Crowley
9 Nov 79

DECISION

THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

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FILE: B-190401 DATE: February 6, 1979

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MATTER OF: Group Hospital Service, Inc.
(Blue Cross of Texas)

DIGEST: [Award of CHAMPUS Program Contract Protested]

1. Protest allegation that negotiated procurement should have been formally advertised which is raised after closing date for receipt of proposals is untimely under GAO Bid Protest Procedures and therefore not for consideration.

2. Where solicitation does not require award to be made in accordance with results of numerical point scoring of proposals, agency is not required to award contract to offeror whose overall proposal is rated two points higher than competing proposal.

3. Where source selection official, after taking into account all evaluation criteria, i.e., both price and technical factors, finds proposals to be "tied" and is unable to make a selection, he properly may consider other factors which are rationally related to specific procurement involved, and such consideration does not violate general rule that awards are to be based on established evaluation criteria.

4. Source selection official's consideration of incumbency status of one offeror and of disruptive effect of changing contractors is reasonable under circumstances where proposals are viewed as "tied" and official seeks appropriate discriminators on which to base award selection.

5. Solicitation provision permitting firm's status as labor surplus area concern to be considered in case of tie bids is intended for use primarily in formal advertising and in negotiated procurements where award is to

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be made on basis of price. Where, however, proposals are "tied" based on evaluation of both technical and price factors, consideration of labor surplus area concern status would not be improper and would not involve violation of Maybank Amendment.

6. Agency's reliance on offeror's claim to be labor surplus area concern by virtue of performing contract to be awarded in area of substantial unemployment was improper where Department of Labor (DOL) had removed designated area from list of such areas several months prior to evaluation and award and so informed Federal agencies. Fact that agencies were notified through monthly notices instead of revision to DOL's formal publication referenced by applicable agency regulation does not change fact that agency had duty to verify offeror's claim and in so doing to seek out latest available information.

7. Agency's actions allowing one offeror, during so-called "pre-award survey", to make its proposal more favorable by offering earlier starting date constituted discussions and should have resulted in new request for best and final offers from other offeror in competitive range. However, agency's actions, while procedurally deficient, appear not to have been materially prejudicial since record suggests that earlier starting date was not significant factor in selection decision.

8. Since selection decision may have been influenced by erroneous view that awardee was labor surplus area concern, recommendation is made that source selection official reconsider his decision. If it is determined that award should have been made to protester, it is further recommended that contract be terminated and award made to protester.

Group Hospital Service, Inc. (Blue Cross of Texas) of Dallas, Texas (GHS) with its proposed subcontractor, Management Data Communications Corporation of Rosemont, Illinois, protests the award of a contract to Mutual of Omaha Insurance Company of Omaha, Nebraska (Mutual) by the Office of Civilian Health and Medical Program of the Uniformed Services, Department of Defense, Denver, Colorado (OCHAMPUS) for the implementation and operation in the State of Texas of a CHAMPUS fiscal intermediary system as the result of request for proposals (RFP) No. MDA-906-77-R-0031. GHS contends that award of the contract was not made in accordance with the criteria set forth in the RFP and that the contract services should have been procured by means of formal advertising, rather than negotiation. GHS requests this Office "to cancel" the award to Mutual and have the contract awarded to GHS.

CHAMPUS is a health benefits program administered by the Secretary of Defense. The fiscal intermediary contractor provides services necessary to receive, adjudicate and pay health benefit claims from eligible beneficiaries and providers to beneficiaries of the program on an area basis, usually a single state or group of states. The contractor is required to perform substantial administrative and automated data processing (ADP) tasks.

The RFP, as originally issued, required proposals to be received by October 12, 1977, and provided for a one year period of contract performance from February 1, 1978 through January 31, 1979, with an option for an additional year. After receipt of initial proposals, no written or oral discussions were held with any offeror. Amendment No. 1, dated November 3, 1977, was issued which changed the contract period to March 1, 1978 through February 28, 1979, and added a second option year. Best and final offers were required by November 16, 1977. Four proposals were received as a result of the solicitation, and all were found to be technically acceptable.

