



Comptroller General
of the United States

Washington, D.C. 20548

S. Gary

Decision

Matter of: Institute for Human Resources

File: B-246893

Date: April 13, 1992

Steven K. Champlin, Esq., Dorsey & Whitney, for the protester.

James F. Trickett, Department of Health & Human Services, for the agency.

Stephen J. Gary, Esq., David Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency improperly evaluated proposal for employee assistance program counseling services is denied where record indicates the agency's evaluation was reasonable and consistent with the solicitation's evaluation criteria.

2. Protest that agency improperly relied on undisclosed criteria in technical evaluation of proposals is denied where matters considered in evaluation were reasonably related to the stated evaluation factors.

3. Discussions were meaningful where record shows that areas of weakness were called to protester's attention, and protester had an opportunity to identify and correct specific deficiencies within those areas.

DECISION

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Institute for Human Resources (IHR) protests the award of a contract to Behavioral Factors, Inc. (BFI), under request for proposals (RFP) No. 240-BHCDA-1(2), issued by the Department of Health & Human Services (HHS) for employee counseling services. IHR asserts that the agency failed to hold meaningful discussions and improperly found BFI's proposal technically superior to its own.

We deny the protest in part and dismiss it in part.

[Protest of Award of Contract to Behavioral Factors, Inc. for Employee Counseling Services]

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BACKGROUND

The RFP was issued to provide Employee Assistance Program (EAP) counseling services to government employees in eight southeastern states, comprising HHS Region IV. The solicitation provided for three major technical evaluation categories, and specified the points available (out of a possible total of 100 points) under each category, as follows: I. Technical Approach (40 points); II. Methodology of Performing Supervisory Training (25 points); and III. Personnel Qualifications (35 points). The solicitation stated that technical factors would receive paramount consideration, with the estimated cost of performance becoming paramount only in the event two or more offerors were found to be approximately equal technically, in which case the agency reserved the right to make the award most advantageous to the government, cost and other factors considered.

Three proposals, including those of IHR and BFI, were found to be technically acceptable and within the initial competitive range. IHR's initial technical proposal received a score of 76, and BFI's, 91. HHS held discussions in early October 1991, and requested that best and final offers (BAFO) be submitted by October 11. On the basis of the BAFO evaluation, the agency increased BFI's technical score by 4 points, to 95, and raised IHR's 6 points, to 82. HHS concluded that, although not the lowest in estimated cost,¹ BFI's proposal was sufficiently superior technically to justify award to that firm. It thus made award to BFI on October 31.

IHR takes issue with several aspects of the evaluation, and also argues that HHS failed to hold meaningful discussions in certain areas. The major areas at issue are discussed below.

ABILITY TO PROMPTLY PROVIDE PERSONNEL

One of the areas in which IHR's proposal was downgraded was under Personnel Qualifications subfactor III.B., "Ability to promptly provide personnel . . . for operation of the counseling unit facility." IHR does not take issue with the agency's substantive evaluation of this area of its proposal; the protester simply argues that, while this subfactor "was important in the scoring, [it was] not

¹IHR's final estimated cost was \$2,248,478, compared to BFI's \$2,476,259. As discussed below, however, HHS questioned the realism of IHR's proposed cost based on what the agency considered unrealistically low salaries and fees for counselors.

brought to IHR's attention in the best and final process," and that HHS therefore failed to hold meaningful discussions.

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The Competition in Contracting Act of 1984, 41 U.S.C. § 253b(d)(2) (1988), as reflected in Federal Acquisition Regulation (FAR) § 15.610(b), requires that written or oral discussions be held with all responsible sources whose proposals are within the competitive range. Price Waterhouse, 65 Comp. Gen. 205 (1986), 86-1 CPD ¶ 54, aff'd, B-220049.2, Apr. 7, 1986, 86-2 CPD ¶ 333. Such discussions must be meaningful; that is, agencies generally must point out weaknesses, excesses, or deficiencies in the offeror's proposal. Mikalix & Co., 70 Comp. Gen. 545 (1991), 91-1 CPD ¶ 527.

