



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: OMV Medical, Inc.

File: B-281490

Date: February 16, 1999

Kenneth A. Martin, Esq., and Jennifer C. Adams, Esq., Martin & Rylander, for the protester.

John R. Osing, Jr., Esq., Department of the Navy, for the agency.

Linda S. Lebowitz, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency reasonably eliminated the protester's revised proposal from the competitive range after conducting discussions where the protester failed to demonstrate past performance in providing registered nurses as required by the terms of the amended solicitation and its low price indicated the firm could have problems recruiting and retaining registered nurses.

DECISION

OMV Medical, Inc. protests the elimination of its revised proposal from the competitive range and the award of contracts to Maryland Professional Staffing Services, Inc. (MPSS) and American Health Research Institute (AHRI) under request for proposals (RFP) No. N62645-97-R-0016, issued by the Department of the Navy to provide registered nurses (RN) to the National Naval Medical Center (NNMC), Bethesda, Maryland. OMV challenges the agency's determination that its revised proposal was not considered among the most highly rated and it questions the evaluation of the awardees' proposals.

We deny the protest.

The RFP, issued on April 14, 1998 as a total small business set-aside, contemplated the award of a fixed-price, personnel services contract. RFP Cover Sheet; RFP § L.3, at 70. The contractor was required to provide RN services for the following groups of hospital units: Group A--intensive care unit (ICU), post anesthesia care unit (PACU), and operating room (OR); Group B--neonatal intensive care unit (NICU) and mother and infant care center (MICC); and Group C--medical surgical, ambulatory care clinic (ACC), and ambulatory procedure unit (APU). The RFP provided that the award would be made to the responsible offeror whose

proposal offered the best combination of past performance and price, RFP § M.2, at 77, with past performance being considered significantly more important than price. Id.

To evaluate an offeror's past performance, the RFP required offerors to "submit a narrative discussion which demonstrates directly related or similar experience in providing Registered Nurse services." RFP § M.3.1, at 77. The RFP defined "directly related or similar experience" as "experience in providing registered nurse services of similar or same quantity in an emergency medicine, medical surgical, or critical care environment." Id. at 78. The RFP required, among other things, the offeror to provide in its past performance narrative a detailed description of work performed, including specific information regarding the wards in which the RN services were provided, the various shifts provided, and the number of RNs provided. The offeror also was required to provide the name and phone number of a point of contact where particular contracts were performed. Id.

The RFP also advised offerors that proposed prices would be evaluated for completeness, reasonableness, and realism. RFP § M.3.2, at 79-80. As relevant to this protest, the RFP stated that an offeror's line item prices would be evaluated for realism "to identify unusually low cost estimates, understatements of costs, inconsistent pricing patterns, potential misunderstandings of the solicitation's requirements, and the risk of personnel recruitment and retention problems during contract performance." Id. at 80. Offerors were required to provide unit and extended prices for a specified number of line item shifts for RN services in Groups A, B, and/or C, as referenced above. Amendment No. 0001, May 6, 1998, § B.4, at 3. As amended, the RFP now provided for the possibility of multiple awards based on groups of RN services. Amendment No. 0001, § M.2, at 77.

Eight firms, including OMV, MPSS, and AHRI, submitted proposals by the initial closing time on May 26. OMV and AHRI submitted proposals for Groups A, B, and C, and MPSS submitted a proposal for Groups A and B. Technical evaluations were performed by the agency's source selection evaluation board (SSEB). As relevant to this protest, the SSEB assigned "marginal" ratings to the technical proposals submitted by OMV and MPSS and a "good" rating to AHRI's proposal.¹ Initial Technical Evaluation Report, June 18, 1998, at 6. These ratings were supported by narratives of strengths and weaknesses in each proposal.

¹As reflected in the agency's source selection plan, a "marginal" rating was defined as "[l]ess than satisfactory; offeror has documented past performance problems in provisions of Registered Nurse services. Low probability of success due to the number of performance problems, their severity, and the offeror's failure to correct them." Source Selection Plan, Apr. 9, 1998, at 10. A "good" rating was defined as "[s]atisfactory, offeror has positive experience in successfully providing Registered Nurse services. Good probability of success." Id.