The offers were reviewed by a Source Selection Evaluation Board (SSEB) and a Source Selection Advisory Council (SSAC). On December 14, 1977, the Council recommended to the Source Selection Authority

(SSA), Director, OCHAMPUS, that Mutual be awarded the contract. However, further evaluation of the Mutual and GHS proposals was directed due to their competitive closeness. (The highest ranked proposal was eliminated from the competition for other reasons.) During the evaluation and negotiation period, Mutual offered to accept a no-cost termination of its then current cost contract with OCHAMPUS for fiscal intermediary services in Texas and to start performance under the new contract on January 1, 1978. The Council, on December 28, 1977, again recommended award to Mutual; the SSA approved the recommendation on that date. The contract, effective January 1, 1978, was executed by the contracting officer on January 9, 1978 and by Mutual on January 13, 1978. The option for the first follow-on year has been exercised.

Section D of the RFP set forth the following four major technical evaluation criteria in descending order of importance: administration, utilization/peer review, claims processing and payment, and management capability. Price was considered less important than the technical evaluation. Paragraph D-1 provided that:

> "These proposals shall be evaluated on the basis of the offeror's demonstrated performance or its plan for accomplishment of each function, with greater weight being accorded actual performance criteria."

Numerical scoring of proposals resulted in a 4-point advantage for Mutual in the technical area (with a 3-point advantage to Mutual in the most important category of administration) and, in recognition of GHS's lower prices, a 6-point advantage for GHS in the price area, with a resulting combined score of 768 to 766 in favor of GHS. The proposal of another offeror, Blue Cross of California, was assigned a somewhat higher score, but the SSAC recommended against acceptance of that proposal. The SSAC also viewed GHS and Mutual as virtually tied, but recommended that award be made to Mutual. The SSAC's rationale is explained in its December 14, 1977 memorandum to the SSA as follows:

"The Source Selection Advisory Council has completed its evaluation * * * and has determined that all proposals are technically acceptable. * * *

" * * * Mutual of Omaha and Blue Shield of California tied for the top ranking in the category of Administration; however, [the GHS] score was only three (3) points less than that of the top offerors. The category of Claims Processing and Payment was also demonstrative of the keen competition that prevailed between the top three offerors. Although that applicable portion of the proposal submitted by Blue Cross Blue Shield of Texas was excellent, Mutual of Omaha and Blue Shield of California are currently OCHAMPUS' two largest contractors with excellent systems in actual operation which accounts for the slight difference in scores. * * *

"In summation, the SSAC is of the opinion that the scoring process has resulted in a rank-order for the top three offerors that is too close to depend completely on for the final decision. * * *

"Therefore, the SSAC has considered several additional factors in arriving at its final recommendation. First, Blue Shield of California's production capacity must be reviewed since they have just recently been awarded the high-volume Florida/Puerto Rico contract. Award of this contract to their existing business could seriously impair their ability to effectively perform, thereby jeopardizing not one, but four, contracts. Furthermore, award to Blue Shield of California would give them 50% of the existing OCHAMPUS business which could be a serious disadvantage in assuring effective control

> of the OCHAMPUS program. Therefore, it is recommended that award should not be made to Blue Shield of California.
>
> "Only two points marked the difference between the 2nd and 3rd offerors. BC/BS of Texas submitted an excellent proposal including a price that would result in a first-year price reduction of $207,030 when compared to Mutual of Omaha. The latter is, of course, the incumbent contractor for the State of Texas and is an effectfve performer. Although the SSAC feels that BC/BS of Texas could also do an effective job the disruptive aspects necessitated by the changeover of contractors could be detrimental to both provider and beneficiary relations which have just recently been redressed. In addition, it is estimated that a considerable portion of the $207,030 savings could be lost in transition costs charged by the losing contractor. Therefore, it is in the best interest of the Government to accept the most responsive offer price and other factors considered, and the SSAC recommends that award be made to Mutual of Omaha."

As previously indicated, the SSA did not accept this recommendation, but directed further evaluation, after which the SSAC again recommended that Mutual be awarded the contract. The SSAC's later memorandum stated, inter alia:

> "2. After considerable discussion it was mutually agreed that this competitiveness dictated additional discussion with these two offerors to assure full understanding of the proposals. A list of twelve questions were prepared for a formal interview. These questions were designed to (1) cover the major factors that affect the fiscal intermediary process; and (2) uncover any weaknesses which could not be ascertained by reading the proposals.

