Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Anthem Alliance for Health, Inc.; TRICARE Management Activity--Reconsideration

File: B-278189.5

Date: July 13, 1998

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DIGEST

Joint request for reconsideration of decision sustaining protests on the basis that the agency failed to disclose the relative importance of evaluation criteria, evaluated the awardee's proposal contrary to the solicitation's requirements, and conducted a cost evaluation that contained arbitrary assessments, is denied where the requesting parties do not demonstrate that our prior decision contained factual or legal errors.

DECISION

Anthem Alliance for Health, Inc. and the Department of Defense's TRICARE Management Activity (TMA),[1] jointly request reconsideration of our decision Foundation Health Fed. Servs., Inc.; Humana Military Healthcare Servs., Inc., B-278189.3, B-278189.4, Feb. 4, 1998, 98-1 CPD ¶ ___, in which we sustained Foundation's and Humana's protests against the award of a contract to Anthem under request for proposals (RFP) No. MDA906-95-R-0005, for health care and associated administrative services for Military Health Services System (MHSS) beneficiaries.

We deny the request.

[1]At the time our prior decision was issued, the agency was known as the TRICARE Support Office. The agency has recently been renamed the TRICARE Management Activity.

BACKGROUND

Under the RFP, offerors were required to propose three health care options for MHSS beneficiaries in geographic Regions 2 and 5. Specifically, the RFP required offerors to propose health care systems under which beneficiaries opt to obtain services: (1) from providers of their own choosing on a fee-for-service basis (the TRICARE Standard program); (2) from members of the contractor's preferred provider organization (the TRICARE Extra program); or (3) from a contractor-established health maintenance organization (the TRICARE Prime program). The RFP provided that the agency would award a contract to the offeror whose proposal was most advantageous to the government, stating that technical factors would be worth 60 percent of the total evaluation score and evaluated cost 40 percent. The technical scores were derived by evaluating 11 performance tasks, along with experience and performance, all of which were listed as evaluation subfactors within seven "major technical factors."

We sustained the protests on the bases that: (1) the agency did not accurately disclose the relative importance assigned to the significant technical evaluation factors and subfactors, as required by 10 U.S.C. § 2305(a)(2)(A) (1994); (2) the agency's evaluation of Anthem's experience and performance was contrary to the express provisions of the solicitation; and (3) portions of the agency's cost evaluation lacked a reasonable basis.

Relative Weights of Evaluation Subfactors

Section 2305 of Title 10 of the United States Code requires that solicitations "at a minimum" include "a statement of--(i) all significant factors and significant subfactors which the head of the agency reasonably expects to consider . . . ; [and](ii) the relative importance assigned to each of those factors and subfactors . . . ." 10 U.S.C. § 2305(a)(2)(A). Where the solicitation is silent as to the relative importance of the subfactors, offerors can only assume that the subfactors are of approximately equal importance. Stone & Webster Eng'g Corp., B-255286.2, Apr. 12, 1994, 94-1 CPD ¶ 306 at 5; Informatics, Inc., B-194734, Aug. 22, 1979, 79-2 ¶ 144 at 6.

The solicitation stated that the "major technical factors" were listed in descending order of importance, but provided no meaningful information regarding the relative importance of the tasks/subfactors. Consistent with the authority referenced above, the protesters interpreted the solicitation as providing that the tasks/subfactors within each major factor were of equal importance. In actuality, however, the agency's evaluation scheme did not accord equal weight to the tasks/subfactors

within each major factor.[2] Thus, offerors were unaware that, for example, Task I/Health Care Providers was nearly twice as important as Task III/Utilization and Quality Management; that Task IV/Enrollment, Marketing and Support Services, a subfactor under the sixth most important major factor, was more important than Task XI/Start-up and Transition, a subfactor under the second most important factor; or that Task V/Claims Processing was six times more important than Task VI/Program Integrity, another subfactor under the same major factor. In short, the agency failed to comply with the statutory requirement that offerors be advised of the relative importance of the evaluation criteria.

[2]The actual evaluation weights applied by the agency were as follows:

MAJOR TECHNICAL FACTOR	TASK	WEIGHT
First	Task I/Health Care Providers	20 percent
	Task III/Utilization and Quality Management	10.1 percent
Second	Task VIII/Management	10 percent
	Task XI/Start-up and Transition	7.9 percent
Third	Task V/Claims Processing	10.8 percent
	Task IX/Reimbursement	2.9 percent
	Task VI/Program Integrity	1.8 percent
Fourth	Task II/Lead Agents and MTF Coordination and Interface	12.5 percent
Fifth	Experience/Performance	12 percent
Sixth	Task IV/Enrollment, Marketing and Support Services	10 percent
Seventh	Task VII/Fiscal Management	1 percent
	Task X/Automated Data Processing	1 percent

