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DECISION **THE COMPTROLLER GENERAL OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-189603 DATE: March 15, 1978

MATTER OF: New Hampshire-Vermont Health Service

DIGEST:

1. Agency's determination that provisions of one of its regulations are not applicable to particular situation is clearly correct. Moreover, even if regulation was less than clear and subject to being construed to cover situation, agency interpretation of its own regulation would be entitled to "great deference."

2. Extent to which offeror's proposed course of action was adequately justified in proposal is matter within subjective judgment of agency procuring officials, and record affords no basis for concluding that agency's judgment that there was sufficient justification was unreasonable.

3. Allegation that price was improperly evaluated must fail where such allegation is directly related to assertion that technical evaluation was also improper and it is found that technical evaluation was proper.

4. Request for "clarification" from one offeror prior to formal technical evaluation which results in submission of detailed data, without which proposal would not be acceptable, constitutes discussions, thereby necessitating discussions with and call for best and final offers from all offerors.

5. Where responsibility-type concerns such as prior company experience are comparatively evaluated in negotiated procurement, rule that responsibility determinations should be based on most current information available is also for application.

6. Where agency evaluates company experience by means of point scoring, but such evaluation does not take into account most recent experience information which is in possession

of agency, source selection official should consider such information along with results of point scoring, particularly where significantly less costly proposal is point-scored low in prior experience but nearly the same as competing offer in technical area, and most current information suggests that low offeror's prior performance problems have been cured. Since record does not indicate that recent experience was considered, GAO recommends that source selection official reconsider award selection.

New Hampshire-Vermont Health Service protests the award of a contract for Medicare Part B Carrier Services for the State of Maine to Blue Shield of Massachusetts, Inc. (BSM) under a request for proposals (RFP) issued by the Department of Health, Education and Welfare, Bureau of Health Insurance (HEW), on March 18, 1977. The RFP solicited fixed-price proposals for a contract period of 3 years and 3 months, from July 1, 1977 through September 30, 1980, and reserved to the Government the option to extend the contract in year increments after September 30, 1980.

Proposals from 5 firms were received by the May 2, 1977, submission date. New Hampshire-Vermont Health Service submitted the lowest priced proposal at $4,737,498. BSM submitted the second lowest price proposal at $5,285,000. The RFP advised that award of the contract would be made to "that financially responsible and technically responsive offeror whose proposal conforms to all conditions and requirements of the RFP and is considered most advantageous to the Government, price and other factors considered." The evaluation and award factors were described in Section III of the RFP as technical, 30 percent; experience, 30 percent; price, 40 percent. The final evaluation shows that out of the total 1000 award points available, New Hampshire-Vermont Health Service received 848.18 points and BSM received 863.21 points. The contract was awarded to BSM on July 11, 1977.

The protester alleges that there were improprieties in the evaluation of proposals, absent which the protester's proposal would have been the highest rated, and that HEW waived an RFP requirement for BSM without informing other offerors.

The RFP required offerors to complete and sign a "Representations and Certifications" section dealing with such matters as an offeror's status as a small business and as a regular dealer or manufacturer, its type of business organization, contingent fees, equal opportunity, Buy American, clean air and water, and independent price determination. BSM's proposal contained the completed representations and certifications but the section was not signed. In addition, BSM responded to the RFP requirement that it be in full compliance with applicable licensure and other state and local statutory or regulatory requirements by including in its proposal a statement to the effect that it had been advised by counsel that it was authorized to do business in the State of Maine without filing any specific forms. By telegram of May 4, 1977, HEW notified BSM of these "deficiencies" in its proposal and requested that it submit a signed copy of the representations and certifications and "documentation from a competent authority within the State of Maine * * * certifying to [BSM's] ability to operate" in Maine. BSM submitted the requested documents on May 10 and May 11, 1977, respectively.

By telegram of May 13, 1977, HEW also advised BSM that its proposal did not meet the requirements of RFP section VIII. B.6.C. That section provided in pertinent part as follows:

> "6. Program Reimbursement
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> "c. If the offeror proposes to change the 1964 CRVS procedure codes currently used by Union Mutual [the incumbent contractor when the RFP was issued] he must substantiate the reasons for change and present a detailed conversion plan

commenting upon the advantages of proposed coding approach."

BSM was the only offeror to propose changing the 1964 CRVS procedure codes; it proposed to convert the Maine Medicare Part B procedure coding structure to the format it utilizes in Massachusetts. Although BSM's proposal advanced several justifications for the change, the telegram further advised BSM that:

> "* * * the level of documentation must meet the published requirements for approval specified in Part 405.512(A)(B) and (C) of Chapter III of Title 20 of the Code of Federal Regulations. We cannot complete the evaluation of your proposal without full compliance with all requirements of the regulation. Please present the full necessary documentation by May 20, 1977, or as a minimum, guarantee by May 20, 1977, the date the documentation will be available."

