



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

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Matter of: Trifax Corporation

File: B-279561

Date: June 29, 1998

Peter A. Greene, Esq., Norman J. Phillion, Esq., and Christopher D. Perry, Esq., Thompson Hine & Flory, for the protester.
Col. Nicholas P. Retson, Maj. Michael J. O'Farrell, Jr., and Robert D. Hamel, Esq., Department of the Army, for the agency.
Henry J. Gorczycki, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest against elimination of a proposal from competitive range is sustained where the record evidences that the score assigned the protester's past/present performance was unreasonably low, considering the information included in the proposal, the evaluation documentation, and the scores assigned the competitive range proposals, and the score of the proposal, if properly evaluated, would have been among the range of scores assigned the competitive range proposals.

DECISION

Trifax Corporation protests the elimination of its proposal from the competitive range under request for proposals (RFP) No. DADA10-98-R-0003, issued by the Department of the Army for nonpersonal occupational health care services for federal employees at existing and future Federal Occupational Health (FOH) provision sites in several states.¹

We sustain the protest.

The RFP, issued on September 30, 1997 as an 8(a) set-aside, contemplated an award of a fixed-price, indefinite-quantity contract for a base period and 4 option years. The RFP, at sections M.2.5 and M.2.5.2, stated a best value evaluation scheme, considering the following four factors: (1) past and present performance;

¹The agency's prior contracts for FOH services were issued for smaller service areas. Several of the offerors responding to this RFP, including Trifax, were incumbent contractors on these smaller contracts.

(2) contractor quality control plan; (3) technical quality (oral presentation); and (4) price/cost. The RFP stated the relative weights of these factors as follows:

Factors 1 and 2 are equal and, individually, are less important than factor 3, and factors 1, 2, and 3 are more important than factor 4. The government is interested in proposals that offer value in meeting the requirements - performance and technical quality with acceptable risk at a fair and reasonable price. Factor 4, however, could become the determinative selection factor if technical quality proposals are determined to be substantially equal, or if a proposal deemed superior in technical quality is determined not to be worth the high cost premium.

Section M.2.1 stated that, in accordance with the clause at Federal Acquisition Regulation (FAR) § 52.215-16 (June 1997), Alternate II, award of a contract based on initial proposals without discussions was intended, although the government reserved the right to conduct discussions if the contracting officer later determined it was necessary.

[DELETED] offerors submitted initial proposals by the October 30 closing date. The agency evaluated proposals and determined that discussions would be necessary. A competitive range of [DELETED] proposals was established based on the respective technical rankings and prices. The overall technical scores of these proposals ranged from a low of [DELETED] to a high of [DELETED] points.² The overall evaluated prices, including option years and proposed escalation, ranged from a low of \$[DELETED] million³ to a high of \$[DELETED] million. The point score and evaluated price of Trifax's proposal--[DELETED] and \$[DELETED] million--fell outside of the competitive range and the Army eliminated it from further consideration.

²The rating\point scale was as follows:

Excellent	-	[DELETED]
Good	-	[DELETED]
Poor	-	[DELETED]
Unsatisfactory	-	[DELETED]

³The lowest-priced proposal did not indicate a price for one item, and thus this price was incomplete.

Trifax's low score largely resulted from low scores under two evaluation factors: past/present performance and quality control plan.⁴ Under the past/present performance factor, the four documented reasons that Trifax's proposal was downgraded were (1) concerns about unidentified problems with Trifax's payment of employee benefits, (2) reports that the firm issued checks to employees with insufficient funds, (3) Trifax's alleged difficulty in recruiting wellness/fitness providers on one contract, and (4) Trifax's alleged submission of two contract references instead of three as required by the RFP. Under the quality control plan factor, all three evaluators stated a concern regarding the selection of sites for site visits, and the frequency of site visits and performance reviews.

By letter of January 7, 1998, the Army notified Trifax that its proposal had been eliminated from the competitive range. No reasons for this elimination were provided in this letter.