Experience and Performance

Section M of the solicitation stated: "[o]fferors who do not have any CHAMPUS [Civilian Health and Medical Program of the Uniformed Services]/MCS [Managed Care Support]/CRI [CHAMPUS Reform Initiative]/MHSS [that is, military health care] experience in the following eight (8) functional areas will receive a neutral rating." Thus, proposals submitted by offerors lacking relevant past performance should have been neither penalized nor credited with regard to the experience and performance evaluation factor. C.W. Over and Sons, Inc., B-274365, Dec. 6, 1996, 96-2 CPD ¶ 223 at 6-7; see generally Excalibur Sys., Inc., B-272017, July 12, 1996, 96-2 CPD ¶ 13 at 3-4. Although neither Anthem nor its subcontractors possessed military health care experience in three of the eight rated areas ([deleted]), Anthem's proposal was rated [deleted] in each of those areas.[3] Thus, the evaluation of Anthem's proposal under the experience and performance evaluation factor was contrary to the solicitation's stated provisions.

Cost Evaluation

The solicitation required that the offerors' cost proposals project health care costs regarding numerous variables--some of which are within the offerors' control (for example, the percentage of beneficiaries participating in the Prime and Extra options and the level of discounts offered by health care providers), and some of which are beyond their control (for example, inflation).[4] The RFP provided that the agency would evaluate the realism of each proposed, controllable trend factor based on the agency's judgment regarding "the likely trends under the offeror's approach." The protest record established that the agency's evaluation of cost proposals included a number of arbitrary assessments. Specifically, in virtually every situation (99.5 percent) where Humana, Foundation or Anthem proposed a controllable trend factor which reflected savings greater than anticipated by the Independent Government Cost Estimate (IGCE), the evaluated cost for that factor was either: (1) [deleted], or (2) [deleted]. That is, rather than evaluating "the likely trends under [each] offeror's approach," the agency conducted a mechanical, 2-point cost evaluation under which essentially all of the controllable trend factors were

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[3]During the protest it became clear that, despite the RFP's express provision, the agency did not believe that offerors without military health care experience should be limited to a neutral rating.

[4]The RFP required that offerors propose a "trend factor" for each variable. Each proposed trend factor represented the offeror's prediction of the costs that would be incurred in relation to baseline cost data set forth in the RFP. A trend factor of .95 indicated that the offeror was projecting a 5-percent savings over the baseline data; a trend factor of 1.05 indicated that the offeror was projecting 5 percent higher costs than those reflected in the baseline data.

evaluated as one of two alternative costs. The impact of this approach was that unrealistically optimistic offerors were effectively rewarded with evaluated costs which incorporated a significant part of the unrealistically high proposed savings.[5] We concluded that the agency's cost evaluation contained elements that lacked a reasonable basis.

Prejudice

In sustaining the protests, we specifically considered whether the protesters had demonstrated a reasonable possibility of prejudice; that is, whether, but for the agency's actions, the protesters would have had a substantial chance of receiving the award. See McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996). In considering the issue of prejudice, we were cognizant of the agency's final evaluation results, which are summarized below.

	Anthem (original/ corrected)	Humana (original/ corrected)	Foundation (original/ corrected)
Evaluated Cost	$3,631,409,997/ $3,659,380,726	$3,855,809,818/ $3,870,444,156	$3,886,720,190/ $3,917,232,685
Cost Score[6]	1,000/1,000	942/945	934/934
Technical Points	[deleted]	[deleted]	[deleted]
Technical Score[7]	[deleted]	[deleted]	[deleted]
Overall Best Buy Score	1,000/1,000	963/968	962/966

We specifically considered the [deleted] technical scores; the fact that Anthem's evaluated cost was less than 6 and 7 percent, respectively, below Humana's and Foundation's evaluated cost; that the solicitation provided for greater weight to be accorded technical factors; and that the protesters made specific representations regarding how their proposals would have been altered had they known of the agency's actual intentions. In the context of the record as a whole, we concluded that, if the agency had properly advised offerors of the relative importance of the

[5]For example, [deleted].

[6]Cost Score=1,000 times low price divided by offeror's price.

[7]Technical Score=1,000 times offeror's score divided by high score.

evaluation criteria, had properly evaluated Anthem's experience and performance, and had conducted a cost evaluation that did not contain arbitrary assessments, there was a substantial chance that one of the protesters would have been awarded the contract.

RECONSIDERATION REQUEST

Application of the Prejudice Standard

In requesting reconsideration, Anthem and the agency primarily challenge our conclusion regarding prejudice.[8] In this regard, Anthem and the agency first complain that the protesters should have been required to provide "a precise showing of impact," and that "GAO never determined any specific impact from the alleged errors."