On May 24, 1977, BSM submitted its response to the telegram. However, HEW's final evaluation team members subsequently determined that the regulations found at 20 C.F.R. 405.512 (1975) had been erroneously cited and did not apply to BSM's proposal to extend its own procedure coding system into another geographic location. BSM's proposed change of procedure codes was then found to be adequately substantiated and acceptable to HEW.

The protester initially objected to HEW's allowing BSM to furnish, after the closing date for receipt of proposals, the signed "Representations and Certifications" section and additional evidence of ability to perform the contract in Maine. However, in a subsequent submission, the protester stated its agreement that "if BSM" was legally able to do business in Maine at the time it submitted its proposal, then clarification of this issue and the [absence of] the signature on the Representations and Certifications could be construed as an informality and could be corrected * * *." Since it appears from the record--particularly BSM's submission to HEW which included the required statement from a Maine official that BSM could perform the contract in the state--that this condition is satisfied, we view these initial objections as having been withdrawn.

With regard to BSM's proposed conversion plan, the protester contends that the provisions of 20 C.F.R. 405.512 are applicable to the proposed change, that BSM did not satisfy those provisions as required by the RFP, and that "the substantial RFP condition and appropriate published regulations for justifying the proposed change and presenting a detailed conversion plan were eliminated for only one bidder without notice to other offerors" in violation of Federal Procurement Regulations (FPR) § 1-3.805-1(d) (1964 ed. Amend. 153). The referenced FPR section provides that a written amendment to an RFP shall be furnished to each prospective contractor when, "during negotiations, a substantial change occurs in the Government's requirements or a decision is reached to relax, increase, or otherwise modify the scope of work or statement of requirements * * *."

20 C.F.R. 405.512 sets forth several specific "considerations and guidelines" for use "in evaluating a carrier's proposal to change its system of procedural terminology and coding." The protester contends that these were applicable to the change proposed by BSM primarily because of HEW's original request that BSM comply with the regulatory provisions and because of the statement in the RFP section entitled "Carrier Responsibilities-Scope of Work" that "The Carrier shall comply with the regulations of the Government as codified in the Code of Federal Regulations Title 20, part 400 * * *."

We do not agree with the protester's contention. The regulation clearly refers to a carrier's proposal to change its own system rather than to an offeror's proposal to convert a system used by a prior contractor. Moreover, even if we found the regulation to be less clear and subject to being construed as the protester interprets it, we would be required to afford "great deference" to the interpretation of HEW, the agency which promulgated the regulation. See Udall v. Tallman, 380 U.S. 1, 16 (1965); High Voltage Maintenance Corp., 56 Comp. Gen. 56 (1976), 76-2 CPD 473; Mayfair Construction Company, B-186278, August 10, 1976, 76-2 CPD 148 and cases cited therein. In addition, we agree with HEW that the RFP statement concerning 20 C.F.R. Part 400 referred only to the contractor's responsibilities during performance of the contract and not to the responsibilities of an offeror when preparing a proposal. Accordingly, we find no basis for concluding that HEW's original reference to the regulation was anything more than an inadvertence or that there was a relaxation or elimination of an RFP requirement merely because there may not have been adherence to the guidelines of the regulation.

With respect to BSM's compliance with section VII. B.6.C. of the RFP, which required substantiation of a proposed new approach along with a "detailed conversion plan commenting upon the advantages" of the new approach, the record indicates that BSM's original proposal submission contained only a one and one half page discussion of the proposed change which briefly set forth the reasons for the change, the advantages that would accrue, and, in general terms, the steps that would be taken to make the conversion. BSM's May 24, 1977 response to the HEW telegram, however, contained a more highly detailed response that in BSM's view would actually comply with the detail required by 20 C.F.R. 405.512. According to HEW, review and analysis of this additional information "established * * * that the proposed coding procedures presented no detrimental program impacts" and therefore were acceptable and were no longer "an impediment to award."

