

DECISION



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

Spangenberg

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FILE: B-215303.3; B-215303.4 **DATE:** April 5, 1985

MATTER OF: Professional Review of Florida, Inc.;
Florida Peer Review Organization, Inc.

DIGEST:

1. Protest that essential terms have been omitted from request for proposal (RFP) and that RFP evaluation criteria were not clear and understandable is untimely when filed after closing date for receipt of proposals.
2. When an initial timely protest that award was not made in accord with RFP evaluation criteria, with no elaboration, is purportedly expanded in a response to an agency report in which the protester points out specific flaws in the awardee's proposal, of which the protester had a copy for more than 10 days, GAO will consider the later submission untimely. This is because the later submission states new and independent protest, that must independently satisfy GAO's timeliness requirements.
3. When a protest pertains only to the evaluation of a particular proposal, GAO will not consider it under the significant issue exception to its timeliness requirements.
4. GAO will not consider protest bases which have not been again mentioned by protester subsequent to filing of initial protest, debriefing and agency response to protest because of protester's apparent decision not to pursue these matters.

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5. GAO considers protests concerning content of discussions with competitors, filed within 10 days of when protesters state that they became aware of protest bases, to be timely in the absence of evidence that protesters knew of protest bases earlier; GAO resolves doubt as to timeliness in protesters' favor.
6. Protest filed 2 months after debriefing but within 10 days after receipt of Freedom of Information Act material is untimely where bases of protest were known or should have been known at time of debriefing.
7. Where major weaknesses and deficiencies of proposal in critical evaluation areas are brought to protester's attention, but final proposal is still not acceptable in these areas, meaningful discussions have been held.
8. Agency's informing one offeror during discussions that it would like to see a round figure of \$15 million does not constitute an auction technique when the offeror's proposed price was slightly more than \$15 million. The fact that two other offerors that initially proposed \$22.5 million and \$8 million were not told of this goal but were adequately informed that their proposed levels of effort might be high and low, respectively, is not improper, since agency may disclose a price goal to only one offeror under appropriate circumstances.

This decision responds to two protests, filed by the Professional Review Organization of Florida, Inc., and the Florida Peer Review Organization, Inc., against award of a contract by the Health Care Financing Administration, Department of Health and Human Services (HHS), to the Professional Foundation for Health Care, Inc. The award was made pursuant to request for proposals No. HCFA 84015, and the selected contractor is now the utilization and quality peer review organization (PRO) for the Medicare program in the state of Florida.

We dismiss the protests in part and deny them in part.

BACKGROUND

The PRO is to monitor the professional activities of physicians and hospitals in Florida as to reasonableness, medical necessity, and quality, with a view to enhancing the cost effectiveness of the Medicare program. This program implements the Peer Review Improvement Act of 1982 (part of the Tax Equity and Fiscal Responsibility Act of 1982), 42 U.S.C. § 1320c (1982).

The RFP, issued on February 29, 1984, solicited technical and fixed price proposals. Only the three offeror's named above responded by the closing date for receipt of initial proposals of April 27, 1984. (Under the same RFP, HHS also solicited PRO proposals for other states and areas. These awards are not at issue here.)

Initial proposals for the Florida PRO were rated as follows:

<u>Offeror</u>	<u>Technical Score</u>	<u>Price</u>
Professional Foundation for Health Care	591.25	\$ 8,142,121
Professional Review Organization	563.00	\$ 15,116,838
Florida Peer Review	806.75	\$ 22,506,465

HHS found all proposals within the competitive range; it conducted written discussions between June 5 and 15 and oral discussions between June 26 and 28, with best and final offers due on July 7, 1984. Final technical scores, proposed prices, and weighted scores, based on a formula set forth in the RFP (a possible 300 points for price, 1,200 for technical capability), were as follows:

<u>Offeror</u>	<u>Technical Score</u>	<u>Price</u>	<u>Weighted Score</u>
Professional Foundation for Health Care	835	\$14,587,061	1,135
Professional Review Organization	687.25	\$14,999,995	978
Florida Peer Review	838	\$20,593,200	1,014

HHS selected the Professional Foundation for Health Care because:

"[I]ts admission and quality objectives were aggressive and met the requirements as specified in the RFP. The offeror demonstrated experience, personnel, management plan, and other requirements in the RFP to adequately perform PRO activities in the state of Florida"

and because

"[G]enerally, the admission and quality objectives [of the other offerors] failed to meet the requirements specified in the RFP."

