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Comptroller General  
of the United States

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## Decision

**Matter of:** Life Oxygen & Health Services, Inc.

**File:** B-282243

**Date:** June 18, 1999

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Bob Keesaer for the protester.

Phillipa L. Anderson, Esq., Department of Veterans Affairs, for the agency.

Sylvia Schatz, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

1. Agency reasonably downgraded protester's proposal in past performance evaluation where contract reference assigned protester middle (instead of highest) of three ratings for all questions in past performance questionnaire, and marked "maybe" in indicating whether it would recommend the protester for current or future contracts.
2. Agency reasonably increased awardee's evaluation score under quality assurance factor where awardee improved its best and final offer in that area in response to discussion questions; fact that one evaluator on technical evaluation team (TET) made a negative comment about awardee's performance on a prior contract during the evaluation process does not render the increase unreasonable, where TET nevertheless determined that increase was warranted and, in any case, evaluator ultimately agreed with other TET members regarding awardee's quality assurance rating.

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### DECISION

Life Oxygen & Health Services, Inc. protests the award of a contract to Rotech Medical Corporation, also known as Resp-A-Care, Inc., under request for proposals (RFP) No. 249-01-99, issued by the Department of Veterans Affairs (VA) for home oxygen services at seven VA medical centers located in Tennessee, West Virginia, and Kentucky. Life Oxygen principally challenges the evaluation of its and the awardee's proposals.

We deny the protest.

The RFP, issued on October 20, 1998, contemplated the award of a fixed-price contract for a base year, with four 1-year options, to furnish all rental, delivery, supplies, oxygen, and related services. RFP at 3. Award was to be made to the responsible firm whose offer conforms to the solicitation and is most advantageous to the government, based on the following (with available points out of 100 total): (1) prior experience and demonstrated capability (30 points); (2) quality assurance (30 points); (3) past performance (20 points); and (4) cost (20 points). RFP at 51; Contracting Officer's Statement at 1. With regard to past performance, offerors' proposals were to be evaluated on the basis of past performance questionnaires from the references listed in each offeror's proposal. RFP at 50; Agency Report at 2. The RFP required offerors to provide no more or less than three references for verification of past performance. RFP at 50.

Among the proposals received by the amended December 30 closing date were Life Oxygen's and Resp-A-Care's; both were included in the competitive range. Agency Report at 2. Following written discussions on the technical proposals, the agency requested and received best and final offers (BAFO). The agency then held price discussions and requested and received revised BAFOs. The technical evaluation team (TET) evaluated the revised BAFOs as follows:

	Technical score	Price
Life Oxygen	87.7	\$9,087,516.00
Resp-A-Care	90.5	12,547,084.32

Agency Report encl. 17, Price Negotiation Memorandum, at 2, 3. Based on the prices and technical scores, the VA made award to Resp-A-Care. Id. at 2.

#### PAST PERFORMANCE

Life Oxygen's proposal received 13.7 of the 20 available points under the past performance factor. Life Oxygen maintains that it should have received a higher score in light of the favorable past performance questionnaire submitted by the [deleted] of Mariner Health Care, one of the references listed in Life Oxygen's proposal. Agency Report encl. 12, Life Oxygen's BAFO Evaluation, at 3; Protest at 1; Comments at 2.

In reviewing an agency's evaluation of proposals, we will not reevaluate the proposals; rather, we will examine the record only to ensure that the evaluation was reasonable and in accordance with the stated evaluation scheme. Development Alternatives, Inc., B-279920, Aug. 6, 1998, 98-2 CPD ¶ 54 at 4.

The evaluation in this area was reasonable. The questionnaire to which the protester refers covered a contract under which Life Oxygen provided durable medical equipment (DME), a requirement which (the agency advised our Office during a conference call) is not as involved as an oxygen supply contract such as the one here. Agency Report at 3 n.4, 5 n.9. The agency reports that it received two

questionnaires signed by Mariner's [deleted], one for DME and one for oxygen supply, and because the solicitation called for precisely three questionnaires to be considered and consideration of both Mariner questionnaires would have led to a total of four, it considered the questionnaire which covered work by Life Oxygen on a home oxygen services contract and did not consider the questionnaire related to the firm's work on a DME contract. Agency Report at 5. On Mariner's questionnaire covering the oxygen services work, Life Oxygen was assigned only the second of three possible ratings for each of the questions and, with regard to whether the reference would recommend Life Oxygen for future contracts and would use them again for their current contract, the reference indicated only "maybe." Agency Report encl. 9, Questionnaires for Life Oxygen, at 3, 4. There is nothing unreasonable in the agency's decision to consider the reference regarding a similar contract and not to consider the same reference's write-up of a less similar contract (where the solicitation called for consideration of only three of the four references that the agency had received); the logic of doing so is obvious. Similarly, we find nothing unreasonable in the agency's downgrading Life Oxygen based on the neutral responses in the questionnaire and the reference's concerns reflected in its questionnaire indicating only that it might contract with Life Oxygen in the future.