On January 9, prior to receiving the agency's elimination letter, Trifax sent a letter to the agency in response to a newspaper report concerning Trifax's administration of the two contracts with the District of Columbia, which Trifax had listed as references in its proposal. Trifax stated that the report contained "seriously inaccurate information," including the statement that Trifax had not paid its employees the full benefits to which they were entitled. Trifax explained that, although payroll checks for incorrect amounts were issued for one payroll period due to errors resulting from a computer crash, Trifax had immediately identified the errors and corrected the underpayments in the very next payroll. Trifax stated that the reports of poor contract administration by Trifax had all been generated without verification or comment by Trifax, and requested that its performance be evaluated based on the actual performance of its firm, not on such misinformation. In this letter, Trifax also referenced a contract for providing occupational health services at several FOH sites in the Army's Central West region, which was one of the three contract references included in Trifax's proposal that Trifax stated should be considered in addition to the two District of Columbia contracts in evaluating past/present performance.

In response to Trifax's January 9 letter, the contracting officer, with the concurrence of the chairperson of the technical evaluation board, revised Trifax's past/present performance score. The contracting officer accepted Trifax's

⁴These were the only two factors under which Trifax's proposal varied significantly from the proposals in the competitive range. Under the technical quality (oral presentation) factor, Trifax's proposal was evaluated higher than [DELETED] competitive range proposals. Comparing evaluated prices, Trifax's price was within [DELETED] percent of the highest-priced competitive range proposal, and was within [DELETED] percent of the prices of [DELETED] competitive range proposals.

explanation concerning the validity of the reported problems with paying employee benefits, and discovered that the Army had overlooked Trifax's reference for the FOH contract with the Army (and that Trifax's proposal had therefore provided the required three references). Trifax's past/present performance evaluation was increased from a rating of [DELETED] and a score of [DELETED], to a rating of [DELETED] and a score of [DELETED]. This increased Trifax's overall score to [DELETED], which was not enough, in the agency's view, to move Trifax's proposal into the competitive range, given the higher ratings of the competitive range proposals.

On January 13, Trifax received the notice that the Army had eliminated its proposal from the competitive range. By letter of January 20, Trifax requested a debriefing. By letter of February 9, the Army provided Trifax with a written debriefing, which identified evaluated weaknesses and deficiencies in Trifax's proposal. On February 18, Trifax protested to the Army the elimination of its proposal from the competitive range. By letter of March 3, the Army denied the protest. Trifax received the Army's protest decision on March 9, and protested to our Office on March 19. The Army awarded the contract to OMV Medical, Inc. on March 16. Contract performance has been suspended.

The Army first asserts that the protest was untimely filed under our Bid Protest Regulations because Trifax's agency-level protest was filed on February 18, more than 10 days after receiving notice on January 13 of the elimination of its proposal from the competitive range. The Army contends that, since Trifax did not request the debriefing within 3 days of learning of the elimination of its proposal, and thus the agency was not required to conduct a debriefing, the 10-day period for filing a protest should be considered to start on January 13, instead of the date of the debriefing. We disagree.

Under our Bid Protest Regulations, protests based on matters other than alleged improprieties apparent on the face of a solicitation must be filed not later than 10 days after the basis of protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2) (1998). A matter initially protested to the contracting agency will be considered timely, if filed within 10 days of actual or constructive knowledge of adverse agency action on the agency-level protest, provided that the agency-level protest was filed within the time limits for filing a protest with our Office, unless the contracting agency imposes a more stringent time for filing, in which case the agency's time for filing will control. 4 C.F.R. § 21.2(a)(3).

Here, the Army did not impose a more stringent time period for filing agency-level protests than the 10-day period. The basis for Trifax's protest to the Army, and subsequently to our Office, arose from the evaluation of Trifax's proposal upon which the elimination decision was based. However, the agency's notice of elimination did not provide any information about the evaluation. Trifax first

received information about the evaluation of its proposal from the agency's letter of February 9, i.e., the written debriefing, which Trifax received on February 10. Since Trifax requested a debriefing within days of learning of its proposal's elimination from the competitive range (so that it cannot be faulted for failing to pursue potential protest grounds), and since Trifax's agency-level protest was filed within 10 days of its learning the basis of protest through the debriefing, that protest was timely. Moreover, its protest to our Office was timely filed 10 days after it received notice of adverse agency action on the agency-level protest.