In addition, the Professional Foundation for Health Care proposed the lowest price; HHS therefore awarded it the contract on July 13, 1984 at a price of \$14,340,000 based on a reduction in direct labor costs. The agency notified the unsuccessful offerors at the time of award and debriefed them on July 25, 1984.

PROTESTS

On July 19, 1984, the Professional Review Organization, the first protester, filed with our Office, alleging that HHS had omitted essential terms from the RFP; had used evaluation criteria that were not clear and understandable; had not adhered to criteria that were listed and, conversely, had based the award on significant criteria not included in the RFP. The protester further alleged that HHS had not conducted meaningful discussions; had followed irregular procedures during price discussions; and had provided incorrect information as to award status. Finally, the protester asserted that neither its vast experience nor its preferred "physician-sponsored" status had been properly evaluated.

In its October 16, 1984 response to HHS's administrative report, the Professional Review Organization supplemented its protest by asserting that the awardee's proposal was defective and that HHS had improperly evaluated it. Specifically, the protester argued that it would be impossible for the awardee to achieve 50 percent

of its proposed reduction in total Medicare admissions in the first 90 days of the 2-year contract, since the awardee is not a statewide organization and because of built-in delays between patient discharge and the submission of claims. In addition, the Professional Review Organization questioned the awardee's data, which had been based only on Medicare admissions in two Florida counties, and alleged that the awardee had overstated the potential reduction in admissions for eye lens procedures in order to meet HHS's stated goal of an overall reduction in admissions of 4.5 to 5 percent.

The protester also alleged that HHS had disclosed sensitive price information to it during discussions, resulting in an unlawful auction, since other offerors were not provided with similar information. Finally, the firm concluded that the awardee's proposal was "nonresponsive and unacceptable as a matter of law," since it allegedly was not supported by valuable consideration, i.e., promises that could be achieved. The protester therefore requested bid preparation costs.

Following a bid protest conference on October 25, 1984, Professional Review Organization still further supplemented its protest on October 31, 1984, contending that during discussions HHS had told Florida Peer Review that it should attempt to achieve a 10 percent reduction in Medicare admissions, instead of the 4.5 to 5 percent target given the Professional Review Organization. The protester states that it would have attempted to meet this goal if it also had received such guidance.

Florida Peer Review, the second protester, initially filed with our Office on September 25, 1984, alleging that HHS had not provided it with the same information that had been given to other offerors, since Professional Review Organization, and probably the awardee, had been told during discussions that HHS sought a contract price of approximately \$15,000,000. In addition, Florida Peer Review alleged that, during discussions, HHS had increased percentage goals for overall reduction in Medicare admissions to 10 percent and had given conflicting advice regarding a preference for proposals using statewide data. Finally, this protester alleged that the awardee's proposed admission and quality objectives had not been properly

evaluated; for example, the awardee allegedly had projected too high a total of septicemia cases.

TIMELINESS OF PROTESTS

The threshold issue is whether, as HHS asserts, these protests are untimely, either wholly or in part.

1. The Professional Review Organization's Protest

We find Professional Review Organization's allegations that HHS omitted essential terms from the RFP and used evaluation criteria that were not clear and understandable to be untimely. Under our Bid Protest Procedures, these matters were required to be raised before the April 27, 1984 closing date for receipt of initial proposals. 4 C.F.R. § 21.2(b)(1) (1984). However, they were not complained of until July 19, 1984.

