



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

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Matter of: OMV Medical, Inc.; Saratoga Medical Center, Inc.

File: B-281387; B-281387.2; B-281387.3; B-281387.4

Date: February 3, 1999

Craig A. Holman, Esq., and Frank K. Peterson, Esq., Holland & Knight, for OMV Medical, Inc., and Norman J., Philion, Esq., Peter A. Greene, Esq., Edward V. Hickey, III, Esq., and Danielle E. Berry, Esq., Thompson, Hine & Flory, for Saratoga Medical Center, Inc., the protesters.

Gary S. Pitchlynn, Esq., Pitchlynn, Morse, Ritter & Morse, for Choctaw Management/Services Enterprises, an intervenor.

Clarence D. Long III, Esq., and Capt. David A. Whiteford, Department of the Air Force, for the agency.

Linda C. Glass, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency reasonably evaluated awardee's proposal as posing a low performance risk based upon favorable reference information received concerning performance under relevant contracts.
2. Allegation that agency misevaluated awardee's proposal with respect to past performance is denied where the record shows that the evaluation was reasonable and in accordance with the applicable stated evaluation factors.
3. Determination to select lowest priced technically acceptable proposal for award of contract, and determination that the awardee's prices were realistic are unobjectionable where both determinations were made in a manner consistent with the evaluation criteria, and the awardee's professional compensation plan and base salaries (which were higher than the protester's) reasonably were deemed adequate to recruit and retain employees.
4. Firm which submitted the third lowest priced proposal of six technically equal proposals is not an interested party to protest that the contracting agency improperly evaluated the awardee's proposal since, as provided by the solicitation,

price properly was the determinative award factor, and the protester would not be in line for award if the allegation were sustained.

DECISION

OMV Medical, Inc. and Saratoga Medical Center, Inc. protest the award of a contract to Choctaw Management/Services Enterprises under request for proposals (RFP) No. F41622-98-R-0015, a competitive small disadvantaged business set-aside, issued by the Department of the Air Force to acquire clinical social services under the Family Advocacy Program (FAP) for Air Force personnel and their families at various locations in the Continental United States (CONUS), Western region. Both protesters principally assert that the agency misevaluated Choctaw's past performance as warranting a low performance risk rating and also question the agency's determination that the awardee's proposed price is realistic. In addition, the protesters assert that the Air Force improperly made award on the basis of low price instead of on a best value basis, and OMV maintains that it was misled by the agency from lowering its professional compensation.

We deny the protests.

BACKGROUND

The RFP, issued on July 7, 1998, called for offerors to provide qualified clinical social workers, United States licensed registered nurses, and family advocacy program staff personnel, as needed, specifying estimated quantities and locations for military bases in the CONUS Western region. RFP §§ B, C.1. The RFP contemplated the award of a fixed-price, indefinite-quantity contract for a base year with four 1-year ordering period options and stated that the agency would employ performance/price tradeoff techniques to make a best value award decision. RFP § M.4.a. The RFP went on to state that, if the technically acceptable offeror submitting the proposal with the lowest evaluated price received a low performance risk rating and was found responsible, that proposal would represent the "best value." RFP § M.4.b.4. The RFP provided that award could be made to other than the offeror that submitted the lowest priced, technically acceptable proposal if that offeror was "judged to have a moderate, high, or not applicable performance risk rating." RFP § M.4.b.5. Concerning past performance, the RFP stated that a performance risk assessment would be conducted and required offerors to submit information on relevant contracts performed within the last 3 years which demonstrate their ability to perform the proposed effort.¹ RFP § L.901, Vol. IIIa.

¹Section M of the RFP stated that the purpose of the past performance evaluation was to identify and review relevant present and past performance and provided that past and present performance information would be obtained through the use of simplified questionnaires or telephone interviews and using data independently obtained from other government and commercial sources. RFP § M.3.

The solicitation further provided for an evaluation of the price proposals for realism. RFP § M.2.

