

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

45 D.C. Reg. 8842

PROTEST OF:

TRIFAX CORPORATION)	
)	CAB No. P-539
Under Contract No. JB/87-97-0-AA and)	
RFP DCGH JB/025-08-04-DH)	

For the Protester: Peter A. Greene, Esq., Thompson, Hine & Flory, LLP. For the Government: Warren J. Nash, Esq., and Howard S. Schwartz, Esq., Assistants Corporation Counsel.

Opinion by Administrative Judge Jonathan D. Zischkau, with Chief Administrative Judge Lorilyn E. Simkins and Administrative Judge Phyllis W. Jackson, concurring.

OPINION

Trifax Corporation, the incumbent contractor for supplemental nursing services for various Community Health Centers, challenges: (i) the decision of the District of Columbia Health & Hospitals Public Benefit Corporation (“PBC”) to allow Trifax’s prior nursing services contract to expire; (ii) PBC’s evaluation of offers submitted under Task II of RFP JB/025-08-04-DH for nursing services at the Community Health Centers; and (iii) PBC’s awarding of a letter contract and subsequent definitized contract to Premier Nurse Staffing, Inc., d.b.a. PSA Healthcare.

We conclude that PBC violated no law or regulation when it allowed Trifax’s prior contract to expire on January 29, 1998. However, we also conclude that the contracting officer’s evaluation and selection of PSA for Task II nursing services violated the procurement law and the terms of the solicitation. Accordingly, we sustain the protest in part and direct the contracting officer to reevaluate proposals for Task II nursing services, and then make award consistent with proper evaluation and selection procedures, terminating the present contract with PSA if PSA is not selected after reevaluation.

BACKGROUND

Through emergency legislation enacted in August 1996, and permanent legislation which became law in April 1997, the Council of the District of Columbia established the District of Columbia Health and Hospitals Public Benefit Corporation, whose primary purpose is to provide comprehensive community-centered health care for the benefit of District residents. D.C. Code § 32-262.2 (1998). To accomplish this purpose, the legislation transferred to PBC the health care functions previously performed by D.C. General Hospital and the Community Health Centers (also referred to as the community clinics) which had operated under the Commission of Public Health of the Department of Human Services. The record indicates that PBC operates D.C.

General Hospital, the Community Health Centers, and the School Nurse Program of the District of Columbia Public Schools (“DCPS”).

On December 10, 1996, the District of Columbia General Hospital (“DCGH”), awarded Contract No. JB/87-97-0-AA to Trifax to provide supplemental nursing services at various District Community Health Centers. (Agency Report (“AR”) Ex. 1). The term of the contract was to expire on December 9, 1997.

On November 3, 1997, PBC issued RFP No. DCGH JB/025-08-04-DH for contractor-furnished supplemental nursing services at D.C. General Hospital, six of the District’s eight Community Health Centers, and various D.C. public school locations. (AR Ex. 3). The RFP divided the nursing services into three tasks. (*Id.*, RFP Section II.1.A-D). Task I covered the supplemental registered nursing services required by patients of D.C. General Hospital. Task II covered the supplemental registered nursing services at six of the eight Community Health Centers. It is undisputed that Task II covered the same scope of work which Trifax was performing under Contract No. JB/87-97-0-AA. (AR at 4). Task III covered the supplemental nursing services at 61 schools. The RFP provided separate pricing schedules for each of the three Tasks. (*Id.*, RFP Section III.3; Section IV, Attachment Nos. 14-17). In the RFP, PBC encouraged offerors to make offers to supply nurses for all three Tasks but anticipated that “no single Offeror will be able to provide the full quantity of nurses with the appropriate qualifications for all three of the Tasks.” (*Id.*, RFP Section II.1.A, at 19-20). Accordingly, PBC stated its intention to make multiple awards to the “offeror(s) whose proposal(s) will be the most advantageous to the DC General Hospital, to the Community Health Clinics, and to the DC Public Schools, price and other factors considered.” PBC reserved the right to make a single award or to make a partial award. (*Id.*, RFP Section I.26; Section II.1.A, at 20; Section III). Offerors were required to submit pricing for a base year and four one-year options for each Task proposed.

