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DECISION



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

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FILE: B-212618

DATE: October 2, 1984

MATTER OF: Hudson Valley Medical Professional
Review Organization

DIGEST:

1. Potential offeror for contract under grant is interested party to complain of solicitation defects and alleged bias toward it, even though it did not submit an offer. It is not an interested party, however, to complain of unrelated problems in the evaluation of offers received in response to the solicitation, even though it participated as a proposed subcontractor.
2. Complainant has not provided "hard facts" showing bias against it and grantee has provided reasonable explanations for actions cited by complainant as evidence of bias. Therefore, we deny the complaint on this issue.
3. Complaint is sustained where grantee's request for proposals did not provide information sufficient to apprise potential offerors of the relative importance of technical and cost factors and where actual evaluation used undisclosed evaluation factors that were not subfactors of disclosed factors.

Hudson Valley Medical Professional Standards Review Organization (Hudson Valley) complains that a solicitation for the review of Medicaid services issued by the New York State Department of Health (New York) contains impermissibly vague evaluation criteria and is tainted by New York's bias against it. Hudson Valley also complains that other sole-source contracts for the review of Medicaid services are improper. Additionally, Hudson Valley complains that the technical evaluators used two undisclosed evaluation criteria, and that New York improperly failed to conduct discussions with offerors.

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We dismiss the complaint in part, deny it in part, and sustain it in part.

BACKGROUND

The solicitation was issued pursuant to a grant from the Department of Health and Human Services (HHS) under the Medicaid Program. Title XIX of the Social Security Act. Prior to 1981, title XIX of the Social Security Act provided that Professional Standards Review Organizations (PSRO's) were responsible for reviewing health care services provided to Medicare and Medicaid recipients. In 1981, section 2113 of the Omnibus Budget Reconciliation Act, Pub. L. 97-35, gave states the option of contracting with PSRO's or using another method of review. The Peer Review Improvement Act of 1982, title I, subtitle "C," of the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. 97-248, as amended by the Social Security Amendments of 1983, Pub. L. 98-21, required HHS to replace the PSRO program with a new program to improve the effectiveness of Medicaid review.

New York has sole-sourced contracts with PSRO's for specific geographic areas. In June 1982, New York decided to continue sole-source contracts with Hudson Valley and 13 other PSRO's. The Hudson Valley contract term ended March 31, 1983. It was extended to September 3, 1983. In April 1983, four of the PSRO contracts were discontinued. In May 1983, New York began implementation of a plan, pursuant to the 1982 act and 1983 amendment, to test various means of Medicaid utilization review. The plan continued four of the remaining 10 sole-source PSRO contracts and consolidated the areas of the other six PSRO's (including Hudson Valley) into two large areas for which competitive solicitations were issued. The complained-of solicitation includes the area that was covered by Hudson Valley's sole-source contract.

New York received two proposals in response to the solicitation--Mid-Hudson Peer Review, Inc. (Mid-Hudson), and Area 9 PSRO of New York State, Inc. (Area 9). Hudson Valley filed its complaint prior to the due date for proposals and, as stated in its complaint, did not submit a proposal. Hudson Valley was named, however, as Area 9's subcontractor for the area that once was covered by Hudson Valley's PSRO

contract. Mid-Hudson's proposal received the highest combined technical and cost point score and was awarded the contract.

Hudson Valley's Standing to Complain

New York and HHS argue that GAO's notice setting forth its review of complaints concerning contracts under grants generally contemplates that only bidders or offerors will be considered interested parties to complain. HHS cites the following language from that notice:

"[GAO will] undertake reviews concerning the propriety of contract awards made by grantees in furtherance of grant purposes upon request of prospective contractors." (Emphasis added by HHS.)

HHS does recognize that we have considered complaints from nonofferors, including subcontractors, when the nonofferors have a legitimate interest that may not be adequately protected by offerors. HHS argues that, because Hudson Valley was proposed as a subcontractor to Area 9, its interests could have been adequately protected by Area 9. Consequently, HHS contends that the entire protest should be dismissed.

Hudson Valley argues that it was a potential offeror when it complained of the solicitation defects and bias and that, as such, it has standing to complain of those alleged problems. Hudson Valley also argues that it is interested to complain of problems in proposal evaluation because those issues are related to the solicitation defect and bias issues and because, as the target of the alleged bias, it has a greater interest in complaining than does the potential prime contractor, Area 9.