"3. Attached as exhibits I and II are the pre-award survey reports on Mutual of Omaha and Blue Cross/Blue Shield of Texas. Although no significant weaknesses were noted as a result of these surveys, the following positive factors are noted:

A. Mutual of Omaha has an experience base which ably reflects their long-term tenure as an OCHAMPUS contractor. This base is further substantiated by excellent training programs which are structured to maintain high quality assurance standards.

B. Blue Cross/Blue Shield of Texas has availability to a much broader statistical base relative to reasonable charges, physicians profiles, hospital reimbursement, and UR [Utilization Review] and PR, [Peer Review], as a result of their operation in Texas.

C. Blue Cross/Blue Shield of Texas has clearly demonstrated that the 23 sub-offices will have trained personnel to handle beneficiary relations. This also is a positive factor for provider relations except that the current physician participation rate experienced by the Medicare program is 65% to 70% which is comparable to the low rate currently experienced by OCHAMPUS.

D. Although Blue Cross/Blue Shield of Texas misinterpreted the question on control of the ADP system, their technical proposal discusses tighter controls than other offerors employing the same ADP system.

E. The incumbent made a firm statement that they would accept a firm fixed-price contract immediately vice 1 March 1978.

Assuming a start-work date of 1 January 1978, OCHAMPUS could save approximately $34,000 over the next two months (75,000 claims x ($5.70 - $5.25).

$5.70 = Cost reimbursement negotiated claim rate
$5.25 = Range 1 firm fixed price.

"4. In summation the SSAC is of the opinion that, although the formal interviews clarified certain facts, no substantial weaknesses were found to exist. Therefore the award recommendation to Mutual of Omaha Insurance Company is reaffirmed based on the following factors:

A. The factors determined to fall outside the normal evaluation process which were discussed in the 14 December 1977 memorandum; or

B. A determination that the evaluation process (inclusive of the pre-award surveys) has resulted in tie bids. This would necessitate award to Mutual of Omaha Insurance Company since they are located in a labor surplus area and have claimed preference as a labor surplus area concern. Exhibit III is an excerpt from their business proposal which clearly substantiates their claim.

"The evaluation process justifies the latter determination and it is the recommendation of the SSAC that award be made to Mutual of Omaha Insurance Company based on the proposal received, price and other factors considered inclusive of the labor surplus preference."

The SSA, in accepting the recommendation of the SSAC, did not specify any particular reason for his action. His memorandum merely references the SSAC's December 14 and 28 memoranda and states that Mutual "is hereby selected for award."

GHS enumerates several reasons why it believes the award to Mutual was improper:

1. GHS received a higher combined technical and price proposals score but award was still made to Mutual because of the "incumbency" of Mutual and the associated convenience to the Government in not having to change contractors, which was not in accordance with the award evaluation criteria set forth in the RFP.

2. Award was also made to Mutual because Mutual was believed to be a labor surplus area concern which was not, in fact, so.

3. Award to Mutual did not result in the lowest ultimate cost to the Government as GHS's proposal price was $201,810 less than Mutual's for the contract year with additional savings for the option years.

4. The contract services should have been procured by means of formal advertising rather than negotiation.

5. GHS was not afforded the opportunity to discuss a change in the contract start date to January 1, 1978 or revise its proposal in that regard after Mutual offered the earlier start date.

Thus, GHS essentially protests 1) OCHAMPUS' failure to make award on the basis of the numerical scoring results and the lower costs associated with the GHS proposal and 2) its decision to rely instead on Mutual's incumbency and labor surplus area concern status. (The assertion that the procurement should have been formally advertised is untimely and will not be considered since it relates to an alleged solicitation deficiency and therefore should have been made prior to the initial closing date for receipt of proposals. See 4 C.F.R. 20.2(b)(1).)

Point scores are often used by agencies in the evaluation of proposals. When a solicitation sets forth a precise numerical evaluation formula and provides that award will be made on the basis of the high score, the highest scored acceptable proposal should be selected for award. Telecommunications Management Corporation, 57 Comp. Gen. 251 (1978), 78-1 CPD 80. In most cases, however, a solicitation will indicate the relative weights of the evaluation criteria, but will not explicitly provide for award on the basis of a numerical score.

> "In such cases, award need not be made to the offeror whose proposal receives the highest number of evaluation points, since point scores need not determine the outcome of a competitive source selection, but are merely guides for decisionmaking by source selection officials whose job it is to determine whether technical point advantages are worth the cost that might be associated with that higher-scored proposal. See Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD 325 and cases cited therein." Telecommunications Management Corp., supra, 57 Comp. Gen. at 254.

