



Comptroller General  
of the United States

Washington, D.C. 20548

# Decision

**Matter of:** Baxter Healthcare Corporation

**File:** B-238306

**Date:** May 14, 1990

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Justin D. Simon, Esq., Dickstein, Shapiro & Morin, for the protester.  
E. L. Harper, Office of Acquisition and Materiel Management, Department of Veterans Affairs, for the agency.  
David Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## DIGEST

Under multiple-award Federal Supply Schedule (FSS) solicitation, where agency determined that protester offered required most favored customer pricing--prices equal to or lower than offeror's lowest commercial prices--for certain percentage of large number of items and solicitation provided for possible award on a product-by-product basis, outright rejection of proposal for unreasonable pricing was improper; agency should have given protester opportunity through discussions to establish which items were priced acceptably, requested best and final offer, and included protester on FSS for all properly priced items.

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## DECISION

Baxter Healthcare Corporation protests the Department of Veterans Affairs' (VA) rejection of its proposal under request for proposals (RFP) No. M3-Q1-89, a multiple-award Federal Supply Schedule (FSS) solicitation for medical supplies. Baxter challenges VA's determination that it could not find Baxter's offered prices equal to or better than those offered its most favored customer (MFC), and its resultant rejection of Baxter's entire proposal as unreasonably priced.

We sustain the protest.

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## BACKGROUND

Under multiple-award schedules, contracts are negotiated with more than one supplier for delivery of commercial supplies and services that are comparable and of the same generic type, at prices based on discounts from commercial price lists. Federal Acquisition Regulation (FAR) § 38.102-2(a). Contracts are awarded only after the contracting officer determines that the prices, terms and conditions offered are fair and reasonable. FAR § 38.102-2(c). Generally, the determination of price reasonableness is a matter of administrative discretion involving the exercise of business judgment by the contracting officer; therefore, we will question such a determination only where it is clearly unreasonable or there is a showing of bad faith or fraud. See Sal Esparza, Inc., B-231097, Aug. 22, 1988, 88-2 CPD ¶ 168.

Although VA is authorized to award schedule contracts for certain medical items, the FSS program is directed and managed by the General Services Administration (GSA). FAR §§ 38.000 and 38.101(e). An agency's determination of price reasonableness therefore is proper when it meets the standards in GSA's Policy Statement on Multiple Award Schedule Procurement, 47 Fed. Reg. 50,242 (1982), which establishes a goal of obtaining discounts from an offeror's established catalog or commercial prices that are equal to or better than discounts the offeror extends to its MFC. 47 Fed. Reg. 50,244; see Credit Bureau Inc. of Georgia, B-220890, Feb. 27, 1986, 86-1 CPD ¶ 202. The Policy Statement does provide for awarding FSS contracts even when the discount offered the government is not equal to or greater than the MFC's discount, where the government's terms and conditions differ from those given to the MFC, for instance "where the government's overall volume of purchases does not warrant the best price." 47 Fed. Reg. 50,244.

The RFP solicited offers for a 3-year FSS contract to supply 37 categories, or special item numbers (SINs), of surgical and medical equipment and supplies. For each SIN under which offerors were proposing products, the solicitation requested the offerors to furnish pricing and sales data for the 5 products with the largest dollar sales volume. Three different divisions of Baxter submitted offers for over 8,400 products under approximately 17 of the SINs. After reviewing the pricing and sales data furnished with Baxter's offers, and additional information furnished at VA's request, the contracting officer, on January 31, 1989, requested an audit by the Defense Contract Audit Agency (DCAA). The audit examined data for 188 products, chosen by the government to include the SINs accounting for the

the highest volume of government sales and those products comprising a significant percentage of government sales in each SIN.

Although the audit showed that Baxter was offering MFC pricing for approximately 12 of the 188 products, for nearly all (over 85 percent) of the remaining products, Baxter was offering a price higher than or equal to its highest commercial price. Furthermore, according to DCAA, Baxter's commercial prices, which varied widely, bore no relation to the volume of sales to a particular customer, so that some customers purchasing large volumes of products paid more per unit than customers purchasing in smaller volume. As a result, DCAA found that Baxter did not have an MFC, but instead sold its products "at whatever the market will bear." The contracting officer accepted DCAA's finding and concluded that there thus was no basis for determining Baxter's prices fair and reasonable. VA considered asking Baxter for cost or pricing data, "which would have been the only other basis for award," but decided against it, concluding on the basis of past experience with Baxter that the firm would refuse to supply such data. Accordingly, the contracting officer rejected Baxter's proposal without requesting a best and final offer.

