

August 28, 1997

P.S. Protest No. 97-07

**WASHINGTON OCCUPATIONAL
HEALTH ASSOCIATES, INC.**

Solicitation No. 102590-96-A-0123

DIGEST

Protest against award of contract for health examinations is denied; with one exception, evaluation of protester's proposal was reasonable, and adjustment of evaluation with regard to the exception would not have required a different award result.

Decision

Washington Occupational Health Associates, Inc., ("WOHA") protests the award of a contract for the performance of health examinations under Solicitation No. 102590-96-A-0123 to Comprehensive Health Services, Inc., ("CHS").

Solicitation -0123 was issued by Purchasing at Postal Service Headquarters on September 30, 1996, seeking offers for the performance of health examinations for individuals in the Postal Career Executive Service ("executives") and for postal inspectors and technical and forensic support personnel ("inspectors").

The following portions of the solicitation are relevant to the protest:

**J.4 INSTRUCTIONS FOR THE PREPARATION OF TECHNICAL AND/OR
BUSINESS PROPOSALS (Provision OA-11) Alternate I (July 1992)**

a. General Instructions. The following instructions establish the acceptable minimum requirements for the format and content of proposals:

1. The proposal must disclose the offeror's technical approach in sufficient detail to provide a clear and concise presentation that includes, but is not limited to, the requirements of the technical proposal instructions. The techni-

cal proposal must not refer to cost, however, resource information (such as data concerning labor hours and categories, materials, subcontracts, etc.) may be contained in the technical proposal so that the offeror's understanding of the statement of work can be evaluated. . . .

2. The Postal Service will evaluate proposals in accordance with the evaluation criteria set forth in Section M of this solicitation.

b. Technical/Management Proposal Instructions.

1. Proposals that merely offer to conduct a program in accordance with the requirements of the Postal Service's statement of work will not be eligible for award. The offeror must submit an explanation of its proposed technical approach in conjunction with the tasks to be performed in achieving the project objectives.

2. A detailed work plan must be submitted indicating how each aspect of the statement of work is to be accomplished. The technical approach must be in as much detail as the offeror considers necessary to explain the proposed technical approach or method fully. The technical proposal must reflect a clear understanding of the nature of the work being undertaken.

3. The technical proposal must include information on how the project is to be organized, staffed, and managed. Information demonstrating the offeror's understanding and management of important events or tasks must be provided. The offeror must explain how the management and coordination of consultant and/or subcontractor efforts will be accomplished.

4. The technical proposal must include a list of names and proposed duties of the professional personnel, consultants, and key subcontractor employees assigned to the project. Their resumes must be included and must contain information on education, background, recent work experience, and specific scientific or technical accomplishments. The approximate percentage of time each of these individuals will be available for this project must be included, and the proposed staff hours for each must be allocated against each task or subtask for the project.

5. The technical proposal must provide the general background, experience, and qualifications of the organization. Information on similar or related contracts, subcontracts, and/or grants should be supplied, including the name of the customer, contract number, dollar amount, time of performance, and names and telephone numbers of the project officer and contracting/grants officer.

6. The technical proposal must discuss present or proposed facilities and equipment to be used performing the contract.

c. The proposal must also include subcontracting information, mentioning all firms contemplated for subcontracted portions of the contract effort and explaining why these firms were selected.

d. Specific Instructions Regarding Price Proposals. The offeror must provide price breakdowns for any line item upon request.

* * *

J.6 PAST PERFORMANCE

The offeror shall provide a minimum of two (2) and no more than four (4) references of applicable past performance. The reference[s] should be either on-going or recently expired contracts for the services that are similar to this effort. The offeror shall provide the following information as it relates to Past Performance/Experience:

- a) Name of customer.
- b) Address of the company.
- c) Contract number.
- d) Annual dollar value of contract.
- e) Period of performance of the contract.
- f) The customer's key technical point of contact.

* * *

- m) A detail[ed] description of what you have done for the customer and how it is applicable to this effort.

Failure to identify most recent references as required . . . above may be treated by the Postal Service as a misrepresentation of material fact.

The Postal Service may obtain and evaluate past performance information from other sources other [sic] than those identified by the offeror.

J.7 PERSONNEL

The offeror shall provide the Postal Service with the resumes of the key personnel for this effort. The offeror shall provide resume information in the following format:

- a) Name of the individual.
- b) Educational background of the individual.
- c) Experience relevant to this contract.

- d) Employment history:
- e) References. Names of at least three (3) References—(Name of contact individual; organization name and address; e-mail address; telephone number(s) and fax number, length of service with each organization). State why the individual experience is applicable to this effort

J.8 ORAL PRESENTATIONS

a. GENERAL. After the submission of offers and written capability information, every offeror [determined by the Contracting Officer to be within the competitive range]^[1] must make a 75 minute presentation to the USPS source selection evaluation panel.

b. PURPOSE. The oral presentation is a capability demonstration, the sole purpose of which is to enable the evaluation panel to assess each offeror's relative level of familiarity with and understanding of the work which, as contractor, it would have to perform under the prospective contract. The offeror's representatives must show by their presentation and by their answers to the Postal Service's questions that they understand the Postal Service's requirements; that they are familiar with the kinds of problems that may develop during performance; and that they are capable of developing practical and effective solutions to those problems.

* * *

e. QUESTIONS. During the presentation the Postal Service attendees will not interrupt the offeror to ask questions (except to request the repetition of inaudible words or statements of the explanation of terms that are unknown to them) or otherwise engage the offeror in any dialogue. The Postal Service will conduct a question and answer session, of approximately thirty (30) minutes, following the oral presentation during which the offeror's representatives must answer questions from the evaluation team. The question and answer session will not constitute discussions nor negotiations. The Postal Service will not consider the offeror's oral presentation and the question and answer session to be part of the offeror's proposal. The USPS will not permit an offeror to discuss or change its proposal during the oral presentation or the question and answer session.

