



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Amcare Medical Services, Inc.

File: B-271595

Date: July 11, 1996

Gary C. Crossen, Esq., Foley, Hoag & Eliot, for the protester.

John A. Cohan, Esq., Cohan & Associates, for Nahatan Medical Services, an intervenor.

Dennis Foley, Esq., and Philip Kauffman, Esq., Department of Veterans Affairs, for the agency.

Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency improperly made award to firm submitting technically noncompliant offer is denied where protester has neither alleged nor demonstrated that agency's actions were prejudicial; prejudice is an essential element of every viable protest, and where none is shown, General Accounting Office will not sustain a protest, even where the agency's actions may have been improper.
2. Protester is not an interested party to maintain that awardee acted in bad faith where another offeror would be in line for award should the protester's allegation prove correct and awardee be eliminated from the competition.

DECISION

Amcare Medical Services, Inc. protests the award of a contract to Nahatan Medical Services under request for proposals (RFP) No. 523-38-95, issued by the Department of Veterans Affairs (VA) for the acquisition of home oxygen services. Amcare challenges the award on several grounds.

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

The RFP called for offers to provide home oxygen services and provided for award on a best value basis. Six proposals were received, four of which were determined to be within the competitive range. After engaging in both technical and cost discussions with the competitive range offerors and receiving proposal revisions in

response thereto, the agency solicited and received best and final offers (BAFO).¹ Based on the BAFO evaluation, Amcare's proposal was ranked third technically (with a technical score of 77.25 points) and was highest priced. Nahatan's proposal was ranked first technically (with a score of 91.5 points) and was the lowest priced. The proposal of a third offeror, NMC Homecare, was ranked second technically (with a score of 87 points), and was priced between Amcare's and Nahatan's. Based on these evaluation results, the VA made award to Nahatan as the firm submitting the proposal deemed to offer the best overall value to the government.

TECHNICAL EVALUATION

Amcare maintains that the agency misevaluated its technical proposal in several respects. The VA provided our Office a detailed report addressing each of Amcare's contentions regarding the technical evaluation, however, and Amcare provided no substantive response to the agency's position in its comments; it stated only that this was one of several issues that ". . . can be determined based upon the agency report and relevant documents. . . ." We have reviewed Amcare's arguments regarding the evaluation in light of the agency's explanation. As there is nothing on the face of the evaluation which brings the reasonableness of the agency's conclusions into question, and Amcare has not rebutted the agency's position, there is no basis for questioning the evaluation. See TRW, Inc.; Systems Research and Applications Corp., B-260968.2, et al., Aug. 14, 1995, 95-2 CPD ¶ 101. We therefore deny this aspect of Amcare's protest.²

¹The offerors were not required to submit these BAFOs at the same time; Amcare was required to submit its BAFO 17 days earlier than any other offeror. Amcare contends that the agency erred in not establishing a common cut-off date for the submission of BAFOs. The record shows, however, that Amcare was advised on February 21, 1996 that the other offerors had not been required to submit their BAFOs at the time Amcare made its submission. Since Amcare did not raise this contention until March 29 when it protested to our Office, we dismiss this allegation as untimely. 4 C.F.R. § 21.2(a)(2) (1996).

²Similarly, while Amcare initially maintained that the VA unreasonably delayed the award of a contract, the VA provided a detailed, reasonable explanation of the various events that resulted in delays of the award, and Amcare made no further substantive comment on this issue. Thus there is no basis for finding any impropriety on the agency's part. TRW, Inc.; Systems Research and Applications Corp., supra.

NONCOMPLIANCE WITH SPECIFICATIONS

Amcare maintains that Nahatan's BAFO did not comply with the specifications in certain material respects and that the agency improperly allowed Nahatan, but not the other offerors, to submit a proposal based on noncompliant equipment. Amcare maintains that Nahatan offered a "liquid low loss" oxygen system rather than a "LINDE" liquid oxygen system or equal (as specified in the RFP) and also offered "M" size oxygen cylinders rather than the "E" and "H" size cylinders called for by the solicitation.