Trifax's failure to meet the requirements to invoke a "required debriefing" did not modify the timeliness rules applicable to the filing of its protest. The only effect a required debriefing has on our timeliness regulations is the tolling of the filing period in limited circumstances. See 4 C.F.R. § 21.2(a)(2). Non-required debriefings are permitted, see FAR § 15.1006(a) (June 1997), and a protest based on information first revealed in a non-required debriefing, as here, may be filed under the generally applicable regulations for filing timely protests. See Minotaur Eng'g, B-276843, May 22, 1997, 97-1 CPD ¶ 194 at 4 n.2.

As to the merits of the protest, Trifax essentially alleges that its evaluation rating/score is arbitrary and unreasonably low under the past/present performance factor, even considering the Army's re-evaluation and upgrading of Trifax's past/present performance evaluation. Trifax also alleges that its rating/score under the quality control plan factor is unreasonable. Trifax asserts that a reasonable evaluation would increase its overall score sufficiently to place its proposal in the competitive range.

We find that the record supports Trifax's allegation concerning the reasonableness of the initial and revised rating/score for Trifax under the past/present performance factor. Based on the evaluation errors made in the initial evaluation of Trifax's proposal under this factor and the ratings/scores under this factor for offerors with comparable past performance records, the record before us shows that a reasonable rating/score under this factor would have put Trifax's proposal in the competitive range. We sustain the protest on this basis.

A competitive range shall be determined on the basis of cost or price and other factors that were stated in the solicitation and shall include all proposals that have a reasonable chance of being selected for award. FAR § 15.609 (June 1997).⁵ When

⁵To the extent the agency alleges that the FAR Part 15 revision (FAC 97-02) is applicable to this solicitation, we note that this RFP was issued on September 30, 1997, more than 2 weeks before October 10, the earliest date on which solicitations issued could be subject to the rewritten regulation. Moreover, if an agency wanted to begin applying the revised regulation to solicitations issued earlier than January 1, 1998, it was required to state on the cover page of the solicitation that

there is doubt as to whether a proposal is in the competitive range, the proposal should be included. Id. The evaluation of proposals and the determination of what proposals are in the competitive range are largely matters of agency judgment and discretion; this judgment and discretion is not unfettered, however, as evaluations and competitive range determinations must be reasonable and bear a rational relationship to the stated evaluation criteria. Safeguard Maintenance Corp., B-260983.3, Oct. 13, 1995, 96-2 CPD ¶ 116 at 4; S&M Property Management, B-243051, June 28, 1991, 91-1 CPD ¶ 615 at 3. In reviewing an agency's decision to exclude a proposal from the competitive range, we look first to the agency's evaluation of proposals to determine whether the evaluation had a reasonable basis. Safeguard Maintenance Corp., supra.

Here, while it was conducting discussions with the competitive range offerors, the Army realized that its initial past performance evaluation of Trifax was unreasonable. The agency promptly conducted a reevaluation, which accepted Trifax's explanation concerning the payment of benefits to its employees and which assertedly included an agency survey of Trifax's third contract reference, a reference that the agency had previously erroneously stated had not been submitted.⁶

In its initial evaluation, the agency identified an alleged problem with Trifax's payment of employee benefits, although it did not know the nature of the problem and had not yet received the January 9 letter. One evaluator's comment stated that the nature of the suspected problem was unidentified and that more information was needed. The reference survey covering these contracts, which otherwise rated Trifax's performance as "excellent," identified the issue only as a question that was being investigated by the surveyed contracting agency, the District of Columbia. Also, although the evaluators in the initial evaluation indicated that there were reports of "bounced" checks, as a second reason for downgrading Trifax's proposal, Trifax states that no such checks were issued. The agency has provided no evidence of checks issued with insufficient funds, nor does the record otherwise establish that such reports were anything more than rumor. Since the record evidences that there was no problem with Trifax paying its employees, its point score for this factor should have been higher than as initially evaluated.

the revised regulation applied. See FAC 90-02, Sept. 30, 1997, cover page. This RFP had no such notice.

