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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

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Decision

Matter of: Innovative Management, Inc.

File: B-291375

Date: November 20, 2002

Theodore M. Bailey, Esq., and Johnathan M. Bailey, Esq., for the protester.
Mike Colvin, Department of Health and Human Services, for the agency.
John L. Formica, Esq., and James A. Spangenberg, Esq., Office of the General
Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester was not prejudiced by agency's alleged loss of protester's original transparencies for its oral presentation, where agency provided protester with copies of the transparencies that protester used during its oral presentation, and nothing in the record suggests that the lack of the original transparencies and use of copied transparencies had any effect on the evaluation.

DECISION

Innovative Management, Inc. protests the award of a contract to Medical Business Consultants (MBC) under request for proposals (RFP) No. 232-03-0001, issued by the Department of Health and Human Services, for clinical operations services.

We deny the protest in part and dismiss it in part.

The RFP, which was restricted to firms certified under the Small Business Administration's section 8(a) program, provided for the award of a labor-hour, personal services contract for a base period of 1 year with four 1-year options. RFP at 90, 121. The RFP stated that award would be made to the offeror whose proposal represented the best value to the government based upon the following evaluation factors: technical merit, past performance, and price. The RFP provided that technical merit would "receive paramount consideration" in the agency's award determination. RFP at 134.

The RFP provided that offerors whose proposals had been determined by the agency to be in the competitive range would be invited to make oral presentations addressing the offerors' "Understanding of the Problem and Technical Approach to accomplishing the goals and objectives of this solicitation." Offerors were requested

to submit with their initial proposals a maximum of “25 view graph style briefing charts” to support such a presentation. RFP at 127. The offerors were also informed that after they had finished their oral presentations, the agency would administer a “pop quiz” consisting of three problems. RFP at 129.

The agency received four proposals, including Innovative Management’s and MBC’s, by the RFP’s closing date of July 29, 2002. The proposal of Innovative Management was evaluated as “acceptable” with “moderate risk” under the technical evaluation factor, and “moderate risk” under the past performance factor, at an evaluated price of \$26.1 million.¹ MBC’s proposal received a rating of “acceptable” with “low risk” under the technical factor, and “very low risk” under the past performance factor, at an evaluated price of \$21.4 million. Only the proposals of Innovative Management and MBC were included in the competitive range. Agency Report (AR), Tab 17, Competitive Range Determination, at 2.

Oral presentations were scheduled and conducted on August 14. At the time of Innovative Management’s oral presentation, the agency was unable to locate the transparencies that Innovative Management had provided with its proposal. The agency, however, had photocopies of the original transparencies, and reproduced a set of transparencies from the photocopies, which Innovative Management used in its oral presentation. Contracting Officer’s Statement at 12.

The agency next forwarded written discussion questions to both Innovative Management and MBC, and requested that the offerors submit final revised proposals (FRP) by August 23, 2002. The agency evaluated the FRPs, considering the content of the offerors’ proposals, as well as the offerors’ oral presentations and responses to the agency’s “pop quiz” questions. MBC received ratings of “good” with “low risk” under the technical factor, and again was rated “very low risk” under the past performance factor, with its evaluated price remaining at \$21.4 million. Innovative Management received ratings of “good/satisfactory” with “moderate risk” under the technical evaluation factor, with its “moderate risk” rating under the past performance factor and evaluated price of \$26.1 million remaining as before. The agency selected MBC’s proposal for award, given its higher technical rating and lower price. AR, Tab 27, Revised Technical Evaluation Report and Contract Award Recommendation.

Innovative Management argues that the agency erred in not having Innovative Management’s original transparencies available for its use during its oral presentation. The protester asserts that its use of copies of its transparencies “placed [it] at a disadvantage in comparison with the other competitors whose

¹ As set forth in the RFP, the offerors’ technical proposals were evaluated for technical merit as well as proposal risk. The offerors’ past performance proposals were evaluated for performance risk. RFP at 134-36.

presentation materials were available for their use,” and made Innovative Management appear “unprepared and unprofessional.” Protest at 5; Protester’s Comments at 2.

Prejudice is an element of every viable protest, and our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency’s actions, that is, unless the protester demonstrates that, but for the agency’s actions, it would have had a substantial prospect of receiving award. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996).

The record here, which consists of, among other things, the individual evaluator score sheets for the oral presentations, does not contain any evidence that the agency’s evaluation of Innovative Management’s oral presentation was affected by Innovative Management’s use of copied transparencies rather than originals. For example, while the record provides numerous statements regarding the strengths and weaknesses of Innovative Management’s proposal and oral presentation, there is no mention or any other indication that any of these statements resulted from, or were somehow affected by, Innovative Management’s use of copied transparencies. Accordingly, we fail to see how Innovative Management was prejudiced by the agency’s alleged error in not having Innovative Management’s original transparencies available for use during its oral presentation.

The protester next complains that the solicitation was defective because it requires that the successful contractor maintain medical malpractice insurance.

The solicitation as issued required that the successful contractor maintain insurance as specified in Department of Health and Human Services Acquisition Regulation § 352.228-7, Insurance--Liability to third persons. The record reflects that a representative of the protester contacted the agency shortly after oral presentations and stated that it did not believe that malpractice insurance should be a requirement of the solicitation. The protester also complained here that in any event the clauses in the solicitation that the agency interpreted as requiring malpractice insurance were defective in that they did not provide information regarding the dollar amount of malpractice insurance required. AR, Tab 24, Memorandum to Document Oral Negotiations with Innovative Management (Aug. 19, 2002), at 1-2. The agency responded to the protester’s concerns by issuing amendment No. 5 to the solicitation, which specified that “[c]ontractors are required to obtain and maintain, for the life of the contract, malpractice insurance” of “\$1 Million per occurrence and \$3 million per year.” RFP, Amend. No. 5 (Aug. 20, 2002), at 2. Innovative Management submitted its FRP on August 23, filed an agency-level protest challenging the terms of the solicitation on September 4, and filed its protest with our Office on September 10.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. They specifically require that a protest based upon alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of proposals must be filed before that time. 4 C.F.R. § 21.2(a)(1) (2002). This rule includes challenges to alleged improprieties that do not exist in the initial solicitation, but which are subsequently incorporated into it; in such cases, the solicitation must be protested not later than the next closing time for receipt of proposals following the incorporation. Id.; see Cessna Aircraft Co., B-261953.5, Feb. 5, 1996, 96-1 CPD ¶ 132 at 16. In this respect, our timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. Dominion Aviation, Inc.-Recon., B-275419.4, Feb. 24, 1998, 98-1 CPD ¶ 62 at 3.

Considered most favorably to the protester, the solicitation's requirements regarding malpractice insurance were clear as of the agency's issuance of amendment No. 5 on August 20. Accordingly, because the protester did not file its protest challenging the malpractice insurance requirements prior to the submission of its FRP on August 23, its protest is untimely.

The protest is denied in part and dismissed in part.

Anthony H. Gamboa
General Counsel