPUS's admitted evaluation of experience as a separate factor was prejudicial, but provides no evidence to explain just how Mutual might have been prejudiced.

CHAMPUS conducted the technical evaluation by reviewing the proposals in each of several broad subject areas. Each offeror, in effect, started with a clean slate and then earned points in proportion to how well it satisfied the criteria in each subject area. Consequently, a proposal which exceeded the minimum requirements of a section would receive a higher score for that subject area than a proposal which was barely adequate. We have previously approved of this method for distinguishing the relative quality of proposals. Amdahl Corporation, B-198911.2, March 27, 1981, 81-1 CPD 231.

In our view, it makes no difference whether experience was considered with each separate element of the first two evaluation factors or was considered independently. Whether experience is considered to be, for instance, 30 percent of the possible total technical score or is considered to be 30 percent of the possible total scores for each of the individual elements matters not at all; it is still given a 30-percent weight in the evaluation. Furthermore, if it is Mutual's contention that experience should have been considered with each of the other evaluation factors as well as being considered as a separate evaluation factor, this would have greatly exaggerated the importance of experience to the evaluation, contrary to the announced evaluation scheme. See The Center for Education and Manpower Resources, B-191453, July 7, 1978, 78-2 CPD 21. We do think, however, that CHAMPUS should clarify this paragraph to express more clearly its intent to evaluate experience as an independent evaluation factor.

We think these arguments obscure Mutual's real objection--that Mutual feels experience should have been of greater importance in the evaluation. In this regard, we note that Mutual did in fact score very highly on the experience factor but did relatively poorly on the other two criteria, Claim Processing and General Administration, each of which was clearly and explicitly identified in the solicitation as being of greater importance than experience. We attribute Mutual's difficulty to its failure to devote adequate attention to these clearly more important aspects of its proposal--a point we think Mutual concedes by failing to contest the evaluation of these factors--and will not consider Mutual's efforts to realign the relative importance of the three criteria in Mutual's favor. As we noted above, the relative importance of the evaluation factors was clearly stated in the solicitation; Mutual's present objection is therefore untimely. 4 C.F.R. § 20.2(b)(1) (1980). We note also that by participating in the procurement without contesting the alignment of the evaluation factors, Mutual has waived this objection. Airco, Inc. v. Energy Research and Development Administration, 528 F.2d 1294 (7th Cir. 1975); Self-Powered Lighting, Ltd., 59 Comp. Gen. 298 (1980), 80-1 CPD 185.

Finally, concerning Mutual's allegation that only one set of evaluators reviewed the experience portion of the proposal, we have held that it is permissible to have portions of proposals reviewed by separate evaluation teams. See Ridgeway Electronics, Inc., B-199557, January 13, 1981, 81-1 CPD 21. In this regard, we note also that CHAMPUS requires each of its evaluators to read each proposal in its entirety prior to performing the evaluation.

Price Proposal

Offerors were required to state their per-claim price for each of three ranges of claim quantities in each of 3 years--the first contract year and 2 option years--with a guaranteed minimum and maximum quantity for each year. The solicitation provided that, for purposes of award, proposals would be evaluated by "combining the total prices for option claim quantities to the total price for the contract period quantity" with certain additions. CHAMPUS evaluated the proposals on the basis of a projected quantity of claims, falling within the middle range in each of the 3 evaluation years, times the appropriate unit price.

Mutual contends that CHAMPUS's price evaluation was improper because the language quoted above from the solicitation required CHAMPUS to evaluate price proposals on the basis of the total, i.e., maximum, quantity of claims. CHAMPUS argues that Mutual's interpretation of the solicitation is unreasonable and points out that all offerors, including Mutual, were on notice of CHAMPUS's evaluation scheme because they were provided the historical data from which to calculate their own estimates.

Although we agree with Mutual that the solicitation is ambiguous on this point, and we consider Mutual's interpretation to be as reasonable as that advanced by CHAMPUS, we will not consider this question because even if the proposals are evaluated as Mutual would like, Mutual's price is still substantially in excess of WPS's price. Consequently, Mutual was not prejudiced. We suggest, however, that CHAMPUS reword this section in the future to make it clear to offerors on what basis CHAMPUS intends to evaluate price proposals.

Qualifications of Evaluators

Mutual does not contest the qualifications of CHAMPUS's evaluators directly, and has suggested no basis on which it might do so, but instead seeks to place the burden on CHAMPUS to affirmatively demonstrate that its evaluators were qualified. We decline to do this.

The decision as to how many and which members of an evaluation panel will review each proposal, as well as the choice of evaluators, is within the discretion of the contracting agency, Data Resources, Inc., B-203166, August 5, 1981, 81-2 CPD 98, and will not be reviewed by our Office absent allegations of fraud, bad faith, or conflict of interest. New York University, B-195792 August 18, 1980, 80-2 CPD 126; University of New Orleans, B-184914, May 26, 1978, 78-1 CPD 401. We generally will not appraise the qualifications of agency evaluators. Ads Audio Visual Productions, Inc., B-190760, March 15, 1978, 78-1 CPD 206; Joseph Legat Architects, B-187160, December 13, 1977, 77-2 CPD 458. Mutual's speculations and suspicions, for which it offers no basis, provide us with no reason to question CHAMPUS's selection of its evaluators.

Additional Comments

Our review of this protest included an examination of CHAMPUS's source-selection documents, including the individual evaluator's scoresheets. We found CHAMPUS's evaluation of proposals generally to be equitable and consistent with the evaluation criteria set out in the solicitation and found no improprieties which might have prejudiced Mutual.

We are concerned, however, that some individual evaluators appear to have been overly strict in applying CHAMPUS's detailed evaluation criteria and did not accord sufficient weight to proposed alternative approaches offering equivalent performance. Although the limited number of instances in which this occurred resulted in no prejudice, we think that in future procurements CHAMPUS should instruct its evaluators on the importance of their reasonable judgement in assessing offerors'

capabilities and should point out clearly that the detailed criteria are to be used only as guidelines.

We also question CHAMPUS's present fragmented evaluation of experience, in which each category of experience, such as CHAMPUS, Medicare, etc., is evaluated and scored separately; the experience score is the sum of these individual scores. This method has the unintended side-effect of requiring offerors to have experience in all of the categories in order to receive the maximum score. We think that the evaluation of experience would be more equitable and realistic if replaced by the unified evaluation and scoring of experience generally. We recommend that CHAMPUS consider such a change.

Mutual's protest is denied in part and dismissed in part.

Henry R. Van Cleave
For the Comptroller General
of the United States