



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Southwest Anesthesia Services

File: B-279176.2

Date: July 21, 1998

Lee D. Lantz for the protester.

Michael Colvin, Department of Health and Human Services, for the agency.

Adam Vodraska, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Record does not support allegation that contracting agency improperly canceled solicitation for hospital anesthesia services to avoid awarding a contract to the protester and responding to an earlier protest of the award of the contract to another firm, where the agency reasonably concluded that solicitation no longer meets the agency's needs and that services should be performed in-house, based on findings and recommendations of an agency medical reviewer concerning the anesthesia program at the hospital.

DECISION

Southwest Anesthesia Services protests the cancellation of request for proposals (RFP) No. 97-10-VZ, issued by the Indian Health Service, Department of Health and Human Services, for anesthesia services at the Santa Fe Indian Hospital, and the agency's determination to perform the services in-house. Southwest contends that the cancellation lacked a reasonable basis and was motivated by the contracting agency's desire to avoid making an award to Southwest and having our Office render a decision on Southwest's previous protest.

We deny the protest.

The president and co-owner of Southwest has provided anesthesia services to the Santa Fe Indian Hospital since 1981 as a Certified Registered Nurse Anesthetist. His previous long-term contract with the hospital expired on October 31, 1996, and thereafter the agency ordered anesthesia services from Southwest by purchase order on a month-to-month basis. During 1997, the agency decided to solicit the services on a long-term basis, issued the RFP at issue here, and requested proposals by October 1, 1997. Southwest submitted a proposal by the due date, participated in discussions, and submitted a best and final offer (BAFO) at the request of the agency, but was not selected for award. Instead, the agency awarded the contract to Anestat, Inc., which commenced performance on February 1, 1998.

Southwest filed a protest with our Office on February 3, contending that the agency acted improperly in not awarding the contract to Southwest. Specifically, Southwest asserted that agency personnel exhibited animosity and retaliated against Southwest for revealing alleged contracting and fiscal improprieties, such as the delayed issuance of purchase orders and subsequent late payments for services ordered, which occurred during Southwest's continued performance of the anesthesia services after the expiration of its previous long-term contract.

On February 13, the agency authorized continued performance of the contract by Anestat, notwithstanding Southwest's protest, because of the critical nature of the services to the patients at the hospital.

The agency informed our Office on March 3 that in reviewing Southwest's protest it discovered inadequacies in the evaluation and award selection process. The agency proposed to take corrective action by reevaluating BAFOs, performing a new source selection, and, if a different awardee was selected, terminating the contract with Anestat for the convenience of the government. Since these proposed actions rendered the protest academic, our Office dismissed Southwest's protest on March 6.

Southwest filed a new protest on May 11 because, instead of taking the promised corrective action, the agency had decided to cancel the RFP and perform the anesthesia services in-house following what the agency advises was the March 26 anesthesia-related death of a pediatric patient at the Santa Fe Indian Hospital while Anestat was providing anesthesia services.¹ Southwest argues that, based on its long affiliation with the hospital, it can provide better quality services at a lower cost than the agency will obtain in-house, and that the agency's stated reasons for the cancellation of the solicitation and determination to perform the services in-house were pretexts to avoid our review of Southwest's initial protest to our Office (and as additional retaliation for having filed the protest) and to avoid awarding Southwest the contract.

The agency responds that it canceled the solicitation and made the decision to obtain the anesthesia services in-house due to a reassessment of its needs resulting from the findings and recommendations in the report prepared by an agency

¹The agency then terminated Anestat's contract and requested that Southwest resume providing anesthesia services at the hospital. Southwest has since been performing these services under purchase orders on a month-to-month basis. The agency plans to continue issuing purchase orders to Southwest pending the recruitment and hiring of a nurse-anesthetist for the hospital. The agency states that until it decided to perform the anesthesia services in-house, it was expecting to make award to Southwest, and that once the services are brought in-house it is likely that the agency will turn to Southwest in the future for back-up support.

medical reviewer investigating the March 26 patient death. As part of the investigation, the reviewer performed an overall examination of the anesthesia program at the Santa Fe Indian Hospital and concluded, among other things, that the hospital's current staffing plan of one nurse-anesthetist under contract was inadequate.