The protester asserts that it could not appreciate these improprieties until it saw how the agency misapplied the evaluation criteria, citing Informatics, Inc., 56 Comp. Gen. 402 (1977), 77-1 CPD ¶ 190. In Informatics, the solicitation included misleading data that the offeror did not know about until after it submitted its proposal. In the present case, the protester argues that certain information should have been--but was not--included in the solicitation. This situation obviously is different from the one in Informatics; the issue here clearly is untimely. See DATA 100 Corp., B-185844, Oct. 21, 1976, 76-2 CPD ¶ 354.

Certain other allegations of Professional Review Organization are also untimely. That protester, in its July 19, 1984 letter contended that HHS did not ultimately adhere to the evaluation criteria included in the RFP and based the award on significant unlisted criteria. The protester's only initial elaboration was that selection may have been based on a specific versus a general commitment to employ minority subcontractors. The protester purported to expand on this basis of protest in its October 16, 1984 response to the agency report, in which it analyzed the awardee's proposal and attempted to show that HHS's evaluation of it had been deficient in several specific respects. We consider the later allegations to be, at best, only tangentially related to the initial protest

since, as noted above, they concern the awardee's ability to meet proposed objectives and use of allegedly incomplete or incorrect data.

New and independent grounds of protest such as these had to independently satisfy the timeliness requirements of our Bid Protest Procedures, and thus had to be filed not later than 10 working days after the basis for them was known or should have been known, whichever is earlier. See Tracor Jitco, Inc., B-208476, Jan. 31, 1983, 83-1 CPD ¶ 98. Here, the contracting officer states that he provided Professional Review Organization with a copy of the awarded contract before its July 25, 1984 debriefing. Additionally, the protester received pertinent portions of the awardee's proposal pursuant to a Freedom of Information Act request on or about August 3, 1984. The protester then apparently employed a consultant to analyze the proposal in order to supplement its protest. The Professional Review Organization did not protest concerning the content of the awardee's proposal or HHS's evaluation of it within 10 working days of when it received either the contract or the proposal, but rather waited until its consultant reviewed both in detail. As a result, the protests concerning the awardee's proposal and HHS's evaluation of it are untimely. See Booz, Allen & Hamilton, 63 Comp. Gen. 599 (1984), 84-2 CPD ¶ 329; Rapid America Corp., B-214664, Dec. 26, 1984, 84-2 CPD ¶ 696.

The Professional Review Organization asserts that the above issues should be considered under the significant issue exception to our procedures, since the integrity of this congressionally-mandated review of the Medicare program is of widespread interest to the procurement community. See 4 C.F.R. § 21.2(c). However, this basis of protest concerns only the evaluation of a particular proposal, and in our opinion it does not warrant invoking the significant issue exception. See NDE Technology, Inc., B-216419, Sept. 24, 1984, 84-2 CPD ¶ 345.

The protester also complained in its initial protest that HHS had not properly evaluated its experience and physician-sponsored status. After filing of the protest, HHS debriefed the Professional Review Organization and, in its administrative report, expressly responded to these allegations. Since Professional Review Organization has not mentioned these matters again, we believe it has

decided not to pursue them. Accordingly, we will not consider these bases of protest. See Mercer Electronics Co., B-212873, Feb. 9, 1984, 84-1 CPD ¶ 161, aff'd on reconsideration, July 23, 1984, 84-2 CPD ¶ 79.

We dismiss the above grounds of the first protest.

2. Florida Peer Review's Protest

Florida Peer Review's protest, as noted above, was filed on September 25, 1984, more than 2 months after the award and the protester's debriefing. The firm asserts that it based its protest on a response to a Freedom of Information Act (FOIA) request that it received on September 13, 1984.

