DECISION

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

61020

FILE: B-186186 DATE: June 23, 1976

MATTER OF: National Health Services, Inc. 98405

DIGEST:

1. Where record does not indicate agency rationale for regarding one of eight offerors as acceptable for award GAO cannot conclude that establishment of competitive range of only one offeror was proper.

2. Where agency meets with one offeror and affords that offeror opportunity to modify its proposal, agency has conducted discussions within meaning of Federal Procurement Regulations § 1-3.805-1(a) and must conduct discussions with all other offerors within competitive range.

3. Offerors should be informed of evaluation factors to be used to select contractor and relative weights of such factors. Solicitation that does not include such information is defective and since mere inclusion in solicitation of language on Standard Form 33A that award will be based on "price and other factors" does not cure defect.

National Health Services, Inc. (NHS) protests the Immigration and Naturalization Service's (INS) award of a contract for professional medical services under Request for Proposals (RFP) CO-22-76 to National Medical Advisory Service (NMAS). The RFP was issued January 8, 1976, with performance, involving the operation of occupational health units in two facilities occupied by INS employees, set to run from date of award to September 30, 1976. Eight proposals were received in response to the RFP.

NHS was informed on the afternoon of March 19, 1976 that a contract had been awarded to NMAS. NHS requested a debriefing which was held on March 24, 1976. NHS asserts that during the course of the debriefing it learned the following: first, that its proposed price per month was about $16.00 over that of NMAS;

second, that in its initial proposal NMAS had proposed the use of a clerk and that INS had entered into negotiations with NMAS which resulted in the deletion of the clerk and the substitution of additional tests for venereal disease and sickle cell anemia; third, that no negotiations or discussions were held with any of the other competitors, all of which were both within the competitive range and fully responsive; and finally, that the sole determining factor in the selection of the successful offeror was price. On the basis of this information, NHS asserts that INS was required to conduct discussions with it and all other offerors and that its failure to have done so requires the termination of the NMAS contract and a reopening of negotiations.

INS contends that it was not required to hold discussions with all offerors, and that while it met with NMAS prior to award, that meeting "* * * was not intended to be a negotiating session" and was only in the nature of a "clarification discussion" with the offeror already selected for award on the basis of best proposal submitted, price and other factors considered. INS does not dispute that as a result of the meeting, laboratory tests were substituted for the offered clerk. INS points out, however, that it, rather than NMAS, raised the question of whether a clerk was necessary and that the agreement between INS and NMAS to substitute the tests for the clerk resulted in no change in cost. INS also denies NHS's allegation that it admitted at the debriefing that all of the proposers were both within the competitive range and fully responsive and that price was the only factor. INS takes the position that what was actually said was "that if all competitors had been in the competitive range and fully responsive the sole determining factor at that point would have been price." In short, INS asserts that so far as it was concerned "only NMAS was in a position to be awarded the contract due to their outstanding proposal."

Federal Procurement Regulations (FPR) § 1-3.101(c) (1964 ed.) requires that:

> "* * * Unless award without written or oral discussion is permitted under § 1-3.805-1(a), negotiation shall thereupon be conducted in accordance with § 1-3.805, with due attention being given to the factors in § 1-3.102 and any other appropriate factors."

FPR § 1-3.805-1(a) provides as follows:

> "After receipt of initial proposals, written or oral discussions shall be conducted with all responsible offerors who submitted proposals within a competitive range, price and other considered, except * * *
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> (5) Procurements in which it can be clearly demonstrated from the existence of adequate competition or accurate prior cost experience with the procuct or service that acceptance of the most favorable initial proposal without discussion would result in a fair and reasonable price * * *." (Emphasis added.)

Although FPR § 1-3.805-1(a) permits an agency to dispense with discussions under certain circumstances, if discussions are held with one offeror, then discussions must be conducted with all offerors in the competitive range. 51 Comp. Gen. 479 (1972); 50 id. 202 (1970). Thus, INS was required to hold discussions with NHS if NHS was in the competitive range and if discussions were held with NMAS.