The record shows that IHR's proposal initially received 5 of the possible 10 points for this subfactor. HHS then provided IHR with the following item for discussion prior to requesting its BAFO: "8. [The evaluation] committee expressed its concerns about the applicant's ability to promptly provide personnel for staffing the EAP." This discussion item clearly relates to the ability to provide personnel, the subfactor in question. The record further shows that IHR specifically addressed this item in its BAFO, stating, among other things, that it "guarantees that we will be 100% staffed by November 1, 1991 for the HHS Region IV project," and providing a list of counselors available to work on the contract. HHS revised its initial evaluation based on IHR's response. The agency's final evaluation report, discussing areas of improvement that resulted in the six-point increase in IHR's BAFO score, stated that IHR "responds adequately regarding the ability to staff the EAP from the beginning. . . ." We conclude that this perceived weakness was adequately brought to IHR's attention, and find no basis to conclude that discussions were not meaningful.

EVALUATION OF COMMUNITY RESOURCES

IHR asserts that the agency improperly downgraded its proposal for perceived weaknesses in IHR's identification and listing of community treatment resources. According to IHR, since the solicitation did not request information concerning knowledge of available resources, and did not list knowledge of community treatment resources as an award factor, the protester had no notice that it would be evaluated in this area. Essentially, IHR is arguing that it was improperly evaluated under an undisclosed criterion.

Solicitations must inform offerors of the basis for proposal evaluation, and the evaluation must be based on the factors set forth in the solicitation. In this regard, a solicitation is to be read as a whole, giving meaning to every

section, including the statement of work. Irwin & Leighton, Inc., B-241734, Feb. 25, 1991, 91-1 CPD ¶ 208. However, while agencies are required to identify the major evaluation factors, under the applicable law here they are not required to identify the areas of each factor which might be taken into account, provided that the unidentified areas are reasonably related to or encompassed by the stated criteria. Avogadro Energy Sys., B-244106, Sept. 9, 1991, 91-2 CPD ¶ 229.

In this case, the most important evaluation category, Technical Approach, provided for the evaluation of an "offeror's plan for . . . organization and day-to-day operations." (Subfactor I.C.) The RFP's statement of work described day-to-day operations in terms of (1) staff or consultant counseling services, under which an employee could receive short-term care (up to six counseling sessions per year), and (2) treatment and counseling services in community resources, to which EAP counselors could refer employees for longer-term care. With respect to the second category, the RFP provided in part:

"Close working relationships with community resources, which offer treatment and rehabilitative assistance to individuals with problems, are to be developed and maintained. The contractor shall become familiar with and maintain a file of community resources and knowledge of resource insurance benefits for federal employees . . . shall establish . . . liaison with community resources for referral of employees . . . shall be responsible for screening all referral resources and for maintaining current records of these resources. . . . The referral resources shall be screened for their credentials and effectiveness, including types of service offered, cost, location . . . and professional staff qualifications. . . ."

With respect to the EAP staff responsible for providing services to employees on a day-to-day basis, the solicitation stated that "staff counselors . . . must have a thorough knowledge of treatment resources in the community . . . and must be fully qualified to . . . refer to a wide range of community resources." In our view, these RFP provisions made it clear that EAP staff were required to have a detailed knowledge of referral community resources, including the specific location and characteristics of each, and that knowledge of such resources was an important requirement for operating the EAP. In view of these stated requirements, we find that IHR's ability to identify appropriate community resources was reasonably related to, and encompassed by, the explicitly stated criterion (plans

for EAP organization and operations). It was therefore reasonable for HHS to consider community resources under that subfactor.

The record shows, moreover, that IHR was aware that it would be evaluated in the area of community resources. Based on the perceived deficiency in this area in IHR's initial proposal, HHS advised the firm in discussions that its "list of treatment resources is minimal." IHR responded by submitting an attachment with its BAFO that listed available community treatment resources. As a consequence, the record indicates, HHS considered IHR's initial deficiencies in this area to have been partially eliminated. We find no basis, therefore, for IHR's contention that it did not know it would be evaluated in this area.

Finally, we find that the evaluation of this area was reasonable. Although, as noted, HHS acknowledged improvement in IHR's proposal by virtue of the additional resources listed in its BAFO, the agency observed in its final evaluation report that "some discussion of [IHR's] mechanism to verify these resources in terms of the quality of service is absent."² Furthermore, the offeror did not discuss the socioeconomic factors in identifying appropriate referral sources."³ In commenting on the final evaluation report, IHR simply argues that "cumulatively, the information provided by IHR was equal to or superior to that provided by BFI."⁴ However, with regard to the specific areas in which HHS considered IHR's proposal weak (lack of discussion of quality verification, and failure to address socioeconomic factors), the protester does not attempt to show that the agency's conclusions were unreasonable. We have confirmed that IHR's proposal did not address these matters, and conclude, in view of the evaluation scheme,

²This was evaluated under subfactor I.C.4, "plans for ongoing evaluation of referral agencies."

