Goldberg

The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: HCA Government Services, Inc.

File: B-224434

Date: November 25, 1986

DIGEST

1. Determination of whether a proposal should be included in the competitive range is a matter primarily within the contracting agency's discretion. However, GAO will determine whether the evaluation was arbitrary, that is, unreasonable or in violation of procurement regulations.

2. Where offeror excluded from the competitive range was found marginally satisfactory on the technical evaluation, but was never scored on its price proposal and the solicitation called for evaluation of technical and price proposals, agency violated FAR § 15.609(a) by not scoring offeror's price proposal prior to determining competitive range.

DECISION

HCA Government Services, Inc. (HCA), protests any award under request for proposals (RFP) No. MDA903-86-0055, issued by the Defense Supply Service-Washington (DSS) for setting up and operating two uniformed services primary care (PRIMUS) centers in the Burke and Woodbridge/Dale City areas of Virginia. HCA contends that it was improperly excluded from the competitive range.

DSS has notified us that award has been made and performance of the contract begun, notwithstanding the pendency of this protest. A determination was made that urgent and compelling circumstances significantly affecting interests of the United States would not permit awaiting our decision. 4 C.F.R. § 21.4(b)(2) (1986).

The protest is sustained.

HCA states that DSS's reason for excluding it from the competitive range relates to weaknesses which were easily curable in the course of discussions or was improperly based on factors not specified in the solicitation. HCA contends that since DSS acknowledged at the debriefing that six or seven of the offerors could have done the job and HCA was

rated third in the evaluation, it should have been included in the competitive range.

DSS reports that it planned to award four contracts for four sites under this solicitation: a pre-implementation phase contract (setting up the facility) followed by a facility operation contract for a basic year and four option years for each site. The pre-implementation phase contract would be fixed price and the follow-on contracts would be requirements type contracts which would provide the contractor with a fixed unit price for all patients treated. The solicitation called for a unit price for the first 24,000 patient visits and a second unit price for all patient visits exceeding 24,000.

Proposals from 11 firms were received on April 8, 1986, and were forwarded to the Army Surgeon General's office for technical evaluation. On April 11, 1986, the technical evaluation panel submitted its report to the contracting officer recommending that discussions be limited to PHP Corporation (PHP), which scored 91.6 out of 100 technical points. The contracting officer, however, also included CEC, Inc. (CEC), which scored 77 technical points in the competitive range. HCA, which had a technical score of 71.5, had the third highest technical score and was rated marginally satisfactory, but was excluded from the competitive range. Only after this competitive range was established, were the total costs for the pre-implementation phase contract and the facilities operation contract for the basic and four option years evaluated with a maximum of 25 points possible.

After being notified of its exclusion from the competitive range and being debriefed, HCA requested that it be allowed to compete because it believed its weaknesses were easily correctable. The contracting officer denied this request on the basis that there were valid technical reasons for excluding HCA and because HCA had a detailed debriefing, it could more easily address deficiencies than an offeror who had not had a debriefing and would therefore receive an unfair competitive advantage.

The contracting officer states that HCA's deficiencies were more than merely informational and would have required a substantially rewritten proposal. In view of these deficiencies, the contracting officer found it extremely unlikely that HCA would be able to improve its proposal sufficiently to receive an award.

HCA contends that many of the alleged deficiencies in its proposal reflect erroneous assumptions which DSS made about

HCA's proposal and other deficiencies were deficiencies only in view of criteria not included within the solicitation and were thus not a basis for reducing HCA's technical score. HCA argues that in any event, any deficiencies that did exist were minor and easily curable through discussions and best and final offers.

HCA also contends that DSS's conclusion that HCA's proposal had no reasonable chance of being selected for award lacks a reasonable basis. HCA states that it was rated only 5 points lower than CEC, which was the only other offeror included within the competitive range with the ultimate awardee, PHP. It argues that there was no basis upon which DSS could assume that CEC had a significantly better chance of being awarded the contract than did HCA considering that 25 points remained to be awarded for price and the proposal could have been improved after discussions.