¹ As revised by Amendment A02.

f. DISCUSSIONS. Oral presentations will not constitute discussions. Discussions, if any are to be held, will occur subsequent to oral presentations.

g. TOPICS. During the oral presentation, the offeror must address the following topics:

1. Describe your corporate philosophy with regard to the management of individual examinations. . . .
2. Describe your quality assurance plan with regard to the examining physicians employed by you or under contract to you. . . .
3. Describe the quality assurance procedures in place to ensure that scheduling is managed according to the terms of the contract.
4. It is essential to the Postal Service that billing is handled according to the contract and that our executives and postal inspectors do not receive erroneous bills. Describe the quality assurance procedures in place to ensure that billing is handled as efficiently and error-free as possible and that the billing process is as invisible as possible to the examinee.

* * *

M.3 CONTRACT AWARD AND PROPOSAL EVALUATION (Provision OA-16) (February 1992)

a. Award will be made to the responsible offeror whose proposal offers the best value to the Postal Service, (i.e. a combination of price, price-related factors, and/or other factors). The primary areas to be used in determining which proposal offers the best value to the Postal Service are listed below in descending order of importance:

- Personnel
- Corporate Experience
- Past Performance
- Administrative Procedures
- Facilities

b. Cost/price will be considered in the award decision, although the award may not necessarily be made to that offeror submitting the lowest price.

* * *

Attachment A^[2]

Program Requirements

* * *

Part II

CONTRACTOR REQUIREMENTS

Resources and Experience

The contractor should have a proven record of successful administration of comprehensive medical services. The successful contractor will be required to demonstrate at least the following:

1. An existing, fully operational organization of full-time, part-time and/ or contract examining physicians in all of the examining locations. The examining physician shall be certified by the American Board of Internal Medicine or the American College of Osteopathic Internists. Each examining physician should have x-ray and laboratory facilities conveniently located within or near the contracted medical facility. The contractor should have expertise in sigmoidoscopy and tonometry, audiometry, ophthalmology, and be able to complete all phases of examination in one day. In areas where the examining physician does not have the capability of performing one or more examinations (ex. stress test, sigmoidoscopy), he or she shall make arrangements for the procedure(s) to be performed by board certified specialists located in close proximity to his or her office.
2. An organization with sufficient full-time medical staff to supervise and audit the examining physicians and an established system of quality control. The supervisory staff must include, as a minimum, physicians Board Certified in Internal Medicine, and a second physician Board Certified in preventive medicine.

* * *

² The solicitation contained two Program Requirement attachments, A for executive exams and B for inspector exams. The quoted requirements are from Attachment A; the provisions of Attachment B were similar. One significant difference between the executive exams and the inspector exams was that the former were elective, while the latter were (with some exceptions) mandatory.

Automated Records

The contractor may automate only the information described in items 19 in Part III of this document.^[3] Epidemiological data must be available for study and analysis.

Locations and Number of Examinations

Exhibit 3 reflects the locations where the Postal Service currently has eligible employees stationed, and the estimated number of employees at each location.^[4] The contractor should be able to perform all phases of the examination in one day at a facility not more than 50 miles from each listed location. Should the examining physician be unable to perform one or more examinations (ex. stress test, flexible sigmoidoscopy), he or she shall make arrangements for the procedure(s) to be performed at the nearest facility that meets the qualifications of the contract.

* * *

Part III

Appointment Procedures

The Postal Service will provide the contractor with an initial list of eligible executives at the post award meeting, and will notify the contractor monthly of changes in address and enrollment of eligible executives, including notification regarding executives who are terminated from participation in the pro-

³ Those items were:

1. Name
2. Social Security Number
3. Month and year of birth
4. Address
5. Date last contacted
6. Month and year of last examination
7. Age at last examination
8. Age at next examination
9. Month and year of next examination

⁴ Locations were identified for 945 executives in 46 states, the District of Columbia, and Puerto Rico; locations were identified for 2424 inspectors in 46 states, the District of Columbia, Guam, Puerto Rico, France, and Germany. Approximately 350 executive exams were to be performed each year; the number of complete inspector exams per year ranged from 1114 to 1364.

gram. The contractor will be responsible for contacting eligible executives and scheduling examinations.

The examinations to be performed and the varying intervals at which they are to be administered (according to the age of the executive) are shown in Exhibit 1. Practitioners are to follow these guidelines.

A notification letter shall be sent by the contractor to the examinee at least thirty (30) days prior to the birthday on which he or she is eligible for an examination. The notification shall include the name and location of the examining physician, and the examination procedures for which the executive is eligible. At the same time, the contractor shall provide the examining physician a description of the examination procedures required.

Required Reports

The contractor's records shall be organized so that they will indicate, on a continuing basis, those individuals for whom completed examination reports have not been received. Approximately sixty (60) days after the initial notification letter has been mailed to the examinee, appropriate follow-up attention will be given if no report has been received.

* * *

Part VI

Billing Procedures

The contractor shall render two copies of invoices and one copy of the voucher and suitability statements, on a monthly basis, for all services performed by [sic] the Manager, Corporate Personnel Operations

Any authorized special tests shall be itemized and billed separately from the cost of the basic examination. The amount billed shall be reasonable and appropriate for the test performed and shall be so justified by the contractor.

If an examining physician does not have the facilities for conducting special tests for which he or she has received permission from the contractor's medical director, he or she will make arrangements with a qualified clinic or specialist to conduct the tests. The arrangements shall include a clearly stated provision either that the service provider will pay the clinic or specialist for the test and bill the contractor for reimbursement, or that the clinic or specialist will bill the specialist directly.

