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**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: National Medical Staffing, Inc.;
PRS Consultants, Inc.

File: B-238694; B-238694.2

Date: June 4, 1990

Arthur T. McDermott, Esq., Arthur T. McDermott & Associates, for National Medical Staffing, Inc., and Harry A. Lattanzio for PRS Consultants, Inc., the protesters.
Herbert F. Kelly, Jr., Esq., Office of the Judge Advocate General, Department of the Army, for the agency.
Linda C. Glass, Esq., Andrew T. Pogany, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest against award of a small business set-aside contract on the basis of initial proposals is sustained where awardee's proposal was unacceptable as submitted because the proposal failed to include required resumes and took exception to the mandatory requirement of the RFP to expend, on a small business set-aside solicitation for services, at least 50 percent of the cost of personnel for the successful contractor's own employees.

DECISION

National Medical Staffing, Inc., and PRS Consultants, Inc., protest the award of a contract on the basis of initial proposals by the Department of the Army to Health Research Associates, Inc., under request for proposals (RFP) No. DABT43-90-R-0022, issued as a total small business set-aside for the services of three pharmacists. National Medical, a woman-owned business, contends that it should have received priority where, as here, two equal low offers were received. National Medical also generally questions the acceptability of Health Research's proposal. PRS maintains that Health Research and National Medical proposed to satisfy the RFP requirements through the use of independent contractor pharmacists and therefore neither satisfied the RFP's insurance requirements.

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We sustain the protests against the award to Health Research. We find that acceptance of the awardee's initial proposal was improper because the proposal failed to include mandatory information and took exception to an RFP requirement concerning small business subcontracting limitations.^{1/}

The RFP was issued on January 12, 1990, for a fixed-price personal services contract for two pharmacists at Dunham Army Health Clinic, Carlisle Barracks, Pennsylvania, and one pharmacist at Kimbrough Army Hospital, Ft. Meade, Maryland. The RFP provided that award would be made to the responsible offeror whose offer conforming to the solicitation would be most advantageous to the government, cost or price and other factors considered. The RFP cautioned offerors that award may be made based on initial offers without discussions. The RFP also required the following information to be submitted for each pharmacist offered: (1) evidence of license; (2) resume; and (3) statement of experience. Finally, the RFP contained the clause, "Limitations on Subcontracting," found at FAR § 52.219-14 (FAC 84-56), which requires that at least 50 percent of the contractor's personnel costs be expended for the contractor's own employees.

Five proposals were received on February 2, 1990. National Medical and Health Research submitted identical low offers of \$95,988. After evaluation of both offers, the Army determined that each demonstrated the ability to meet the government's minimum needs and therefore the Army decided to make award without discussions on the basis of price. Since the offers were identically priced, the Army followed the procedures of FAR § 14.407-6 to determine the award priority. FAR § 14.407-6 provides for the following order of priority when two or more low "bids" are equal in all respects: (1) small business concerns that are also labor surplus area concerns; (2) other small business concerns; (3) other business concerns that are also labor surplus area concerns; and (4) other business concerns. If two offerors still remain equally eligible, FAR § 14.407-6 provides for a drawing by lot to determine the winner.

^{1/} In view of our conclusion, we need not address National Medical's and PRS' other grounds for questioning the award to Health Research. Concerning National Medical's protest, we do note that the applicable regulation does not give priority to a woman-owned business in the event of equal low offers. See Federal Acquisition Regulation (FAR) § 14.407-6 (FAC 84-56).

Here, since both offerors were small businesses and neither certified that they were in a labor surplus area, the award decision was made by a drawing of lots which was held on February 23, 1990, and was witnessed by four persons. Although invited to attend, none of the offerors attended the drawing. Health Research was chosen. These protests followed. Award of the contract to Health Research has subsequently been made.

