

DECISION



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

FILE:

B-219361.2

DATE: October 1, 1985

MATTER OF:

EHE National Health Services, Inc.

DIGEST:

1. A protest of the use of an oral solicitation and of deficiencies in the oral solicitation should have been filed either prior to the time protester's proposal was submitted or within 10 days of receiving inquiries on its proposal from the agency.
2. Brooks Act procedures for contracting are only to be used for architect-engineer solicitations and are not to be used to procure health support services.
3. Recovery of the costs of filing and pursuing a protest, including attorney's fees, and proposal preparation costs is appropriate where GAO recommends that option to extend contract not be exercised since the protester does not thereby get an opportunity to compete for the basic contract period. Federal Properties of R.I., Inc., B-218192.2 May 7, 1985, 85-1 C.P.D. ¶ 508 and The Hamilton Tool Company, B-218260.4, Aug. 6, 1985, 85-2 C.P.D. ¶ ___, distinguished.

EHE National Health Services, Inc. (NHS) protests the award of contract No. GR 85-0008 to provide occupational health services at the National Science Foundation (Foundation). NHS asserts that the Foundation improperly used procedures contained in the Federal Acquisition Regulation (FAR) applicable to architect-engineer (A-E) services and improperly used an oral solicitation for this contract.

The protest is sustained.

In response to a November 16, 1984 oral solicitation for health care support services at the Foundation's headquarters for an indefinite period beginning on or about February 1, 1985, NHS submitted a proposal to the Foundation

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on December 28, 1984. On two subsequent occasions in January 1985, NHS responded to inquiries from the Foundation, supplying additional information on the medical director and the nursing and secretarial staff that NHS was proposing to provide.

On February 14, 1985, NHS was informed by the Foundation that a contract had been awarded to another offeror on February 1. NHS was informed at that time that the award was made on factors other than price.

NHS filed a protest on February 26 with the contracting officer, alleging that the Foundation had failed to comply with the FAR. By letter of May 23, the Foundation denied the protest and NHS protested to our Office on June 5.

NHS objects to the oral solicitation, asserting primarily that its use was improper because the Foundation knew in mid-November 1984 of its contracting needs and therefore had adequate time, 2-1/2 months, to issue a written solicitation, conduct negotiations and make an award. NHS contends that the Foundation failed to identify the factors other than price that were major considerations in awarding the contract. Further, NHS contends that the oral solicitation was not documented as required, that NHS was not notified whether its proposal was in the competitive range, that no discussions were held with NHS and best and final offers were not requested, and that no preaward or post award notice was given to NHS. Finally, NHS disputes the Foundation's contention that certain negotiated procurement procedures in Part 15 of the FAR did not have to be followed because the Foundation had the authority to procure the health care support services under the procedures applicable to the procurement of A-E services (FAR Part 36).

Portions of this protest are untimely. Our Bid Protest Regulations require that protests of solicitation deficiencies be filed prior to the closing time for receipt of proposals, 4 C.F.R. § 21.2(a)(1) (1985), while all other protests must be filed within 10 days of when the basis for protest was known or should have been known. 4 C.F.R. § 21.2(a)(2). Here the protester knew at the outset that an oral solicitation was being used, and we find that at least by the time it received and responded to the Foundation's inquiries in January, NHS was on notice of the fact that the oral solicitation was not resulting in an immediate award. Thus, we think NHS' objection to the use of an oral solicitation should have been filed either prior to the time it submitted its proposal or, at the latest, within 10 days of receiving the Foundation's inquiries in January. Similarly,

the protester's objection to the absence of evaluation factors other than price also should have been filed prior to proposal submission.

Regarding the merits of the protest, it appears that the Foundation thought that it could contract for the health/medical support services using the procedures in Part 36 of the FAR relating to contracting for A-E services. The contracting officer stated that health services are similar to A-E services as they are professional in nature and thus should be treated similarly. The contracting officer determined that certain requirements in Part 15 of the FAR concerning procedures to be used for negotiated contracts were not to be followed. For example, the Foundation planned to rate the proposals technically and then to negotiate with the highest ranked proposer. This procedure is consistent with Part 36 of the FAR, but not Part 15 relating to negotiated contracts generally.