In this case, despite the 4-point scoring advantage Mutual had in the technical area and the overall 2-point scoring advantage in favor of GHS, and despite the OCHAMPUS assertions, in response to the protest, that Mutual was selected for award on the basis of its technical superiority, the record clearly reflects that both the SSAC and the SSA viewed the two competitors as essentially equal overall. Under such circumstances, and since the RFP did not mandate award in accordance with the results of point scoring, there was no requirement that award be made to GHS merely because of the higher total point score assigned its proposal vis-a-vis the Mutual proposal.

Where competing proposals are regarded as essentially equal technically, cost or price, even when designated as a relatively unimportant evaluation

factor, usually becomes the award determinant. See, e.g., Computer Data Systems, Inc., B-187892, June 2, 1977, 77-1 CPD 384, aff'd on reconsideration August 2, 1977, 77-2 CPD 67; Bunker Ramo Corporation, 56 Comp. Gen. 712 (1977), 77-1 CPD 427, aff'd on reconsideration B-187645, August 17, 1977, 77-2 CPD 124. Here, however, the situation is somewhat different. The Mutual and GHS proposals were not viewed as equal technically; rather, they were viewed as "a tie" on the basis of the overall scoring, that is, on the basis of both technical and price considerations. In other words, although there was a lower cost associated with the GHS proposal, there was more technical value associated with the Mutual proposal. It was only when the more technically advantageous but more costly Mutual proposal was compared with the less costly but less technically advantageous GHS proposal on an overall basis that OCHAMPUS determined that the competing proposals were virtually equal. This evaluation approach is similar to others where there is a numerical cost/technical trade-off. See Corbetta Construction Co., 55 Comp. Gen. 201 (1975), 75-2 CPD 144 and TGI Construction Corporation, et al., 54 Comp. Gen. 775 (1975), 75-1 CPD 167, where cost/quality ratios were computed, and Bell Aerospace Company, 55 Comp. Gen. 244 (1975), 75-2 CPD 168, where the technical point scores were "normalized" to reflect the dollar value of technical point spreads between competing proposals. The situation is unusual, however, because the SSA found himself unable to make a reasoned judgment that the cost premium involved in making award to Mutual would or would not be justified in light of the technical superiority of Mutual's proposal. See Grey Advertising, Inc., 55 Comp. Gen. 1111, 1118-20 (1976), 76-1 CPD 325. Under these circumstances, and given the low relative weight assigned to price as an evaluation factor, we do not believe the SSA was required to select GHS on the basis of that offeror's lower price.

Since application of the RFP evaluation criteria produced a "tie" in the sense that the SSA found himself without a clear choice on the basis of the technical cost considerations reflected in the point scoring, the SSA logically had to find an appropriate discriminator on which to make a rational selection.

Consequently, he was presented with and took into account two factors--the disruptive effects and cost consequences of not awarding to the incumbent contractor, and the status of one offeror as a labor surplus area concern--which were not explicitly encompassed by the evaluation criteria delineated in the RFP.

We often have expressed the view that solicitations should contain a listing of all significant evaluation factors along with an indication of their relative importance, and that an award based on an agency's failure to adhere to those factors is improper. See Francis & Jackson, Associates, 57 Comp. Gen. 244 (1978), 78-1 CPD 79, and cases cited therein; 50 Comp. Gen. 59 (1970); BDM Services Co., B-180245, May 9, 1974, 74-1 CPD 237. When, however, competing proposals are measured against the evaluation factors established for the procurement and the selection official, in the good faith exercise of the discretion vested in him, is unable to discern an appropriate choice on the basis of that evaluation, we think that official properly may take into account other factors which are rationally related to a selection decision for the particular procurement involved. Thus, what must be determined here is whether the award to Mutual is rationally supportable on the basis of the two additional factors considered by OCHAMPUS.

