

144229



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: St. Mary's Hospital and Medical Center of
San Francisco, California

File: B-243061

Date: June 24, 1991

Donn Pickett, Esq., and Holly A. House, Esq., McCutchen, Doyle, Brown & Enersen, for the protester.
Robert M. Halperin, Esq., Crowell and Moring, for Foundation Health Federal Services, Inc., an interested party.
Karl E. Hansen, Esq., Office of Civilian Health and Medical Program of the Uniformed Services, for the agency.
Richard P. Burkard, Esq., Andrew T. Pogany, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Requirement under 4 C.F.R. § 21.1(d) (1991) of General Accounting Office's (GAO) Bid Protest Regulations that the contracting officer receive copy of protest within 1 working day after filing with GAO was met by subcontractor which provided copies of the protest to the contractor conducting the procurement "by or for the government" as well as to government officials believed to be involved in the subcontractor selection.
2. General Accounting Office (GAO) will consider protest of subcontract award where the government's involvement in the procurement is so pervasive that the contractor was a mere conduit for the government in selecting the subcontractor. Where government officials identify the need for the services, draft the solicitation evaluation criteria, select government officials to serve on the evaluation committee, and approve the evaluation committee's subcontractor selection, the procurement is "by or for the government" and subject to GAO's bid protest jurisdiction.
3. Where a protest has been filed initially with contracting agency, subsequent protest to General Accounting Office is timely where filed within 10 days of initial adverse agency action, provided that the initial protest was filed in a timely manner. Where government contractor is conducting the procurement "by or for the government," protest to contractor constitutes agency-level protest.

4. Protest against award of subcontract is sustained where proposals were not evaluated based solely on evaluation factors stated in the solicitation.

DECISION

St. Mary's Hospital and Medical Center of San Francisco, California, protests the award of a subcontract by Foundation Health Plan (Foundation) to May, Ecker, Iverson, Young, and Ennix Cardiac & Thoracic Surgery Medical Group (May, Ecker) for cardiac surgery services. St. Mary's essentially argues that the award decision was based on undisclosed evaluation criteria.

We sustain the protest.

BACKGROUND

The Office of Civilian Health and Medical Program of the Uniformed Services (OCHAMPUS) is a civilian agency of the Department of Defense which is responsible for providing health care for the civilian dependents of active duty members of the uniformed services and for retirees of the uniformed services and their dependents. On January 19, 1988, Foundation Health Corporation entered into contract No. MDA903-88-C-0056 with OCHAMPUS requiring Foundation Health Corporation to provide for the development, implementation, and operation of a health care delivery system and claims adjudication and processing system which would operate in support of and in coordination with the uniformed services medical treatment facilities located within California and Hawaii.^{1/} The contract was awarded under a program called "CHAMPUS Reform Initiative," which seeks to improve the coordination between the military and civilian components of the military health services system. The contract specifically required that Foundation Health Corporation establish a provider network, by contractual or other arrangements, and to develop and implement a plan for seeking agreements with individual military treatment facilities to use medical personnel, equipment, and/or supplies.

On June 30, 1988, Foundation Health Corporation entered into a subcontract with Foundation which provided, generally, that Foundation would perform the services required under the prime contract to eligible CHAMPUS beneficiaries in northern California.

^{1/} By virtue of a novation agreement between Foundation Health Federal Services, Inc. (FHFS) and Foundation Health Corporation, FHFS subsequently assumed responsibility for performance of the contract.

By letter dated May 14, 1990, the Commander, San Francisco Medical Command, Department of the Navy, sent Foundation a proposal for a cardiac surgery program to be performed initially at Letterman Army Medical Center and to be transferred to Naval Hospital Oakland on July 1, 1991. The proposal identified the requirement for cardiac surgery services as a result of a decision to terminate the cardiac surgery program at Letterman Army Medical Center, the only existing military cardiac surgery program in the San Francisco area. The plan contemplated that these military treatment facilities would enter into a resource sharing agreement with Foundation under the CHAMPUS Reform Initiative. Foundation would then enter into a contract with a cardiac surgery provider which would perform the required cardiac surgery at Letterman Army Medical Center and Naval Hospital Oakland.