We agree that Hudson Valley is interested, as a potential offeror, to complain of the alleged bias and of the alleged solicitation defects. Our cases are clear that any potential offeror has the requisite interest to complain of or protest alleged solicitation defects, whether or not it eventually submits an offer. See, e.g., Engine and Equipment Company, Inc., B-199480, May 7, 1981, 81-1 C.P.D. ¶ 359. At the time that Hudson Valley complained of those issues, it was a potential prime contractor. In fact, in its complaint, Hudson Valley expressed an interest in competing if the alleged solicitation defects were corrected.

We also find that the complaint that undisclosed evaluation factors were used in evaluating proposals is so closely related to the complaint that the evaluation factors in the RFP did not adequately set forth the basis for evaluation, that we will consider it as well.

We find, however, that Hudson Valley is not an interested party to complain that no discussions were held with offerors. As the potential prime contractor, Area 9's interest is greater than Hudson Valley's, and it could have adequately protected whatever interest Hudson Valley has as a potential subcontractor. See, e.g., Hydro-Clear Corporation, B-189486, Feb. 7, 1978, 78-1 C.P.D. ¶ 103. We do not think that this issue is intertwined with the bias issue, since both offerors were treated equally with regard to lack of discussions.

Finally, we find that Hudson Valley is not interested to complain of sole-source awards to other PSRO's. Hudson Valley stated, at a conference held at GAO, that it had no interest in competing for those contracts, since they were for Medicaid review in an area not served by Hudson Valley. Since Hudson Valley was not a potential offeror, it lacks standing to complain.

Alleged Bias

Hudson Valley contends that New York officials responsible for this procurement were so biased against it that it could not participate in the procurement as a prime contractor. According to Hudson Valley, the genesis of the alleged bias is an ongoing dispute between Hudson Valley and a doctor employed by New York, whose duties included monitoring Hudson Valley's performance under its PSRO contracts. Hudson Valley claims that the doctor's negative assessment of Hudson Valley's performance was incorrect. Hudson Valley complained to New York about the problem with the doctor, and New York conducted a review that agreed with the doctor's findings. Hudson Valley contends its complaint to New York was an act of "whistleblowing" that led to retaliation by New York.

The evidence of bias presented by Hudson Valley is that New York refused to award it a sole-source contract, even though it had a higher objective performance rating on its

previous contracts than did the four PSRO's which did receive sole-source contracts. Hudson Valley also complains that "its" geographic area was split and parceled out to two other areas in which competitive procurements were held. Hudson Valley also alleges that New York promised to conduct a second review of the doctor's finding, but did not do so. Finally, Hudson Valley provided affidavits by members of its staff stating that they had heard from members of other PSRO's that Hudson Valley would not be awarded a contract as a co-prime contractor, but might get an award as a subcontractor.

New York and HHS state that Hudson Valley was not awarded a sole-source contract, as several other PSRO's were not, because of the program changes taking place to implement the legislation outlined in the "Background" section above. That reason was also given for the geographic realignment. According to New York, it did, in fact, complete the second review of the doctor's disputed findings as agreed to and that they supported the doctor. The results of the review were not provided to Hudson Valley, but were provided to GAO. New York also states that the request for proposals (RFP) required a single organization for the entire area, so that it would not accept any co-prime contractor arrangement. Finally, New York points out that it specifically invited Hudson Valley to compete on two separate occasions. New York emphatically denies any bias against Hudson Valley.

We have held that the mere appearance of, or opportunity for, bias is not a sufficient basis for questioning a contract award, but that a protester must provide "hard facts" showing actual bias. See, e.g., Pinkerton Computer Consultants, B-212499.2, June 29, 1984, 84-1 C.P.D. ¶ 694. Hudson Valley has not shown the existence of bias, and the record before us does not contain such evidence. New York has provided legitimate, Medicaid review reasons for the actions cited by Hudson Valley as evidence of bias, including the geographic restructuring of PSRO's, the continuation of some sole-source contracts and not others, and the use of a competitive solicitation for the complained-of procurement. Additionally, New York appears to have made a good-faith effort to resolve the

differences between Hudson Valley and the monitoring doctor concerning Hudson Valley's previous performance. Also, New York appears to have made an effort to solicit Hudson Valley for competition, rather than discouraging it in any way. In fact, Hudson Valley's complaint, in this regard, appears to be based on disapproval over not being awarded another sole-source contract, rather than on any impediments to entering into competition for a contract.