Incumbency frequently, but not always, confers certain competitive advantages upon an incumbent contractor. Obviously, if those advantages routinely are taken into account in proposal evaluation and source selection, incumbent contractors usually will have an edge over their competitors, with the consequence that the fresh approaches and new ideas proposed by non-incumbents may be lost to the Government and something less than maximum competition will be realized. See, for example, Burns and Roe Tennessee, Inc., B-189462, July 21, 1978, 78-2 CPD 57, where the source selection official chose to stay with the long-term incumbent contractor rather than take a chance on the unsupported promises for a more efficient and less costly operation offered by a non-incumbent. Because of the possible detrimental effect on competition an undue concern with incumbency can have, contracting agencies do, at times,

attempt to avoid evaluation results which reflect such concern. See, e.g., Rockwell International Corporation, 56 Comp. Gen. 905 (1977), 77-2 CPD 119 and Consultants and Designers, Incorporated, B-186391, April 29, 1977, 77-1 CPD 294, where the cost of phasing in a new contractor were either not considered or considered apart from the basic cost evaluation, and Grey Advertising, Inc., supra, where the selection official determined that an offeror's higher point score reflected the "natural advantage" of incumbency rather than any meaningful technical superiority and that a lower scored proposal should be selected for award.

However, because incumbents often can offer real advantages to the Government, those advantages are often taken into account in proposal evaluation, and we have uniformly held that such action is proper since the Government is not required to equalize the "natural" advantages arising out of incumbency. Burroughs Corporation, 57 Comp. Gen. 109 (1977), 77-2 CPD 421; Houston Films, Inc., B-184402, December 22, 1975, 75-2 CPD 404; H. J. Hansen Co., B-181543, March 28, 1975, 75-1 CPD 187.

Under the circumstances here, we find nothing improper with OCHAMPUS considering both the "disruptive" effects of changing contractors on provider and beneficiary relations, a matter of some concern to OCHAMPUS in view of an earlier problem in that area, and the cost involved in transferring the claims processing function from one contractor to another. These seem to be reasonable matters for a selection official to consider, particularly when application of the designated evaluation factors do not enable that official to make a selection.

With respect to the consideration of labor surplus area concern status, we note that the RFP clause relied on by OCHAMPUS, which is set forth at Defense Acquisition Regulation (DAR) 7-2003.13, refers to bids, bidders, and tie bids and thus appears to have been written for use in formally advertised procurements, where the term "tie bids" would refer to a precise dollar and cents tie in bids either as submitted or as evaluated.

Although DAR 3-501(b) Section B (ix) provides for use of the clause in negotiated procurements, we believe that use is limited primarily to situations where award is to be made on the basis of price. Other use of the clause, such as to break technical evaluation "ties", could result in a violation of the Maybank Amendment, which precludes the use of appropriated funds by the Department of Defense for the payment of a price differential to alleviate labor surplus situations. See Maybank Amendment, 56 Comp. Gen. 34 (1977), 77-2 CPD 333.

Here, of course, award was not to be made on the basis of price, but neither was there a finding of technical equality. Rather, the "tie" proposals reflected cost as well as technical factors, so that it is clear that the higher cost of the Mutual proposal is associated with the higher technical quality of the proposal. Thus, it cannot reasonably be said that an award to Mutual based on labor surplus considerations would involve payment of a price differential in violation of the Maybank Amendment.

The problem here is not that labor surplus status was taken into account, but that, as alleged by the protester, Mutual was regarded as a labor surplus area concern when in fact it was not.

The record shows that Mutual in its proposal claimed to be a labor surplus area concern on the basis of its incurring costs of more than 50% of the contract price in an area of substantial unemployment, which it identified as the Omaha Labor Area. The record does not indicate that OCHAMPUS sought to verify Mutual's claim.

At the time of this procurement, "labor surplus areas" were listed in a Department of Labor (DOL) publication entitled "Area Trends in Employment and Unemployment." The January, February 1977 issue of this publication listed the Omaha Labor Area as an area of substantial unemployment. During 1977, the publication was updated periodically by a DOL press release and notices to State employment security offices and Federal agencies. A notice dated March 1977, advised that the

Omaha Labor Area was no longer designated as an area of substantial unemployment. However, the March, April 1977 edition of "Area Trends in Employment and Unemployment" which did not include the Omaha Labor Area as an area of substantial unemployment, was not published and distributed by DOL until late January 1978, after award to Mutual had been made.