UNDER NO CIRCUMSTANCES IS A STATEMENT FOR ANY SERVICES TO BE SENT TO THE EXAMINEE. In the event this should occur, the contractor shall be responsible for resolving the problem in a timely manner by sending payment and correspondence to the provider and any agency (e.g., collection agencies) explaining the situation and resolving the issue to the satisfaction of the Postal Service.

[Emphasis in original.]

The solicitation contemplated an initial one-year term, with four one-year options. Estimated quantities were provided for the basic examination by age and for separately priced procedures for the base term and each option year. Prices were to be evaluated for award “by adding the total price for all option quantities to the total price for the basic quantity.”

Four offers were received. The technical evaluators determined that one offer was “nonresponsive,” and did not score it. Following the oral presentations and written discussions, the remaining proposals were scored by the technical evaluators using the following technical evaluation scheme:

1. Personnel	30
a. Board Certification	
b. Quality of examining Medical Personnel	
c. Quality of medical laboratory used	
d. Quality of staff physicians who view reports	
e. Quality assurance plan, examining physicians (ORAL)	
Corporate Experience	25
a. Nationwide experience	
b. Experience with comprehensive exams	
c. Experience with large firms	
d. Corporate philosophy (ORAL)	
Past Performance	20
Administration Procedures	15
a. Scheduling/follow-up procedures/quality assurance (ORAL)	
b. Reporting (individual and annual)	
c. Billing procedures/quality assurance (ORAL)	
d. Tracking system	
e. Patient relations philosophy	
Facilities	10

- a. Adequate board certified practitioners, where needed
- b. Medical facilities, self-contained

CHS's proposal was scored more highly than WOHA's; its received a total score of 95.395 (a subsequent contracting officer's submission refines it to 95.37); WOHA's score was 73.69.⁵ The scoring plan for the solicitation described scores in excess of 95 as "excellent," and scores of less than 75 but more than 60 as "marginal."

CHS proposed the highest evaluated price, \$6.189 million; WOHA's price was substantially less than CHS's price.⁶

The recommendation for award memorandum which the contracting officer approved includes the following paragraph:

We have a situation here where there are three offerors who have presented proposals All three are recognized professional organizations with good reputations, but obviously from the standpoint of our particular requirements, they have not been found to be equal. . . . [T]he offerors[] which have proposed lower prices than [CHS] . . . have been evaluated . . . and their proposals were judged to be marginal, whereas, the proposal submitted by [CHS] was found to be excellent, was recommended for award Past performance was certainly a factor which worked in the factor of [CHS] since they are the incumbent and their performance has been excellent. Under the circumstances, notwithstanding the price differential, which has been taken into consideration, it is my recommendation that award be made to [CHS] which in my opinion represents the best value to the Postal Service.

Following notice of the award to CHS, WOHA received an oral debriefing and submitted further request for information which was the subject of a written reply.

⁵ The third offeror, which was rated lower technically than WOHA, and which proposed a higher price, did not figure in the evaluation.

⁶ The protester has asserted that various aspects of its proposal, including its technical features and its evaluated price, as well as its evaluated score, and the Postal Service's comments with respect to that score are privileged material, exempt from disclosure under Purchasing Manual (PM) 3.6.7.d.1. While the contents of its unsuccessful proposal no doubt may be privileged, the basis on which it asserts a privilege in the Postal Service's evaluation of that proposal which does not disclose the proposal's contents is not explained and is less obvious. It has not been the practice of this office to issue unredacted versions to the participants pursuant to nondisclosure agreements and redacted versions to others; instead, we have undertaken to discuss privileged contents only in general terms. We have similarly done so here.

WOHA's initial protest contends that its technical evaluation was improperly downrated with respect to the following items:⁷

[II. A. 1.] for offering some physicians who failed to meet a mandatory requirement;

[II. A. 2.] because its key personnel lacked experience with executive physical examinations;

[II. A. 3.] for inadequate quality control feedback (according to the protester, this evaluation comment was withdrawn by the contracting officer before the protest was filed, demonstrating its lack of merit);

[II. A. 4.] for failure to receive more credit than CHS because it had more qualified and certified employed physicians;

[II. B.] for lack of corporate experience with executive physical examinations, that is, examinations which were voluntary on the part of the examinee;⁸

[II. C.] for failing to list equivalent "national" past performance (the debriefing comment evidencing a misunderstanding of the performance described);

[II. D. 1.] for inadequate description of "follow-up" when a physical did not take place;

[II. D. 2.] for failing to explain how it would assure the Postal Service would not be billed for procedures not performed when they were "waived" by the examinee;

[II E. 1.] for failing to have contracts in place with all physicians and other health personnel;

[II. E. 2.] for failure to meet the "same day" requirement for all locations.⁹

⁷ The protester's initial outline numbers are included to track the issues in subsequent references.

⁸ The protest faults the evaluation for giving undue emphasis to the executive evaluations, which comprise only a quarter of the total requirement.

⁹ Noting its extensive facility in Washington, DC, as not matched by CHS, WOHA asserts it should have received a rating as high or higher than the awardee.

WOHA asserts that most of these criticisms arise from misunderstandings of the substance of its proposal, while others reflect requirements not established by the solicitation. WOHA contends [III A.] that the best value determination was flawed; in its view it should have received a technical evaluation “equal to that of the incumbent contractor, or nearly so,” and thus that it should prevail on the basis of its price.

The protest also asserts [III. B.] that the evaluation improperly took into account elements of the oral presentation, contrary to the explicit terms of the solicitation, and further contends [III. C.] that the incumbent’s high score and its low score, demonstrated the technical evaluators’ “pronounced bias in favor of the incumbent. . . .”