The record affords no basis for our objecting to this aspect of the evaluation. Determinations as to the needs of the Government and the adequacy of a proposal submitted in response to an agency's statement of its needs are the responsibility of the procuring activity. See, e.g., Joanell Laboratories, Incorporated, 56 Comp. Gen. 291 (1977), 77-1 CPD 51. Accordingly, a determination as to whether information submitted in response to solicitation requirements is sufficiently detailed to permit a finding of acceptability is essentially a matter within the subjective judgment of agency procuring officials. Checchi and Company, 56 Comp. Gen. 473, 480 (1977), 77-1 CPD 232; Urbdata Associates, Inc., B-187247, April 20, 1977, 77-1 CPD 275; W.S. Gookin & Associates, B-188474, August 25, 1977, 77-2 CPD 146; cf. Continental Service Company, B-187700, January 25, 1977, 77-1 CPD 53; Mosler Airmatic Systems Division, B-187586, January 21, 1977, 77-1 CPD 42. In HEW's view, the information submitted by BSM was sufficient to substantiate the proposed change. Although the protester apparently believes that BSM's submissions did not constitute the "detailed conversion plan" required by the RFP, the record, in our view, does not establish that HEW's judgment in this regard was unreasonable.

The protester's contention with regard to the price evaluation is directly related to its contention regarding the acceptability of BSM's proposed procedure code change. The protester's position is that BSM's proposal was erroneously evaluated as to price so that although its own proposal received the maximum number of award points available under the price evaluation

formula, it did not receive "full value" for its low proposal. The protester argues that:

> "* * * the primary justification by Blue Shield of Massachusetts, Inc. for changing procedure codes was that it would result in reducing their administrative costs by $800,000.
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> "The proposal to change procedure codes should have been denied since it was not substantiated according to RFP specifications and published regulations. This would have added $800,000 to their bid price resulting in a total bid of $6,086,000. This price would have given Blue Shield of Massachusetts, Inc. 311.42 points for price and would have reduced its total points to 816.07. We would then be the highest rated offeror by 32.74 points, and the difference in price between Blue Shield of Massachusetts, Inc. and New Hampshire-Vermont Health Service would have been $1,347.502."

In view of our finding that HEW did not act improperly in accepting BSM's proposals to change the codes, this contention of the protester must fail and need not be considered further.

However, we are concerned about the procedures used by HEW to obtain the additional justification from BSM. FPR 1-3.805-1(a) (1964 ed. Amend 153) requires that, with certain exceptions, after receipt of initial proposals written or oral discussions be conducted with all responsible offerors who submit proposals within a competitive range, price and other factors considered. Although the cited regulation permits an agency to dispense with discussions under certain circumstances, if discussions are held with one offeror, then they must be held with all offerors in the competitive range. 51 Comp. Gen. 479 (1972); 50 _id._ 202 (1970).

HEW maintains that it did not conduct discussions in this case and that its contacts with BSM after receipt of proposals were only for "clarification" purposes and were in accordance with FPR 1-3.805-1(a)(5) and HEW Procurement Regulations (HEWPR) 3-3.5103(e), 41 C.F.R. 3-3.5103(e). The FPR provision states:

> "In any case where there is uncertainty as to the pricing or technical aspects of any proposals, the contracting officer

shall not make any award without further explanation and discussion prior to award."

The HEWPR provision states:

"(e) For the sole purpose of eliminating any uncertainty or ambiguity in an initial proposal, the contracting officer may make inquiry of an offeror. Such inquiry of and clarification furnished by such offeror shall not be considered to constitute 'discussions' within the meaning of § 1-3.805-1(g) of this title and shall not necessitate any inquiry of other offerors. However, if the clarication results in an offeror revising its proposal or it would in any way prejudice the interests of other offerors, discussions must be held with all responsible offerors within the competitive range."

It is not always easy to determine if a Government-offeror contact or interchange constitutes the competitive range discussions envisioned by FPR 1-3.805-1(a) or is merely a clarification inquiry such as is permitted by HEWPR 3-3.5103(e). However, whether discussions have been held "is a matter to be determined upon the basis of the particular actions of the parties, and not merely the characterization thereof by the contracting officer." The Human Resources Company, B-187153, November 30, 1976, 76-2 CPD 459. Certain inquiries, and the responses thereto, are generally regarded as not constituting discussions. See Armed Services Procurement Regulation (ASPR) 3-805.1(b), which is similar to HEWPR 3-3.5103(e), and ASPR 2-405, which treat such things as an offeror's correction of its failure to (1) furnish required information concerning the number of its employees; (2) indicate its size status, and (3) execute equal opportunity and affirmative action program certifications, as clarification of minor irregularities. We have also regarded such things as an agency's receipt of a second cloth sample from one offeror to verify that the offeror's original sample met the solicitation requirements, Fechheimer Brothers, Inc., B-184751, June 24, 1976, 76-1 CPD 404, and an agency's informing offerors, after receipt of initial proposals, of a change in the class of black powder to be furnished by the Government, Ensign Bickford Company, B-180844, August 1[illegible], 1974, 74-2 CPD 97, as not constituting discussions.