Section III of the RFP defined the selection criteria and corresponding weights as follows:

<u>Selection Criteria</u>	<u>Weight</u>
1. General Quality and Responsiveness of Technical and Cost Proposals	5%
A. Completeness and Thoroughness	
B. Responsiveness to all Terms and Conditions	
2. Technical Proposal	65%
A. Understanding of Statement of Work	
B. Technical Approach to Accomplishing Description of Services	
C. Work Plan. Implementation & Schedule	
D. Proposed Project Organization and Management Approach	

- E. Qualifications of Proposed Personnel
 - F. Relevant Corporate Experience & Record of Past Performance
- 3. Cost Proposal 30%
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Although the RFP did not specify the formula for evaluating prices, there is no dispute regarding the actual method used by PBC in evaluating prices, *i.e.*, lowest price divided by evaluated price, multiplied by 30. (*See* AR at 7 n.5; District's August 6, 1998 Response, at 3). The RFP also provided for the possibility of qualified offerors receiving points for evaluation purposes pursuant to the Local, Small, and Disadvantaged Business Enterprises Act ("LSDBE Act"), *i.e.*, 5 points for being a local business enterprise ("LBE"), 5 points for being a disadvantaged business enterprise ("DBE"), and 2 points for being located in an enterprise zone. (*Id.*, RFP Section I.32, at 10-11).

Ten vendors submitted technical/management and price proposals for one or more of the three Tasks by the RFP's November 17, 1997 closing date. Eight of the vendors' proposals contained technical and price submissions for the Task II nursing services at issue here. (AR at 4). The eight offerors were: Trifax Corporation; Premier Nurse Staffing, Inc. ("PSA"); National Nursing Services ("NNS"); Progressive Nursing Staffers ("PNS"); Professional Healthcare Resources International, Inc. ("PHR"); CUP Healthcare Services; American Consultants and Management Enterprises, Inc. ("ACME"); and Professional Network Group, Inc. ("PNG"). (AR Ex. 7, at 2; AR Ex. 8). Although Trifax submitted a proposal for Task II and Task III work (*see* AR Ex. 13), and other vendors submitted proposals for one or more of the three Tasks, we focus on Task II because Trifax only challenges the award made to PSA under Task II.

By memorandum from the contract specialist dated November 19, 1997, Ms. Cassandra Morgan, PBC Associate Director of Nursing, was notified that she had been chosen to chair the technical evaluation panel. (AR Ex. 4). In the memorandum, she was instructed to distribute the proposals and evaluation forms to the panel members and to ensure that the proposals are "evaluated on the basis of the selection criteria and weighing factors outlined in the Solicitation Section [III]." The evaluation form was three pages in length, listing the selection criteria and providing an area for comments and percentage scores. The November 19 memorandum also instructed Ms. Morgan that:

Upon completion of each panel member[']s review, each is to return the evaluation sheets to you for ranking and summarization of their findings. Your written summarization shall include the following:

1. An analysis of the proposals, including an assessment of each offeror's ability to accomplish the technical requirements;
2. A ranking of each proposal[']s Technical in relation to the best ranking possible; and
3. A summary of findings.

Discussion of proposals shall remain exclusive to each technical panel member. Outside discussion of the proposals prior to award [will] prejudice the selection process. Upon completion of the Technical and Management evaluation, the Compensation Proposals will be forwarded for review.

The other designated panel members were Ms. Carolyn French, DCPS School Coordinator, Mrs. Rose Livingston, Director of Nursing of the Community Health Centers, Mr. Kenneth Hawkins, PBC Director of Regulatory Affairs, Ms. LeNeve Ford, PBC Patient Service Manager, and Ms. Juliana Somerville, PBC Director of Surgery and Nursing Systems Division. (*Id.*; AR Ex. 6, at 5).