As a general rule, our Office does not review agency decisions to cancel procurements and instead perform the work in-house, since such decisions are a matter of executive branch policy. Mastery Learning Sys., B-258277.2, Jan. 27, 1995, 95-1 CPD ¶ 54 at 2; Miller, Davis, Marter & Oppen, P.C., B-242933.2, Aug. 8, 1991, 91-2 CPD ¶ 176 at 4. However, where, as here, a protester argues that the agency's rationale for cancellation is but a pretext--that the agency's actual motivation is to avoid awarding a contract or is in response to the filing of a protest--we will examine the reasonableness of the agency's actions in canceling the procurement. Mastery Learning Sys., *supra*, at 2-3; Griffin Servs. Inc., B-237268.2 *et al.*, June 14, 1990, 90-1 CPD ¶ 558 at 3, *recon. denied*, General Servs. Admin.--Recon., B-237268.3 *et al.*, Nov. 7, 1990, 90-2 CPD ¶ 369 at 2.

We think the agency's reassessment of its anesthesia needs at the Santa Fe Indian Hospital resulting from the medical reviewer's investigation of the March 26 patient death provides a reasonable basis for the cancellation of the solicitation because, as a result of the reviewer's report, the solicitation for the contract sought by Southwest no longer meets the needs of the agency, given the deficiencies reported by the reviewer and his recommended steps to address these deficiencies, which would require material changes to the solicitation. For example, the reviewer recommended that the agency increase anesthesia staffing above the level of one nurse-anesthetist; require that any anesthesia contractor operate as an independent practitioner; add coverage to ensure that caesarian section cases are handled within 30 minutes and that pediatric cases be referred elsewhere or receive the requisite level of specialized expertise; and establish policies and procedures for the hospital's anesthesia program rather than relying on the contractor's policies and procedures. Although performing the services in-house may not be the only way the agency could have addressed the reported deficiencies, it is consistent with the reviewer's recommended "long term" solution of providing for the services in-house with contractor back-up. To the extent the protester is challenging the agency's reliance on the reviewer's recommendations, including that the anesthesia services be performed in-house, we view this as a challenge to the agency's medical policies and judgments, which we will not consider under our bid protest function. *See* Bristol-Myers Squibb Co., B-275277, Feb. 5, 1997, 97-1 CPD ¶ 60 at 9-10 (and cases cited therein).²

²Southwest contends that the medical reviewer's report, which it provided to our Office, demonstrates an extension of the prejudice and retaliation towards
(continued...)

We recognize that, but for the allegedly improper award of the contract to Anestat and the subsequent patient death and resulting reassessment of the hospital's anesthesia program, Southwest, which apparently has a long track record of providing safe anesthesia services at the hospital, may have been awarded the contract. However, once the agency received the recommendations of the medical reviewer that brought to light the deficiencies in the anesthesia program at the hospital, we believe the agency had a reasonable basis to cancel the existing solicitation. Accordingly, we do not view the proffered rationale for the cancellation of the solicitation as merely a pretext by the agency to avoid awarding the contract to Southwest or to avoid responding to Southwest's earlier protest. Further, even if we assume, arguendo, that there may have been some personal animus towards Southwest on the part of some agency personnel, this does not provide a basis to conclude that the cancellation was improper, where, as here, the cancellation was otherwise reasonably justified. See Mastery Learning Sys., supra, at 3; Dr. Robert J. Telepak, B-247681, June 29, 1992, 92-2 CPD ¶ 4 at 4.

Finally, to the extent the protester argues that the agency's decision to perform the services in-house is unreasonable because the agency failed to conduct a cost comparison to measure the relative costs of in-house versus contractor performance of the services, we will not review an agency's decision to perform services in-house, absent an allegation of a statutory violation (which is not present here), because we consider such decisions to be a matter of executive branch policy, except where the challenged agency had used the procurement system by issuing a solicitation for the purpose of conducting a cost comparison under Office of Management and Budget Circular A-76 (which did not occur here). Pemco Aeroplex, Inc., Aero Corp., B-275587.9 et al., June 29, 1998, 98-2 CPD ¶ ___ at 8 n.3.

The protest is denied.

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²(...continued)

Southwest alleged in its earlier protest. This contention is baseless. Rather, it is evident from the report that the medical reviewer, who was an agency employee from another medical facility, performed a comprehensive review of the hospital's anesthesia program, including the acquisition of the services, which is the type of thorough and comprehensive investigation of the March 26 tragedy that would be expected under the circumstances.