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

FILE: B-217481 **DATE:** May 15, 1985

MATTER OF: Indian Community Health Service, Inc.

DIGEST:

1. Protest contending that an agency should have conducted technical discussions with protester, since they were held with the other offeror in the competitive range, is denied since protester's proposal received 49 of 50 points and could not have been materially improved by discussions. Although the other offeror's revised technical proposal received 50 points, the two proposals were essentially equal in technical merit and the protester lost the award because it raised its estimated costs in its best and final offer above those of its competitor.

2. Protest contending that agency manipulated protester during cost discussions to increase its price to its detriment is denied since record shows that the agency's discussions were fair and reasonable, consisting only of requests for support or explanations of proposed costs.

Indian Community Health Service, Inc. protests the award of a contract to the Phoenix Indian Center, Inc. (PIC) under request for proposals (RFP) No. 568-9-04-84, issued by the Department of Health and Human Services (HHS) for the development of an alcoholism service program for Indians in the Phoenix area. Indian Health contends that HHS held technical discussions with PIC and allowed PIC to revise its technical proposal without providing Indian Health with the same opportunity. The protester also asserts that it lost the contract because the agency improperly manipulated it to increase its estimated costs in its best and final offer, and that the agency improperly accepted PIC's proposal, which did not include required affiliation agreements with other providers of health care.

The protest is denied.

Background

The solicitation contemplated a cost-reimbursement type contract and allocated 50 evaluation points to technical factors and 50 points to the offeror's business proposal, including estimated costs. The agency's budget for the program was $96,000. HHS advises that this figure somehow was leaked to all offerors before the solicitation was released.[1]/

Three proposals were received in response to the RFP. The initial technical evaluations resulted in Indian Health's proposal being scored at 49 points and PIC's proposal at 38 points. The third offeror's proposal received only 18 points and was determined to be outside of the competitive range. The agency states that because Indian Health's technical proposal was essentially free of defects, no technical discussions with Indian Health were conducted. PIC, however, was sent a letter setting forth the general areas of deficiency in its technical proposal and was permitted to revise the proposal. In addition, oral discussions with both PIC and Indian Health were conducted regarding their estimated costs, and best and final business proposals were solicited from both offerors.

PIC's revised technical proposal was evaluated and given a score of 50 points. Its best and final proposed cost was $102,296, and Indian Health's revised cost was $110,952. The award decision was originally based on the greater technical merit of PIC's proposal. However, after reviewing the contract file, in response to Indian Health's protest to the agency against the contract award, the contracting officer stated that the award was based on the combination of technical merit and PIC's low price.

Discussion

With respect to Indian Health's contention that it should have been given the same opportunity to revise its

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[1]/ While Indian Health does not protest this point, we note that the leak of budgetary information does not render the procurement improper since nothing prohibits the release of this type of information in any event, provided that all offerors receive the same information at approximately the same time. See Fresh Flavor Meals, Inc., B-208965, Oct. 4, 1982, 82-2 CPD ¶ 310.

technical proposal as was given to PIC, the agency concedes that generally if discussions are held with one offeror, they must be held with all offerors within the competitive range. The agency correctly points out, however, that the content and extent of those discussions are within the discretion of the contracting officer since the number and type of deficiencies, if any, will vary among the proposals. See Pope Maintenance Corp., B-206143.3, Sept. 9, 1982, 82-2 CPD ¶ 218. We have recognized that an agency need not conduct discussions with an offeror when, as here, it perceives no deficiencies in the offeror's proposal, provided that the offeror is given the opportunity to submit a best and final offer. Magnaflux Corp., B-211914, Dec. 20, 1983, 84-1 CPD ¶ 4. Although Indian Health argues that it was not in fact given an opportunity to submit a best and final technical proposal, it was asked to provide a best and final cost proposal. We have held that absent express contrary instructions, offerors should know that changes to their technical proposals are permitted in best and final offers. Systems Group Associates, Inc., B-198889, May 6, 1981, 81-1 CPD ¶ 349. Moreover, Indian Health's technical proposal was essentially free of deficiences and even without discussions or revision, its score was a nearly perfect 49. Thus, we see no prejudice to Indian Health from the lack of discussions regarding its technical proposal.

