The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: HCA Government Services, Inc.--Reconsideration and Claim for Proposal Preparation Costs
File: B-224434.2; B-224434.3; B-224434.4

Date: April 24, 1987

DIGEST

1. Request for reconsideration is denied where awardee and agency do not show errors in law or fact.

2. Claim for costs incurred in preparing a proposal is allowed where the protester was unreasonably excluded from the competitive range and the only recommended remedy is that options not be exercised.

DECISION

PHP Corporation and the Defense Supply Service (DSS) - Washington, Defense Logistics Agency, request reconsideration of our decision in HCA Government Services, Inc., B-224434, Nov. 25, 1986 86-2 C.P.D. ¶ 611, where we sustained a protest filed by HCA Government Services, Inc., against any award under request for proposals (RFP) No. MDA903-86-0055, issued by DSS for setting up and operating two uniformed services primary care (PRIMUS) centers in the Burke and Woodbridge/ Dale City areas of Virginia. We held that DSS's exclusion of HCA's marginally satisfactory technical proposal from the competitive range was improper because DSS did not consider price in determining the competitive range. We recommended that DSS not exercise any of the options of the contract and resolicit for its subsequent years' needs. PHP and DSS argue that we misinterpreted certain precedents cited in our decision, ignored another key precedent and that our decision was therefore erroneous as a matter of law.

HCA claims its proposal preparation costs. The costs of filing and pursuing its protest, including attorney's fees were allowed in our prior decision.

We affirm our prior decision and allow HCA its proposal preparation costs.

HCA contends that DSS's request for reconsideration is untimely. DSS states, however, that it received our decision on December 1, 1986. Since our office received DSS's request for reconsideration on December 15, within 10 working days of DSS's receipt of our decision, DSS's request for reconsideration is timely. 4 C.F.R. § 21.12(b) (1986).

In its reconsideration request, PHP cites several decisions of our Office to support its contention that HCA was properly excluded from the competitive range. PHP claims that the mathematical score received by an offeror in relation to the scores of other offerors is a better measure of acceptability than adjectival ratings. PHP therefore urges that although HCA's technical proposal was rated marginally satisfactory, its technical numerical score of 71.5 in relation to PHP's 91.6 and the second ranked offeror's 77 gave the contracting officer sufficient justification to exclude HCA from the competitive range. PHP contends that we did not consider our decisions in 49 Comp. Gen. 309 (1969) and 52 Comp. Gen. 718 (1973), in which we upheld agency decisions to exclude protesters from the competitive range, even though cost was not considered in determining the competitive range. PHP states that the technical scores of the highest and lowest scores within the competitive range and the score of the protester in both 52 Comp. Gen. 718, supra, and the instant case are strikingly similar.

DSS contends that our decision's reliance on Simpson, Gumpertz and Hager, Inc., B-202132, Dec. 15, 1981, 81-2 C.P.D. ¶ 467, in which we held that it is improper to exclude some offerors from the competitive range without considering price because their acceptable proposals are technically inferior is inapposite here. DSS contends that even if price were considered HCA would still place third and would have been excluded. DSS argues that GAO precedents in this area are unclear and DSS reasonably relied on certain other decisions. In this regard, DSS argues that our decision in Leo Kanner Associates, B-213520, Mar. 13, 1984, 84-1 C.P.D. ¶ 299, upheld an offeror's exclusion from the competitive range because of technical considerations alone and cost was not articulated as a factor in the exclusion. DSS also argues that in Lloyd E. Clayton & Associates, Inc., B-205195, June 17, 1982, 82-1 C.P.D. ¶ 598, and Virgin Islands Business Association, Inc., B-186846, Feb. 16, 1977, 77-1 C.P.D. ¶ 114, although cost was considered, the decision to eliminate an offeror from the competitive range was based on technical considerations alone.

As stated in our prior decision, 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 because a proposal is technically inferior though not unacceptable. Simpson, Gumpertz and Heger, Inc., B-202132, supra. PHP and DSS argue that it need only consider the relative technical scores before eliminating a technically acceptable inferior proposal from the competitive range. However, even where an offeror's technical score is significantly less than another score, the agency cannot eliminate that offeror from the competitive range unless that offeror's technical proposal is unacceptable or the agency considers cost/price in making its competitive range determination. See Federal Acquisition Regulation, 48 C.F.R. § 15.609(a) (1986); Simpson, Gumpertz & Heger, Inc., B-202132, supra. Here, DSS admits that HCA's proposal is not unacceptable and that it did not consider cost/price in making its competitive range determination.

As in the present case, the procuring agency in Simpson, Gumpertz & Heger, Inc., supra, argued that the protester was not prejudiced because its acceptable, albeit inferior, proposal would not be in the competitive range even if its low price had been considered. However, we found in that case that the agency's argument failed to consider the possible impact of discussions on improving the protester's acceptable proposal. In the present case, we find at least some of the evaluated deficiencies in HCA's technical proposal could have been remedied through meaningful discussions, such that HCA may have become the highest rated offeror, considering cost and technical factors. See Aviation Contractor Employees, Inc., B-225964, Mar. 30, 1987, 87-1 C.P.D. ¶ ____. Therefore, it was improper for DSS to have excluded HCA's marginally satisfactory proposal without considering price.

PHP's reliance on 49 Comp. Gen. 309, supra, is misplaced. In that case, 13 proposals were found to be acceptable in declining degrees. The tenth technically ranked offeror protested its exclusion from the competitive range. In that decision, we found that categorizing 13 proposals with adjectival ratings of declining degrees of acceptability diluted the word acceptable to the point of meaninglessness and found that the protester's so-called marginally acceptable proposal was properly not within the competitive range. In the present case, however, HCA's proposal was rated third technically of 11 offerors and there is no evidence that its

"marginally satisfactory" technical proposal is in reality an "unacceptable proposal," as was the protester's proposal in 49 Comp. Gen. 309, supra.