Life Oxygen questions the agency's assertion that it relied on a second questionnaire from Mariner, claiming that Mariner's [deleted] completed only one questionnaire, and that the response was very favorable. Life Oxygen relies in this regard on a March 31, 1999 letter provided by Mariner at the protester's request, in which the [deleted] states that [deleted] "received one (1) inquiry as to contractor performance," on a contract Life Oxygen performed for the past 5 years "to provide oxygen supplies, E-Tank O2, Liquid O2, respiratory supplies, concentrators and clinical services seven (7) days a week by a credentialed therapist," and that [deleted] wrote "definitely" next to the question concerning whether [deleted] would recommend Life Oxygen for future contracts and would use them again for the current contract. Comments at 2; Letter from Mariner to Life Oxygen (Mar. 31, 1999).

While the source of the confusion regarding Mariner's questionnaires is unclear, the record in fact contains two signed questionnaires from the [deleted] of Mariner for work performed by Life Oxygen on two separate contracts, as discussed above--one favorable, concerning the DME contract, and one less favorable, for home oxygen services. Agency Report encl. 9, Questionnaires for Life Oxygen, at 3, 4, 7, 8. During the course of this protest, the VA specifically requested Mariner's [deleted] to clarify whether [deleted] completed the unfavorable questionnaire concerning the protester's home oxygen services contract. By letter of April 20, the [deleted] responded that "while it appears to be my signature on page 2 of the questionnaire I could not say for certain one way or the other if it is." Letter from Mariner to the VA (Apr. 20, 1999). Since the signature on the questionnaire appears to be the [deleted], the [deleted] does not deny that it is [deleted] signature, and there was nothing else in the questionnaire bringing into question its authenticity, there is no basis for us to question the agency's reliance on this questionnaire in the evaluation.

## QUALITY ASSURANCE

Life Oxygen argues that the agency unreasonably increased Resp-A-Care's revised BAFO score by two points under the quality assurance factor, since one of the evaluators noted during the evaluation that the firm's performance under a prior DME contract with the VA went "downhill" after it lost a key employee. Protest at 2; Comments at 2. Life Oxygen maintains that this indicates poor quality assurance.

The evaluation in this area was reasonable. The agency initially downgraded Resp-A-Care's initial technical proposal and BAFO under the quality assurance factor, where the firm received 28 of 30 available points, because the firm failed to provide evidence of timely monitoring of each new patient, and a performance improvement (PI) plan that included JCAHO functions. Agency Report encl. 2, Resp-A-Care's Evaluation, at 2; Agency Report encl. 14, Resp-A-Care's BAFO Evaluation, at 3. Following discussions during which these concerns were raised, the firm submitted a revised BAFO addressing these concerns. Agency Report encl. 5, Resp-A-Care's Revised BAFO. Specifically, Resp-A-Care included in its revised BAFO the methods for timely monitoring of each new patient, such as when the initial assessment for each new home oxygen patient would be completed, by whom the assessments would be performed, and the type of assessment forms that would be used. *Id.* at 2, 3. In addition, Resp-A-Care's PI plan included some JCAHO functions, such as maintaining an updated patient list, which reflects the various needs of different patients in times of emergencies or possible service interruptions. *Id.* at 3. The fact that one evaluator made a negative comment about Resp-A-Care's prior performance did not by itself render the 2-point increase improper; different evaluators may develop different opinions in evaluating a proposal. *Oceaneering Int'l, Inc.*, B-278126, B-278126.2, Dec. 31, 1997, 98-1 CPD ¶ 133 at 10. Notwithstanding this evaluator's expressed concern, the TET ultimately reached a consensus that the increase was warranted. Moreover, the record shows that the evaluator ultimately agreed with the other TET members regarding Resp-A-Care's quality assurance

rating and the source selection.<sup>1</sup> Contracting Officer's Statement at 3; Agency Report at 6.

The protest is denied.

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<sup>1</sup>In its protest, the protester raised other arguments, to which the agency responded in its report. In commenting on that report, the protester did not attempt to rebut the agency's responses. Accordingly, we consider it to have abandoned those bases of protest. Arjay Elecs. Corp., B-243080, July 1, 1991, 91-2 CPD ¶ 3 at 1 n.1. In addition, in its comments on the agency report, the protester raises additional arguments concerning the evaluation of its proposal and the adequacy of discussions. Under our Bid Protest Regulations, protests such as this must be filed no later than 10 days after the protest bases were known or should have been known. 4 C.F.R. § 21.2(a)(2) (1999). The agency report, issued on April 9, 1999, contained the information on which these arguments are based. Thus, these arguments had to be raised no later than April 19. Because the protester's comments were not received in our Office until April 26, these arguments are untimely and will not be considered. Outdoor Venture Corp., B-279777, July 17, 1998, 98-2 CPD ¶ 27 at 3 n.1.