In its comments to the agency report, National Medical contends that Health Research's offer was not technically acceptable because Health Research failed to submit the required information (i.e., license, resume, and experience) concerning all three offered pharmacists. The Army responds that Health Research's failure to submit all three resumes was not considered a material deficiency because in addition to the two individuals for whom resumes were furnished, Health Research already had a third pharmacist currently working under contract with the Army at Fort Meade.

PRS contends that the offers of National Medical and Health Research were unacceptable because they both proposed to provide pharmacists on an independent contractor basis and therefore cannot meet the RFP's insurance requirements. The Army rejects this argument with respect to Health Research and maintains that Health Research took no exception to the subcontracting limitations and, in fact, has verified its compliance with all insurance and subcontracting provisions.

In negotiated procurements, any proposal that fails to conform to material terms and conditions of the solicitation should be considered unacceptable and may not form the basis for an award. Martin Marietta Corp., B-233742.4, Jan. 31, 1990, 69 Comp. Gen. _____, 90-1 CPD ¶ 132; see Consulting and Program Management, 66 Comp. Gen. 289 (1987), 87-1 CPD ¶ 229.

The record shows that the awardee submitted two resumes and only one license for the three pharmacists required. Our review of these resumes indicates that they are for the president and vice-president of Health Research, both of whom have extensive education and experience in pharmaceutical matters and reside in the state of Georgia. The vice-president of Health Research has been a pharmacist for over 15 years, has a degree in management, and has published numerous articles. The president has been a pharmacist for over 30 years, has a Ph.D. in Physical-Microbial-Biochemistry (with a minor in Pharmacology), and is also widely published and has been a visiting lecturer since 1973 at medical, pharmacy and nursing schools, associations, and hospitals. It appears inconceivable that Health Research was actually offering the services of these highly qualified individuals, its chief corporate officers, to perform as pharmacists in Carlisle,

Pennsylvania, and Ft. Meade, Maryland, at approximately \$20 per hour. We therefore conclude that instead of submitting resumes of the pharmacists who would actually perform the services, Health Research submitted informational resumes of its corporate staff for background and responsibility purposes. Since Health Research failed to provide any required resumes of the pharmacists who would actually perform the services, the Army could not properly determine whether Health Research met the RFP's requirements for pharmacists, and therefore we believe the Army's evaluation was unreasonable.

In addition to these resumes, Health Research's proposal contained a blank standard form contract for "Independent Contractor Pharmacists" (ICP).^{2/} Absent proper resumes, the only indication in Health Research's proposal as to who would actually be performing the required services is the ICP standard form contract, which indicates to us that Health Research was planning and proposing to pay all its personnel costs through the use of independent contractors in violation of the subcontracting limitations in small business set-asides. See 15 U.S.C. § 644(o) (1988); FAR § 52.219-14 (FAC 84-56). We therefore believe that Health Research's initial proposal took exception to the RFP's mandatory requirement concerning subcontracting limitations and was therefore unacceptable.

Finally, with respect to PRS' argument that National Medical also proposed to satisfy this requirement through the use of independent contractors, our review of National Medical's proposal establishes that it took no exception to the subcontracting limitations and supplied the required information for each proposed pharmacist. Further, the record indicates that under a prior contract for the same type of services, National Medical was advised that compliance with the subcontracting limitations was mandatory. In response, National Medical assured the Army that it would revise its procedures to become fully compliant.

^{2/} The ICP form, a standard agreement to be signed by the working-level pharmacist with Health Research, makes the pharmacist an independent contractor and not an employee of Health Research while performing the services. As such, the pharmacist is required under the ICP agreement to carry his own workman's compensation and other insurance and to pay his own taxes.

The protests against award to Health Research are sustained. We recommend that the Army terminate for convenience the award to Health Research and award the contract to National Medical. We are so advising the Secretary of the Army. Further, we find National Medical and PRS to be entitled to the costs of pursuing the protests, including attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1990); See Falcon Carriers, Inc., 68 Comp. Gen. 206 (1989), 89-1 CPD ¶ 96.

Milton J. Fowler

~~Acting~~ Comptroller General
of the United States