By letter dated May 31, 1990, Foundation requested proposals to provide cardiac surgery services to CHAMPUS beneficiaries at Letterman Army Medical Center which would later be moved to the Naval Hospital Oakland. The request for proposals (RFP or solicitation) stated that as part of the CHAMPUS Reform Initiative Resource Sharing Program, the selected offeror would provide cardiac surgery services to CHAMPUS beneficiaries. The solicitation, which indicated that a representative of Foundation was conducting the procurement, required that the prospective contractors furnish all surgical staff other than an anesthesiologist. In addition, the solicitation required that proposals include information regarding the number and outcomes of surgery cases performed over the last 3 years. The RFP also requested that offerors provide curricula vitae for all members of its surgery group.

Foundation received six proposals in response to its solicitation by July 1990. By letter dated October 5, 1990, Foundation requested that May, Ecker and St. Mary's provide Foundation with additional information not requested in the original RFP concerning credentialing action or cases filed against liability coverage. By letter dated November 9, 1990, the Commander, San Francisco Medical Command, at the request of the San Francisco Medical Command Executive Committee, appointed a selection committee to choose the cardiac surgery provider. The Commander designated the chief of the cardiac surgery program at Letterman Army Medical Center as chairman of the committee. The Commander also appointed members of the staffs of the Department of Veterans Affairs Medical Center, David Grant U.S.A.F. Medical Center, San Francisco Medical Command, and Naval Hospital Oakland, to serve on the selection committee. The Foundation representative specified in the solicitation also served on the committee.

After the offers were received, the chairman of the committee drafted evaluation criteria which were later approved by the committee. The offerors were not provided copies of the evaluation criteria used by the committee. The record shows that the selection committee met on December 7, 1990, to review and rank the proposals. May, Ecker received the high score of 1,800, while St. Mary's received the second highest score of 1,749. By letter dated December 11, Foundation advised the two surgery groups that the selection committee would conduct an interview with each group concerning the following three specific issues: (1) a case-by-case review of the group's mortality experience; (2) 24-hour coverage to Naval Hospital Oakland; and (3) a fixed, per patient rate.^{2/} The agency has not provided our Office with any documentation describing what was actually discussed at the interviews or what impact the interviews had on the decision-making process. The committee did not request best and final offers or rescore the proposals after the interviews. The committee voted 4 to 2 to recommend May, Ecker for selection.

The record shows that the primary factors leading to the recommendation were that May, Ecker is a large, cohesive group with experience, that all members work and live in close proximity to the Hospital, and that the members of the group hold academic appointments and are currently involved in teaching residents. None of these factors was identified to the offerors as an evaluation factor during the course of the procurement.

The recommendation was approved by the Commander, San Francisco Medical Command, who, in turn, notified Foundation on January 4, 1991. Foundation advised May, Ecker and St. Mary's of the award decision on January 7. On March 1, Foundation entered into a resource sharing agreement with Letterman Army Medical Center and Naval Hospital Oakland requiring Foundation to provide cardiac surgery services to those military treatment facilities. The agreement, which was signed by the Commander, San Francisco Medical Command for Naval Hospital Oakland, provided that Foundation shall bear the costs of providing the services, subject to the compensation arrangements contained in its subcontract.

The protester asserts that, on January 10, it first learned from a Foundation representative in a telephone conversation that the award decision was based on factors which had not been stated in the solicitation. St. Mary's filed a protest with Foundation on January 25, alleging that the award decision was not based on what St. Mary's believed to be the

^{2/} These issues corresponded to only 3 of the 24 evaluation factors actually used by the committee to evaluate proposals.

three main evaluation criteria: mortality rate, 24-hour coverage, and price. The protester argued that its mortality statistics were significantly lower than the awardee's, that St. Mary's promised coverage with physicians residing in the geographical area, and that it has a much lower price than the awardee. By letter dated February 11, the Commander, San Francisco Medical Command, notified St. Mary's that the award decision would not be changed. St. Mary's filed this protest on February 25.

