31361

DECISION

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

FILE: B-215303.5 **DATE:** June 4, 1985

MATTER OF: National Capital Medical Foundation, Inc.

DIGEST:

1. Third ranked and highest priced of three offerors, which protests the evaluation of its and the awardee's proposals, but not the second ranked offeror's proposal, is an interested party under GAO Bid Protest Procedures since it may be in line for award if the protest concerning the evaluation of its own proposal is sustained.

2. Agency evaluation of the individual proposed goals and objectives of the protester and the awardee under an RFP is not arbitrary or contrary to procurement law in view of the considerable agency discretion involving a high degree of subjective judgment on the medical policy issues addressed.

3. An agency's use of a rating plan, which resulted in the award to the protester of zero points for certain evaluation criteria while not similarly rating the awardee, is arbitrary. Also, this rating plan gives inordinate weight to certain evaluation criteria and is inconsistent with the RFP evaluation criteria.

4. Even where the agency's evaluation of the protester's technical proposal is arbitrary and inconsistent with the RFP evaluation criteria such that the protester should have been highest rated technically, the award to a competitor is not objectionable where the award is to be

032215

based upon a formula contained in the RFP integrating technical and price factors and the protester received a significantly lower score than the awardee under the formula (even using the higher technical score which the protester should have received) because of its significantly higher price.

National Capital Medical Foundation, Inc. (NCMF), protests the award of a contract to the Delmarva Foundation for Medical Care, Inc. (Delmarva), by the Health Care Financing Administration, Department of Health and Human Services (HHS). The award was made pursuant to request for proposals (RFP) No. HCFA 84015 and the awardee became the utilization and quality peer review organization (PRO) for the Medicare program in the District of Columbia.

We deny the protest.

BACKGROUND

The PRO is to monitor the professional activities of physicians and hospitals in the District of Columbia, 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 solicited fixed price and technical proposals. The following proposal evaluation criteria are set forth in the RFP:

1.	Understanding of Work	50 points
2.	Objectives and Review Activities	600 points
	(a) Proposed specific objectives and required review activities	400 points
	(1) Admission Objectives and Required Review Activities	200 points
	(2) Quality Objectives	200 points
	(b) Approach for accomplishing other required activities	100 points

	(c) Data collection and analysis	100 points
3.	Experience	150 points
4.	Personnel	200 points
5.	Management Plan	100 points
6.	Physician-Sponsored Organizations (100 points will be awarded automatically to those offerors who qualify as "Physician-Sponsored Organizations.")	100 points
7.	Price	300 points

The price rating for responsive proposals is determined by the following formula:

$$300 - \frac{(\text{Price of Proposal} - \text{Lowest Priced Proposal}) \times 300}{\text{Lowest Priced Proposal}}$$

In response to the RFP, three proposals were received by September 7, 1984, and rated as follows:

	Technical Score	Price
Delmarva	514.55	$944,657
Maryland Foundation for Medical Care	512.5	$778,553
NCMF	521.65	$927,737

All proposals were found to be within the competitive range. After written and oral discussions, best and final offers were submitted by October 16, 1984. The final scores were as follows:

	Technical Score	Price	Price Score	Total Score
Delmarva	657	$599,886	300	957
Maryland Foundation	626.25	$683,562	258	884.25
NCMF	614.25	$905,658	148	762.25

HHS states that all best and final proposals were technically acceptable. Award was made to Delmarva on October 18, 1984. HHS states that award selection was "based upon Delmarva's submission of the highest rated technical proposal and the lowest offered price."

NCMF protests that it should have received the award because its proposal was the most accurate, most technically sound and feasibly accomplishable under the RFP guidelines. In this regard, NCMF states that it is more intimately familiar with the District of Columbia's patients' needs, physician and surgeon standards of practice, and identified and validated medical problems because it has performed as the PRO for the District of Columbia since 1974.

NCMF also protests the evaluation of Delmarva's proposal. Specifically, NCMF alleges that virtually all of the admission objectives and quality objectives proposed by Delmarva are inaccurate, not factually substantiated or medically feasible, and/or not in accordance with the RFP evaluation criteria.