The solicitation required offerors to submit a total compensation plan setting forth base salaries and fringe benefits proposed for the professional employees. RFP § L.901, Vol. IIb, § 6. Offerors were cautioned that the government was concerned with the quality and stability of the workforce and that professional compensation that was unrealistically low or not in reasonable relationship with the various job categories might impair the contractor's ability to attract and retain competent professional service employees, and could be viewed as evidence of failure to comprehend the complexity of the requirements. RFP § L-95.c.

The RFP also provided for offerors to demonstrate through oral presentations how they planned to meet the stated RFP requirements, and to show that the offeror had the necessary understanding, expertise, personnel and experience to successfully accomplish the work required in the statement of work. RFP § L.901, Vol. I. Five firms whose proposals had been determined technically acceptable for a companion FAP acquisition for the European regions were exempted from making oral technical presentations for this procurement. RFP § L.901, Vol. I.b., c. They were required, however, to submit documentation regarding the qualifications of their proposed program managers.

On August 7, 1998, the agency received seven proposals, and two of the seven offerors made technical presentations on August 18. On August 25, three offerors were advised of deficiencies in employee compensation and were requested to submit revised proposals. After receipt and evaluation of the revised proposals, all seven proposals were included in the competitive range. All offerors were given the opportunity to submit final proposal revisions by September 8. The final evaluation of offers was as follows:

<u>OFFEROR</u>	<u>TECHNICAL</u>	<u>PRICE</u>	<u>PERFORMANCE RISK</u>
Choctaw	Acceptable	[deleted]	Low
OMV	Acceptable	[deleted]	Low
Saratoga	Acceptable	[deleted]	Low
A	Acceptable	[deleted]	Low
B	Acceptable	[deleted]	Low
C	Acceptable	[deleted]	Low
D	Acceptable	[deleted]	Low

Agency Report, Tab 2.

With respect to Offeror A, which had submitted the lowest priced qualifying proposal, the Small Business Administration advised the agency that the firm was not eligible for award of a small disadvantaged business set-aside. Accordingly, on

October 15, the award was made to Choctaw on the basis that it had submitted the lowest priced technically acceptable proposal with a low performance risk, and these protests followed.

SARATOGA'S PROTEST

Saratoga's first complaint is that the agency unreasonably assigned Choctaw a low past performance risk rating despite Choctaw's being a new company with only 6 months of experience in providing services comparable to those being sought here. Saratoga also maintains that the information the agency relied on was contradictory and questions the relevance of the awardee's references.

We review an agency's evaluation of proposals to ensure that it is fair, reasonable, and consistent with the evaluation criteria stated in the solicitation. Wind Gap Knitwear, Inc., B-261045, June 20, 1995, 95-2 CPD ¶ 124 at 3. Where a solicitation requires the evaluation of offerors' past performance, an agency has discretion to determine the scope of the offerors' performance histories to be considered, provided all proposals are evaluated on the same basis and consistent with the solicitation requirements. Federal Env'tl. Servs., Inc., B-250135.4, May 24, 1993, 93-1 CPD ¶ 398 at 12.

Here, Choctaw's proposal was assigned a low performance risk rating based on its performance on two contracts that the agency concluded were relevant, including a current Air Force Family Advocacy Program contract. The references contacted for Choctaw responded to the agency's questionnaire and provided information which the agency found sufficient to conclude that Choctaw was capable of performing this requirement. Both references unequivocally stated that, given what was known about Choctaw's ability to execute what it promised in its proposal, they definitely would award to Choctaw again if given the choice. Agency Report, Tab 8. Saratoga was assigned a low performance risk rating based on its performance on three relevant contracts, including a current Air Force Family Advocacy Program contract. [Deleted].

Notwithstanding Saratoga's assertions to the contrary, we see nothing unreasonable in the Air Force's manner of assessing the past performance history of the offerors, nor do we see any reason to question the agency's conclusion, based on that investigation, that both offerors presented a low risk of nonperformance. While Saratoga challenges the agency's past performance evaluation because the agency did not contact every reference listed by Choctaw, there is no requirement that an agency contact all of an offeror's references, Dragon Servs., Inc., B-255354, Feb. 25, 1994, 94-1 CPD ¶ 151 at 8, nor is there any requirement that an agency contact the same number of references for each offeror. IGIT, Inc., B-275299.2, June 23, 1997, 97-2 CPD ¶ 7 at 6.