More specifically, the SSEB assigned a "marginal" rating to OMV's proposal because OMV appeared to have limited experience in providing inpatient or outpatient RN services of similar quantity in an emergency medicine, medical surgical, or critical care environment as described in the RFP. While OMV stated that it had experience in providing outpatient/wellness RN services and critical care and emergency medicine RN services of similar quantity, the agency was unable to confirm or verify this information with OMV's listed references. The SSEB determined that OMV had extensive experience in providing therapists and physicians and in providing a large number of RNs in the area of occupational health services and in providing a substantial number of personnel (the number of RNs was not specified) in the area of family advocacy services. The agency, however, was unable to confirm OMV's performance information for these services. While the SSEB confirmed that OMV had an excellent record of performance in furnishing a small number of RNs to provide mental health nursing services at the NNMC and had an excellent record of performance in providing a small number of medical surgical and critical care RNs at a local hospital, the agency was unable to confirm performance information for OMV in providing RN services at other local hospitals. The SSEB concluded that due to the lack of verifiable references for OMV for quantities of RNs similar to those required by the RFP, OMV demonstrated a low probability of successfully performing the RFP requirements. Initial Technical Evaluation Report at 18-19.

As relevant here, price proposals were evaluated for realism by basically comparing an offeror's proposed direct labor rates to the direct labor rates paid under the three most recent contracts at the NNMC. (One contract was awarded on a sole-source basis for ICU and PACU services; one contract was awarded competitively for NICU and MICC services; and the last contract was awarded on a sole-source basis for medical surgical and ACC services, with options for OR and APU services.) Initial Price Evaluation Report, undated, at 2-3. Neither OMV, MPSS, nor AHRI was determined to have submitted complete, reasonable, or realistic price proposals. OMV's price was lower than the prices submitted by MPSS and AHRI. Id. at 4-6, 9-10.

The agency included the proposals of all eight firms in the competitive range and conducted written discussions with each competitive range offeror. With each discussion letter the agency enclosed a copy of amendment No. 0003 to the RFP, issued on August 14, which changed the requirement for the submission of past performance information. Specifically, offerors were now required to "submit a narrative discussion which demonstrates directly related or similar experience in providing each of the specific categories of Registered Nurse services required in this solicitation." Amendment No. 0003, § M.3.1, at 78. This amendment defined "directly related or similar experience" in terms of "experience in providing registered nurse services of similar or same quantity in an ICU, PACU, NICU, MICC, medical/surgical unit, ambulatory care clinic, OR, and ambulatory procedure unit." Id.

In the discussion letter to OMV, the agency requested that the firm provide the names of individuals at local hospitals familiar with OMV and who could confirm OMV's past performance information; that the firm specify whether nurses supplied to military hospitals were RNs; that the firm specify the number of RNs provided in performing family advocacy services; and that the firm provide references who could verify that OMV has provided numbers of RNs similar to those required by the RFP. OMV was further reminded that the requirement for the submission of past performance information changed in amendment No. 0003 and the firm was told to refer to that amendment. In addition, the agency noted the single reason why OMV's price proposal was considered incomplete (a mistake in a line item shift quantity); explained that OMV's price was considered unreasonable because prices exceeded the government's estimate; and explained that its proposed direct labor rates appeared low, *i.e.*, unrealistic, when compared to the government's estimate. OMV Discussion Letter, Aug. 14, 1998.

The competitive range offerors submitted revised proposals which responded to the discussion questions by the closing time on September 1. In its revised technical proposal, OMV provided the name of one reference at a local hospital. OMV was unable to locate the individual who served as the point of contact during performance under another local hospital contract and, therefore, deleted this hospital as a reference. OMV stated that it provides a "cadre" of highly qualified registered nurses at military hospitals, and in responding to the past performance requirements of amendment No. 0003, OMV submitted information for two family advocacy service contracts (total of 20 RNs), an occupational health services contract (47 full- and part-time RNs) for which it provided a reference, and two local hospital contracts (unspecified number of RNs for emergency room, critical care, medical surgical, and ambulatory surgery units on an as-needed basis). OMV also revised its price proposal.

The SSEB evaluated revised technical proposals and assigned an "excellent" rating to AHRI for Groups A and C, and an "excellent" rating to MPSS for Group B.² The SSEB assigned a "marginal" rating to OMV for Groups A, B, and C. Again, these ratings were supported by narratives of proposal strengths and weaknesses. Supplemental Technical Evaluation Report, Sept. 14, 1998, at 6-8.

²An "excellent" rating was defined as "[o]utstanding in essentially all respects: represents the best that could be expected of any contractor. Offeror has extensive positive experience in providing Registered Nurse services. Very high probability of success." Source Selection Plan at 10.