³This was evaluated under subfactor I.C.4, concerning an offeror's discussion of "the appropriate criteria for recommending treatment sources," and subfactor III.D, regarding the provision of "counseling services to populations with a wide range of socioeconomic and ethnic backgrounds."

⁴IHR also asserts that the agency "neglects to mention that IHR, in its best and final offer, provided further information concerning available facilities, in response to a criticism that its list of treatment resources was minimal." This statement is factually incorrect since, as shown above, HHS did acknowledge IHR's improvement in this area.

that the agency reasonably determined that this failure constituted a weakness in IHR's proposal.

KNOWLEDGE OF PERSONNEL POLICIES

IHR states that HHS failed to hold meaningful discussions prior to reaching its conclusion that IHR did not demonstrate in-depth knowledge of federal personnel policies, procedures, and Merit Systems Protection Board precedent-setting cases, as called for by Technical Approach subfactor I.A.4. IHR argues that HHS did not advise it that failure to provide training opportunities in these matters for the EAP staff was a weakness in its initial proposal, and that the agency lacked a basis for downgrading its final proposal on that account.

We find no merit in IHR's allegations. The solicitation required EAP staff counselors to be thoroughly familiar with federal personnel matters, in connection not only with their counseling duties, but also with the RFP requirement that they be able to train agency employees in these areas. Generally, the RFP stated that "the contractor shall provide qualified staff counselors to conduct the EAP . . . provide regular and ongoing consultation to supervisors . . . and provide direct counseling to employees. . . ." In carrying out these responsibilities, the solicitation required that EAP counselors be able to function within the framework of applicable federal statutes (identified in the RFP), Executive Order 12564 (Drug Free Workplace), the Federal Personnel Manual, and "Merit Systems Protection Board precedent-setting cases."

The record shows that HHS found IHR's initial proposal deficient, since it contained no assurances that IHR's staff counselors would possess a detailed knowledge of federal personnel matters. HHS advised the protester in discussions that:

"3. IHR fails to demonstrate that it has in-depth knowledge of federal personnel policies, procedures, and Merit Systems Protection Board precedent-setting cases."

In response, IHR stated in its BAFO that its management had knowledge of such matters due to its experience under other federal contracts. Although, in their final evaluation report, HHS' evaluators agreed that IHR had satisfactorily demonstrated that its management had some knowledge of these matters, they concluded that IHR staff did not and that "the training opportunities for a staff person [as opposed to management] in a geographically dispersed area, as well as the responsibility for assuring that staff would receive this information, is not considered." The agency determined

that IHR's failure to assure that EAP staff had an in-depth knowledge of federal personnel matters was a significant weakness, since it was the staff, not management, that would be interacting with employees on a day-to-day basis.

As previously noted, IHR objects to the agency's failure in discussions to raise the specific weakness for which it was ultimately downgraded. Agencies, however, are not required to describe deficiencies in such detail that there could be no doubt as to their identity and nature; they are required only to impart sufficient information to the offeror to afford it a fair and reasonable opportunity to identify and correct the deficiencies. Eagan, McAllister Assocs., Inc., B-231983, Oct. 28, 1988, 88-2 CPD ¶ 405. Accordingly, agencies are not obligated to "spoon-feed" offerors as to what factors must be addressed in an acceptable proposal or to conduct all-encompassing discussions. Research Analysis and Maintenance, Inc., B-242836.4, Oct. 29, 1991, 91-2 CPD ¶ 387.

While HHS did not specifically discuss the EAP staff's knowledge of personnel matters as an area of concern, IHR reasonably should have been led into that area by the reference in the agency's discussion item to a lack of knowledge of personnel matters, since the RFP discusses the requirement for such knowledge primarily in terms of EAP staff, not management. For example, in order to carry out their responsibilities of counseling and training employees, the solicitation required:

"Staff counselors must be familiar with the Federal Personnel Manual (FPM), specifically FPM guidance relating to a drug-free workplace, in order to coordinate with such agency functions as training, performance evaluations, disciplinary and grievance systems, medical, safety, equal employment opportunity (EEO), federal employee health benefit programs, employee organizations and labor organizations." (Emphasis in original.)