The record does not indicate whether the committee members ever met together as a group during the actual technical evaluation of proposals. In the period of late November and early December 1997, the evaluation panel members apparently reviewed the proposals and completed evaluation score sheets for the proposals. Each evaluator completed only a single evaluation form for each offeror, even where the offeror proposed multiple Tasks. The evaluation forms do not provide for separate evaluation and scoring by Task and the evaluators were never instructed to evaluate and score by Task. With two exceptions to be discussed below, Ms. French's evaluation forms are dated November 23 and November 24, 1997, Mrs. Livingston's are dated November 24 and November 26, Ms. Morgan's and Mr. Hawkins' are dated November 28, Ms. Somerville's are dated November 28 and November 29, and Ms. Ford's are dated December 1.

Ms. Morgan collected the completed evaluation forms, and prepared a one-page memorandum dated December 23, 1997, advising the contract specialist that the "General Quality, Responsiveness, Technical and Cost evaluation of submitted proposals for supplemental nursing services have been completed." (AR Supp. Ex.17). In the memorandum, Ms. Morgan states that "Summary of findings are attached" which apparently refers only to the completed evaluation sheets. No other contemporaneous "findings" are known to exist. (*See* District's May 26, 1998 Response to Comments of Trifax Corporation, at 3-4 (and attachments); Board's July 30, 1998 Order and Report on Telephone Conference, at 2-3). Ms. Morgan provided a chart listing the top three ranked offerors for each of the three tasks. For Task II, PSA was ranked first, National Nurses is ranked second, and Trifax is ranked third. PSA was recommended for award for Task II services "based on the findings and ranking."

In January 1998, someone realized that Ms. Somerville had not evaluated or scored the Trifax proposal. Indeed, on November 28, 1997, Ms. Somerville had signed an evaluation form for Trifax but listed no comments or scores for the various selection criteria. At the top of the form she wrote: "No proposal for Task I." At some point in early January 1998, Mr. Ernest Wagner, Supervisory Contract Specialist for PBC, prepared a spreadsheet for each of the three Tasks listing the scores given by each evaluator for each proposal. The Task 1 spreadsheet shows scores for Trifax by Ms. Morgan and Mr. Hawkins, even though Trifax did not include Task 1 in its proposal. The same spreadsheet omits a score by Ms. Somerville for Trifax which suggests to us that the spreadsheets were completed prior to the January 13 evaluation and scoring of Trifax by Ms. Somerville. Regardless of whether it was Mr. Wagner who discovered the absence of an evaluation by Ms. Somerville of Trifax, Ms. Morgan apparently instructed Ms. Somerville to evaluate the Trifax proposal. The record, as supplemented by the District, includes

an evaluation form for Trifax signed by Ms. Somerville on January 13, 1998. It contains numerical scores adding up to a total of 30. (AR Supp. Ex. 4).¹ Except for three “Incomplete” notations and a notation, “Unclear”, there are no evaluation comments by Ms. Somerville. PBC also was unable to locate the evaluation sheet of Ms. French for PNS. The District has supplemented the record with a re-evaluation of PNS done by Ms. French on July 29, 1998. (*Id.*).