The SSEB assigned a "marginal" rating to OMV's revised technical proposal considering the past performance requirements described in amendment No. 0003.³ With respect to the requirements for ICU, PACU, and OR RNs (Group A), OMV stated it provided 21 RNs and 7 licensed practical nurses to work in critical care and shock trauma areas at three local hospitals. However, OMV failed to specify the critical care units in which these RNs were provided and the agency was unable to confirm or verify OMV's performance. With respect to the requirements for NICU and MICC RNs (Group B), the SSEB determined that OMV failed to demonstrate any experience in providing NICU RNs, and while OMV stated that it provided five labor and delivery nurses at two military hospitals, OMV failed to provide sufficient information for purposes of verification. Finally, with respect to the requirements for medical surgical, ACC, and APU RNs (Group C), the SSEB recognized that OMV demonstrated RN experience in the occupational health services area which was similar in scope and magnitude to the ACC RN requirement. However, the agency was unable to verify OMV's performance. Although OMV stated that it provided RNs on an as-needed basis in the emergency room, ambulatory surgery, and medical surgical units at two local hospitals, OMV failed to specify the number of RNs provided at these hospitals and the agency was generally unable to confirm the performance information provided by OMV. The SSEB reiterated that for the references reached, satisfactory performance by OMV was reported. Supplemental Technical Evaluation Report at 29-32.

In its revised price proposal, OMV introduced mathematical errors which resulted in the agency determining its price proposal was incomplete; the agency further determined its price was reasonable, but not realistic, suggesting that OMV may not have understood the RFP requirements and may have problems recruiting and retaining RNs. The MPSS revised price proposal was determined incomplete, but reasonable and realistic. AHRI's revised price proposal was determined complete, but unreasonable and unrealistic. Supplemental Price Evaluation Report, Oct. 8, 1998, at 5-6, 11-13.

On October 15, the source selection advisory council (SSAC) determined to narrow the competitive range. The SSAC determined that OMV's revised proposal, and the revised proposals of four other offerors, were not among the most highly rated proposals, and that additional technical and price discussions would not improve these proposals. The SSAC concluded that the past performance of the three firms whose revised proposals would remain in the competitive range--MPSS, AHRI, and The Arora Group, Inc. (which submitted a proposal for Groups A, B, and C)--was superior to that of the offerors whose revised proposals would be eliminated from the competitive range. In accordance with Federal Acquisition Regulation (FAR) § 15.306(d)(4) (FAC 97-02), the SSAC recommended that OMV's revised proposal, as

³The SSEB narrative also incorporated comments from the initial technical evaluation report.

well as the other four proposals, be removed from the competitive range. Minutes of SSAC, Oct. 15, 1998. The contracting officer, serving as the source selection authority (SSA), approved the SSAC's recommendation. SSA Approval Memorandum, Oct. 15, 1998.

The agency conducted another round of discussions, by telephone, with MPSS, AHRI, and Arora. These discussions focused on price issues only as no past performance issues remained to be resolved with these offerors. Following discussions, final price proposal revisions were submitted by the closing time on October 23.

The SSAC recommended that Groups A and C be awarded to AHRI and that Group B be awarded to MPSS. SSAC Report, Oct. 28, 1998, at 3-5. The SSA concurred with the SSAC's recommendation, E-mail from SSA, Oct. 28, 1998, and accordingly, on October 30, the agency awarded contracts to AHRI and MPSS as the firms whose proposals offered the best combination of past performance and price.

OMV challenges the evaluation of its past performance and price which resulted in the agency's elimination of its revised proposal from the competitive range as not being among the most highly rated proposals.

In reviewing competitive range determinations, our Office will not independently reevaluate proposals; rather, we will examine the record to ensure that the evaluation was reasonable and in accordance with the solicitation's evaluation criteria. SDS Petroleum Prods., Inc., B-280430, Sept. 1, 1998, 98-2 CPD ¶ 59 at 4.

In evaluating an offeror's past performance, the agency, in accordance with amendment No. 0003, focused on whether an offeror demonstrated "experience in providing registered nurse services of similar or same quantity in an ICU, PACU, NICU, MICC, medical/surgical unit, ambulatory care clinic, OR, and ambulatory procedure unit." In evaluating OMV's past performance, the record shows that the SSEB considered all the information furnished by OMV in its initial and revised proposals and in its response to the discussion questions. While OMV stated it had experience in providing RNs in the areas of occupational health services, family advocacy services, critical care, emergency room, and medical surgical, the SSEB concluded that but for OMV's experience in providing occupational health RNs, which corresponded to the RFP's ACC requirement, none of the areas for which OMV provided RNs corresponded to any of the specific substantive and quantitative RN requirements in amendment No. 0003.