On the other hand, we have held that acknowledgement of an RFP amendment constitutes discussions, 50 Comp. Gen. 202, supra, as does holding a "clarification" meeting which results in substantive proposal revisions, National Health Services, Inc., B-186186, June 23, 1976, 76-1 CPD 401, and requesting "clarifications" which are essential for determining the acceptability of a proposal. The Human Resources Company, supra. The acid test of whether discussions have been held is whether it can be said that an offeror was provided the opportunity to revise or modify its proposal. The Human Resources Company, supra; 51 Comp. Gen. 479, supra.

Although here HEW states that no discussions were held with BSM because "no basic change was made in price or in any other factors, and at no time was the scoring of any offeror's proposal affected by the clarification," the record indicates that the acceptability of BSM's proposal was dependent upon its explaining the proposed code changes to HEW's satisfaction. As stated earlier in this decision, it was only after HEW evaluated BSM's supplemental submission that it determined the proposed change to be acceptable, thereby removing "the coding issue * * * as an impediment to award." Thus, we think this case is similar to Centro Corporation et al., B-186842, June 1, 1977, 77-1 CPD 375, where the agency, prior to establishing a competitive range, sought "clarification" from offerors on various technical aspects of their proposals. We held that the "questions asked of the offerors went to the heart of their proposals and had a substantial effect on the Government's determination of acceptability" and therefore "constituted negotiations."

Moreover, HEW's reference to FPR 1-3.805-1(a)(5) negates its own position, since that provision refers to competitive range "discussion[s]" and not to mere clarification. See, e.g., Nationwide Building Maintenance, Inc., 55 Comp. Gen. 693 (1976), 76-1 CPD 71; Spacesaver Corporation, B-188427, September 22, 1977, 77-2 CPD 215; 53 Comp. Gen. 201 (1973).

Accordingly, while we find HEW's desire to obtain additional justification from BSM was appropriate under

the circumstances and consistent with the general requirement for maximizing competition, we also find that the "clarification" data required of BSM was essential to a determination of proposal acceptability and therefore constituted discussions. Consequently, HEW should have established a competitive range and conducted discussions, including calling for best and final offers, with all offerors in that range. See FPR 1-3.805-1(a) and (b).

Contrasted with the above is HEW's treatment and evaluation of company experience.

The applicable RFP provision stated:

"Experience - 30 percent of total points

"* * * Up to a total of 36 months of experience gained since April 1972 will be considered in the evaluation. Quality will be derived from sources knowledgeable about the past performance of the offeror. The type, amount and quality [of] data will be scored and then converted to award points."

In implementing this provision, HEW quantified the quality of company experience by means of a formula established in its evaluation plan. For offerors with Medicare Part B carrier or intermediary experience, Annual Contractor Evaluation Report (ACER) ratings were used. The ACERs, issued by HEW's Bureau of Medicare, review a Medicare Part B carrier's performance in the areas of claims process, coverage and utilization safeguards, program reimbursement, EDP operations, beneficiary services and professional relations, fiscal management, and carrier management. The ACER reports the carrier's performance in detail and includes a summary rating of satisfactory, acceptable but needs improvement, or unsatisfactory for each of the seven areas. In quantifying these ratings, HEW took into account the ACER ratings for the 3 most recent years (covering January 1, 1973 through September 30, 1976), assigning 2 points for each satisfactory rating, 1 point for each adequate rating, and no points for unsatisfactory ratings. The total evaluation/award points for company experience for carriers with 3 years of experience in administering the Medicare Part B program was based solely on the ACER ratings.

The protester objects to the evaluation based solely on the ACERs because it had the effect of precluding consideration of the most recent company experience for the 7-month period between the

date of the last ACER and the proposal submission date and of performance trends indicated by the ACERs. The protester explains that this recent experience was important because at least 5 of the past 10 "adequate" ratings it received in the ACERs were directly related to problems with its data processing system, but that those problems were solved, with a resulting substantial improvement in its performance, during the period immediately subsequent to the end of the last ACER reporting period (September 30, 1976). According to the protester, HEW knew or should have known of this recent experience from (1) the protester's proposal, which stated that substantial improvements had been made to its processing system and performance; (2) references, submitted pursuant to an RFP requirement; and (3) a memorandum from the HEW Resident Health Insurance Representative (who was listed as one of the protester's references) to the Regional Medicare Director which discussed the protester's ability to process the additional workload reflected in the RFP and stated that due to improvements in the protester's claims processing and EDP systems, an update of its ACER would result in satisfactory ratings in all sections.