Shortly after January 13, 1998, Mr. Richard Pannell, a consultant for PBC, prepared a separate spreadsheet for each of the three Tasks showing the scores of the evaluators by offeror, and a total score and average score for each offeror. (AR Ex. 8). Because some of the evaluators incorrectly totaled their own scores, and Mr. Pannell apparently relied on the totals as computed by the evaluators, there are some computational errors in the spreadsheets. Mrs. Livingston’s scores were not included on the spreadsheets because PBC had determined that because she had retired prior to completing evaluations for Medstaff and Nursing Solution, Inc., two offerors who had submitted proposals for either Task I or Task III, but not Task II, none of her scores would be used. (District’s May 26, 1998 Response, at 2-3 (and attachments)). Mr. Pannell evaluated the price proposals for the top two scoring offerors, PSA and National Nurses, assigning PSA the maximum price score of 30 and then calculating a price score for NNS based on a ratio of PSA’s price to NNS’ price (yielding a fraction less than one because PSA’s price was lower than NNS’) multiplied by 30. For Task II, PNG had the lowest price but because PNG was not ranked first or second in technical scoring, neither PNG nor the other five offerors were evaluated based on price. Mr. Pannell prepared a one-page spreadsheet showing the final total scores (technical and price) for PSA and NNS and the final technical scores for the other offerors, covering Tasks I, II, and III. (AR Ex. 8, at 1). Because the evaluators only prepared one score for each offeror, regardless of the number of Tasks proposed, Mr. Pannell used the same technical score for each offeror for any Tasks proposed by that offeror.

On January 15, 1998, Ms. Morgan issued a new recommendation and evaluation memorandum superseding the one dated December 23, 1997. (AR Ex. 5). This memorandum identifies the total scores for PSA and NNS under the three Tasks. Her recommendations for award differ from the December 23 recommendations in that she recommends partial awards to PSA and NNS under each Task. For example, for Task II, she recommends that PSA receive an award to provide nursing services at four Community Health Centers and that NNS receive an award to provide nursing services at one Community Health Center. In her memorandum she states:

Based on past experience and with the need of supplemental nursing services increasing, the hospital, the clinics and the DCPS have found it difficult for one contractor to provide the number of nurses requested. Therefore, the evaluation committee recommends multiple awards as follows: to Premier Nurse Staffing Inc., and National Nurses Service.

(AR Ex. 5). On January 16, 1998, the contracting officer, Mr. Irwin Bloom, signed a

¹ On August 6, 1998, the District supplemented the record by, *inter alia*, resubmitting a more complete and organized set of the evaluation sheets which originally had been submitted as part of Agency Report Ex. 4 on April 24, 1998.

Determination and Findings (“D&F”) recounting the recommendation to make awards to PSA and NNS. The D&F states: “PSA has demonstrated capability to effectively deliver the services required by the DCGH, the Community Health Centers and the DCPS under the terms and conditions of this contract.” (AR Ex. 6). No other evaluation or selection documentation is referenced in the D&F. Thus, the contemporaneous documentation of PBC’s evaluation and selection consists of the evaluation score sheets, the various spreadsheets listing scores and pricing, Ms. Morgan’s memoranda of December 23, 1997, and January 15, 1998, and the January 16, 1998 D&F.

On January 28, 1998, PBC executed a letter contract with PSA after it became apparent that a contract award under the RFP could not be awarded before January 29, 1998, the date that Trifax’s prior contract, as amended, would expire. On February 23, 1998, PBC’s contracting officer executed a definitized contract with PSA for Task II. The Council of the District of Columbia and the Authority approved the contract.

DISCUSSION

We exercise protest jurisdiction pursuant to D.C. Code § 1-1189.3 (Supp. 1998).