While Saratoga believes that its references were more relevant than Choctaw's, and better demonstrated its ability to perform, the RFP stated that the purpose of performing the past performance risk assessment was to identify and review relevant present and past performance and then to make an overall risk assessment of an offeror's ability to perform the requirement. RFP § M.3.c. The RFP did not place any premium on the possession of a greater number of the kinds of references that Choctaw points to, and the record provides a basis for the evaluators reasonably to conclude that both offerors' past performance records warranted the conclusion that each demonstrated an ability to successfully perform the requirement.

Saratoga next argues that the agency conducted an improper performance/price tradeoff by changing the basis for award from best value to one based on low price. In this regard, Saratoga also essentially contends that the agency's failure to properly evaluate the realism of Choctaw's proposed prices resulted in a flawed source selection decision.

With respect to Saratoga's argument that the agency changed the basis for award from best value to one based on low price, the RFP, as outlined above, stated that the agency would make a "best value award," which the RFP went on to specify meant selection of the offeror submitting the lowest priced technically acceptable proposal if it also received a low performance risk rating. The RFP provided for a performance/price tradeoff only if the offeror submitting the lowest priced technically acceptable proposal was judged to have a moderate, high or inapplicable performance risk rating. Here, the lowest priced technically acceptable proposal also received a low performance risk rating and in accordance with the RFP represented the best value to the government. Accordingly, the award to Choctaw was consistent with the RFP award criteria.

With respect to Saratoga's argument that the agency did not perform a proper price realism analysis, where, as here, the award of a fixed-price contract is contemplated, a proposal's price realism is not ordinarily considered, since a fixed-price contract places the risk and responsibility for contract costs and resulting profit or loss on the contractor. HSG-SKE, B-274769, B-274769.3, Jan. 6, 1997, 97-1 CPD ¶ 20 at 5. However, since the risk of poor performance when a contractor is forced to provide services at little or no profit is a legitimate concern in evaluating proposals, an agency in its discretion may, as here, provide for a price realism analysis in the solicitation of fixed-price proposals. Volmar Constr., Inc., B-272188.2, Sept. 18, 1996, 96-2 CPD ¶ 119 at 5. The Federal Acquisition Regulation (FAR) provides a number of price analysis techniques that may be used to determine whether prices are reasonable and realistic, including a comparison of the prices received with each other, FAR § 15.404-1(b)(2)(i); with previous contract prices for the same or similar services, FAR § 15.404-1(b)(2)(ii); and with an independent government cost estimate, FAR § 15.404-1(b)(2)(v). The depth of an agency's price analysis is a matter within the sound exercise of the agency's

discretion. Ameriko-OMSERV, B-252879.5, Dec. 5, 1994, 94-2 CPD ¶ 219 at 4; Ogden Gov't Servs., B-253794.2, Dec. 27, 1993, 93-2 CPD ¶ 339 at 7.

Here, the RFP stated that price proposals would be evaluated for realism, reasonableness and completeness, and provided that the evaluators would consider the reasonableness of the proposed price versus proposed staffing. RFP § M.2. The RFP further stated that there should be a clear and concise correlation between the offeror's ability to meet the requirements and the offeror's technical information to support a positive determination as to the realism, reasonableness, and completeness of the offeror's price. Id. For the price realism analysis, the RFP stated that evaluators would assess the compatibility of the proposed price with the proposal scope and efforts, the list of estimating ground rules and assumptions, and the schedule duration. To determine reasonableness, evaluators were to determine that (1) the offeror's estimates are based on factual, verifiable data and the estimating methodology employed is sound under current market conditions, (2) the estimated costs are most likely to be incurred by the offeror in the performance of the contract, and (3) the estimated total cost and profit are reasonable to the seller and reasonable to the buyer. For an offer to be determined complete, the RFP stated that the offeror must provide all the data necessary to support the offer. Id.