The record (our Office conducted a hearing in connection with this issue) confirms that the agency made award based on Nahatan's alternate proposal for a "liquid low loss system," as Amcare alleges. However, prejudice is an essential element of every viable protest and where none is shown, our Office will not sustain a protest, even where the agency's actions may have been improper. IT Corp., B-258636, et al., Feb. 10, 1995, 95-1 CPD ¶ 78. At the conclusion of the hearing, the parties were asked to address prejudice in connection with this issue. In its post-hearing comments, Amcare neither alleges nor demonstrates that it was prejudiced by the agency's actions. Specifically, while Amcare maintains only that the Nahatan offer was technically noncompliant, and that the agency should reopen the competition to provide all firms an opportunity to submit offers based on the alternate equipment, it does not assert—and there is nothing in the record which suggests—that it would or could have offered the alternate equipment, or that any such offer would have been significantly lower priced (in the context of this competition). In view of these considerations (and, to some limited extent, the fact that both Nahatan and NMC submitted BAFOs that were rated technically superior to and offered the compliant system at lower prices than Amcare's), there is no basis for concluding that the VA's actions were prejudicial to Amcare.

BAD FAITH

In its initial protest, Amcare alleged that a senior official at one of VA's installations for this acquisition had a conflict of interest. Specifically, Amcare alleged that the Chief of Respiratory Therapy at one installation was on the board of medical advisors for Nahatan and that, because he was the supervisor for one of the technical evaluators, he had an opportunity to improperly influence the outcome of the procurement. During the hearing, we obtained testimony showing that the Chief of Respiratory Therapy had in fact entered into a paid consultant relationship with Nahatan, but that at the time he entered into the relationship, he was unaware of the fact that Nahatan was competing for the requirement. The testimony further showed that the Chief of Respiratory Therapy and the evaluator in question never had substantive discussions concerning the ongoing competition or the firms involved. There was no evidence, and the record gives no reason to believe, that the Chief of Respiratory Therapy ever directly or indirectly attempted to influence

the outcome of the competition, or that the evaluator was either aware of, or influenced by, the existence of a relationship between the Chief Respiratory Therapist and Nahatan.

In its post-hearing comments, Amcare apparently abandoned its conflict of interest allegation.³ Amcare argues instead that Nahatan's actions in establishing a relationship with the Chief of Respiratory Therapy constituted bad faith.⁴ It is not apparent on what basis Amcare would have us sustain its protest, since there is no evidence or allegation of either a legal impropriety on Nahatan's part, or that the evaluation was improperly influenced. In any case, we need not decide this issue since Amcare is not an interested party for purposes of advancing the argument. Our Bid Protest Regulations, 4 C.F.R. §§ 21.1(a) and 21.0(a), require a protester to be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. As noted, there was another offeror, NMC, whose proposal was found technically superior to, and lower priced than, Amcare's. Amcare has not challenged the evaluation of NMC's proposal, or otherwise raised allegations that would bring into question its relative competitive standing. Thus, even if Nahatan were eliminated from the competition, NMC, not Amcare, would be in line for award. Amcare therefore is not an interested party for purposes of this allegation.

The protest is denied in part and dismissed in part.

Comptroller General
of the United States

³To the extent that Amcare's post-hearing submission can be interpreted as commenting on the conflict of interest protest basis, we deny the allegation. There is no evidence to show that the consulting relationship between the Chief Respiratory Therapist and Nahatan either directly or indirectly affected the outcome of the procurement; thus, there is no basis to sustain Amcare's allegation in this regard. TRESP Assocs., Inc.; Advanced Data Concepts, Inc., B-258322.5; B-258322.6, Mar. 9, 1995, 96-1 CPD ¶ 8.

⁴Amcare also alleged, without supporting evidence, that Nahatan had purchased equipment to be used in connection with the contract prior to the award. Even if Amcare's allegation were true, however, it would show no more than that Nahatan had decided to buy certain equipment, a decision not necessarily related to the performance of this particular contract.