



**The Comptroller General  
of the United States**

Washington, D.C. 20548

## **Decision**

**Matter of:** Associated Healthcare Systems, Inc.

**File:** B-222532

**Date:** September 2, 1986

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### **DIGEST**

Where a solicitation for indefinite quantities of oxygen solicits prices for gaseous and liquid oxygen supplies, but provides that the contractor may provide whichever type of oxygen it prefers, evaluation based on the prices for both types of oxygen provides no assurance that the low evaluated price will result in the lowest actual cost to the government and, thus, provides no valid basis for award.

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### **DECISION**

Associated Healthcare Systems, Inc. (AHS), protests the rejection of its low bid as nonresponsive and the award of a contract to Home Health Care Products, Inc. (HHCP), under invitation for bids (IFB) No. 528-33-86 issued by the Veterans Administration (VA), VA Medical Center, Buffalo, New York, for furnishing oxygen and inhalation supplies.

We sustain the protest.

The VA rejected AHS's low bid for failing to comply with the VA's interpretation of a clause limiting the government's cost under the IFB. The IFB specified estimated quantities and requested unit prices for each of six sizes of oxygen cylinders, and for regulators, liquid oxygen systems, and oxygen concentrators. The solicitation provided:

"The Contractor can provide oxygen in any form of liquid if he/she prefers; however, the cost of liquid oxygen, including monthly rental of system and cost per pound of liquid oxygen, shall not be in excess of equivalent oxygen provided by 'H' [244 cubic feet] cylinders.

The VA interpreted this provision as requiring a bidder to submit an offered price for liquid oxygen which did not exceed the bidder's offered price for an equivalent unit of gaseous oxygen provided in "H" cylinders, while permitting the bidder to provide at its discretion "H" oxygen

cylinders or liquid oxygen systems to meet the agency's needs (while nothing similarly prohibited the price of gaseous oxygen from exceeding the price of liquid oxygen). AHS submitted prices of \$16.50 per "H" cylinder and \$1.40 per pound of liquid oxygen. Each "H" cylinder contains gaseous oxygen equivalent to 20.19 pounds of liquid oxygen. By dividing AHS's price of \$16.50 per "H" cylinder by 20.19, the VA determined that AHS's price per pound of \$1.40 for liquid oxygen exceeded its price of an equivalent amount of gaseous oxygen in "H" cylinders (\$0.817 per pound). Because of this, and the VA's interpretation that the offered price for liquid oxygen could not exceed the offered price for an equivalent unit of gaseous oxygen, the VA rejected the AHS bid as nonresponsive.

The protester states that it interpreted the provision in question not as imposing a limit on the prices it could offer, but as limiting the monthly amount the contractor could be paid for liquid oxygen to the cost of supplying an equivalent amount of gaseous oxygen at the bidder's "H" cylinder price. As the protester interpreted the provision, it could offer and charge \$1.40 per pound for liquid oxygen, but the maximum monthly cost per patient could not exceed the cost of providing the patient with gaseous oxygen. The protester argues that if it was mistaken in this interpretation, it should be allowed to correct its bid so that its price for liquid oxygen is equal to its originally offered price for an equivalent amount of gaseous oxygen in "H" cylinders. We understand this argument to mean that, if the VA applied the provision as a bidding limitation, AHS should be allowed to modify its bid to reflect the VA's interpretation.

By its terms, the IFB referred to the contractor's performance and prohibited the cost of liquid oxygen, including monthly rental of the attendant equipment, from exceeding the cost of equivalent oxygen in "H" cylinders and attendant equipment. The provision did not expressly limit what price a bidder could offer for liquid oxygen. Further, if the costs of the different types of oxygen and attendant equipment were to be compared on the basis of a common quantity, it was impossible to determine the equivalent costs without factoring in the number of months the systems would be rented, a number entirely in the contractor's control based on the type of oxygen the contractor chooses to supply. Thus, it was, at best, unclear whether the IFB prohibited offering higher prices for liquid oxygen than for equivalent gaseous oxygen in "H" cylinders, or merely placed a limit on the amount the contractor could be paid for liquid oxygen systems during performance.

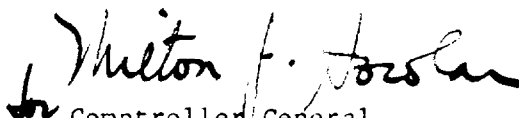
Further, we find that the IFB did not provide a proper basis for an award. An award must be based on the most favorable cost to the government measured by the actual and full scope of work to be awarded. A to Z Typewriter Co.--Reconsideration, B-213281.2, Apr. 8, 1985, 85-1 CPD ¶ 404. If the IFB's evaluation scheme does not assure that an award to the lowest evaluated bidder will result in the lowest cost to the government in terms of actual performance, the IFB is defective per se and no bid can be evaluated properly. Exclusive Temporaries of Ga., Inc., B-220331.2 et al., Mar. 10, 1986, 86-1 CPD ¶ 232.

The fact that the IFB provided that the contractor could supply any type of oxygen, but that the low bidder would be evaluated based on prices for both types of oxygen, provided no assurance that the evaluated low bid would result in the least costly performance. A bidder could have bid a minimal unit price for liquid oxygen and an excessive unit price for gaseous oxygen with the intention of providing only gaseous oxygen, as allowed by the IFB, and therefore the evaluated total price would not reflect the actual cost to the government. In this regard, we note that the awardee's price for gaseous oxygen was higher than the protester's.

We also note that although the IFB apparently contemplated a requirements contract and provided estimated quantities of anticipated requirements for gaseous oxygen, it provided no estimates of the amount of oxygen to be used with liquid oxygen systems. It therefore was not clear whether the liquid oxygen merely represented an alternative to the estimated requirements for gaseous oxygen or an additional requirement. If the line item for liquid oxygen represented an additional requirement, the IFB should have included an estimated quantity for liquid oxygen and provided for a price evaluation based on the estimated quantities of the items to be purchased. See North American Reporting, Inc., et al., 60 Comp. Gen. 64 (1980), 80-2 CPD ¶ 364. In addition, the IFB solicited prices for two sizes of gaseous oxygen cylinders where in each case the estimated quantity was stated as zero.

Because of these deficiencies, it is impossible to determine whether any award under this solicitation would be in the government's interest of obtaining the least costly responsible firm. We recommend that the VA expeditiously prepare a revised solicitation that accurately states the agency's needs and provides a basis for evaluation that takes those needs into account and assures award at the lowest cost to the government. In this regard, we suggest that if the contractor will be able to provide whichever type of oxygen it prefers, the IFB should require a fixed price for a common measure of oxygen (including necessary equipment) without regard to type. This would alleviate the need for any limitation on the pricing or cost of liquid oxygen relative to gaseous oxygen. We further recommend that the VA then resolicit and award a contract as soon as possible, terminating the current contract for convenience if feasible. Since it is quite possible that this action cannot be effected before a substantial portion of the current contract's 1-year term has expired, we find that the protester should be reimbursed the reasonable costs of filing and pursuing the protest, including attorney's fees. 4 C.F.R. § 21.6(e) (1986).

The protest is sustained.

  
for Wilton F. Jordan  
Comptroller General  
of the United States