To establish prejudice, a protester is not required to show that, but for the alleged error, the protester would have been awarded the contract. Management HealthCare Prods. & Servs., B-251503.2, Dec. 15, 1993, 93-2 CPD ¶ 320 at 4; Manekin Corp., B-249040, Oct. 19, 1992, 92-2 CPD ¶ 250 at 5. Such a rule would make it virtually impossible for a protester ever to prevail, no matter how egregious the error in the procurement process. Further, GAO's determination regarding whether a given protester would have a substantial chance of receiving the award, but for the procurement flaws, is frequently not susceptible to a precise mathematic calculation. Indeed, the very description of the applicable prejudice standard--"substantial chance of receiving the award"[9]--denotes a determination that, of necessity, must be based on judgment rather than precise calculations. Here, mathematical calculations would require definitive projections regarding how the protesters' proposals would have differed, and how the agency would have evaluated such differences. In this procurement, such projections were not possible.[10]

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[8]The request for reconsideration was submitted jointly by Anthem and the agency on February 17, 1998. On March 19, Foundation submitted a response to the joint reconsideration request. On April 16, Anthem submitted a reply to Foundation's response to the reconsideration request.

[9]The prejudice standard has also been described as requiring a "reasonable likelihood" of award. See Data Gen. Corp. v. Johnson, 78 F.3d 1556, 1562 (Fed. Cir. 1996). We, like the Court of Appeals for the Federal Circuit, view these alternative articulations of the standard to be essentially synonymous. See Statistica v. Christopher, 102 F.3d 1582.

[10]Anthem and the agency refer to Geonex Corp., B-274390.2, June 13, 1997, 97-1 CPD
(continued...)

Regarding the protesters' representations, Anthem and the agency complain that our decision is based on a "misreading" of the protesters' testimony. Specifically, they complain that GAO "relied upon mere **general** discussion of what the protesters **might** have done," (emphasis in reconsideration request), and improperly equated the protesters' use of the words "might" and "may" with the word "would." Anthem and the agency are in error.

Our decision concluded that:

> The protesters assert, and offered testimony to the effect, that they would have allocated their proposal preparation resources differently and would have restructured their proposals, if they had been aware of the actual relative importance of the significant evaluation considerations."

The record shows that Humana's representative unambiguously testified, among other things, that if he had known the actual weighting of the evaluation criteria, that information would have "absolutely" affected his proposal effort, Hearing Transcript (Tr.) at 13, explaining that Humana "spent more time on those [tasks] that [Humana] believed were of higher value." Id. at 13-14. Noting that the RFP weightings provided a framework for allocation of resources in preparing the proposal, he further testified that, had the actual criteria weightings been disclosed, Humana "would have also changed the involvement [in proposal preparation] of [Humana's] senior staff." Id. at 13. Similarly, Foundation's representative testified, among other things, that his understanding of the criteria weightings "determined how I used internal resources and bought external resources [for proposal preparation]," and that "[i]f I had known that the government was going to evaluate with these relative weights, I would have restructured my proposal . . . ." Id. at 92, 93. Specifically with regard to Task I, Health Care Providers--which the agency accorded twice the weight accorded the other task contained within the "major

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[10](...continued)
¶ 225, as authority for their assertion that "in assessing prejudice, GAO **must quantify** the alleged impact of the errors." (Emphasis in reconsideration request.) In Geonex, we found the agency's evaluation was flawed regarding a single, specific evaluation factor. Nonetheless, we found no prejudice because the record established that even if the protester had received the maximum possible score under that evaluation factor, the relative competitive positions of the offerors would not have been reversed. Contrary to Anthem's and the agency's assertions that the impact of procurement errors must be quantified, Geonex simply stands for the proposition that we will find no prejudice flowing from an agency's flawed evaluation where the record establishes that, even if the protester had received the maximum possible score under the factor containing the evaluation flaw, the protester would not be in line for award. Such is not the case here.

evaluation factor"--Foundation's representative testified that Foundation considered, but rejected, a more expensive approach to meeting the requirements for this task based on Foundation's understanding that the two tasks were of equal importance. Id. at 112. Based on the record as a whole, we found these representations credible.

Anthem and the agency also complain that our conclusion regarding prejudice here is "starkly at odds" with our decision in Hughes Missile Sys. Co., B-272418 et al., Oct. 30, 1996, 96-2 CPD ¶ 221. There, we found that the Department of the Air Force, in evaluating proposals to provide certain missiles, essentially eliminated a solicitation requirement regarding the proposed missiles' capability to destroy "Target X," but denied Hughes's protest on the basis that it was not prejudiced by the agency's error.