By leading IHR into an area that was described with great specificity in the RFP, we think the agency's discussion item imparted sufficient information to IHR to afford it a reasonable opportunity to provide assurances that staff counselors would have the knowledge required by the RFP to perform their counseling and training functions.

Further, contrary to IHR's assertion, we find that the agency's evaluation of this area of IHR's proposal was reasonable. In reviewing protests of an evaluation of proposals, we will not independently evaluate the proposals. ACM Env'tl. Servs., Inc., B-242064, Mar. 7, 1991, 91-1 CPD ¶ 255. Rather, since the determination of the relative

desirability and technical adequacy of the proposals is primarily a matter of agency discretion, we will consider only whether the evaluation was reasonable and consistent with the stated evaluation criteria. Pemco Aeroplex Inc., B-239672.5, Apr. 12, 1991, 91-1 CPD ¶ 367. Here, in view of the solicitation requirement that the EAP staff be familiar with federal personnel matters, we find that the agency reasonably considered IHR's failure to assure that its staff, as opposed to its management, possessed the requisite in-depth knowledge to be a significant weakness.

ABILITY TO PROVIDE QUALITY SERVICES

The protester questions HHS's conclusion that IHR's proposed salaries and fees for counselors were unrealistically low, and that this inadequacy called into question the protester's ability to perform adequately and provide quality services in a number of areas. (HHS determined, for example, that IHR's unrealistically low salaries and fees would likely affect the quality of care that would be provided by EAP counselors in light of probable high turnover and dissatisfaction.) According to IHR, the salaries and fees it proposed are appropriate, and it should "not be penalized for offering a competitive proposal."

We find that the agency's conclusions were reasonable. The record shows that HHS provided IHR with a total of three written discussion items concerning its proposed levels of compensation. In the first, HHS observed that "salaries as proposed . . . are lower than the prevailing rates in the geographic area covered." In response, the protester revised its salaries upward in its BAFO, explaining that "IHR has reevaluated its salaries, and increased them based on prevailing industry rates in the region." HHS also advised IHR that its "fee-for-service [consultant] counselors are also underestimated." In response, IHR stated in its BAFO that "IHR has increased the amount of our fee-for-service counselor fees in order to provide adequate affiliate counselor coverage . . . averaging \$40.00 per hour." Finally, HHS stated that IHR "should provide more details on consultant fees," to which the protester responded, "IHR's consultant fees are the fees that we will reimburse affiliate counselors. . . . We compensate our affiliates on an average of \$40.00 per session."

In evaluating IHR's BAFO, HHS noted that the firm's compensation rates had been increased by about six percent over the levels initially proposed. The agency determined, however, that IHR's revised salaries and fees were still well below minimum levels recommended by the National Association of Social Workers for comparably qualified

personnel.⁵ The agency's final evaluation report concluded:

"The [final evaluation] panel raised concerns about IHR's ability to attract and retain qualified personnel given the projected salary for counselors. In 1996 [the last year of the contract], the proposed hourly rate for a counselor is \$13.44 [a five-percent increase from the rate proposed in IHR's initial proposal]. These salaries are not adequate for Masters or Ph.D. prepared counselors and will lead to staff dissatisfaction which would impact the quality of care given to the participants. The concern of providing a quality program resurfaced when reviewing the fee-for-service contracts with the affiliate counselors because the contractual amount is below the average."

The record indicates that the agency's assessment was reasonable. As noted above, in determining what constituted a reasonable level of compensation for counselors with the qualifications called for in the RFP, HHS took into account comparable pay data from an independent professional organization. The agency found IHR's proposed rates of pay to be well below the minimum recommended by that organization. For example, while IHR proposed an hourly rate for counselors in the first year of the contract of \$11.06 per hour, the national professional association recommended a minimum of approximately \$15 per hour, and BFI proposed a rate of approximately \$15.50 per hour. (While IHR's proposed hourly rate for affiliate counselors was \$40, BFI's was \$75.)

IHR has not asserted that BFI's rates were excessive; nor has it offered any evidence, such as comparable pay information of the type relied on by HHS, showing that its own rates were realistic. Instead, IHR simply asserts that its salaries and fees were competitive. However, the mere fact that a protester disagrees with the agency does not render an evaluation unreasonable. Pemco Aeroplex Inc., supra. Based on our review of the record, we find that the agency reasonably concluded that IHR had not demonstrated that its pay levels were adequate to assure the capability to attract and retain qualified counselors who would provide quality services.