In reviewing complaints about the reasonableness of the evaluation of a technical proposal, and the resulting determination of whether an offeror is within the competitive range, our function is not to reevaluate the proposal and to make our own determination about its merits. That determination is the responsibility of the contracting agency, which is most familiar with its needs and must bear the burden of any difficulties resulting from a defective evaluation. Procuring officials have a reasonable degree of discretion in evaluating proposals, and we therefore determine only whether the evaluation was arbitrary, that is, unreasonable or in violation of procurement laws and regulations. Pharmaceutical Systems, Inc., B-221847, May 19, 1986, 86-1 C.P.D. ¶ 469 p. 6. However, we need not decide if each of the technical findings of the evaluation panel was reasonable because of the following discussion.

As HCA argues, Federal Acquisition Regulation (FAR) § 15.609(a) requires that the competitive range shall be determined on the basis of cost or price and other factors that were stated in the solicitation and shall include all proposals that have a reasonable chance of being selected for award. Here, DSS did not comply with the regulation since it did not use price in its determination of the competitive range.

We have held that an agency did not have to include an offeror in the competitive range even though cost or price was not evaluated where the offeror was found technically unacceptable. Proffitt and Fowler, B-219917, Nov. 19, 1985, 85-2 C.P.D. ¶ 566; Advanced ElectroMagnetics, Inc., B-208271, Apr. 5, 1983, 83-1 C.P.D. ¶ 360 at 6. However, it is improper, in a negotiated procurement, to exclude an offeror

from the competitive range solely on the basis of technical considerations, unless the proposal is technically unacceptable; exclusion from the competitive range is not justified merely because a proposal is technically inferior, though not unacceptable. Simpson, Gumpertz & Heger, Inc., B-202132, Dec. 15, 1981, 81-2 C.P.D. ¶ 467 at 6.

Both DSS and PHP have cited several decisions of our Office for the proposition that a marginally acceptable or generally adequate proposal may be excluded from the competitive range if it does not have a reasonable chance of award. See Leo Kanner Associates, B-213520, Mar. 13, 1984, 84-1 C.P.D. ¶ 299; Lloyd E. Clayton & Associates, Inc., B-205195, June 17, 1982, 82-1 C.P.D. ¶ 598; Virgin Islands Business Association, Inc., B-186846, Feb. 16, 1977, 77-1 C.P.D. ¶ 114. Our decision here is consistent with those decisions, however, as in each of the latter cited decisions, price was considered as a factor prior to determining the competitive range.

Here, HCA was ranked third technically out of 11 proposals and marginally satisfactory, not technically unacceptable, by the technical evaluation panel. Based on our review of the proposals, HCA's cost proposal was substantially lower than that of both PHP, the high technical scorer, and CEC, ranked second. As noted earlier, price was worth 25 points and had it been properly evaluated at the time the competitive range was determined, HCA's total evaluated score would have risen in comparison to both PHP and CEC.

In view of the FAR requirement that price and technical proposals be evaluated in determining the competitive range and the fact that HCA's price proposal was much more favorable than PHP's, we think that DSS's exclusion of HCA's technically marginal proposal from the competitive range was improper. Moreover, it appears that at least some of the deficiencies in HCA's technical proposal properly could have been remedied through discussions. Accordingly, we sustain HCA's protest.

REMEDY

FUTURE COMPETITION

We recognize that substantial start up costs have already been incurred. In view of the Army's urgent and compelling need for the continuation of these medical services for its members and their dependents and since the pre-implementation contracts setting up the two facilities have already been performed, we do not recommend termination and resolicitation. However, we recommend that DSS not excercise any of

the options for this contract and resolicit for its subsequent year's needs.

COSTS

Although HCA will have an opportunity to submit a proposal for the Army's future needs, HCA has lost the chance to have received either the pre-implementation contract or the base year contract for provision of services. Accordingly, we allow recovery of HCA's costs of filing and pursuing its protest, including attorney's fees. EHE National Health Services, Inc., 65 Comp. Gen. 1 (1985) 85-2 C.P.D. ¶ 362.

for Milton J. Socolar
Comptroller General
of the United States