As indicated previously, the award to PIC originally was based on the "comparatively greater technical merit" of the PIC proposal, but the contracting officer's letter denying Indian Health's protest to the agency stated that the award was based on a combination of technical merit and price. The agency now contends that the record supports a conclusion that price was the determining factor for award since the two proposals were rated essentially equal technically, after the evaluation of PIC's best and final technical proposal. HHS thus argues that the original confusion of the agency contracting officials did not prejudice Indian Health since it is clear that the appropriate offeror was selected for award.

We agree with the agency that even though an award originally may have been based on invalid grounds, we will not disturb the award if proper grounds in fact exist for the award. The purpose of our review of a procurement

under our bid protest function is to determine whether, under all the circumstances, including those discovered after the protest, the agency complied with the applicable statutes and regulations. See Roth-Radcliffe Co., Inc., B-213872.2, June 1, 1984, 84-1 CPD ¶ 589.

We think that a sound basis for the award in this case did exist. The solicitation gave equal weight to technical merit and estimated costs, and it should have been obvious to all offerors that estimated costs could become the basis on which award would be made if the two most acceptable proposals were evaluated as essentially equal. See 52 Comp. Gen. 686, 690 (1973). Even when a solicitation gives no weight to estimated costs, or less weight than to technical merit, estimated costs may become the basis for award when the technical proposals are equal in merit. See Medical Services Consultants, Inc., MSH Development Services, Inc., B-203998 et al., May 25, 1982, 82-1 CPD ¶ 493; The Singer Co., B-211857 et al., Feb. 13, 1984, 84-1 CPD ¶ 177. Here, there was no material difference in the technical merit of the proposals of Indian Health and PIC, and each met the agency's needs. Thus, award properly was made to PIC, whose estimated costs were lower than those proposed by Indian Health.

Regarding Indian Health's allegation that the agency improperly manipulated it into increasing its costs to its detriment, the agency states that due to the leak of the $96,000 budget for the program, all offerors proposed costs of $96,000 in their initial proposals. As a result, it took great care during the discussions to ascertain the offeror's true costs, and informed the offerors that the $96,000 figure was an estimate and not a ceiling. The agency denies any unequal treatment of the offerors during the discussions.

We find no substance to Indian Health's insistence that it was manipulated into increasing its costs to its detriment. Rather, the questions asked by the agency about Indian Health's initial cost estimate appear to have been fair and reasonable. As an example, Indian Health's initial proposal stated that 20 percent of the time of its executive director, who receives an annual salary of $28,750, would be allocated to the program, but the proposal showed an annual cost figure of only $1,692 for

the position. In response to the agency's question about this inconsistency, Indian Health's best and final offer agreed that the proper figure should be $5,750. In addition, the initial proposal allocated 50 percent of the full-time salary of a clerk/receptionist to this program, and the agency expressed doubt that a secretary employed only half time would be sufficient. The best and final offer allocated the full salary to the program. In response to the agency's request for support for $300 in training costs, the best and final offer gave the requested details, but also provided for additional training and increased the figure to $1,170.

Nothing in any of the agency's questions indicates any unfair manipulation of the protester. Rather, the record shows that HHS merely asked that Indian Health clarify aspects of its cost proposal which raised some concern on the agency's part about the adequacy or accuracy of the proposal. We find no impropriety in this, and note that in fact the agency was obligated to bring these deficiencies to Indian Health's attention. See the Federal Acquisition Regulation, 48 C.F.R. § 15.610(c) (1984).

Indian Health also contends that the proposals were unfairly evaluated because PIC did not supply with its proposal the affiliation agreements with cooperating agencies that Indian Health insists were required by the solicitation. The solicitation, however, states that the "contractor" shall be required to negotiate the agreements and required only that the "proposed agreement" be attached to the proposal. The record indicates that PIC's proposal included a protocol signed by managing officals of three branches of the Phoneix Indian Medical Center expressing an intent to sustain a medical relationship with PIC's alcoholism treatment program. In addition, PIC's proposal indicated an intent to negotiate other affiliation agreements after award and, according to the agency, PIC now has agreements with two more providers of services relating to treatment of alcoholism. Based on these circumstances, the agency was not unreasonable in accepting PIC's proposal as complying with the affiliation agreement provision.

The protest is denied.

for Harry R. Van Cleve
General Counsel