THRESHOLD ISSUES

Service of a Copy of Protest on the Procuring Agency

OCHAMPUS preliminarily argues that our Office should dismiss the protest because the protester did not furnish the agency a copy of the protest within 1 day of filing the protest with our Office and that OCHAMPUS has been prejudiced by the protester's failure to do so. St. Mary's provided copies of its protest to the Foundation representative, the Commander, San Francisco Medical Command, several members of the selection committee, and the Deputy Assistant Secretary of Defense, Health Services Financing.

Our Bid Protest Regulations require a protester to furnish a copy of the protest to the individual or location designated by the contracting agency in the solicitation for receipt of protests, or the contracting officer if no individual or location is so designated, within 1 day of the filing of the protest. 4 C.F.R. § 21.1(d), (f) (1991). This requirement was drafted with protests of prime contract awards in mind. The reference to individuals designated by the contracting agency and to the contracting officer is not applicable in the context of a subcontract protest, where there is no contracting agency or contracting officer. University of Mich.; Indus. Training Sys. Corp., 66 Comp. Gen. 538 (1987), 87-1 CPD ¶ 643. The protester clearly sought to comply with the purpose of the regulation by providing copies of its protest to the contractor which appeared to be conducting the procurement and to certain government officials, and in the absence of any designated individual in the solicitation, we find this was all that was reasonably required by the regulation.

Jurisdiction

OCHAMPUS also argues that the protest should be dismissed for lack of jurisdiction over subcontract protests. Under the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3551 et seq. (1988), our Office has jurisdiction to decide protests involving procurements by federal agencies. Procurements by government prime contractors generally are not

viewed as procurements by federal agencies. See, e.g., ToxCo, Inc., 68 Comp. Gen. 635 (1989), 89-2 CPD ¶ 170. In some cases, however, the prime contractor is merely acting "by or for the government." In such cases, we will assume jurisdiction. 4 C.F.R. § 21.3(m)(10). One such case is where the government's involvement in the subcontractor selection is so pervasive that the contractor is a mere conduit for the government. See University of Mich.; Indus. Training Sys. Corp., 66 Comp. Gen. 538, supra; Aviation Data Serv., Inc.-- Recon., B-238057.2, Apr. 11, 1990, 90-1 CPD ¶ 383. Although Foundation technically is itself a subcontractor here, we take jurisdiction because we find that the government's involvement was so pervasive in this procurement ostensibly conducted by Foundation that Foundation was a mere conduit for the government and that the government "took over" the procurement from Foundation. See Perkin-Elmer Corp., Metco Div., B-237076, Dec. 28, 1989, 89-2 CPD ¶ 604.

Although Foundation issued the solicitation, received proposals, asked offerors for additional information, and notified offerors of interview sessions and of the award decision, every meaningful aspect of the procurement for cardiac surgery services, involving evaluation of proposals and selection of a contractor, was controlled by government officials. The Commander, San Francisco Medical Command, identified the need for services and appointed an evaluation committee. This committee consisted almost exclusively of government employees, members of the medical staffs of government facilities. The evaluation criteria were drafted by a government official who was chairman of the committee. The committee approved the criteria, evaluated the proposals, conducted the interviews with the two offerors, and recommended one of them for selection. The Commander then reviewed and approved the recommendation of the committee and so notified Foundation, which, on the next working day, notified May, Ecker and St. Mary's of the award decision.

While the Foundation representative has provided our Office with an affidavit stating that the final decision was made by Foundation, the record contains no other documentation indicating that Foundation participated in the final decision. On the contrary, the record shows that Foundation performed the procedural aspects of the procurement, but that the substantive aspects were performed by the government such that the selection of the cardiac surgery provider was, in effect, by the Department of Defense. Foundation, by virtue of its contractual status with OCHAMPUS, served only as a conduit or "middleman" between various components of the Department of Defense, i.e., OCHAMPUS, San Francisco Medical Command, Letterman Army Medical Center, and Naval Hospital Oakland, and the awardee.