For example, OMV's two family advocacy services contracts involved providing counseling and medical services to military personnel identified as being at high risk for domestic abuse. OMV did not demonstrate that its experience in providing 20 family advocacy RNs corresponded to any of the specific RFP requirements. As another example, OMV stated that it has provided critical care RNs at local

hospitals; however, OMV failed to specify the particular critical care hospital units for which these RNs were provided, e.g., ICU, PACU, OR. In addition, OMV omitted information regarding the number of RNs furnished under these contracts--OMV simply stated RNs were provided on an as-needed basis for a range of shifts per month in emergency room, medical surgical, and ambulatory surgery units.

We believe the agency could reasonably conclude that OMV failed to demonstrate that its experience in providing RNs corresponded to any of the RN requirements specified in amendment No. 0003 and the agency could reasonably assign a "marginal" rating to OMV's revised technical proposal because there was a low probability that OMV could successfully perform the contract.

OMV, which does not dispute that the agency had difficulty reaching some of its listed references, also asserts that the agency should have had discussions with the firm regarding the agency's inability to confirm or verify past performance information with these references. We point out, however, that following the SSEB's evaluation of OMV's initial proposal, OMV was specifically asked during discussions, prior to the submission of its revised proposal, to provide the names of individuals at local hospitals familiar with OMV who could confirm OMV's past performance information and to provide references who could verify that OMV had provided numbers of RNs similar to those required by the RFP. In other words, the agency, during discussions, placed OMV on notice that it was having difficulty confirming or verifying OMV's past performance information as contained in its initial proposal. In responding to the discussion questions and in its revised proposal, the record shows that OMV failed to provide the necessary references. Because agencies are not required to notify offerors of deficiencies remaining in their proposals or to conduct successive rounds of discussions until omissions are corrected, ITT Fed. Servs. Corp., B-250096, Jan. 5, 1993, 93-1 CPD ¶ 6 at 6, the agency was not required to afford OMV another opportunity to address the issue of references.

In sum, regarding the evaluation of OMV's past performance, the agency had three interrelated concerns--that OMV's experience in providing RNs was not similar to the substantive RN requirements of the amended RFP; that to the extent OMV had furnished appropriately experienced RNs, OMV did not demonstrate that it provided these RNs in similar quantities to those required by the amended RFP; and that OMV failed to provide references who could verify the firm's past performance information.⁴ Any one of these concerns, we believe, provides a reasonable basis for the agency's "marginal" rating assigned to OMV's past performance.

⁴Even if the agency had confirmed and verified OMV's past performance information, the record indicates that OMV's experience still would not have been considered similar (in substance and in quantity) to the requirements of the amended RFP.

In addition, OMV objects to the agency's conclusion that its low-priced proposal was unrealistic based on a comparison of its proposed direct labor rates to the direct labor rates paid under the most recent contracts for RN services at the NNMC. OMV disagrees with the agency's conclusion that its low direct labor rates might result in recruitment and retention problems.⁵

The manner in which a price realism analysis is conducted is a matter subject to a contracting agency's sound discretion which we will not disturb unless it lacks a reasonable basis. Telford Aviation, Inc., B-275896, Apr. 16, 1997, 97-1 CPD ¶ 142 at 6. Compensation rates properly may be considered as part of a realism analysis. Id.

Here, the RFP stated that in evaluating the realism of an offeror's proposed prices, prices would be evaluated for "unusually low cost estimates, understatements of costs, inconsistent pricing patterns, potential misunderstandings of the solicitation's requirements, and the risk of personnel recruitment and retention problems during contract performance." Other than objecting to what it characterizes as a mechanical comparison of its direct labor rates to an undisclosed government estimate based on direct labor rates paid under three recent contracts,⁶ OMV has offered no meaningful challenge to the agency's conclusion that its proposed price was too low and presented a risk in terms of recruitment and retention of RNs for this contract. OMV does not explain why the direct labor rates paid under the other recent contracts was not a reasonable basis to determine price realism for this contract. Accordingly, we have no basis to object to the agency's conclusion that OMV's proposed price was unrealistically low.