The record does not indicate that the contracting officer ever formally determined which offerors were within the competitive range. His actions, however, appear to have established a competitive range of one, out of a potential field of eight offerors. See Home and Family Services, Inc., B-182290, December 20, 1974, 74-2 CPD 366. As a general rule, our Office closely scrutinizes agency determinations which leave only one proposal within the competitive range. Comten Comress, B-183379, June 30, 1975, 75-1 CPD 400. Here, INS reports that its evaluation panel considered "responsiveness, additional charges, experience, performance record, and extras." However, nowhere in the record is there any specific indication of how NMAS was considered to be superior to all other offerors. Rather, INS states only that the "[c]onclusion between members [of the evaluation panel] was that NMAS had made the best proposal, price and other factors considered, and that price range was not a factor," that it is "the position of INS that only NMAS was in a position to be awarded the contract due to their outstanding proposal," and that "'Price and other factors considered', the proposal of NMAS was clearly the best."

Furthermore, INS has informally advised us that there is no documentation in existence which explains the evaluation panel's rationale for regarding the NMAS proposal as the only one in line for the award.

While it is not the function of this Office to evaluate proposals, we will review the record in order to ascertain the reasonableness of agency determinations which are based upon agency evaluations of proposals. TGI Construction Corp., et al., 54 Comp. Gen. 775 (1975); RAI Research Corporation, B-184315, February 13, 1976, 76-1 CPD 99. In reviewing this source selection, we find that both offerors complied with all solicitation requirements and that, as evaluated, NHS was only approximately $16 per month more expensive than NMAS. Beyond that the record fails to establish that the agency had any rational basis for establishing a competitive range consisting only of NMAS. Thus the record does not provide support for INS' determination that NHS' proposal was not within the competitive range.

With regard to whether INS conducted discussions with NMAS, we have held that discussions have been conducted if "an offeror has been afforded an opportunity to revise or modify its proposal, regardless of whether such opportunity resulted from action initiated by the Government or the offeror." 51 Comp. Gen. 479, 481 (1972). Here, as a result of the March 3, 1976, meeting between INS and NMAS, NMAS revised its proposal and the revisions were incorporated into the contract. We therefore are of the view that INS clearly conducted discussions with NMAS within the meaning of FPR § 1-3.805-1(a), and that INS consequently was required to conduct discussions with all other offerors in the competitive range.

Furthermore, we believe the solicitation used for this procurement was defective because it did not identify the evaluation factors to be used to select an offeror for award. We have frequently stated that offerors should be advised of both the evaluation factors to be used and the relative importance of each of those factors. See Grey Advertising, Inc., B-184825, May 14, 1976, 55 Comp. Gen. 530 (1974), 74-2 CPD 386 and cases cited therein. The mere inclusion of the language informing offerors that award will be based on "price and other factors" does not satisfy this standard. Honeywell Inc., B-184245, November 24, 1975, 75-2 CPD 346. Since INS states that its proposal evaluation included such areas as "experience" and "performance record," the RFP should have informed offerors that these areas would be considered.

We recognize that INS has a current and on-going requirement for the operation of occupational health units. We further recognize that the current contract is to run only until September 30, 1976, and that INS is preparing a new solicitation for fiscal year 1977. Nevertheless, in view of the serious deficiencies that attended this procurement, we believe that remedial action is warranted. Accordingly, we recommend that INS ascertain if NHS or other offerors are interested in competing for an award to cover the period through September 30th. If there is an affirmative response, we further recommend that INS reopen negotiations by issuing an amendment to the RFP setting forth all appropriate evaluation factors and their weights and permitting the prompt submission of revised proposals. If evaluation of such proposals in accordance with the stated evaluation criteria results in the selection of an offeror other than NMAS, then the NMAS contract should be terminated for the convenience of the Government pursuant to the contract clause permitting such termination of a service contract with Government liability extending only to "services rendered prior to the effective date of termination."

Since our decision contains a recommendation for corrective action, we have furnished a copy to the congressional committees referenced in 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 on Government Operations and Appropriations concerning the action taken with respect to our recommendation.

Deputy Comptroller General
of the United States