We have considered protests filed within 10 days of receipt of FOIA materials to be timely if they are based entirely upon that information. Native American Management Services, Inc. B-216282, Sept. 17, 1984, 84-2 CPD ¶ 304; Drinkwater Engineering, Inc., B-209386, Mar. 14, 1983, 83-1 CPD ¶ 248. However, if a protest is based upon facts that the protester is or should have been aware of before the FOIA request, we will consider the protest untimely. See Canberra Industries, Inc., B-213663, June 22, 1984, 84-1 CPD ¶ 659; Compucorp, B-212533, May 22, 1984, 84-1 CPD ¶ 536. We believe the bulk of Florida Peer Review's protest is based upon facts that it was aware of well before receipt of the FOIA materials.

Specifically, we find the allegation that HHS gave varying percentage goals for reduction of Medicare admissions during discussions untimely. Florida Peer Review does not attempt to relate this basis of protest to materials it received in response to the FOIA request. The discussions in question were held on June 28, 1984. The protester was informed of the award on July 13, 1984 and was provided with a copy of the contract before the debriefing on July 25, 1984, when it discussed this issue with HHS. Under these circumstances, we will not consider this basis of protest.

Similarly, the firm's protest concerning HHS's alleged preference for statewide data is untimely. The protester indicates that it became aware of the prejudicial effect of the agency's allegedly conflicting advice when it reviewed

the contract and found that it was based on limited local data. Since Florida Peer Review was provided with a copy of the contract before its debriefing, we also find this protest basis untimely.

The allegation that HHS did not properly evaluate the awardee's proposed admission and quality objectives also was based upon a review of the contract. In addition, the record shows that the allegedly overstated number of septicemia cases was specifically discussed at Florida Peer Review's debriefing. Consequently, these bases of protest also are untimely.

We dismiss the above grounds of the second protest.

GAO ANALYSIS OF TIMELY ISSUES

1. Selection in Accord with Evaluation Criteria

The Professional Review Organization timely protests that award was not made in accord with the RFP evaluation criteria. This allegation is generally unsupported. However, although the protester was debriefed about deficiencies in its own proposal and given a copy of the awardee's contract, as well as pertinent portions of the successful proposal, there is no indication that it was provided with details of the evaluation. Consequently, we will consider this general basis of protest based on our in camera review of HHS's records. See Magnolia-Boyd Corp., et al., B-214716, Oct. 5, 1984, 84-2 CPD ¶ 388.

This review indicates that each technical evaluator used scoresheets made up in accord with the RFP criteria and noted, in writing, weaknesses and deficiencies. The scores appear to have been properly compiled, with the reasons related to the evaluation criteria; all are documented. In addition, prices were evaluated in accord with the RFP formula. See Harrison Systems, Ltd, 63 Comp. Gen. 379 (1984), 84-1 CPD ¶ 572. The awardee's final technical score was significantly higher than Professional Review Organization's, and its price was lower. Therefore, since the protester has not shown that the evaluation was arbitrary, we deny the protest on this basis. See General Management Systems, Inc., B-214246, Sept. 25, 1984, 84-2 CPD ¶ 351; Deuel and Associates, Inc., B-212962, Apr. 25, 1984, 84-1 CPD ¶ 477.

The protester also alleges that HHS based the award on significant unlisted criteria. As noted above, the only timely elaboration on this basis of protest was that the selection may have been due to the awardee's expressed commitment to utilizing minority subcontractors. Our in camera review indicates that this was not a factor in the selection.

2. Meaningful Technical Discussions

Professional Review Organization also has taken issue with HHS's conduct of discussions. First, the firm alleges that HHS did not engage in meaningful discussions, pointing out its deficiencies and requesting appropriate information.

When an agency conducts discussions with firms in the competitive range, it must make these discussions meaningful. Raytheon Co., 54 Comp. Gen. 169 (1974), 74-2 CPD ¶ 137. However, the content and extent of discussions in a given case are matters of judgment, primarily for determination by the agency involved and not subject to question by our Office unless they are clearly without a reasonable basis. Stewart & Stevenson Services, Inc., B-213949, Sept. 10, 1984, 84-2 CPD ¶ 268. As a general rule, negotiators should be as specific as practical considerations will permit in advising offerors of the corrections required. Id.