In determining the propriety of an evaluation and selection decision, we examine the record to determine whether the decision was reasonable and in accord with the evaluation criteria listed in the solicitation and whether there were any violations of procurement laws or regulations. *Health Right, Inc.*, CAB No. P-507, Oct. 15, 1997, 9 P.D. 7372, 7395. Implicit in the foregoing is that the evaluation and selection decision must be documented in sufficient detail to show that it is not arbitrary. *Id.*; *Southwest Marine*, 96-1 CPD ¶ 56; *S&M Property Management*, B-243051, June 28, 1991, 91-1 CPD ¶ 615. In particular, the agency's technical evaluation documentation is required to include an analysis of the technically acceptable and unacceptable proposals, including an assessment of each offeror's ability to accomplish the technical requirements. The District’s procurement regulations require contracting agencies to document their evaluation of proposals so as to show the basis for evaluation, an assessment of each offeror’s ability to accomplish the technical requirements, and the relative differences among the proposals, their strengths, weaknesses, and risks in terms of the evaluation criteria. *Health Right*, 9 P.D. at 7395-94; *Recycling Solutions, Inc.*, CAB No. P-377, Apr. 15, 1994, 42 D.C. Reg. 4550, 4581; 27 DCMR §§ 1618.5, 1622.6, 1622.7. We do not limit our review to contemporaneous evidence, but consider all the information provided, including the parties' arguments, explanations, and testimony. We accord greater weight to contemporaneous evaluation and source selection material than to arguments and documentation prepared in response to protest contentions. *Health Right*, 9 P.D. at 7396.

There is no indication in the present record that the contracting officer ever conducted any independent evaluation of the proposals. Neither the contracting officer nor the technical evaluation panel prepared any record of the relative differences among the proposals, their strengths, weaknesses, and risks in terms of the evaluation criteria. There was no consensus evaluation report from the technical evaluation panel, simply Ms. Morgan’s uninformative memoranda identifying the top ranked offerors, their average point scores, and the disparate score sheets. The inadequate evaluation and selection record is aggravated by a fundamental

flaw in the way the PBC evaluated proposals. Having structured the solicitation to define three separate Tasks against which offerors could submit individual technical and price proposals and which PBC could individually award to different offerors, it was only logical for there to be distinct technical evaluations according to individual Task. That did not happen here. The technical evaluation committee members completed a single evaluation form for each offeror, sometimes, but not always making comments relating to different Tasks if an offeror proposed more than one. In no case did the evaluators identify separate technical scores according to the different Tasks. Ms. Morgan, in preparing what purports to be the report of the evaluation panel, simply applied the same technical score to the one or more Tasks proposed by an offeror. (*See* AR Ex. 5). Based on these deficiencies alone, we are unable to sustain the evaluation and selection for the Task II nursing services.

Trifax argues that Ms. Morgan and Mr. Hawkins improperly gave Trifax lower evaluation scores because Trifax failed to make an offer on Task I. The contracting officer has responded generally that: “Trifax’s score was not lowered because Trifax did not submit a proposal for Task I.” (May 20, 1998 Memorandum of Roscoe Wade, included in the District’s May 26, 1998 Response to Comments of Trifax). In affidavits prepared on August 26, 1998, Ms. Morgan and Mr. Hawkins state that they recall being told at the outset of the evaluation process that offerors were not required to propose nursing services for all three Tasks and that they did not lower Trifax’s score because it did not propose Task I services. In this case, we are more persuaded by the contemporaneous evaluation data. When comparing the Trifax evaluation sheets with the evaluation sheets of the other seven offerors prepared by Ms. Morgan and Mr. Hawkins, it is quite clear that these evaluators mistakenly believed Trifax was making a proposal for Task I services and downgraded Trifax because of an incomplete or inadequate response to Task I. (AR Ex. 4).

Trifax also argues that Mr. Hawkins improperly downgraded Trifax on the erroneous basis that Trifax’s Medical Director being on the staff of D.C. General Hospital presented a conflict of interest. Both Mr. Hawkins’ and Ms. Morgans’ evaluation materials for Trifax mention an apparent conflict of interest. The contracting officer has responded by stating that their evaluations “did not reflect whether Trifax’s score was lowered because of the mentioned conflict of interest.” (May 20, 1998 Memorandum of Roscoe Wade). The District agrees that there was no actual conflict of interest and that it would have been improper to downgrade Trifax on that basis.² Based on our review and comparison of the evaluation materials, we find that it is more likely than not that Mr. Hawkins and Ms. Morgan downgraded Trifax, at least in part, due to a perceived conflict of interest on the part of Trifax.