Evaluation Factors

The solicitation provided that selection of an awardee would be based on the following criteria:

- A. Understanding of Utilization Review Systems and Review Programs
- B. Performance Standard
- C. Technical Approaches
- D. Personnel
- E. Organizational Experience and Capability
- F. Cost

The actual evaluation of proposals used the following criteria and weighing:

<u>Criteria</u>	<u>Points Assigned</u>
Background	5 points
Performance Standard	20 points
Technical Approach	35 points
Personnel	10 points
Organizational Capability	10 points
Cost	5 points
Innovative Proposal	10 points
Proposal Presentation	<u>5 points</u>
Total Points Assigned	100 points

Hudson Valley argues that the evaluation factors as stated did not provide potential offerors with even the minimum amount of information required by HHS's grant conditions and by GAO cases. According to Hudson Valley, the solicitation must at least identify all significant evaluation factors and provide a statement of the relative importance of technical and price/cost considerations. Hudson Valley points out that the solicitation merely lists the factors. Hudson Valley also argues that the factors "Innovative Proposal" and "Proposal Presentation" were undisclosed evaluation factors and, as such, were improper to use in the evaluation.

HHS responds that, while the weights of the evaluation factors are not provided in the RFP, the fact that cost is listed last should be sufficient to alert offerors that cost is not as important as technical factors. HHS also contends that since technical factors were discussed more often and in more detail in the RFP, a reasonable potential offeror should realize that technical factors are more important than cost.

HHS also argues that the two "undisclosed" evaluation factors were, in fact, subelements of other factors that were reasonably related to them. Consequently, HHS argues that it was proper to use them in proposal evaluation.

We agree with Hudson Valley's position on both issues. The law governing this area is clear. The federal requirement for an adequate statement of evaluation criterion in a grantee's RFP is that:

"The request for proposal shall identify all significant evaluation factors, including price or cost where required and their relative importance."

45 C.F.R. § 74, app. "G," attachment "0," paragraph 11c(2) (1983).

Additionally, in McAuto Systems Group, Inc., B-206556, May 14, 1982, 82-1 C.P.D. ¶ 460, we found that a New York solicitation under an HHS Medicaid grant sufficiently set forth the evaluation criteria because it advised offerors of the relative importance of low price to an offeror's technical qualifications.

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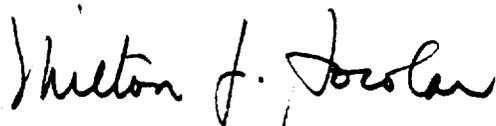
Concerning the use of undisclosed evaluation factors, we have held in a grant context that the use of undisclosed subfactors is permissible so long as they are logically and reasonably related to, or are encompassed by, the stated factors. Madison-McAfee-Stull Transit Group, B=203766, Apr. 5, 1982, 82-1 C.P.D. ¶ 301.

Here, we find that the RFP provided no indication of the relative importance of technical versus cost factors. The mere listing of cost last or the discussion of technical factors more often than cost in the RFP are not sufficient to apprise offerors of relative importance. This is particularly obvious upon examination of the actual weighing of the factors. There is no discernible relationship between the order of listing of factors and their weighing. For example, both the first- and last-listed factors have the same weight, and the third factor is weighed more heavily than the second.

It also appears that the undisclosed criteria were not subfactors of disclosed factors, but were separate primary factors themselves. They appear to have been treated separately in the evaluation, not as part of other factors. Additionally, they are listed with separate weighing, in both cases as significant as several so-called primary factors. Consequently, they should have been provided to offerors either in the initial solicitation or by amendment.

In examining the effect that these errors might have had on the award of the contract, it appears unlikely that they had any significant effect. If Hudson Valley was discouraged from competing as a prime contractor, it appears to have been as a result of its own perception of bias, rather than because of vague evaluation criteria. Additionally, Area 9's proposal was ranked so much lower than Mid-Hudson's that it is not likely that the use of undisclosed evaluation criteria totaling 15 points made any real difference in the evaluation. In that regard, Hudson Valley has not shown in detail how it or Area 9 was prejudiced by the errors.

In any event, the contract is near completion, so there is no opportunity for corrective action even if we found that it was appropriate.

for 
Comptroller General
of the United States