The contracting officer’s statement responds to the protest point-by-point, making the following points:

The weaknesses discussed in WOHA’s debriefing were not all of the weaknesses identified by the evaluators.

[II. A. 1.] WOHA’s best and final offer (“BAFO”) does not provide that all local medical providers (that is, its contract service providers) met a mandatory requirement.

[II. A. 2.] While the Postal Service does not challenge the supervisory physicians’ credentials, it also considered the experience of the examining physicians, and determined they lacked “requisite experience with executive physicals.”

[II. A. 3.] This issue was resolved as of the BAFO, and WOHA received credit for its quality control feedback.

[II. A. 4.] An offeror’s absolute number of qualified employed physicians is not determinative; what is important is that the physicians “can do the job required.” WOHA’s employed physicians were not shown to be assigned to this contract.

[II. B.] The Postal Service’s perception of the importance of the EXECUTIVE examinations differs from WOHA’s. The requirements were stated separately, and WOHA was “alerted at discussions” that these examinations were “deemed special . . . because of the importance of the executive examinees . . . and the visibility of the program”

[II. C.] WOHA’s BAFO lacked “enough information . . . to demonstrate WOHA’s nationwide experience with executive physical examinations.”

[II. D. 1.] Neither its initial proposal nor its BAFO described the manner in which follow-up would be accomplished nor did they distinguish between follow-up for executive and inspector examinations.

[II. D. 2.] Solicitation J.8.g.4 sought input on “procedures in place to ensure that billing is . . . as . . . error-free as possible and . . . as invisible as possible to the examinee;” and a question about billing for waived procedures was posed in discussions, but WOHA’s BAFO did not respond to it. The successful proposal described “the relationship between receipt of [the examination] results and the billing process. The successful offeror’s system is computerized; all examination results are entered into the contractor’s data system and the billing statement is system-generated based upon the information in the database.”

[II. E. 1.] The solicitation required that offerors demonstrate their capability of meeting all requirements, and to identify by street address proposed facilities. The evaluators expected to find a list of facilities in WOHA’s proposal, and “the absence of formal agreement with a physician or practice called into question WOHA’s ability to consistently meet contract requirements.”

[II. E. 2.] While WOHA stated that it understood the same-day requirement, its proposal did not explain how it would meet it, in the absence of formal agreements with local providers.¹⁰

[III. A.] WOHA had the opportunity to understand the solicitation’s requirements and “to respond with its best presentation.” Contrary to its assertions, the evaluation was “significant and believable” and “presented a case for not awarding to WOHA” which WOHA’s proposal should not be allowed to second-guess.

[III. B.] Offerors were told at the outset of the oral presentations that information presented there should also be included in their BAFOs, “and for the most part it was.” Evaluators discounted information from the oral presentations unless it was repeated in the BAFOs, so the use of information from the oral presentations was “at worst, a mistaken reference resulting in a harmless error.

[III. C.] The protester’s assertions of bias in favor of the incumbent are “presumptions, unsupported, and offensive,” and require the decision-maker to “question the technical judgment and professionalism of the technical evaluators.”

The protester’s May 5 response to the contracting officer’s statement raises a new protest ground, asserting that the contracting officer’s response has disclosed that

¹⁰ WOHA’s Washington facilities are not relevant to the issue of its facilities nationwide (and overseas) where the protester “failed to demonstrate . . . that they had the required resources at their disposal to deliver in all locations”

CHS's proposal did not meet a mandatory contract requirement because it proposed to automate elements of examinees' records beyond those allowed by the statements of work. Alternatively, WOHA contends that its offer may have been improperly downrated because it proposed to meet the requirement that information other than that specified not be automated, although it had the capability to do more.¹¹

The protester's comments also address the contracting officer's responses to its initial protest, including the following points:

[II. A. 1.] The contracting officer quotes the BAFO out of context; the BAFO does not imply that existing physicians failed to meet the mandatory requirements.

¹¹ The protester contends that this protest issue is timely raised within ten days after its disclosure in the contracting officer's initial statement, citing the second sentence of PM 3.6.4.d. The contracting officer's response does not discuss the issue's timeliness, but contends that the initial characterization of the CHS system in the initial statement was incorrect. We must consider the issue's timeliness since we are without jurisdiction over issues which are untimely raised. *Coopers & Lybrand*, P.S. Protest No. 89-91, March 21, 1990.

PM 3.6.4.d. reads as follows:

In all cases other than those covered by b. and c. above [dealing with protests of improprieties in solicitations], protests by a protester that has received a debriefing shall be received not later than 10 days after the debriefing. In all other cases, the protest shall be received not later than 10 days after the basis of protest is known or should have been known, whichever is earlier. No protest other than one by a protester that has received a timely requested debriefing (see 4.2.8.a) will be considered if received more than 15 days after award of the contract in question.

The equivalent provision of the immediately preceding protest regulation, Purchasing Manual 4.7.8, differed from this provision in two respects. It expressed its time limits in working days, not calendar days, and included a prohibition on the consideration of any protest "received more than 15 working days after award of the contract in question." PM 3.6.4.d removed that prohibition with respect to protests from protesters which, like WOHA here, had timely requested a debriefing, reflecting the results of decisions holding that a delay in a debriefing created an exception to the 15 day restriction. *See, e.g., Morganti Incorporated; Giordano Construction Co., Inc.*, P.S. Protest Nos. 94-01; 94-03, March 4, 1994.

However, under both the previous regulation and the current one the timeliness of an issue asserted in the course of a protest (which is measured individually and does not relate back to the date of the initial protest, *Ed Wilson, Inc.*, P.S. Protest Nos. 96-18, 96-19, February 4, 1997) depends not only on the time which has elapsed between notice (or constructive notice) of the issue, but also on the time elapsed from a separate triggering event, which is, in the context of PM 3.6.4.d, the latter of contract award or a timely requested debriefing. WOHA's timely requested debriefing was held in mid-March. Accordingly, this issue is untimely raised more than ten days after the debriefing and is dismissed.