INTERESTED PARTY

HHS initially argues that NCMF is not an interested party under our Bid Protest Procedures, since NCMF would not be in line for award even if its protest is upheld. In this regard, HHS notes that both Delmarva and Maryland Foundation are higher technically rated and lower priced than the NCMF and that the evaluation of Maryland Foundation's proposal has not been protested.

NCMF is an interested party under our Bid Protest Procedures, 4 C.F.R. § 21.1(a) (1984), since it is not just protesting the evaluation of Delmarva's proposal; it is also protesting the evaluation of its own technical proposal. Consequently, if NCMF's technical proposal is found to be improperly rated, NCMF may then be in line for award. Under the circumstances, NCMF has the requisite direct interest to maintain this protest. 4 C.F.R. § 21.1(a). Wing Manufacturing; Simulators Limited, Inc.--Request for Reconsideration, B-213046.3, et al., Aug. 17, 1984, 84-2 C.P.D. ¶ 187 (fourth and seventh highest priced offeror's under an RFP, where price was the award selection criterion, are not interested parties eligible to protest lowest priced offeror's pricing and competitive advantage, because the protesters would not be in line for award even if their protests were sustained).

EVALUATION OF THE PROPOSED OBJECTIVES

NCMF's protest centers around the evaluation of the admission and quality objectives proposed by itself and the awardee. Three admission objectives and five quality objectives addressing certain specific concerns and problems in the Medicare program were required to be responded to by the offerors. The offerors were required to document and verify the problems to be addressed, outline their approach to improving the situation addressed in the specific objectives, and designate percentage goals for improving the present situation. The proposed objectives of the awardee are incorporated into the contract. The PRO's contract performance is judged by its compliance with these goals. The primary reason for the evaluated technical difference between Delmarva's and NCMF's proposals was the admission and quality objectives in the best and final offers.

In this case, NCMF has been furnished a copy of Delmarva's contract which contains Delmarva's admission and quality objectives. However, NCMF has not been furnished the detailed technical evaluation of the proposals, nor has it been debriefed on the evaluated weaknesses and deficiencies found in its technical proposal. Consequently, we have performed an in camera review of the technical evaluation of NCMF's and Delmarva's proposals. See Professional Review of Florida, Inc.--Florida Peer Review Organization, Inc., B-215303.3, B-215303.4, Apr. 5, 1985, 85-1 C.P.D.¶ 394 at 9.

Our in camera review focused primarily on the offerors' proposals and the technical scoring of the individual evaluators based on the rating plan worksheets designed for this RFP. The rating plan and worksheets were developed prior to receipt of initial proposals. The rating plan provided for adjectival ratings of each weighted evaluation subcriterion as follows: not acceptable, poor, acceptable, good, very good, and excellent. Various points were awarded based upon these adjectival ratings. Additionally, 110 points were allocated to the admission objectives under the rating plan, which provided that each proposed admission objective had to be rated at least acceptable for the offeror to receive any of the allocated points. The same rating scheme was applicable for the five quality objectives in order to receive any of the 200 points allocated to that criterion. None of the foregoing aspects of the rating plan was specified in the RFP.

Although we reviewed the noted documents, we note that it is not the function of our Office to evaluate technical proposals or resolve disputes over the scoring of technical proposals. General Management Systems, Inc., B-214246, Sept. 25, 1984, 84-2 C.P.D. ¶ 351. Consequently, the determination of the relative merits of a proposal, particularly with respect to technical considerations, is primarily a matter of administrative discretion and the exercise of that discretion will not be disturbed unless it is shown to be arbitrary or violative of procurement law. Alturdyne, B-214103.2, Oct. 2, 1984, 84-2 C.P.D. ¶ 379; Leo Kanner Associates, B-213520, Mar. 13, 1984, 84-1 C.P.D. ¶ 299.