The record in this case shows that to assess realism, the offerors' prices were compared against the RFP requirements to ensure that all areas of the acquisition were reflected in the proposal. Agency Report, Tab 10b. For completeness, each proposal was compared against the RFP to ensure compliance and the proposals were also compared against the requirements in the RFP to verify that all areas were addressed. For reasonableness, offerors' assumptions, proposed profit rates, and contract summary information were evaluated.²

Choctaw's prices were reviewed by the price analyst and found to be complete. Choctaw's proposed wages were in line with existing contracts and the 1998-99 Bureau of Labor Statistics Occupational Outlook Handbook. On that basis, they were determined to be realistic. Likewise, Saratoga's proposed wages were found to be in line with existing contracts and the 1998-99 Occupational Outlook Handbook and were also determined to be realistic.

Saratoga objects to the price realism analysis arguing that it did not follow the RFP's stated evaluation plan and objects to the fact that the base salary comparison was allegedly made after contract award. However, as explained above, the agency

²The agency reports that, since this RFP was issued after the FAP RFP for the European Office and with the exception of OMV and offeror D, all offerors submitted proposals in response to the earlier RFP, many of the issues and cost elements were corrected in response to the European RFP and only limited clarifications were necessary.

performed a detailed price evaluation consistent with the RFP plan, as a result of which the agency concluded that Choctaw's prices were reasonable. Based on the record before us, we have no basis to object to the reasonableness of this determination. As noted above, in a fixed-price solicitation the extent of a price realism analysis is left to the discretion of the agency. In response to Saratoga's allegation that the base salary comparisons were made after award, the Air Force reports that the November 4, 1998 memorandum (Agency Report, Tab 9) was prepared to explain how the standards for minimum salaries were determined but that the spreadsheet was prepared concurrently with the evaluation of proposals. Contracting Officer's Statement of Facts in Response to Protesters Comments. The record also shows that Choctaw's proposed compensation was consistent with prior contracts. Moreover, the record shows that Choctaw's professional compensation plan is actually higher than Saratoga's. In sum, there is no merit to Saratoga's allegation that the agency failed to properly evaluate Choctaw's professional compensation.

Next Saratoga contends that the agency improperly held discussions with some but not all competitive range offerors. As disclosed in the agency report, discussions were held with offerors A, B, and D because these offerors proposed base salaries for some of the labor categories that were determined to be unrealistically low. Agency Report, Tab 10b. The contracting officer determined that clarifications with these three offerors were necessary to ensure the offerors' complete understanding of the requirements. Discussions were held with these offerors and they submitted revised proposals on August 28. All three revised proposals were determined to be realistic and these proposals were included in the competitive range. Subsequently, all competitive range offerors were given the opportunity to submit a final revised proposal. This issue is untimely because it was first raised by Saratoga more than 10 days after it first learned of this basis of protest through its receipt of the agency report. 4 C.F.R. § 21.2(a)(2). In any event, Saratoga could not have been prejudiced by these allegedly improper discussions, since the agency did not hold such discussions with the awardee.

Saratoga also argues that Choctaw's proposal contains assumptions and qualifications that are inconsistent with the solicitation. Specifically, Saratoga states that Choctaw in its proposal assumed that: (1) the incumbent contractor would have the responsibility of recruiting for vacant positions between the date of contract award and the beginning of performance by the awardee; (2) pending hires would be identified to Choctaw for final hiring determinations; (3) the incumbent contractor would cooperate with Choctaw in providing certain information allegedly known only to the incumbent; (4) the successful offeror would not be required to provide replacement staffing; and (5) certain preferences would be afforded in the credentialing process. The record shows that these assumptions were either required by the existing contract or simply restated what was required under this solicitation and did not affect the price, quantity, quality or delivery of the services. For example, the requirement that the incumbent contractor provide credential files

on privileged employees to the new contractor and provide proof in writing of the primary source of verification of employee credentials appears in the solicitation at RFP § C.1.8.6. Similarly, the solicitation contains a requirement that the contractor shall ensure sufficient staffing for full coverage throughout the term of the contract. RFP § C.1.6.³ In short, Choctaw's final proposal did not contain any material qualifications and Saratoga's allegations in this regard are factually misplaced.

OMV'S PROTEST

OMV first contends that the agency materially misled it by cautioning it against lowering compensation from levels under predecessor contracts for essentially the same professional work and then failing to meaningfully evaluate all offerors' proposed professional compensation plans, and that the agency relaxed the RFP's adequate compensation requirements.