[II. A. 2.] The contracting officer misquotes the evaluator's comment; since one-third of the examinations were to occur where the supervising physicians work, more credit should have been given for them.

[II. A. 3.] The worksheet contradicts the contracting officer's assertion in identifying this "weakness."

[II. A. 4.] When the awardee showed performance beyond the minimum, it was rewarded in the evaluation; when WOHA showed such performance, it was not, as demonstrated as to the number of employed physicians, a number which the contracting officer does not dispute. WOHA's BAFO did show those physicians' attention to this contract.

[II. B.] WOHA's proposal demonstrated nationwide experience; the claimed distinction between mandated and voluntary exams "is grasping at straws" since patient physiology is the same in either case. The contracting officer's statement affirms WOHA's position since the solicitation did not afford weight to the executive exams equivalent to the far more numerous inspector exams. No statement of their equivalence was made during negotiations, and, if made, could not amend the written solicitation.

[II. C.] The contracting officer's comments ignore the evaluators' misconstruction of WOHA's prior experience, but he concedes the relevance of one prior contract, and WOHA's other cited contracts are similarly relevant. Information said to be lacking about the prior contracts was provided.

[II. D. 1.] WOHA did establish how exams would be scheduled as required; the solicitation did not require distinction in the routines for the two types of exams.

[II. D. 2.] WOHA denies it was asked about "waived procedures."

[II. E. 1.] WOHA demonstrated this capability by past performance and existing capability. The solicitation did not require that the network be in place at the time of the proposal; the Postal Service did not identify the lack of a facility list as a deficiency, and such a requirement would unfairly favor an incumbent. The Place of Performance requirement is informational only, a matter of responsibility, not responsiveness, and may be furnished after proposals are due.

[II. E. 2.] No requirement for formal agreements was stated; and any such requirement would unduly favor the incumbent; WOHA can meet the requirement, as it has in other contracts, by entering into suitable agreements where it does not now have coverage.

[III. B.] Amendment A02 did not permit or announce the use of the oral presentation for scoring; the evaluators clearly relied on information presented during the oral discussions; and there is insufficient evidence to establish the extent of the harm suffered by WOHA from the improper consideration of the oral presentation.

[III. C.] The contracting officer's objections suggests, inappropriately, that protesters may not get postal contracts, objectionably suggesting intimidation or retaliation.

WOHA also objects to the contracting officer's unwillingness to enter into a protective order concerning the contract file, and suggests that we draw appropriate adverse inferences from it.¹²

While the protest was pending, the initial contracting officer was succeeded by a new contracting officer, who submitted the following comments on the protester's further submissions, including comments on some points by his predecessor:

[II. A. 1.] WOHA's BAFO asserted all examiners would meet the mandatory requirements (although it had stated otherwise at its oral presentation), but it noted that all practitioners were not in place. While the BAFO recited an expectation of no difficulty in meeting the requirement, the review panel "correctly question whether WOHA could deliver what it promised without having all of its people in place."

[II. A. 2.] No misquotation occurred; since over two-thirds of the exams were to occur outside the Washington area, the prior characterization was correct.

[II. A. 3.] The comment was made before the BAFO, and should have been stricken when the BAFO was received. An adjustment was made to the numerical scoring, so WOHA was not penalized in this regard.

[II. A. 4.] CHS's proposal identified as many employed physicians as WOHA.

[II. B.] The protester does not understand the distinction between executive physicals ("perks" not required for duty, offered to "our most important, often

¹² This suggestion will not be adopted. The provision of redacted versions of privileged material is fully consistent with PM 3.6.7.d.2. Since the full text has been submitted to the General Counsel for *in camera* review (3.6.7.d.4), no adverse inference is appropriate. "This office does not resolve conflicts between contracting officials and protesters about the release of information." *American Bank Note Company*, P.S. Protest No. 94-02 May 11, 1994 (citations omitted).

most influential, executives and officers”) and mandated law enforcement physical exams, a distinction attempted to be conveyed both in the solicitation and in subsequent discussions. The Postal Service placed equal weight on the two types of exams. It did so “consistently . . . to counter the tendency to underrate the importance of the executive exams and [to] marginalize and eliminate any perceived differences [between the two types]”

[II. C.] WOHA’s past performance was not mischaracterized; they all involved mandated, not elective, examinations similar to the inspector examinations here, and were not relevant to the executive exam requirements. Its proposal’s references to executive physicals only in the context of law enforcement physicals and were specifically cited as relevant to the inspector examinations.

[II. D. 1.] In its context, the reference to scheduling did not appear to relate to either category of examinations; the Postal Service believes that offerors should have understood the need for distinctions in follow-up for the two types of exams.

[II. D. 2.] Accuracy of billing to the Postal Service was a relevant issue since J.8.g.4. required that billing be “error-free” as well as “invisible to the examinee.”

[II. E. 1.] The requirement was not to have a network in place, but to demonstrate the capability of responding to the requirement. WOHA’s proposal did not indicate how the requirements would be met. The requirement gave no necessary advantage to the incumbent; the other unsuccessful offeror met the requirement.

[II. E. 2.] An existing agreement with a subcontractor is entitled to more weight than an offeror’s assurance that an agreement can be obtained.

[III. C.] “[C]ounsel for WOHA has selective woven language from the [contracting officer’s] response to give the impression that protests, and the companies that file them, are considered objectionable at the Postal Service. . . . [I]t is clear that the . . . [contracting officer’s] statement demonstrates a lack of animosity to the protest process [while it] focuses entirely on the language used . . . to question the judgment and motives of individuals involved with this procurement.”