A. Evaluation of NCMF's Objectives

NCMF received a "poor" rating for two of the three admission objectives and "poor" ratings for all five of the quality objectives. Consequently, both NCMF's admission and quality objectives were rated "unacceptable" overall and it received zero points for these evaluation subcriteria under the rating plan. But for this zeroing aspect of the rating plan, NCMF would have received 102.5 points. As discussed below, we find that these awards of zero points were improper. However, we will first review the propriety of HHS's evaluation of each of NCMF's proposed admission and quality objectives to ascertain if they were improperly rated low.

The evaluator's rating plan worksheets indicated that NCMF's first admission objective to reduce Medicare admissions for eye lens procedures was rated "poor" because it proposed too low a reduction in admissions. Additionally, in the report on the protest, HHS states that NCMF erroneously indicated that there were no adequate facilities for outpatient treatment of eye lens procedures. NCMF denies making this statement, but does state that the availability of such facilities must be considered in proposing an achievable admission objective. It is apparent that the poor rating of this objective is based upon a basic disagreement between NCMF and HHS as to how much reduction is possible for medical admissions for eye lens procedures. NCMF admits that HHS advised it during discussions that its eye lens procedures admissions reduction goal could be substantially reduced, yet NCMF did not modify its proposed goal.

Our review of NCMF's second admission objective to reduce the number of inappropriate or unnecessary procedures reveals that the technical evaluators found that the NCMF proposal did not show a sufficient review to identify the problems encompassed by this objective.

All of NCMF's quality objectives were rated "poor." The documented reasons of the technical evaluators for the "poor" rating of NCMF's quality objectives include evaluated failures to validate or document the nature or scope of the problems to be addressed and evaluated limited impacts or nonaggressive approaches.

Additionally, in the agency report on the protest, HHS specifically commented on NCMF's first quality objective to reduce unnecessary hospital readmissions resulting from substandard care provided in prior admissions. HHS states that NCMF proposed that the hospital be permitted to decide on the corrective action if problems are identified. HHS states that this is the PRO's responsibility. NCMF did not respond to this HHS observation.

The agency report also questions why NCMF did not utilize the most recent 1984 data in formulating its first quality objective. NCMF had access to this data as the responsible PRO for the District of Columbia. NCMF admits that this suggestion was made to it during discussions, but explains that this 1984 data is a very limited data base. NCMF contends that since the quality of care on readmissions could not be realistically ascertained from this data, it validated its quality objectives with the more complete 1983 data. From our review of NCMF's best and final offer, it is apparent that NCMF had been apprised during discussions that HHS did not believe NCMF's first quality objective was sufficiently aggressive and that NCMF's verification with data of the extent of the problem for this objective was not perceived by HHS to be sufficient. However, NCMF's best and final proposal did not propose additional data analyses to further justify or verify this quality objective, although NCMF did offer to further reduce the readmission rate goal based on HHS's observation that this goal should be further reduced.

It is apparent that the parties fundamentally disagree as to the aggressiveness and achievability of NCMF's admission and quality objectives as well as the quality and believability of the supporting data analyses. The fact

that the protester disagrees with the agency's evaluation does not render the evaluation unreasonable. See General Management Systems, Inc., B-214246, supra. Moreover, there must necessarily be considerable discretion on the part of the procuring agency, involving a high degree of subjective judgment, in evaluating objectives of the medical policy nature involved here. See High Plains Consultants, B-215383, Oct. 18, 1984, 84-2 C.P.D. ¶ 418. Under the circumstances, we cannot conclude that the individual adjectival ratings or the 102.5 points awarded for the individual admission and quality objectives was arbitrary or in violation of law.

B. Evaluation of Delmarva's Objectives

NCMF protests the evaluation of virtually all of Delmarva's proposed objectives. Basically, NCMF contends that Delmarva's proposed admission and quality objectives have not been verified as problems in the District of Columbia or are otherwise inaccurate. In this regard, Delmarva reportedly has had very little experience in the District of Columbia, although it has gathered considerable data from Baltimore and the District of Columbia's Maryland suburbs.