Our factual determinations in Hughes were materially different than our determinations here. In Hughes, we expressly rejected the protester's representations that, had it known of the agency's actual requirements, it would have proposed a different warhead. Specifically, we concluded that "Hughes would not have offered a different warhead," elaborating that:

> Since the record--including Hughes's contemporaneous documentation---indicates that Hughes's [proposed] warhead remained its most effective warhead even after removal of Target X . . ., and given the substantial effort required to change warheads, we simply do not find credible Hughes's claim that elimination of Target X would have led it to alter its proposal to its significant competitive advantage.

In contrast, on the record before us here, we found no basis to question the credibility of the protesters' representations that they would have altered their proposals had they known of the agency's actual requirements.

Anthem and the agency next complain that our decision failed to give proper consideration to what they refer to as Anthem's "mammoth" and "tremendous" cost advantage. Referring to a recently published opinion of the United States Court of Federal Claims, Alfa Laval Separations, Inc. v. United States, 1998 U.S. Claims LEXIS 7 (Fed. Cl. Jan. 23, 1998), Anthem asserts that "a significant price differential precludes a finding of prejudice."

This argument is without merit. In Alfa Laval, the Court concluded that, although the procuring agency improperly found the awardee's proposal acceptable, the record did not reflect a reasonable likelihood that the plaintiff would have received

the award but for the agency's error.[11] In reaching this conclusion, the Court noted that the plaintiff's price was 29 percent higher than the awardee's, that the agency had previously rejected as too high a price lower than that offered by the plaintiff, and that the Navy retained the option to cancel the solicitation and recompete the contract.[12]

Here, in contrast, Anthem's evaluated cost advantage was less than 6 and 7 percent, respectively, with regard to Humana's and Foundation's evaluated costs; [deleted]; and the RFP established that cost was less important than technical factors. Thus, on this record, we reject the assertion that Anthem's "tremendous" cost advantage precluded a finding of prejudice.[13]

Finally, Anthem and the agency assert--as they argued during the protest--that our conclusion regarding the flawed cost evaluation is inconsistent with our prior decisions, most notably QualMed, Inc., B-257184.2, Jan. 27, 1995, 95-1 CPD ¶ 94. Specifically, Anthem and TMA assert that the cost evaluation employed here "was the very same one that GAO found reasonable in QualMed, Inc.," in which we denied the protest challenging the agency's cost evaluation.

In QualMed, we held that the agency was not required to evaluate proposed trend factors by independently calculating a factor to replace each proposed trend factor, noting that, there, the agency's evaluators chose from 1 of 5 possible evaluation

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[11]Although we are not bound by the decisions of the Court, we view our standard for establishing prejudice to be essentially the same as that applied by the Court.

[12]In reaching its conclusion, the Court referenced its decision in Analytical Research Tech., Inc. v. United States, 39 Fed. Cl. 34 (1997), where a 35-percent difference in proposed costs existed and no prejudice was found by the court.

[13]Similarly, Anthem and the agency argue that our decision failed to properly consider Anthem's [deleted]. Anthem and the agency complain that our decision [deleted]. Our decision is not at odds with the view that [deleted] was a clear discriminator in the procurement. As we found in our decision, however, the agency improperly failed to advise the offerors of the relative importance of that discriminator.

points in assigning evaluated costs for proposed trend factors.[14] We concluded that such an approach was similar to a rating system under which a proposal feature must be assigned a score of 1, 2, 3, 4, or 5, and concluded that, "[w]hile such a system is not precise, it is not unreasonable."

In contrast to the 5-point evaluation scheme employed in QualMed, the agency here extended the level of imprecision found reasonable in QualMed to a system which essentially permitted only two evaluation points: [deleted]. This imprecision led to anomalies in the cost evaluation. Further, the agency was aware that alternative cost evaluation methodologies (including the use of a multi-point system, as in QualMed) would have produced more accurate estimates for individual trend factors without imposing an undue burden on the agency. We thus were unwilling to accept as reasonable the agency's expansion of the permissible imprecision associated with the 5-point evaluation system employed in QualMed, to the greater imprecision created by the 2-point evaluation system employed here. The requesters have not established that our conclusion in this regard was erroneous.

In summary, to prevail on a request for reconsideration, the requesting party or parties must show that our prior decision contains factual or legal errors or failed to consider information that warrants reversal or modification of our decision. 4 C.F.R. § 21.14 (1998). Upon consideration of the arguments presented in the reconsideration request, we find that Anthem and the agency have failed to make the requisite showing.

The request for reconsideration is denied.

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[14]Specifically, we stated:

> In determining the probable figure for each trend factor, the evaluators chose among a limited number of possibilities ([deleted]).

QualMed, Inc., B-257184.2, Jan. 27, 1995, at 7 (protected decision).