Timeliness

Foundation and OCHAMPUS argue that the protest is untimely because it was not filed with our Office within 10 days of when St. Mary's learned of the basis of the award decision. St. Mary's, however, initially protested to Foundation. Our Regulations provide that if a protest has been filed initially with the contracting agency, any subsequent protest to our Office filed within 10 days of formal notification of or actual or constructive knowledge of initial adverse agency action on the protest will be considered, provided that the initial protest to the agency was filed in a timely manner. 4 C.F.R. § 21.2(a)(3). St. Mary's filed a timely protest of the award decision with Foundation on January 25, 1990, within 10 working days of when it learned of the basis for its protest.^{3/} By letter dated February 11, the Commander, San Francisco Medical Command, advised St. Mary's that the award decision would not be changed. The St. Mary's protest to our Office on February 25, filed within 10 days of its receipt of the Commander's letter, is therefore timely.^{4/}

DISCUSSION

Standard of Review

The statutes and regulations governing direct federal procurements generally do not apply to procurements by prime contractors. However, where, as here, the contractor is only a conduit for providing the government with its required services, we believe it is appropriate to consider the

^{3/} While the agency argues that the protest to Foundation should not be considered an "agency-level" protest, in the context of a subcontract protest, where, as here, there is no apparent contracting officer other than the contractor's representative, the protest to Foundation constitutes an agency-level protest.

^{4/} We also find that St. Mary's had no reason initially to believe that the government would "take over" the procurement or that the solicitation was subject to our bid protest jurisdiction. Based on the correspondence which it initially received from Foundation, St. Mary's could not have reasonably concluded that Foundation was conducting the procurement on behalf of the government. The record shows that St. Mary's first learned of the government's involvement from a letter, signed by the Foundation representative, dated February 15. Since the protester had no jurisdictional basis to protest with our Office before that date, its protest of February 25 to our Office is timely for this reason also.

procurement as one by the government and thus subject to federal statutes and regulations and to review the protest in that light. See University of Mich.; Indus. Training Sys. Corp., 66 Comp. Gen. 538, supra.

Evaluation of Proposals

The procurement violated a basic statutory requirement applicable to competitive procurements. CICA requires that solicitations include a statement of evaluation factors (including price) and their relative importance and further requires that agencies evaluate proposals solely on those factors. 10 U.S.C. §§ 2305(a)(2), (b)(1) (1988). The record clearly shows that this requirement was not met here.

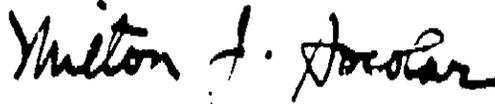
The solicitation requested general information about the provider's performance history and personnel qualifications. As stated, the actual award decision was made on the basis of weighted evaluation criteria which were disclosed only to the members of the selection committee. These undisclosed factors included the size of the group, the proximity of surgeons to the hospital, and the willingness of the group to become involved in teaching and training. While the agency has failed to provide our Office with a complete breakdown of the scoring of proposals based on the undisclosed factors, the record shows that the principal factors provided by the committee to support its recommendation were that the awardee is a large cohesive group with experience, that all members work and live within a 30-minute commuting distance from Naval Hospital Oakland, and that the group has extensive experience in training residents. Since the government based its award decision on these factors, which were never revealed during the course of the procurement, the award was improper and we sustain the protest.

CONCLUSION/RECOMMENDATION

In fashioning a remedy, our Office considers the particular circumstances surrounding the procurement at issue. Here, several firms submitted proposals which were highly rated under the government's undisclosed evaluation criteria. It is unclear how the outcome of the competition would have been affected had offerors been able to prepare their proposals in response to a solicitation which contained a statement of the evaluation factors and the relative importance of those factors. Consequently, we recommend that Foundation issue a new solicitation and provide offerors with a statement of the evaluation factors and their relative importance. If, upon the evaluation of the proposals based on the stated criteria, a firm other than May, Ecker is the successful offeror, Foundation should terminate the current contract and award the

contract as appropriate. Further, we find that St. Mary's is entitled to the costs of pursuing its protest, including attorneys' fees. 4 C.F.R. § 21.6(d)(1); University of Mich.; Indus. training Sys. Corp., 66 Comp. Gen. 538, supra.

The protest is sustained.



Acting Comptroller General
of the United States