The statement also provided a further breakdown of the BAFO scores of WOHA and CHS.

The protester submitted final comments on the following points addressed in the contracting officer’s second submission:

[II. A. 1.] Representations in the oral presentation could not vary the written proposal. WOHA was not questioned about its ability to perform, and the evaluators overlooked its similar past performance.

[II. A. 3.] WOHA's score for this item remained lower than CHS's.

[II. A. 4.] One of CHS's key personnel is based in New York, and, to WOHA's knowledge, is not employed full time by CHS.

[II. B.] "The [contracting officer] never had reason to doubt that the Postal Service executives would get the highest quality of care." The issues said to be relevant to that care are undisclosed evaluation criteria.

[II. C.] The cited experience was "directly relevant to nationwide executive physicals," the evaluation overlooked the revision in the description of the experience in WOHA's BAFO, and while the contracting officer correctly quotes the BAFO, "the narrative as a whole showed relevance to executive physicals. . . ."

[II. D. 1] There should have been no confusion on this issue, or clarification should have been sought in discussions.

[II. D. 2] The contracting officer's statement may be correct but is irrelevant; the proposal consistently demonstrated the ability to bill properly.

The breakout scores provided by the contracting officer reflect differences not explained by the disclosed record. In various areas, WOHA's score did not improve despite BAFO changes which should have resulted in higher scores; the misunderstanding of WOHA's proposal with respect to its personnel's qualifications had a "devastating" effect on WOHA's evaluation.

DISCUSSION

We restated our well-settled standard for the review of proposal evaluations:

It is not the function of our office to evaluate technical proposals or resolve disputes on the scoring of technical proposals. In reviewing a technical evaluation, we will not evaluate the proposal *de novo*, but instead will only examine the contracting officer's evaluation to ensure that it had a reasonable basis. We will not overturn the determinations of a contracting officer unless they are arbitrary, capricious, or otherwise unsupported by substantial evidence. Similarly, we will not substitute our views for the considered judgment of technical personnel upon which such a determination is premised in the absence of fraud, prejudice, or arbitrary and capricious action.

The protester bears the burden of proving its case affirmatively. This burden must take into account the "presumption of correctness" which accompanies the statements of the contracting officer, and if such allegations do not overcome the presumption of correctness, we will not overturn the contracting officer's position.

Timeplex Federal Systems, Inc., Sprint Communications Company, P.S. Protest Nos. 93-22; 93-24, February 2, 1994. (citations omitted), *quoted in Kelly Services, Inc.*, P.S. Protest No. 95-15, October 27, 1995.

Further, as the Comptroller General has noted, "[i]n determining the rationality of an agency's evaluation and award decision, we do not limit our review to contemporaneous evidence, but consider all the information provided, including the parties' arguments, explanations, and hearing testimony." *Southwest Marine, Inc.; American Systems Engineering Corporation*, Comp. Gen. Dec. B-265865.3, B-265865.4, January 23, 1996, 96-1CPD ¶ 56.

We discuss the protester's specific objections as presented in the initial protest.¹³

The first issue [II. A. 1.] involves whether WOHA suggested that some of its contracted medical providers did not meet a mandatory requirement of the solicitation. The protester contends that language in one portion of the BAFO so understood by the evaluators, when read in context with another BAFO provision, meant instead that fully qualified providers are already in place for most of the Postal Service's required locations.¹⁴ The evaluators' comments also cite a statement made in the course of the oral presentation as indicating that some providers lacked the required qualification; WOHA objects to the consideration of the presentation in the evaluation of offers,¹⁵ and further

¹³ While we have not treated in detail all of the protester's many arguments, they have all been considered in our decision. *Cf. Simms Industries, Incorporated*, Comp. Gen. Dec. B-252827.2, 93-2 CPD. ¶ 206, October 4, 1993.

¹⁴ While the protester's reading of its BAFO statement is more reasonable than that of the evaluators, it is consistent with the evaluator's separate concern that WOHA had not yet established providers for all of the Postal Service's locations, another issue for which its offer was faulted.

¹⁵ The protester's contention that the oral presentation could not be used for evaluation purposes is a misunderstanding of the solicitation. Its various admonitions that the oral presentation would not be considered part of the proposal, and that the question and answer exchange incorporated into that presentation did not constitute discussions did not preclude the use of the information provided in the presentation in the evaluation of the offer. To do so was fully consistent with the purpose of the presentation as stated in the solicitation (*see* J.8.b., *supra*), and failing to consider the presentation in the course of evaluation would have rendered the exercise meaningless since there was no use to which it could have been put. The protester cites *Labat-Anderson, Inc.*, 71 Comp. Gen. 252 (1992) to the contrary, but the facts in that case differ substantially from those here. The evaluators downrated Labat-Anderson for "a lack of under-

(Footnote cont. on next page.)

contends that the asserted statement was not made. That issue need not be resolved, however, because both WOHA's proposal and its BAFO contained the representation that its clinics were staffed with providers meeting the requirement, and explained how new providers would be "vetted" for that requirement. In addition, the BAFO reiterated that only approved providers would render services. WOHA's proposal should not have been downrated in this regard.

WOHA next objects [II. A. 2.; II. B.] to its evaluation for lack of experience with executive (non-mandatory) examinations on two grounds; first, that the importance of the factor was overstated in the evaluation when it was treated as importantly as its experience with law enforcement exams, even though there were many more of those exams than executive exams, and because it was not given appropriate credit for the experience with such exams identified in its proposal and BAFO.