HEW initially argues that this aspect of the protest is untimely. HEW asserts that the RFP is explicit as to the manner in which company experience would be evaluated and that the protester's objection is based upon an alleged impropriety in the RFP which was apparent prior to the date for receipt of proposals. Such improprieties are required to be raised prior to the closing date for receipt of proposals. 4 C.F.R. § 20.2(b)(1) (1977). We do not agree, however, that this issue is untimely. The protest is directed not toward the RFP provision, but rather to its implementation. Accordingly, the issue will be considered on the merits. U.S. Nuclear, Inc., B-187716, December 29, 1977, 57 Comp. Gen. ___, 77-2 CPD 511.

We have held that determinations as to the responsibility of a bidder or offeror to perform a contract should be based on the most current information available. Inflated Products Company, Incorporated, B-188319, May 25, 1977, 77-1 CPD 365; 51 Comp. Gen. 588 (1972); 49 id. 139 (1969). We believe the thrust of that holding is also applicable to cases where a responsibility-type concern such as company experience is comparatively evaluated under evaluation factors established for a negotiated procurement. See SBD Computer Services Corporation, B-186950, December 21, 1976, 76-2 CPD 511.

On the other hand, we have recognized that the selection of a particular method for proposal evaluation is within the broad discretion of the procuring activities. "The only requirements are that the method provide a rational basis for source selection and that the evaluation itself be conducted in good faith and in accordance with the announced evaluation criteria." Francis & Jackson, Associates, B-190023, January 31, 1978, 57 Comp. Gen. ___, 78-1 CPD ___.

Here HEW's evaluation plan called for the point scoring of company experience on the basis of the ACERs for offerors with prior Medicare Carrier or intermediary experience. Although the RFP stated that "[w]henever possible, at least two references should be supplied for each category of experience," the evaluation plan appears to have provided for point scoring of responses received from offeror references only in the case of firms which had not been Medicare carriers or intermediaries. Thus, in accordance with the evaluation plan, the protester and BSM were point-scored in the area of company experience solely on the basis of prior ACERs.

HEW explains that the ACER, as the "official appraisal of contractor performance," was determined to be "the best available source of data to evaluate the quality of experience of offerors presently participating in the Medicare program." While recognizing that "there is necessarily some lag time between the latest completed [ACER] period and the current date," HEW states that it used the yearly performance evaluations because it has been its experience "that performance indicators fluctuate from quarter to quarter and the best gauge of performance occurs on a yearly basis." In HEW's view, it used "the best, most currently published data in evaluating company experience."

Based on the above, we cannot say that the evaluation of experience which resulted in the point scoring was without a rational basis. However, under the circumstances of this case, we also think it would have been appropriate for the source selection official, when considering the results of the evaluation and point scores, to take into account the information available concerning the most recent experience of the offerors. In this regard, we point out that the RFP did not mandate award in accordance with the results of the point scoring scheme, so that the source selection official properly could determine whether whatever advantage was indicated by the numerical scoring was worth the cost that might be associated with the higher-scored proposal. See Telecommunications Management Corp., B-190298, January 31, 1978, 57 Comp. Gen. ___, 78-1 CPD ___.

Here--where the highest-scored proposal was priced more than $500,000 above the price associated with the next highest scored proposal; where that second-ranked proposal was scored at only 15.03 points (out of 1,000) below the top-ranked offer; where the point-scoring of the technical area resulted in a virtually equal rating (220.24 for the protester; 222.86 for BSM) for the top two proposals; where the difference in final overall scoring was due almost exclusively to the difference in numerical ratings given to the two top offerors in the experience area; and where the agency was in possession of current information indicating that an up-to-date performance appraisal of the second-ranked offeror would result in significantly improved ACER ratings in view of the elimination of previously-incurred problems--it would seem particularly apt for a meaningful source selection decision to be based not only on the results of the point-scoring, but also an available information which is relevant to the selection and which was more current than that reflected by the point scores. In other words, just as HEW was interested in giving full consideration to what BSM could offer, we think it would have been appropriate for it to do the same with respect to the protester.

There is no indication in the record that this information was considered by the HEW source selection official prior to the selection of BSM for award. Accordingly, we are recommending to the Secretary of Health, Education, and Welfare that the source selection decision be reconsidered in light of the views expressed herein.

This decision contains a recommendation for corrective action to be taken. Therefore, we are furnishing copies to the Senate Committees on Governmental Affairs and Appropriations and the House Committees on Government Operations and Appropriations in accordance with section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1970), which requires the submission of written statements by the agency to the Committees concerning the action taken with respect to our recommendation.

R. F. Keller
Deputy Comptroller General
of the United States