First, NCMF protests that Delmarva's second admission objective to reduce the number of necessary admissions or invasive procedures for 34 problem diagnosis-related groups (DRG) is inaccurate and not achievable because (1) Delmarva's proposal fails to acknowledge that better coding of DRG's will not actually reduce admissions, but rather will only shift these cases to other DRG's; (2) many of the targeted 34 DRG's are low-volume case groups; (3) the problem DRG's are not identified and validated; and (4) 3 of the 34 DRG's are so serious that hospitalization is always a necessary step. HHS responds that (1) it specifically considered the coding issue in evaluating the proposals and did not believe that it was a significant problem with respect to Delmarva's proposed objective; (2) there was no requirement that this objective only consider high-volume DRG's and the overall impact proposed by Delmarva is substantial; (3) the problems were properly identified and verified using appropriate and believable data; and (4) the 3 cited DRG's actually could include unnecessary Medicare admissions and are but a small percentage of the targeted 34 DRG's admissions in any case.

NCMF asserts that Delmarva's third admission objective to reduce the number of inappropriate or unnecessary admission or invasive procedures in eight problem hospitals

is inaccurate because Delmarva claimed there was a reduction in hospital admissions from 1982 to 1983 when there actually was an increase. HHS states that the data shows there was a decrease in admissions and that Delmarva's aggressive approach to this objective satisfied HHS that its proposed goals can be achieved.

NCMF further protests that Delmarva's proposed approach to this third admission objective to precisely quantify and target the problem within the first 90 days shows that it has not validated the problem in its proposal. HHS states that since Delmarva had not been conducting Medicare reviews in these hospitals, its proposed approach was reasonable. Further, the HHS review of Delmarva's proposal shows that Delmarva properly validated and quantified the objective and that any changes to the proposed goals as a result of its initial 90-day study would not be significant.

NCMF protests that Delmarva's first quality objective to reduce unnecessary readmissions resulting from substandard care provided during prior admissions is inaccurate because this objective includes DRG's which encompass patients whose readmissions are not caused by substandard care. Delmarva's proposed objective states that only one-third of the cases in the targeted DRG's are problems. HHS found that Delmarva adequately validated the problem and related it to the District of Columbia.

NCMF also protests Delmarva's second quality objective to assure provision of medical services which, when not performed, have significant potential for serious patient complications. In response to this objective, Delmarva proposed two subobjectives. With regard to Delmarva's quality objective number 2A, NCMF protests that this objective was developmental, not validated and constitutes inappropriate medical practice. HHS admits that the objective is too developmental to be considered acceptable, but states that Delmarva's second quality objective was considered acceptable overall because Delmarva's quality objective number 2B is acceptable. HHS explains that if either subobjective is acceptable, then the entire objective is to be evaluated as acceptable under the rating plan since more than one response to a particular objective is optional.

NCMF contends that Delmarva's quality objective number 2B to assure timely provision of antibiotics for genitourinary surgery has no validity in the District of Columbia

where physicians tend to overuse prophylatic antibiotics. HHS disagrees and states that Delmarva has adequately verified this problem.

NCMF contends that the fifth quality objective to reduce avoidable post-operative or other problems erroneously combines hospital-acquired infections with post-operative complications and that an actual review of the District of Columbia records is necessary to validate this objective. HHS has reviewed Delmarva's data and is satisfied that this validates the problems and goals as applicable for the District of Columbia.

Based upon our review and given the considerable agency discretion in these medical policy matters, we cannot find that any of the foregoing objectives proposed by Delmarva is unacceptable or that they were arbitrarily overrated or overscored.

The rating of Delmarva's third and fourth quality objectives is of more concern. Delmarva's third quality objective is to reduce avoidable deaths and its fourth quality objective is to reduce the incidence of unnecessary surgery in four DRG's. NCMF contends that Delmarva did not adequately verify the problems with the District of Columbia data, and such data would show that these objectives are inappropriate. In the protest report, HHS defends in detail Delmarva's data, which was obtained from Baltimore and the Maryland suburbs, and concludes that each of these objectives was acceptable and verified. However, our review of the technical evaluation panel's rating of Delmarva's best and final proposal reveals that it was rated "poor" for both these quality objectives. The reasons for the "poor" ratings are not documented by HHS. We have reviewed the evaluator's comments regarding these two quality objectives in Delmarva's initial technical proposal. Delmarva's alleged failure to use District of Columbia data is not the most notable evaluated deficiency. Rather, according to the evaluator's comments, the initial "poor" ratings were primarily related to the evaluators' perceptions that Delmarva's goals were not sufficiently aggressive. The subject of relating the data actually utilized by Delmarva for these objectives to the District of Columbia was discussed and responded to in detail in Delmarva's best and final proposal, however.