The provisions of DAR 1-801.2 in effect during the procurement defined a "labor surplus area" as a geographic area which at time of award is classified by DOL as an area of persistant or substantial unemployment and listed as such by DOL in its publication "Area Trends in Employment and Unemployment." OCHAMPUS takes the position that inasmuch as that publication did not actually change the classification of the Omaha Labor Area from one of substantial unemployment until the publication and distribution of the March, April 1977 issue in late January 1978, Mutual was, in fact, a labor surplus area concern when award was made to it. In support of its position, OCHAMPUS relies on our decision 45 Comp. Gen. 471 (1966) where the contracting officer received the latest issue of "Area Trends", which changed an offeror's eligibility for labor surplus area concern status, one day after award. We found that although the awardee was not a labor surplus area concern at the time of award as a consequence of the new "Area Trends" listing, the award itself was proper because it was made in accordance with the information contained in the latest issue of the applicable DOL publication which had been or should have been received by the procuring activity prior to the time the relevant determination had to be made.

We do not agree with OCHAMPUS. Although the DAR provision referred to the "Area Trends" publication, DOL's own regulations provided only that "the Secretary of Labor will publish at regular intervals a list of * * * areas of persistent or substantial unemployment." 29 C.F.R. 8.6 (1977). Further, we are advised by DOL that changes to the "Area Trends" listings were made through monthly notices, including the March 1977 notice entitled "CLASSIFICATION CHANGES AFFECTING * * * AREAS OF SUBSTANTIAL OR PERSISTENT UNEMPLOYMENT * * *" which

DOL informally advises was sent to all Federal agencies. Thus, this case differs substantially from 45 Comp. Gen., supra, where there had been no updates to "Area Trends" and where the contracting officer reasonably relied on the most recent issue of that publication that he had any reason to know about. Here, we believe the "Area Trends" publication must be viewed as having been periodically updated by the March 1977 and succeeding notices issued by DOL, that OCHAMPUS should have known of this updated information or should have sought it out to verify Mutual's claim instead of automatically relying on it, and that the Omaha area was not, at the time of award to Mutual, an area of substantial unemployment. Consequently, we find that Mutual properly could not be viewed as a labor surplus area concern on the award date.

With respect to the final issue, the record shows that during the subsequent evaluation directed by the SSA, Mutual verbally offered to accept a no-cost termination of its existing contract and to begin immediate performance under the new contract to be awarded. This was followed by a confirming telephone conversation and telegram, in which Mutual stated it "is in a position to implement immediately under the [new] contract." The second SSAC memorandum to the SSA referred to Mutual's offer and pointed out that an award to Mutual by January 1, 1978 instead of March 1, 1978 would result in approximate savings of $34,000, the difference between what Mutual would be paid under its existing contract and under the new contract. Award was made effective January 1. GHS objects that it was not given the opportunity to offer an earlier start date.

It is not clear from the record before us just what GHS was given the opportunity to offer. The second SSAC memorandum, quoted above in pertinent part, states that a list of 12 questions was prepared for further discussions with GHS and Mutual. We have not been furnished a copy of that list; however, the confirming telegram from Mutual referred to "the OCHAMPUS verbal questionnaire" and the OCHAMPUS request for "anything we wished to add favoring our receiving this award." If GHS were also given the same response opportunity,

it would have been given the same opportunity as was given Mutual to make its offer more attractive. We do not understand, however, how GHS could have made its offer appear more favorable by offering an earlier starting date, since it appears that the earlier date was beneficial to OCHAMPUS only in light of a no-cost termination of the existing Mutual contract and since it further appears that Mutual offered to accept a no-cost termination only in connection with award of the new contract to it and not to a competitor.

Nonetheless, we find OCHAMPUS' actions in this regard to be procedurally deficient. First of all, although OCHAMPUS characterizes its additional discussions with GHS and Mutual as pre-award surveys, it is clear that the discussions were for the purpose of further exploring offeror understanding of requirements and ferreting out possible weaknesses, all with a view toward providing a meaningful discriminator for selection of a contractor. As such, the discussions should have been treated as a new round of competitive negotiations, as envisioned by DAR 3-805, and should have been concluded by a request for new best and final offers. See, e.g., The Human Resources Company, B-187153, November 30, 1976, 76-2 CPD 459.