The record establishes that the agency reasonably evaluated offerors' proposed compensation plans and did not relax the RFP's adequate compensation requirement. As noted above, the RFP warned all offerors about the government's need for a high-quality, stable workforce and that proposed professional compensation that was unrealistically low or not in reasonable relationship with the various job categories might impair the contractor's ability to attract and retain competent professional service employees, and could be viewed as evidence of failure to comprehend the complexity of the requirements. RFP § L-95.c. To ensure that an adequate compensation plan was offered, a salary standard for the CONUS Western region was developed. Agency Report, Tab 9. In this regard, the agency requested from current contractors the average annual salaries paid to current employees by position. *Id.* The lowest average salaries paid by position for the CONUS Western region were used to establish the minimum salary requirements for purposes of proposal evaluation. *Id.* In evaluating proposals, the agency compared the offerors' proposed base salaries with the minimum salary standard and with the Occupational Outlook Handbook. The final total annual salaries proposed by the awardee and the protesters were as follows:

³Saratoga also contends that the Air Force improperly relied upon the proposals Saratoga had submitted in response to the CONUS Eastern region RFP and the European RFP to determine its acceptability under the CONUS Western region RFP. We first note that the West CONUS RFP specifically provided that those offerors found acceptable under the European RFP did not need to make an oral presentation and only needed to provide information outlining the program manager qualifications and experience. Consequently, Saratoga was well aware that its previous submitted proposals would help form the basis for its evaluation under the instant solicitation. Further, we do not see how Saratoga could have been prejudiced in this regard since Saratoga's proposal was found to be acceptable with a low performance risk rating under all three procurements.

<u>POSITION</u>	<u>CHOCTAW</u>	<u>SARATOGA</u>	<u>OMV</u>
Treatment Manager	[deleted]	[deleted]	[deleted]
Outreach Manager	[deleted]	[deleted]	[deleted]
Nurse	[deleted]	[deleted]	[deleted]
Assistant	[deleted]	[deleted]	[deleted]
Total Annual Compensation	[deleted]	[deleted]	[deleted]

Agency Report, Tab 2.

That the total annual compensation for all three offerors is approximately equal, with Choctaw offering the highest overall total, by itself strongly suggests that OMV's objection in this regard is factually misplaced. Further, the record shows that the agency did not relax its professional compensation requirement and evaluated proposed professional compensation for all offerors in a reasonable and consistent manner.

OMV also challenges the agency's decision to award to Choctaw on the basis that by doing so the Air Force misevaluated Choctaw's past performance, misevaluated Choctaw's employee retention/backup plan and employee recruitment plan, and neutralized past performance as a discriminator.⁴ These objections are not for consideration on the merits..

Under the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3556 (1994), only an "interested party" may protest a federal procurement. That is, a protester must be an actual or prospective supplier whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. § 21.0(a). Here, the record shows that all offerors were found technically acceptable with a low performance risk rating and that the protester submitted the third highest priced proposal. If the protester is correct that Choctaw should not have been awarded the contract, Saratoga, not OMV, would be next in line for award. Thus, OMV is not an interested party to protest the award to Choctaw. Watkins Sec. Agency, Inc., B-248309, Aug. 14, 1992, 92-2 CPD ¶ 108 at 4. Although OMV maintains that an appropriate remedy for each of its protest grounds involves a reopening of competition and therefore it is an interested party, in fact, these protest issues concern only the propriety of the evaluation and selection of Choctaw as the awardee. It was only in its comments on

⁴OMV also asserts that the awardee's proposal contained assumptions and qualifications inconsistent with the RFP, and that the agency conducted unequal discussions, failed to evaluate offerors' price proposal for realism, and abandoned the RFP's announced basis for award. These issues were addressed above in our disposition of Saratoga's protest.

the agency report, filed December 11, that OMV questioned the agency's rating of Saratoga as a low performance risk. However, this objection is untimely because these comments were filed more than 10 days after OMV's receipt of the agency report. 4 C.F.R. § 21.2(a)(2).

The protests are denied.

Comptroller General
of the United States