We have held that point scores and adjectival ratings reflecting the technical evaluator's judgment are not

themselves controlling in determining proposal acceptability. While such ratings are required to be considered by the source selection official or contracting officer, it is ultimately his responsibility to determine what, if any, significance should be attached to the technical evaluators' ratings. See Global Associates, B-212820, Apr. 9, 1984, 84-1 C.P.D. ¶ 394.

Neither the contracting officer's negotiation memorandum/selection statement nor the agency report mentions these "poor" ratings. However, Delmarva's proposal was specifically found technically acceptable by the contracting officer who decided Delmarva's objectives were sufficiently acceptable to justify an award. When the contract was executed, an accurate summary of Delmarva's final proposed admission and quality objectives was agreed to by HHS and Delmarva and specifically incorporated into the contract. Also, as indicated above, HHS has made a detailed technical response in the agency report to NCMF's attack on these objectives. Consequently, we cannot find that HHS's determination that these quality objectives were acceptable is arbitrary or contrary to law. In any case, Delmarva's final technical point score is reflective of the "poor" rating of these objectives.

C. Defective Rating Plan

Although we do not find that HHS's evaluation of the individual admission and quality objectives of NCMF and Delmarva is arbitrary or contrary to law, we believe that the technical rating plan as it was utilized here was inconsistent with the evaluation criteria set forth in the RFP. Procuring agencies do not have the discretion to announce in a solicitation that one evaluation plan will be used and then follow another in the actual evaluation. Columbia Research Corp., 61 Comp. Gen. 194, 201 (1982), 82-1 C.P.D. ¶ 8. Consequently, it is improper for an agency to depart, in a material way, from the evaluation plan described in the RFP without informing the offerors and giving them an opportunity to structure their proposals with the new evaluation scheme in mind. Id.

In this case, the rating plan actually used required the award of zero points of the total possible 110 points allocated to the admission objectives and 200 points allocated to the quality objectives, if any one of the proposed

objectives was rated less than "acceptable." This was done regardless of the merits of the other proposed objectives. No similar zeroing process was authorized for any other evaluation criteria.

This aspect of the rating plan was not set forth in the RFP nor reported in the agency report on the protest. Further, we find that the RFP gave no indication that an offeror could possibly receive zero points for an entire evaluation criterion if any one of the subcriteria was rated less than acceptable. To the contrary, the RFP states the "points listed in the [evaluation criteria] are maximum values possible and can be awarded in part or whole as determined by [HHS]." (Emphasis supplied.) Contrast Home and Family Services, Inc., B-182290, Dec. 20, 1974, 74-2 C.P.D. ¶ 366 (where RFP indicated the possibility that zero points could be awarded for each of the evaluation criteria; a scoring scheme involving the award of zero points for criteria is not irrational or unreasonable).

In the present case, the evaluation panel scored NCMF 40 points and Delmarva 54 of 110 possible points for the admission objectives and NCMF 62.5 points and Delmarva 69.5 of 200 possible points for the quality objectives. However, under the rating plan, NCMF was awarded none of the 102.5 points earned for its proposed objectives because two of its three admission objectives and all of its quality objectives were rated "poor." On the other hand, even though Delmarva was rated "poor" on two of the quality objectives and the evaluation panel did not rate its quality objectives "acceptable" overall, Delmarva received all of its 123.5 points. In the report on the protests, HHS unequivocably designates both NCMF's and Delmarva's final technical proposals as "acceptable" and makes no reference to NCMF's receiving zero points for its proposed objectives.

