



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: American Marketing Associates, Inc.--Recon.

File: B-274454.4

Date: May 14, 1997

J. Douglas Scherling, Esq., for the protester.

Jeanne A. Anderson, Esq., Department of Veterans Affairs, for the agency.

Christine F. Davis, Esq. and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

General Accounting Office will not consider a protest concerning the enforceability of a settlement agreement unless it alleges that the agreement, if followed or breached, would result in a prejudicial violation of procurement law or regulation.

DECISION

American Marketing Associates, Inc. (AMA) requests reconsideration of our dismissal of its protest of the award of a contract to PSA Home Healthcare under request for proposals (RFP) No. 554-52-96, issued by the Department of Veterans Affairs (VA), for home oxygen services and equipment.

We deny the request for reconsideration.

VA received proposals from three offerors, including AMA and PSA, and determined that PSA's offer represented the best value to the government under the RFP evaluation scheme. AMA protested the award, asserting that a member of VA's evaluation board had a conflict of interest because she worked part-time for a subsidiary of the awardee. In response to the protest, VA informed our Office that it would convene a new evaluation board without the member challenged by AMA, request best and final offers (BAFO), and perform a new evaluation and source selection. We therefore dismissed AMA's protest as academic.

AMA requested reconsideration of our dismissal, asserting that it was entitled to the appointment of an entirely new evaluation board. VA then agreed to appoint an entirely new evaluation board to evaluate BAFOs. Based upon this agreement, AMA withdrew its reconsideration request.

VA did not impanel an entirely new evaluation board to evaluate BAFOs, as had been promised, although VA did remove the evaluator whom AMA originally challenged as having a conflict of interest. Upon reevaluation, VA gave AMA's BAFO 51.9 of the 100 available evaluation points and PSA's BAFO 94.9 points. VA

determined that PSA's significantly superior, slightly higher-priced BAFO was more advantageous to the government than AMA's BAFO and affirmed the award to PSA.

Upon learning that VA had not impaneled an entirely new evaluation board, AMA reinstated its protest. VA submitted an agency report, including all evaluation documentation, which was furnished to AMA's counsel under a General Accounting Office protective order. In its report comments, the protester argued that VA broke its promise to convene an entirely new evaluation panel, but did not identify any evaluation error committed by the allegedly improper panel.

While we do not condone VA's disregard of the settlement agreement, we dismissed the protest as lacking any valid basis. We found that VA's evaluation documentation supported on its face the determination that PSA's BAFO was significantly superior to AMA's BAFO. Because AMA did not challenge any specific evaluation conclusion as unreasonable, incorrect, or biased, we had no basis to find that VA's failure to convene an entirely new evaluation panel compromised the evaluation or prejudiced the protester.

AMA claims that we erred in dismissing the protest. The protester asserts that its protest was cognizable because "VA breached the [settlement] agreement with AMA and as a result AMA has suffered damages." According to AMA, the settlement agreement constituted a contract, and AMA could properly protest to enforce that contract, regardless of whether the agency violated any other procurement law or regulation.

Our bid protest jurisdiction is limited to deciding protests "concerning an alleged violation of a procurement statute or regulation." 31 U.S.C.A. § 3552 (West Supp. 1997). Thus, we will not consider a protest concerning the enforceability of a settlement agreement unless it alleges that the agreement, if followed or breached, would result in a prejudicial violation of procurement law or regulation. See, e.g., Techplan Corp., 68 Comp. Gen. 428, 431-432 (1989), 89-1 CPD ¶ 452 at 4-5; Earth Property Servs., Inc., B-237742, Mar. 14, 1990, 90-1 CPD ¶ 273 at 4-5, aff'd, B-237742.2, June 11, 1990, 90-1 CPD ¶ 546 at 5.

While AMA, in its protest, alleged that VA breached the settlement agreement by failing to assemble an entirely new evaluation panel, AMA never questioned the evaluation performed by that panel as being biased, unreasonable, inconsistent with the evaluation scheme stated in the solicitation or otherwise in violation of law or regulation. Regarding AMA's claim that it was somehow prejudiced by the agency's violation of the settlement agreement, we note that our Office allowed AMA to reinstate its protest when it realized that VA failed to convene an entirely new evaluation panel, as promised. See York Int'l Corp., B-244748, Sept. 30, 1991, 91-1 CPD ¶ 282 at 5. Had the protester alleged, based upon the documentation in the agency report, that VA's breach of the settlement agreement resulted in an evaluation that was prejudicially unfair, biased, or otherwise in violation of a

specific law or regulation, its protest would have been cognizable. Because the protester made no such allegation, but merely sought specific enforcement of the settlement agreement, we had no basis for considering its protest.

The request for reconsideration is denied.

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