The record here indicates that extensive written and oral discussions were conducted with Professional Review Organization and the other offerors. Further, the scores given the proposals indicate that the most significant difference between the awardee's and the protester's proposals was with regard to admission and quality objectives. The record shows that HHS conducted extensive written and oral discussions, pointing out deficiencies and weaknesses on all of the objectives. We cannot conclude that HHS's discussions with the Professional Review Organization were not meaningful. See Canaveral Port Services Inc; et al., B-211627.3, Sept. 26, 1984, 84-2 CPD ¶ 358 at 21-22.

3. Price Discussions

Professional Review Organization also asserts that irregular procedures were followed during price discussions. In this regard, the protester alleges that because HHS told it to "lower its budget to \$15,000,000," it therefore reduced its best and final offer to just below that amount. Professional Review Organization alleges that a similar goal was not disclosed to the other offerors and contends that this constitutes an impermissible auction under the Federal Acquisition Regulation (FAR), 48 Fed. § 15.610(d)(3)(i)(1984).

HHS asserts that the allegations concerning use of auction techniques, made in the protester's letter of October 16, 1984, are untimely. We believe, however, that they are an elaboration of the original protest concerning irregular price discussions. We therefore will consider them.

HHS states that Professional Review Organization was told that \$15,000,000 was a fair and reasonable price for its proposal, but that it could submit a best and final offer at whatever price it deemed appropriate. The protester, however, argues that it believed it had to meet the \$15,000,000 figure to be eligible for further consideration.

We have reviewed HHS notes on the oral discussions, which indicate that various aspects of Professional Review Organization's price were discussed and further state:

"13. Fixed Price Contract; Offeror needs to adjust objectives; a round figure of about \$15,000,000 would like to be seen."

It is entirely proper for an agency to disclose its price goal during negotiations as a tool for reaching a fair and reasonable price. Ikard Manufacturing Co., 63 Comp. Gen. 239, 241 (1984), 84-1 CPD ¶ 266 at 4; Griggs and Associates, Inc., B-205266, May 12, 1982, 82-1 CPD ¶ 458. Although FAR, 48 C.F.R. § 15.610(d)(3)(i), prohibits auction techniques such as "indicating to an offeror a cost or price that it must meet to obtain further consideration," the protester has the burden of proving that this prohibition was violated. Id.

In this case, we believe that the best evidence of what was actually communicated to Professional Review Organization is HHS's concurrent notes on the discussions. In our opinion, the comment "a round figure of about \$15,000,000 would like to be seen" does not reasonably convey that an offeror must meet this price to be further considered. Even the protester does not say that it was told directly that it had to lower its price to \$15,000,000, but rather argues that this was implicit from the negotiations. Under these circumstances, we cannot conclude that an auction occurred.

Florida Peer Review also protests the price discussions, contending that if it had been advised of the \$15,000,000 goal, it would have revised its technical proposal, in which it proposed to review 100 percent of Medicare admissions, and thereby would have significantly lowered its \$20,593,200 price. Florida Peer Review suggests that HHS also provided the awardee with similar information on the \$15,000,000 goal, resulting in disparate and prejudicial treatment.

Although HHS contends that this protest basis is untimely, Florida Peer Review states that it became aware of this basis of protest when it received a copy of the Professional Review Organization's protest indicating that it had been informed of this amount on September 13, 1984 in the response to its FOIA request. HHS asserts that it is inconceivable that the two protesters did not discuss this matter earlier, but has offered no proof. We therefore will resolve any doubt as to timeliness in the protester's favor. See Builder's Security Hardware, Inc., B-213599.2, Feb 15, 1984, 84-1 CPD ¶ 207.