Trifax next contends that PBC arbitrarily discarded the evaluations of Mrs. Livingston who gave Trifax a perfect technical evaluation score of 70. The contracting officer responds that Mrs. Livingston retired from government service before she completed the evaluations on all

² It is undisputed that Trifax’s Medical Director does not own or control Trifax. As a staff member at D.C. General Hospital, the Medical Director is also an employee of the Hospital but has no procurement responsibilities. We agree with the parties that no conflict of interest is presented. *See* D.C. Code § 1-1190.1; 27 DCMR §§ 2220-2222. We note that 27 DCMR § 2220.4 requires the contracting officer to obtain the advice of the Corporation Counsel in evaluating potential conflicts.

proposals, and that her evaluations were not used to score any of the proposals which she had evaluated. (May 20, 1998 Memorandum of Roscoe Wade). The original contracting officer, Mr. Irwin Bloom, made essentially the same point in his January 16, 1998 Determination and Findings supporting award to PSA. (AR Ex. 6, at 4-5). The problem with the position of the contracting officers is that Mrs. Livingston did in fact complete the evaluation of all eight offerors who submitted technical and cost proposals for Task II. Accordingly, we conclude that the contracting officers erred in excluding consideration of Mrs. Livingston's evaluations of the offerors under Task II.

PBC also failed to properly evaluate price proposals for Task II. None of the eight offers for Task II were deemed outside of the competitive range. Nevertheless, in computing total scores, the contracting officer, Ms. Morgan, and the PBC consultant limited the price evaluation to two offerors, giving the maximum price score to the lower of the two. The contracting officer should have computed a price evaluation for each of the offerors under Task II, assigning the maximum 30 points to the lowest price proposal, apparently PNG here. The other offerors' evaluated prices should have been calculated based on a ratio of the lowest price to the offeror's price.

It is agreed that the solicitation provided for the possibility of qualified offerors receiving points for evaluation purposes pursuant to the Local, Small, and Disadvantaged Business Enterprises Act ("LSDBE Act"), *i.e.*, 5 points for being a local business enterprise ("LBE"), 5 points for being a disadvantaged business enterprise ("DBE"), and 2 points for being located in an enterprise zone. PBC awarded no preference points. Trifax argues that it is entitled to 5 percentage points based on LBE status. The District agrees that Trifax would be entitled to the 5 points for LBE status if it was properly qualified as of the closing date for proposals. According to the District, Trifax's certification as an LBE expired on November 7, 1997, ten days before the closing date for proposals. However, the record reflects that by letter of November 12, 1997, the Department of Human Rights and Minority Business Development acknowledged receipt of Trifax's recertification application and self-certification affidavit, making Trifax temporarily eligible for LBE preference points. (Trifax Supplemental Comments, filed August 13, 1998). On December 2, 1997, the Local Business Opportunity Commission subsequently issued Trifax a two-year certificate of registration as an LBE. On the record presented, Trifax was entitled to 5 points as a qualified LBE.

Remedy

The evaluation and selection for Task II violated procurement law and the terms of the solicitation. The violations were substantial and material. Accordingly, we agree with the District that the proper remedy under the circumstances is to order the contracting officer to reevaluate the proposals with regard to Task II services and make a new selection decision for Task II consistent with our discussion above. If the contracting officer desires to use a technical evaluation panel, a new panel shall be selected. If the contracting officer determines through a valid reevaluation and selection process that award of Task II should be made to an offeror other than PSA, then the contracting officer shall terminate PSA's contract for the convenience of the District and make award consistent with the selection decision. PBC shall complete the reevaluation and selection within 60 days from the date of our decision.

CONCLUSION

The protest is sustained.

DATE: September 25, 1998

/s/
JONATHAN D. ZISCHKAU
Administrative Judge

CONCURRING:

/s/
LORILYN E. SIMKINS
Chief Administrative Judge

/s/
PHYLLIS W. JACKSON
Administrative Judge