⁵The RFP required that staff counselors be "master's degree level graduate mental health professionals," and that they be fully licensed and certified in substance abuse counseling.

AMOUNT OF SUPERVISORY RESPONSIBILITY

IHR asserts that HHS failed to advise it of initial proposal deficiencies under Personnel Qualifications subfactor III.C., "The amount of authority and supervisory responsibility vested in the on-site principal counselor." (IHR's initial proposal received only 5 of 10 available points for this subfactor.) The agency responds that it considered this a minor deficiency that did not need to be raised in discussions, and that did not enter into its final source selection decision.

The record confirms that HHS did not specifically refer to this subfactor in discussions. The final evaluation report, on the other hand, does not refer to any weaknesses in this area, tending to confirm that it was not a continuing concern in the agency's overall assessment of IHR's technical merit. See Textron Marine Sys., B-243693, Aug. 19, 1991, 91-2 CPD ¶ 162 (failure of final evaluation summary to mention area of concern in initial proposal was an indication that agency no longer had concern about area).

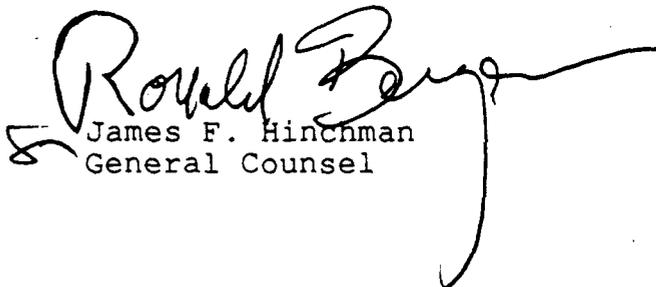
In any case, a showing of prejudice is an essential element of a viable protest. 120 Church Street Assocs.--Recon., B-232139.2, Mar. 7, 1989, 89-1 CPD ¶ 245; where no prejudice is shown or is evident from the record, our Office will not disturb an award. Merrick Eng'g Inc., B-238706.3, Aug. 16, 1990, 90-2 CPD ¶ 130. Here, IHR has not indicated how it would have modified its proposal--or indeed, that it would have modified it at all--in order to address the agency's initial concern in this area. See generally Julie Research Labs., Inc., B-240885, Dec. 31, 1990, 90-2 CPD ¶ 526. Furthermore, even if IHR had modified its proposal and received a perfect score under this subfactor, its overall technical score still would have been eight points lower than BFI's and its proposal still would have contained significant weaknesses, including the perceived adverse impact of IHR's unrealistically low salaries and fees on the quality of service generally, the lack of knowledge of federal personnel matters on the part of IHR's staff, and IHR's failure to discuss methods of verifying the quality of services provided by community resources. In these circumstances, and notwithstanding IHR's lower proposed cost (which, as noted, HHS considered unrealistic in any case), it does not appear that a five-point improvement in its technical score would have affected the outcome of the evaluation. See TRW, Inc., B-243450.2, Aug. 16, 1991, 91-2 CPD ¶ 160.

DEFECTIVE SOLICITATION

IHR asserts that it was at a disadvantage in this procurement because the RFP did not include full details concerning the location of employees in the region. IHR argues that because BFI, the incumbent, had that information, that firm was able to submit a more detailed proposal. Thus, according to IHR, "the solicitation process improperly favored the winning bidder. . . . "

This allegation is untimely. Our Bid Protest Regulations provide that protests based on alleged improprieties in a solicitation which are apparent prior to the time set for receipt of offers must be filed prior to that time. See 4 C.F.R. § 21.2(a)(1) (1991), as amended by 56 Fed. Reg. 3759 (1991); Brinkerhof Realty and Constr., B-244544, Sept. 27, 1991, 91-2 CPD ¶ 303. The absence of a complete employee site list was apparent on the face of the solicitation, and therefore the alleged impropriety had to be protested no later than the closing date for receipt of proposals. Since IHR did not raise the allegation until after the agency had already awarded the contract, this aspect of its protest is dismissed as untimely and will not be considered on the merits.

The protest is denied in part and dismissed in part.


James F. Hinchman
General Counsel