Baxter challenges VA's determination that it has no MFC, arguing that an MFC in fact was readily ascertainable by means of a simple arithmetical comparison of the prices Baxter charges its commercial customers with Baxter's proposed prices on this RFP. Baxter maintains that its proposal should not have been rejected for inability to determine reasonableness of its prices.

#### ANALYSIS

VA's determination of price unreasonableness as it related to Baxter's prices for the products in the sample for which it was not offering its lowest prices was unobjectionable. Notwithstanding the likelihood of approximately \$65 million in sales to the government for the products it proposed, Baxter offered its highest commercial price for nearly all of the sampled products other than the 12 for which it was offering MFC pricing, and the firm has failed to demonstrate that any difference in terms and conditions adequately explains the relatively higher prices offered the government. See Policy Statement, 47 Fed. Reg. 50,244 (burden is on offeror to identify differing terms and conditions which explain price differential); Baxter Healthcare Corp., B-230580.5, Apr. 26, 1990, 90-1 CPD ¶ \_\_\_\_\_. The Policy Statement permits inclusion of products with the lowest net price on the schedule even where they are not the offeror's

MFC prices. However, VA's review of nearly 50 products selected by Baxter did not show the lowest net prices. Although the agency found that inadequate product descriptions from two of the divisions precluded determination of comparable products, none of Baxter's prices for the products from the third division were lower than the prices offered by competitors (as selected by Baxter) for comparable products. We note that an agency properly may perform a price evaluation based on a sampling of item prices. 47 Fed. Reg. 50,248; Carrier Joint Venture, B-233702, Mar. 13, 1989, 89-1 CPD ¶ 268.

While we find VA properly rejected Baxter's proposal as to products for which the firm did not offer MFC pricing, we also find that VA improperly rejected the proposal as to the MFC-priced items revealed in the sampling. As VA itself acknowledges, the solicitation provided that award may be made on a product-by-product basis.<sup>1/</sup> Indeed, according to the agency, not only can "a contract be awarded for a single item under a SIN just as easily as for many items under that SIN," it may even be to the disadvantage of the government under the circumstances not to evaluate on a product-by-product basis.

Where offered products are priced equal to or lower than the offeror's lowest commercial prices for the products and, as was the case here, are not otherwise determined to be out of line with government estimates and the prices proposed by other offerors, there is no basis for rejecting the products as unreasonably priced due to the lack of MFC pricing on other items. Thus, since data available to and considered by the agency indicated that Baxter's offered prices for 12 products were equal to or lower than Baxter's lowest commercial prices, these products should have been included on the schedule.

In addition, once the audit sampling showed MFC pricing for a percentage of the items, VA should have taken further

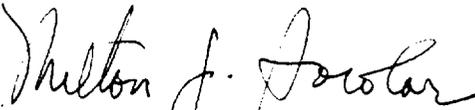
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<sup>1/</sup> The solicitation indicated that the award decision may be made on a product-by-product basis when it (1) required the submission of catalogs or price lists and the listing of sales and commercial discounts for specific, proposed products; (2) established a minimum level of anticipated purchases as a precondition to award for any particular product; and (3) provided that the agency may make awards for the listed articles or services, but cautioned that it would award "only one contract for each specific product" in the event of multiple offers of identical products. See Baxter Healthcare Corp., B-230580.5, supra.

steps to identify which of Baxter's other products were properly priced. The results of the sampling--MFC pricing for approximately 12 of 188 products--suggested statistically that Baxter may have been offering MFC pricing for over 500 (i.e., approximately 6 percent) of the 8,400 products it offered. The solicitation specifically provided that a BAFO would be requested at the conclusion of negotiations. In our view, instead of rejecting Baxter's proposal outright without requesting a BAFO, the agency should have afforded Baxter the opportunity to indicate (and furnish substantiating sales data for) the remaining products for which it was offering MFC pricing. Of course, VA then would have been permitted to sample the products identified to determine whether they all in fact satisfied the MFC pricing criterion--that is, whether Baxter was offering the government its lowest prices--and warranted inclusion on the schedule.

The protest is sustained.

By separate letter of today to the Secretary of Veterans Affairs, we are recommending that VA reopen negotiations and afford Baxter the opportunity to submit a BAFO certifying and documenting for which products it is offering MFC pricing. In addition, we find that Baxter is entitled to be reimbursed its protest costs. 4 C.F.R. § 21.6(d)(1) (1989); see Falcon Carriers, Inc., 68 Comp. Gen. 20 (1989), 89-1 CPD ¶ 96.



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