Part 36 of the FAR prescribes policies and procedures peculiar to contracting for construction and A-E services and implements provisions of the Brooks Act, 40 U.S.C. § 541 et seq. (1982), which by their express provisions are restricted to A-E firms. See Work System Design, Inc., B-213451, Aug. 27, 1984, 84-2 C.P.D. ¶ 226. They do not apply to anything other than A-E services, and thus their use in contracting for health or medical services was totally inappropriate. The fact that both A-E and medical services may be supplied by professionals provides no basis for using Brooks Act procedures when medical services are being procured.

Although admitting that it used A-E procedures to conduct this procurement, the Foundation contends that its actions may be construed as fulfilling the requirements for negotiated procurements in Part 15 of the FAR. For example, the Foundation states that NHS was always considered to be in the competitive range, that discussions were held when resumes of the proposed medical director, and nursing and clerical staff were requested, and that the resume request was, in fact, a request for best and final offers.

We do not agree that the procedures used here complied with regulatory requirements. First, it is evident that the Foundation did not consider price in evaluating proposals, even though agencies may not ignore price in evaluating proposals. FAR, § 15.610(a). Also, even assuming that the Foundation's requests for additional information constituted adequate discussions, the Foundation did not comply with FAR, § 15.611 concerning best and final offers. Agencies

are required to conclude discussions by notifying offerors that discussions are concluded and calling for best and final offers, with a common cutoff date and time that allows a reasonable opportunity for the submission of written best and final offers. These requirements simply were not met here, and thus we cannot conclude that NHS had a meaningful opportunity to submit a best and final offer or that all offerors were given a common cutoff time for their final submissions. Accordingly, we sustain NHS' protest.

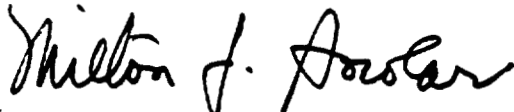
The Foundation informs us that the current contract covers the period through September 30, 1985, and provides for the negotiation of additional 1-year options. We are recommending that the Foundation not negotiate an additional 1-year contract with the incumbent but rather resolicit using the appropriate procedures.

NHS requests reimbursement of the costs of preparing its proposal and the costs of filing and pursuing its protest, including attorney's fees. We will allow a protester to recover its proposal preparation costs only where (1) the protester had a substantial chance of receiving the award but was unreasonably excluded from the competition, and (2) the remedy recommended is not one delineated in 4 C.F.R. §§ 21.6(a)(2-5). In light of the recommendation here, and since NHS, by the agency's own admission, was one of three firms in line for the award, we believe it had a substantial chance for receiving the award. Therefore, the recovery of proposal preparation costs is granted. 4 C.F.R. § 21.6(e).

Our Regulations limit the recovery of the costs of filing and pursuing a protest to situations where the protester unreasonably is excluded from the procurement, except where this Office recommends that the contract be awarded to the protester and the protester receives the award. 4 C.F.R. § 21.6(e). We have construed this to mean that where the protester is given an opportunity to compete for the award under a corrected solicitation, the recovery of the costs of filing and pursuing the protest are generally inappropriate. See Federal Properties of R.I., Inc., B-218192.2, May 7, 1985, 85-1 C.P.D. ¶ 508 and The Hamilton Tool Company, B-218260.4, Aug. 6, 1985, 85-2 C.P.D. ¶ ____.

In this case, however, the basic 1-year contract has almost expired. Therefore, although pursuant to our recommendation NHS will have an opportunity to compete for subsequent contracts, it has lost any opportunity to compete for and be awarded the contract for the basic contract period. Accordingly, the basis for our denial of the costs

of filing and pursuing a protest, the opportunity to compete for essentially the same solicitation, which was present in Federal Properties and The Hamilton Tool Company, supra, is not present here. Therefore, we allow recovery of NHS' costs of filing and pursuing the protest, including attorney's fees.


for Comptroller General
of the United States