On this record, considering that OMV failed to demonstrate past performance in providing RNs as required by the terms of the amended RFP and that the agency was concerned with OMV's ability to recruit and retain RNs in light of its low proposed direct labor rates, we believe the agency reasonably determined to remove

⁵Contrary to OMV's assertion, the record shows that the agency did not ignore statements in its initial and revised technical proposals to the effect that the firm basically had a perfect recruitment and retention record for all of its contracts. Again, the requirements of these contracts were not shown by OMV to be similar to the RN requirements of the amended RFP and much of the information furnished by OMV could not be confirmed or verified.

⁶Price comparisons are specifically contemplated by FAR § 15.404-1(b)(2) (examples of price analysis techniques, including comparison of previously proposed prices and contract prices with current proposed prices for the same or similar end items), and there is nothing improper in an agency's comparing proposed prices with an undisclosed government estimate. See, e.g., P.E. Sys., Inc., B-249033.2, Dec. 14, 1992, 92-2 CPD ¶ 409 at 6.

OMV's revised proposal from the competitive range as not being among the most highly rated proposals, and therefore not having a realistic prospect for award. FAR § 15.306(c)(1); SDS Petroleum Prods., Inc., *supra*, at 5. Contrary to OMV's position, the agency was not required to keep the firm's revised proposal in the competitive range, to conduct additional past performance and price discussions with the firm, and to request another revised proposal since to do so, where the agency had concluded that OMV had no realistic chance for award, would have benefited neither OMV nor the agency. FAR § 15.306(d)(4); SDS Petroleum Prods., Inc., *supra*, at 6.

Finally, OMV challenges the agency's evaluation of the past performance of the two awardees. OMV disputes the agency's assignment of an "excellent" rating to MPSS, arguing that the firm should have been downgraded for past performance in light of a contract that was terminated at the NNMC because of staffing shortages. OMV also objects to the SSEB's assignment of an "excellent" rating to AHRI based on the attribution of the past performance of AHRI's subcontractor to AHRI.

Under our Bid Protest Regulations, a party is not interested to maintain a protest if it would not be in line for award if the protest were sustained. 4 C.F.R. § 21.0(a) (1998). Here, where the agency reasonably excluded OMV's revised proposal from the competitive range, and where, in addition to the proposals of MPSS and AHRI, the proposal of another offeror--Arora--remained in the competitive range, OMV, which did not challenge the evaluation of Arora's proposal, is not an interested party to challenge the evaluation of the awardees' proposals because, even if its protest against the evaluation of the awardees' proposals were sustained, Arora, not OMV, would be in line for award. Magnum Prods., Inc.; Amida Indus., Inc., B-277917 *et al.*, Dec. 8, 1997, 97-2 CPD ¶ 160 at 6 n.3.⁷

⁷We note that with respect to the evaluation of the past performance of MPSS, OMV merely expresses disagreement with the agency's statement that the termination of the MPSS contract was for convenience, not default, as a result of government cancellations of shifts and unplanned shift changes with short notices. The record shows that the agency terminated the MPSS contract pursuant to the clause at FAR § 52.249-12, captioned "Termination (Personnel Services)," which states in relevant part that "[t]he Government may terminate this contract at any time upon at least 15 days' written notice by the Contracting Officer to the Contractor." There is nothing in the record suggesting that the MPSS contract was terminated for default and, as reflected by the evaluation record, the agency reasonably considered the circumstances surrounding the staffing shortages and termination. With respect to the evaluation of AHRI's past performance, the RFP did not prohibit subcontracting, and, in fact, required an offeror to include in its past performance narrative information regarding subcontractors who will perform major or critical aspects of the RFP requirements. The record shows that the agency recognized that
(continued...)

The protest is denied.

Comptroller General
of the United States

⁷(...continued)

while AHRI did not demonstrate RN experience as required by the amended RFP, its proposed subcontractor has, for over 20 years, provided RNs in accordance with the amended RFP requirements. References reported reliable and excellent performance for AHRI's proposed subcontractor. We believe the agency reasonably balanced AHRI's noted weakness and its proposed subcontractor's excellent past performance history in assigning an "excellent" rating to AHRI for past performance. See, e.g., Hago-Cantu Joint Venture, B-279637.2, July 20, 1998, 98-2 CPD ¶ 99 at 11. We also note that to the extent OMV questions whether AHRI will comply with the RFP's limitation on subcontracting clause, this is a matter of contract administration not for review by our Office. 4 C.F.R. § 21.5(a). Finally, we point out that in any event, OMV does not dispute that both awardees demonstrated, either as a prime contractor or through a subcontractor, past performance in accordance with the RFP requirements.