PHP's and DSS's reliance on 52 Comp. Gen. 718, supra, in which we held that an offeror was properly excluded from the competitive range because of its low technical score is also misplaced. In that case, cost/price was considered by the agency before the protester, the eleventh ranked offeror, was eliminated from the competitive range, which consisted of seven other offerors.

In our prior decision, we addressed DSS's and PHP's allegation that several decisions of our Office recognize 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. Leo Kanner Associates, B-213520, supra; Lloyd E. Clayton & Associates, Inc., B-205195, supra, and Virgin Islands Business Association, Inc., B-186846, supra. Contrary to DSS's argument, in each of those decisions, cost/price was considered as a factor prior to determining the competitive range.

PHP and DSS also challenge our decision on the basis of our decisions which hold that in procurements of items involving critical human survival needs agencies may require the highest possible reliability, effectiveness and safety performance characteristics. See Maremont Corporation, 55 Comp. Gen. 1362 (1976), 76-2 C.P.D. ¶ 181, and Fenwal, Inc., B-202283, Dec. 15, 1981, 81-2 C.P.D. ¶ 469. PHP and DSS contend that since this procurement affects the health and lives of many individuals, those individuals should not be required to accept medical care which can be regarded as "marginally satisfactory."

However, as DSS acknowledges, the decisions cited are distinguishable, since they concern the government's description of its minimum needs in the specifications. Those decisions have no bearing on how an agency evaluates proposals or determines the competitive range. Our prior decision did not dispute the government's minimum needs; the decision held that when the agency has determined an offeror to be marginally satisfactory, price must also be considered in setting the competitive range. As noted above, once in the competitive range and following discussions, some of the evaluated deficiencies in the HCA's proposal could be easily remedied.

Therefore, PHP and DSS have not shown any error in law or fact in our previous decision.

PHP argues that even if the protest should be sustained the recommended remedy is inappropriate. PHP suggests that if a remedy is needed we should have the contracting officer redetermine the competitive range by which price as well as technical factors are considered. If the contracting officer determines that HCA should have been included in the competitive range after consideration of price, then the options can be recompeted as recommended. In this regard, PHP states that it is unlikely HCA's score on price would raise its total score to bring it within the competitive range.

PHP's disagreement with our recommended remedy does not demonstrate an error of law or fact in our prior decision. With respect to PHP's suggestion for relief in this case, to expect DSS at this point now to reconstruct on a hypothetical basis the competitive range, even if price is factored in, is too problematic to give an appropriate remedy. In any case, as discussed above and in our prior decision, if meaningful discussions had been conducted with HCA, it may have sufficiently improved its proposal to be the highest rated offeror. Since HCA should have been in the competitive range based upon the evaluation record before our Office when we issued our prior decision, a redetermination of the competitive range was unnecessary. The shortcoming of the procurement was the failure to conduct discussions with HCA so that its technical score may have been raised.

Finally, PHP states that the recommended remedy unreasonably prejudices PHP. PHP states that all items of equipment costing more than $5,000 are to be amortized, pursuant to amendment 0004 of the solicitation, into the fixed prices charged per patient visits. PHP chose to amortize such costs over the full contract period (base year plus 4 option years). PHP states that the cost for those items for the two facilities is approximately $250,000, and that much of this cost is for installation, a cost which cannot be recovered if the equipment is moved or sold. PHP states it assumed that the options would be exercised and it now finds itself in a position of suffering substantially on account of actions not of its own making.

DSS also argues that our remedy is unduly harsh because if a new contractor is chosen, the location of the facilities would be changed causing disruption to the patient population. DSS also alleges that since the prices of the successful offeror are known, the recompetition would have aspects of an auction.

In issuing our prior decision, we were cognizant that PHP was required to amortize much of its equipment expenses on a per patient basis under the contract and that there may be costs and disruptions associated with termination of the contract

or non-exercise of the options. Other equipment costs have been reimbursed by the government. Furthermore, whatever expectations PHP had about the exercise of the contract option, PHP was clearly aware that exercise of an option is solely within the discretion of the issuing agency--not the contractor--and that there is a risk assumed by the contractor that options will not be exercised.

Moreover, we doubt whether any significant or long term disruption will occur, such as DSS alleges, if upon recompetition, another offeror receives the contract to provide these services. A change of contractors providing the government with the same services is not uncommon and any disruption can be minimized through such planning as normally occurs when the government changes contractors.

Because of our awareness of the potential costs and effects of termination of the contract, we recommended that the options not be exercised rather than termination. We found that the integrity of the competitive bid system would not be served if we allowed the options on this improperly awarded contract to be exercised to extend its term for the full 5 years. See Honeywell Information Systems, Inc., 56 Comp. Gen. 505 (1977), 77-1 C.P.D. ¶ 256.

With regard to DSS's complaint that the recompetition would have aspects of an auction, we note that the recompetition conducted over a year after the initial solicitation will be for a different time period with potentially different offerors. Consequently, any potential for an auction-like atmosphere is mitigated.

Accordingly, after reconsideration, our prior decision is affirmed.

We allow HCA's claim for proposal preparation costs. A protester is entitled to recovery of proposal preparation costs where as here he is unreasonably excluded from the procurement for which it had a substantial chance for award if discussions had been conducted, where the only remedy recommended by our Office is that options not be exercised. EHE National Health Services, 65 Comp. Gen. 1 (1985), 85-2 C.P.D. ¶ 362; Hall-Kimbrell Environmental Services, Inc., B-224521, Feb. 19, 1987, 87-1 C.P.D. ¶ ___.

for Comptroller General
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