The contracting officer has elaborated the reasons why the evaluators considered the two types of examinations of equal importance, and those reasons are not without substance. That equivalence was, according to the contracting officer, identified in the course of discussions, and the protester's unelaborated denial that it was not is insufficient to overcome that assertion. The protester's contention that information imparted in the course of discussions could not alter the evaluation criteria is incorrect, since WOHA had the opportunity to revise its proposal to reflect the change. *Cf. Systems Group Associates, Inc.*, Comp. Gen. Dec. B-198889, May 8, 1981, 81-1 CPD ¶ 349.

WOHA points to various portions of its BAFO's discussions of its prior experience and the qualifications of its principals as constituting evidence of its experience with executive-type examinations. Our reading of those portions, however, supports the contracting officer's characterization; the primary focus of the experience cited by the offeror is related to the law-enforcement portion of the work, and the executive references are incidental and nonspecific. It was reasonable for the proposal to receive less than the full score in that regard.

The protester asserts that it did not receive credit for its BAFO's revised discussion of quality control feedback [II. A. 3]; the contracting officer asserts that it did. The pro-

(Cont. from previous page.)

standing or consensus among its team members" in the course of an oral presentation which the GAO attributed to "the agency's clear failure to provide any guidance to offerors about the expected content or importance of the oral presentations" and the agency also disregarded two of the four stated evaluation factors in its evaluations. Here, in contrast, offerors were fully advised of the expected format and content of the oral presentations, and the information obtained on the topics designated for presentation was incorporated into the evaluation scheme.

tester's objection appears to be that since it did not receive the maximum possible score with respect to that evaluation factor, the prior evaluation must have been carried forward. In light of the contracting officer's explanation, this contention lacks merit.

WOHA contends [II. A. 4] that it was entitled to more credit than the awardee with respect to its employed physicians. The two proposals each identify the same number of employed physicians and the awardee's proposal assigns more of its employed physicians' time to the postal contract than does WOHA's proposal. The protester has not established that the evaluation on this point was erroneous.

The protester also contends [III. C.] that it did not receive adequate credit for its existing national experience. The contracting officer's explanation for the scoring to which the protester objected had to do with the nature of an existing WOHA contract with national reach as relating only to experience with law enforcement examinations, not executive examinations, although the protester's initial objection was based on the evaluator's asserted mischaracterization of the nature of an existing WOHA contract for law enforcement related examinations in another respect. The initially asserted mischaracterization resulted in part from the proposal's lack of detail with respect to the size of the sub-groups for whom the services were provided, and as such was fairly attributable to the protester. The contention that the protester was not adequately scored for executive examination experience with respect to the reference arises out of a revision to the description of the services provided in the BAFO. While that revision did identify a "major" executive examination program as one of two parts of the referenced services, nothing described the extent of the executive program in terms consistent with the services described in the postal solicitation.¹⁶ The information provided was insufficient to warrant the full credit for which the protester contends.

The protester objects [II. D. 1.] to its score with respect to follow-up when an examination did not occur. The contracting officer faulted the proposal for failure to explain whether the procedure was automated or manual, for failure to distinguish between inspector and executive follow-up, and for providing only one follow-up letter. The protester contends that the proposal clearly stated that "exam scheduling routines" were automated, that no distinction between exam types was required, and that the absence of additional follow-up letters was not a serious deficiency.

While the proposal does describe automated exam scheduling routines as represented, elsewhere it characterizes follow-up as dependent on telephonic inquiry to the office of

¹⁶ Thus, for example, the BAFO did not describe the geographic scope within which the executive examinations were provided or of what elements the executive examinations were comprised. Similarly, there was no discussion whether the executive examinations were voluntary or mandatory.

the physician where the examination is to occur, creating reasonable doubt whether follow-up is included within exam scheduling. Further, while the solicitation does not prescribe different procedures for follow-up for the different types of exams, the differing natures of those exams as voluntary or mandatory suggests differences in consequences which would warrant different approaches to follow-up,¹⁷ and lesser credit for proposals which did not recognize those differences is not unreasonable. “We see no basis to reject as unreasonable an agency’s higher rating for a proposal that offers more detail concerning the technical approach.” *Payco American Corporation*, Comp. Gen. Dec. B-253668, Oct. 8, 1993, 93-2 CPD ¶ 214.

WOHA contends that it should not have been downrated for failing to explain how it would assure that the Postal Service would not be billed for procedures scheduled but not performed in the course of an examination because the examinee “waived” them. The contracting officer contends that all offerors were asked about such waived procedures in negotiations; the protester denies that they were, noting instead the solicitation’s and oral presentation’s concerns about examinees not being billed. As discussed above, we credit the contracting officer’s characterization of the discussions. Further, as the contracting officer notes, while the solicitation’s discussion of proposal content did include various references to the avoidance of examinee billing, it also noted the need for billing as “efficient[] and error-free as possible,” and directed that proposals address quality assurance in that regard. While WOHA’s proposal addressed quality assurance in general terms, and also addressed billing issues with respect to additional tests performed, it did not specifically address assuring the accuracy of billing procedures in general or with respect to omitted procedures.

The protester objects [II. E. 1] to the reduction in its score because it did not have a full network of medical providers in place. It contends that no such requirement existed, and that it adequately showed its capability to provide the required services.

The contention that the solicitation did not require that a network of medical providers be in place overlooks its advice that “[t]he successful contractor will be required to demonstrate at least . . . [a]n existing, fully operational organization of full-time, part-time and/or contract examining *physicians in all of the examining locations.*” (Attachment A, Part II, *supra*, emphasis added.) To the extent that it now objects to such a requirement, its objection is untimely raised, since the requirement was “an alleged impropriety . . . apparent before the date set for the receipt of initial proposals” and thus only subject to challenge before that date. PM 3.6.4.b.

¹⁷ The offered follow-up letter related to a voluntary examination, not a mandatory one.