HHS's notes on the oral discussions include the following comments relating to Florida Peer Review's price:

"HHS has a budget. Think about some alternatives in reducing. . . . You are the only offeror who wishes to go on 100 percent retrospective review to our knowledge. Think of what the RFP requires. . . ."

We believe Florida Peer Review was adequately apprised by this and other documented statements that its level of effort and price were high. The burden is on offerors to

furnish satisfactory responses after discussions are conducted. See Phoenix Safety Associates Ltd., B-216504, Dec. 4, 1984, 84-2 CPD ¶ 621. Here, it is apparent that Florida Peer Review decided to continue its 100 percent review approach despite what it was told in discussions. Also, the RFP clearly indicated the importance of price in award selection.

Further, we have held that under appropriate circumstances an agency may disclose a cost goal to one offeror without conducting similar discussions with all offerors. See Bank Street College of Education, 63 Comp. Gen. 393, 410-411 (1984), 84-1 CPD ¶ 607 at 23. There is no requirement that an agency hold the same kind of detailed discussions with all offerors when the weaknesses or deficiencies, if any, in their proposals may vary. Id.

In this case, HHS asserts and the record substantiates that it did not mention the \$15,000,000 figure to other offerors because that figure would not apply to their particular approaches. For example, HHS told the awardee that its staffing appeared too low and that its price "would have to include the accomplishment of all objectives." The awardee states that it responded to these discussions by significantly increasing its level of effort and price.

Since Florida Peer Review's initial price was significantly higher than \$15,000,000, while Professional Review Organization's price was very close to this amount, we do not believe that either protester was prejudiced by the mention of a cost goal to only the latter in discussions.

4. Differing Goals for Reduction of Admissions

On October 31, 1984, as noted above, Professional Review Organization protested that Florida Peer Review had been told during discussions that it should attempt to achieve a 10 percent reduction of Medicare admissions instead of the 4.5 to 5 percent reduction that had been communicated to it in discussions. The protester indicates that it would have endeavored to meet this goal if it had been told of it.

HHS argues that this supplemental protest is untimely, questioning whether the Professional Review Organization first heard of Florida Peer Review's contentions regarding a 10 percent reduction at the bid protest conference at our Office. However, HHS cannot prove that the protester knew or should have known of this basis of protest earlier. We therefore again will resolve doubt as to timeliness in the protester's favor. See Builder's Security Hardware, supra.

HHS denies that it made any such suggestion to Florida Peer Review, and the agency's notes on the discussions do not include any such statement. The protester has submitted an affidavit indicating that, during a lunch break, its representative was asked whether the proposal could have 10 percent or more impact. We would not interpret this as a demand that a 10 percent reduction be achieved, but rather as a question, i.e., whether the proposal could actually produce a 10 percent impact. In any case, because the only evidence of record is the conflicting statements of the protester and the agency, we will accept the agency's denial that this discussion took place. American International Rent A Car, B-215018, Sept. 25, 1984, 84-2 CPD ¶ 354. Further, HHS did not discuss a 10 percent goal for reducing admissions with the awardee, which states that its discussions with HHS and its proposal were based upon the same 4.5 to 5 percent goal that was given to the protester. Consequently, we find no merit in this basis of protest.

Finally, Professional Review Organization alleges that on July 13, 1984, HHS told it that award would not be made until July 16, 1984, and that all proposals were competitive. Later that day, HHS announced that the contract had been awarded. While HHS has not denied this allegation, we find it at best a procedural deficiency that neither violated any regulation nor prejudiced the protester.

CONCLUSION

In view of the foregoing, both protests are dismissed in part and denied in part; the Professional Review

Organization's claim for bid preparation costs is also denied. See Mechanical Equipment Co., Inc., B-213236, Sept. 5, 1984, 84-2 CPD ¶ 256.

Harry R. Van Cleve
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General Counsel