⁶We note that, although the contracting officer states that she conducted her reevaluation on January 14 and that she considered the omitted reference survey in the reevaluation, the actual reference survey was dated February 6, more than 3 weeks after the reevaluation.

The remaining two areas of concern initially expressed by the evaluators, *i.e.*, Trifax's alleged problems recruiting wellness/fitness providers and allegedly providing only two of the required three contract references, are related. The recruiting issue arose under Trifax's incumbent FOH contract with the Army for sites in several states, which was the same contract that the agency apparently otherwise did not initially evaluate because it erroneously concluded that this reference was not submitted in Trifax's proposal. The record shows that but for the delayed recruitment of 2 of 61 or more positions under that contract, Trifax's performance was ultimately considered "favorable."

Moreover, Trifax's protest letter provided a detailed explanation of why the delay in filling the wellness/fitness provider positions was the agency's fault, and why resolution of the underlying problems was solely within the agency's control. The agency report in response to the protest did not refute the protester's explanation. The protester's comments continue to assert the agency's responsibility for delay in the filling of those two positions. The belated reference survey for the contract corroborates that the agency had some responsibility for this delay.

In light of the above analysis, there appears to be little, if any, support in the record for any of the four reasons relied on by the agency to downgrade Trifax's proposal. While the agency's January 1998 reevaluation upward of the proposal's rating recognized the tenuousness of the initial evaluation, we conclude that the record supports Trifax's argument that even the increased score of [DELETED] points fails to correct the errors in the evaluation. While our Office does not evaluate proposals *de novo*, here a review of the scores of other proposals shows that there is no reasonable basis for a score as low as [DELETED] for a proposal referencing three relevant contracts with favorable references, one of which was an incumbent contract for FOH services. In this regard, the record shows that offerors with similar past performance histories consistently received scores [DELETED]. For example, one of the competitive range proposals that was scored at [DELETED] points had three contracts of similar size and scope to Trifax's contracts, including a FOH services contract of a much smaller scale than Trifax's and a contract with the Army for which it, too, had staffing problems that were apparently considered to be beyond the contractor's control.⁷ Based on this similar contract history, it would seem reasonable that Trifax's score should be similar to that offeror's. Instead, Trifax's score of [DELETED] points is the same score given to another offeror whose proposal referenced only one contract for evaluation purposes (albeit an incumbent FOH contract).

On this record, given the range of scores of the other proposals, it would appear that Trifax's past/present performance score should have been much higher than

⁷The record contains no evidence of particular strengths that would account for the point differential between that offeror's and Trifax's past/present performance.

[DELETED] points, perhaps as high as [DELETED]. When this correction is weighted in the overall evaluation scheme, it alone would raise Trifax's overall score sufficiently--to [DELETED] points--to place Trifax's proposal within the range of scores of the proposals included in the competitive range. Since Trifax's evaluated price was also extremely close to most of the evaluated prices of the competitive range proposals, and [DELETED] than the highest-priced competitive range proposal, we think that Trifax's proposal had a reasonable chance of being selected for award after discussions and resulting proposal revisions. Thus, Trifax's proposal should have been included in the competitive range as it was established. See Safeguard Maintenance Corp., supra, at 4-14.

We recommend that the Army make a new competitive range determination consistent with this decision, conduct discussions, and make a new source selection decision based upon the resulting proposal revisions. If an offeror other than OMV is selected for award, we recommend that the Army terminate OMV's contract and make award to that other offeror. We also recommend that the protester be reimbursed the reasonable costs of filing and pursuing its protest, including attorneys' fees. 4 C.F.R. § 21.8(d)(1) (1998). The protester's certified claim for costs, detailing the time spent and costs incurred, must be submitted to the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Comptroller General
of the United States