Second, even if the discussions initially properly could have been viewed as merely pre-award survey contacts, Mutual's offer to make its proposal more desirable by beginning contract performance two months earlier than the start date indicated in the RFP, and OCHAMPUS' willingness to consider that offer, constituted additional competitive range discussions, thereby requiring additional discussions with GHS. New Hampshire-Vermont Health Service, 57 Comp. Gen. 347 (1978), 78-1 CPD 202; University of New Orleans, 56 Comp. Gen. 958 (1977), 77-2 CPD 201; Bristol Electronics, Inc., et al., 54 Comp. Gen. 16 (1974), 74-2 CPD 23. Consequently, OCHAMPUS should have reopened negotiations, issued an RFP amendment indicating its willingness to accept the earlier start date, and requested new best and final offers. Union Carbide Corporation, 55 Comp. Gen. 802, 807 (1976), 76-1 CPD 134. While GHS may not have been able to offer an earlier starting date, since Mutual had been

given an opportunity to make its offer more attractive, GHS was also entitled to an opportunity to improve its proposal in any way it deemed appropriate. PRC Information Sciences Company, 56 Comp. Gen. 768 (1977), 77-2 CPD 11.

The question remains as to what, if any, remedial action is appropriate in light of the deficiencies noted in this case. When an offeror is improperly denied the opportunity to submit a revised proposal, we often recommend that negotiations be reopened so that the impropriety can be corrected. See, e.g., Bristol Electronics, Inc., et al., supra; Union Carbide Corporation, supra. Similarly, when a source selection decision, or evaluation upon which the decision is based, is subject to question, we will recommend that the selection official reconsider his decision. See New Hampshire-Vermont Health Service, supra; Bell Aerospace Company, 55 Comp. Gen. 244 (1975), 75-2 CPD 168; see also Lockheed Propulsion Company, et al., 53 Comp. Gen. 977 (1974), 74-1 CPD 339. However, when it appears likely that little or no prejudice resulted from such deficiencies in the procurement process, we see no reason to disturb an award or recommend other corrective action with respect to the procurement under review. See Fiber Materials, Inc., 57 Comp. Gen. 527 (1978), 78-1 CPD 422; 52 Comp. Gen. 161 (1972); Data 100 Corporation--Reconsideration, B-185884, October 21, 1976, 76-2 CPD 354.

Here, we doubt that GHS was materially prejudiced by the agency's consideration and acceptance of Mutual's offer to advance the contract start date. Although the Mutual offer and its benefits were discussed in the SSAC's second memorandum, the SSAC's final recommendation referenced only two factors: Mutual's incumbency and Mutual's status as a labor surplus area concern. Thus, we find it unlikely that the advantage to OCHAMPUS of the earlier starting date played a significant role in the SSA's decision. Consequently, we do not believe we would be warranted in recommending the reopening of negotiations on the basis of this particular deficiency.

The situation is less clear, however, with respect to the effect of Mutual's perceived labor surplus area concern status on the selection decision. On the one hand, OCHAMPUS' erroneous view of Mutual as a labor surplus area concern could be regarded as immaterial since under the circumstances we believe the selection decision properly could have been based on the incumbency considerations alone. On the other hand, the SSAC's first memorandum recited the advantages of retaining the incumbent contractor, but the SSA declined to make a decision on the basis of that memorandum and instead ordering further evaluation. It was on the basis of the second memorandum, which recommended award to Mutual in part on the basis of labor surplus considerations, that resulted in the selection decision.

It is possible, of course, that if labor surplus status had not been mentioned and the SSA merely had been informed that the subsequent evaluation produced no additional meaningful award discriminators, he at that time might have accepted the SSAC recommendation to award to Mutual solely on the basis of the firm's incumbency. Such a conclusion on our part, however, would only be conjectural; on the basis of the record, we can only conclude that the selection decision may have been influenced by the SSAC's belief that Mutual was a labor surplus area concern. Accordingly, we are recommending that the SSA reconsider his selection decision without regard to any labor surplus considerations. We are further recommending that, should the SSA conclude GHS should have been selected for award, the Mutual contract be terminated for the convenience of the Government as soon as it is feasible to do so and that award be made to GHS for the remainder of the first year option period. In either case, in light of the deficiencies in the procurement, we are also recommending that the second-year option not be exercised.

This decision contains a recommendation for corrective action to be taken. Therefore, we are furnishing copies to the Senate Committees on Governmental

Affairs and Appropriations and the House Committees on Government Operations and Appropriations in accordance with section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. 1176 (1976), which requires the submission of written statements by the agency to the Committees concerning the action taken with respect to our recommendations.

The protest is sustained.

Deputy Comptroller General
of the United States