It is not possible to discern from WOHA's BAFO much about the content of its provider network. While the BAFO includes "a partial list of cities" where WOHA has local providers, nothing in the BAFO relates those cities to the locations identified in the solicitation, nor identifies the providers in those cities by name, specific qualifications, or address (as would be necessary in some instances to determine compliance with the solicitation's "50 mile" requirement). These omissions were clearly inconsistent with the following portions of Provision J.4, *supra*:

a. General Instructions. . . .

1. *The proposal must disclose the offeror's technical approach* in sufficient detail to provide a clear and concise presentation that includes, but is not limited to, the requirements of the technical proposal instructions. . . .

* * *

b. Technical/Management Proposal Instructions.

1. Proposals that merely offer to conduct a program in accordance with the requirements of the Postal Service's statement of work will not be eligible for award. *The offeror must submit an explanation of its proposed technical approach* in conjunction with the tasks to be performed in achieving the project objectives.

* * *

6. The technical proposal *must discuss present or proposed facilities* and equipment to be used performing the contract.

c. The proposal must also include subcontracting information, *mentioning all firms contemplated for subcontracted portions of the contract effort* and explaining why these firms were selected.

(Emphasis added.)

WOHA's proposal was appropriately downrated for its omission of specific information about the identity of its contract providers and the extent to which its existing provider network met the Postal Service's requirements.

The protester also complains [II. E. 2] that its proposal was improperly scored for failing to meet the requirement that all required procedures be performed on the same day, either at the provider's facility or nearby. The protester contends that it was improperly faulted for a lack of formal agreements in all locations. As discussed above, given that the requirement that an in-place network of providers be demonstrated was set out in

the solicitation, the proposal could reasonably be evaluated less favorably for the absence of information about the extent of the existing network and its capabilities.

The contention [III. C.] that the evaluator's scores demonstrate bias in favor of the incumbent fails for lack of proof.

In the absence of clear evidence to the contrary, . . . it must be presumed that the government acted in good faith [T]he plaintiff bears an extremely heavy burden of proving the contrary, and the government is prevented only from engaging in actions motivated by a specific intent to harm the plaintiff. The difficult burden of proof for a plaintiff attempting to show 'government bad faith' has been outlined as follows:

[i]t requires 'well-nigh irrefragable proof' to induce the court to abandon the presumption of good faith dealing. In the cases where the court has considered allegations of bad faith, the necessary 'irrefragable proof' has been equated with evidence of some *specific intent to injure the plaintiff*. Thus, in *Gadsden v. United States*, 78 F.Supp. 126, 127, 111 Ct.Cl. 487, 489-90 (1948), the court compared bad faith to actions which are 'motivated alone by malice'. . . . Similarly, the court in *Struck Constr. Co. v. United States*, 96 Ct.Cl. 186, 222 (1942) found bad faith when confronted by a course of Governmental conduct which was 'designedly oppressive.'

A-Transport Northwest Co., Inc. v. United States, 27 Fed.Cl. 206, 220 (November 25, 1992), quoting *Kalvar Corp. v. United States*, 211 Ct.Cl. 192, 198-99, 543 F.2d 1298, 1301-02 (1976), *cert. denied*, 434 U.S. 830 (1977)(some citations omitted; emphasis in original).

"Procurement officials are not required to attempt to equalize competition to compensate for the experience, resources, or skills that one offeror has obtained in the course of performing a prior contract or because of one offeror's own particular circumstances. . . . The test is whether the competitive advantage enjoyed by a particular firm is the result of a preference or unfair action by the government." *T.J. O'Brien Company, Inc.; Bell Atlanticom Systems, Inc.*, P.S. Protest No. 87-83, September 17, 1987. Despite the strenuous language with which it presses its claim, and to which the contracting officer has responded in kind, WOHA has not demonstrated that the Postal Service's actions were improper.

Having concluded that the evaluation was not flawed, for the most part, the question remains whether the one error identified, the mischaracterization of the qualification of some of the offeror's providers, improperly prejudiced the offeror.

Price/technical tradeoffs may be made, and the extent to which one may be sacrificed for the other is governed only by the test of rationality and consistency with the established evaluation factors. Awards to offerors with higher technical scores and higher prices are thus proper so long as the result is consistent with the evaluation criteria and the procuring agency has reasonably determined that the technical difference is sufficiently significant to outweigh the cost difference.

OK's Cascade Company; Western Catering, Inc., Comp. Gen. Dec. B-257543, B-257562, 94-2 CPD ¶ 141, October 14, 1994.

In its final submission, the offeror identified three subfactors which it asserts were adversely affected by the error: 1.a., Board certification; 1.b., Quality of examining medical personnel; and 5.a., Adequate board certified practitioners, where needed.

If WOHA's scores were revised to equal CHS's scores for each of these subfactors,¹⁸ its overall evaluated score would rise from 73.69 to 78.43, improving it from "marginal" to "average" in terms of the adjectival scoring system used, but leaving it with a score which remains substantially lower than that of the awardee. The difference in the scores would have remained sufficient to allow the contracting officer to make a reasonable price/technical tradeoff in favor of the higher-ranked technical award. Accordingly, the evaluation error did not affect the award.

The protest is dismissed in part and denied in part.

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Contract Protests and Policies

¹⁸ CHS's score, rather than the maximum possible score for each subfactor, was selected because the contracting officer's statement does not disclose the weighting breakdown by subfactor and WOHA's protest does not contend that it should have been scored higher than CHS as to these subfactors. It is highly unlikely that WOHA's scores on factors 1.b. and 5.a. would have been as high as CHS's scores, given that its proposal did not identify or provide information about the qualifications of any of its contracted examining medical personnel as to the first factor, nor did it demonstrate that it had local providers in place for all of the examining locations as to the second.