Based on the record, it is apparent that this aspect of the rating plan was applied inconsistently and arbitrarily, particularly since HHS has concluded that NCMF's proposal is acceptable. Further, the application of this rating plan made what would have been a 21-point advantage to Delmarva for these criteria a 123.5-point advantage. Since the other evaluation criteria were scored as indicated in the RFP, such an application of the rating plan gives inordinate weight to the admission and quality objectives to the consequential detriment of the other evaluation criteria. See Group Operations Inc., 55 Comp. Gen. 1315 (1976), 76-2 C.P.D. ¶ 79 (rating plan which assigned essentially equal points for proposed costs was inconsistent with the RFP

statement that cost was worth 20 percent of total evaluated weight, since the plan caused cost to be given negligible weight); Everhart Appraisal Service, Inc., B-213369, May 1, 1984, 84-1 C.P.D. ¶ 485 (agency evaluation which weighted technical factors 10 times more than designated in the RFP without correspondingly increasing the weight for price is inconsistent with the announced RFP evaluation criteria); The Center of Education and Manpower Resources, B-191453, July 7, 1978, 78-2 C.P.D. ¶ 21 (evaluator who considered experience in evaluating all evaluation criteria acted inconsistently with the RFP statement that experience would be worth 20 percent of evaluation weight because this evaluation caused experience to be worth more than 20 percent).

Therefore, we conclude that NCMF should have been awarded the 102.5 points for the admission and quality objectives. NCMF's technical score is consequently 716.25 points as compared to Delmarva's 657 points. The apparent reason for NCMF's evaluated technical advantage, despite HHS's stated and evaluated preference for Delmarva's proposed objectives, is the 100 points NCMF received for its "physician-sponsored organization" status. This 100-point advantage presumably implements the statutory preference for this type of organization over other qualified organizations to become a PRO. See 42 U.S.C. §§ 1320c-1, 1302c-2. Delmarva is not a physician-sponsored organization and did not receive this 100 points. Therefore, the portion of the HHS selection basis that Delmarva has the highest rated technical proposal is erroneous.

However, as outlined above, the RFP integrated both price and technical factors in an evaluation formula. The RFP specified that price is worth 300 points and designated a specific formula for price evaluation. If a solicitation sets forth a precise numerical evaluation formula, including price and technical factors, and provides that the awardee will be selected on the basis of total score, the contracting officer or other source selection authority retains the discretion to examine the technical point scores to determine whether the point differential between offerors represents any actual or significant differential in technical merit. Harrison Systems, Ltd., 63 Comp. Gen. 379 (1984), 84-1 C.P.D. ¶ 572. If he agrees with the technical evaluation and scores, he must abide by the formula and make the award to the offeror with the highest total point score. Id. If he disagrees, he can re-examine the scores to determine whether the point differential represents any actual technical merit and, if he concludes that it does not, he can make an award to the lowest priced offeror. Id.

Since HHS has concluded that both Delmarva and NCMF are technically acceptable and since NCMF's highest technical score is primarily based upon its statutory "physician-sponsored organization" preference, we do not believe that HHS could legitimately conclude under the RFP evaluation scheme that NCMF's 59-point technical advantage does not represent actual technical merit. Indeed, the record reflects that the contracting officer adopted the technical evaluation and scoring of the proposals to determine the awardee and that the stated RFP formula was to be the award selection basis.

Under these circumstances, we believe the selection should be based upon the evaluation formula stated in the RFP. NCMF has made no objection to this formula or the price evaluation under the RFP. Since Delmarva's final price of $599,886 is substantially lower than NCMF's final price of $905,658, Delmarva received 300 points under the RFP evaluation formula for price while NCMF received 148 points. When the price scores are added to the corrected technical scores, Delmarva's total score of 957 points is significantly higher than NCMF's 864 points. Under these circumstances, we cannot conclude that NCMF was competitively prejudiced by HHS's defective technical rating plan. Humanics Associates, B-193378, June 11, 1979, 79-1 C.P.D. ¶ 408.

The protest is therefore denied.

for Seymour Efros
Harry R. Van Cleve
General Counsel