



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

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Matter of: American Native Medical Transport, L.L.C.

File: B-276873

Date: August 5, 1997

Cynthia Y. McCoy, Esq., Moore McCoy, P.C., for the protester.
Michael Colvin, Department of Health & Human Services, for the agency.
Charles Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency reasonably evaluated the protester's and awardee's proposals as technically equivalent and properly made award under a best value evaluation scheme based on the awardee's lower-priced proposal.
2. Protester was not prejudiced by the agency's failure to conduct discussions, as required by the solicitation and applicable regulations, where the record demonstrates that the protester could not significantly improve its highly rated technical proposal and would not lower its price below that offered by the awardee.

DECISION

American Native Medical Transport, L.L.C. protests the award of a contract to Native American Air Ambulance, Inc. (NAAA) under request for proposals (RFP) No. 794, a total set-aside for Indian-owned firms, issued by the Department of Health and Human Services, Phoenix Area Indian Health Service (IHS), Phoenix, Arizona, for medically necessary air transportation services.

We deny the protest.

The RFP, issued November 18, 1996, contemplated the award of a fixed-price requirements contract for air transportation services for eligible IHS beneficiaries in IHS' Whiteriver Service Unit and San Carlos Service Unit in Arizona for a 1-year base period with four 1-year options. The contractor is required to provide fixed-wing and rotor aircraft to meet the contract requirements. The RFP did not specify a minimum number of aircraft necessary to perform the services, but advised offerors that the contractor must have sufficient personnel and equipment to

perform the services, or arrange to subcontract for the services.¹ The RFP established minimum response times for the various aircraft; for example, the required response time for fixed-wing aircraft was set at 45 minutes for both the Whiteriver and San Carlos Units.

The RFP services include "Level I," "Level II", and "Level III" air medical transport. The RFP defined Level I services to include "Critical Care Life Support: Acute Conditions"; "Advanced Life Support: Acute or Non-acute Conditions"; "Specialty Care Missions (Neonatal, Obstetric)"; and "Scene Response Rotor Craft (Acute Conditions/Situations)." Level II services were defined to include "Basic Life Support (BLS) monitoring required (Non-acute Stable)" and "Air Ambulance: Specialty care monitoring required (Non-acute Stable)." Level III services were for "any person not requiring at least BLS monitoring."

Under the RFP's pricing format, offerors were required to submit prices for Level I and Level II air transport based upon the Medicare reimbursement formula in effect at the time the services are rendered--an offeror could price its proposal directly at the Medicare reimbursement rate or offer a percentage discount off the rate.² Level III services were required to be offered at a per unit price for an estimated quantity of 350 Level III transports.

The proposal instructions advised that the technical proposal should include a detailed work plan indicating how each aspect of the statement of work was to be accomplished to include present or proposed facilities and equipment which would be used in the performance of the contract.

Award under the RFP was to be made under a best value evaluation scheme, considering price and the following technical criteria: Corporate Experience/Customer Support (35 points), Required Rotor Craft Documents (20 points), and Required Fixed Wing Documents (45 points). Each technical criterion required the offeror to furnish various licenses, certificates, corporate policies, and experience. Under Corporate Experience/Customer Support, among other things, was the requirement to furnish Department of the Interior Office of Aircraft Services (OAS) certification. Under Required Rotor Craft Documents,

¹The RFP also cautioned that under the Buy Indian Act not more than 50 percent of the work could be subcontracted to other than an Indian-owned firm.

²While American Native complains that the price evaluation scheme is defective because there are no estimated quantities for the Level I and Level II transports, this constitutes a protest of an alleged defect apparent from the face of the RFP not for consideration by our Office inasmuch as it was filed after the time set for receipt of initial proposals and is therefore untimely under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1997).

among other things, offerors were required to furnish a copy of each pilot's commercial rotor craft airman's certificate; to list each rotor craft by type, model, year, and time in use; and to describe the medical configuration of the rotor craft. Under Required Fixed Wing Documents, among other things, offerors were required to furnish a copy of each pilot's commercial multi-engine certificate and years of experience; to list each aircraft by type, model, year, and time in use; and to describe the medical configuration of the aircraft. Price was not to be separately evaluated or scored and was said to be less important than the technical criteria.

The RFP also stated:

The Government intends to evaluate proposals and award a contract after conducting written or oral discussions with all responsible offerors whose proposals have been determined to be within the competitive range. However, each initial offer should contain the offeror's best terms from a cost or price and technical standpoint.

American Native and NAAA submitted proposals by the December 18 closing date. American Native's proposal offered for Level I and Level II transports a 5-percent discount off the Medicare reimbursement rate, and a total price of \$1,038,250 for Level III transports. NAAA's proposal offered for Level I and II transports a 25-percent discount for the base year, a 20-percent discount for the first option year, a 15-percent discount for the second and third option years, and a 10-percent discount for the fourth option year, and a total price for Level III transports of \$752,500.

Technical proposals were evaluated by a four-member technical evaluation panel. American Native's proposal received an overall score of 90.17 of 100 points and NAAA's proposal received an overall score of 90.25 points.³ Based upon the technical scores, the proposals were determined to be essentially equal. Because NAAA's prices were lower and considered to be reasonable, the agency determined that NAAA's proposal represented the best value and made award to NAAA without conducting discussions on April 15, 1997. This protest followed.

American Native protests the reasonableness of the technical evaluation that its proposal was essentially equal to NAAA's proposal, arguing that the evaluation of the proposals was unreasonable and that its proposal should have been considered technically superior to NAAA's.

In reviewing an agency's evaluation, we will not reevaluate proposals, but instead will examine the agency's evaluation to ensure that it was reasonable and consistent

³The total technical score was derived from averaging each individual member's score under each criterion, then totaling the sum from each category.

with the solicitation's stated evaluation criteria. Global Assocs., Ltd., B-275534, Mar. 3, 1997, 97-1 CPD ¶ 129 at 3. The determination of the merits of competing proposals is within the discretion of the agency which is responsible for its needs and the best method of accommodating them; a protester's mere disagreement with the agency does not render the evaluation unreasonable. Id.

The record indicates that IHS rated NAAA's proposal favorably because, among other things, NAAA had successfully performed all requested medical transport services for both the San Carlos and Whiteriver Units since 1995--this included a high number of consistently trouble free flights. The record also evidences that several evaluators considered NAAA's British Aerospace J31 fixed-wing aircraft to be superior to the Cessna 421 C fixed-wing aircraft offered by Indian Native because the J31 is a larger aircraft and had the capability to transport more than one patient. Both proposals omitted certain requested documentation and were downgraded for this reason.

American Native makes a large variety of attacks on the evaluation, all of which were considered. Based on our review of the record, we find no basis to sustain the protest. We discuss those arguments that form the focus of American Native's protest below.

American Native first argues that NAAA's proposal should have been downgraded because NAAA proposed to provide three British Aerospace J31 fixed-wing aircraft, but it had only two such aircraft available at the time it submitted its proposal. American Native has presented evidence allegedly showing that one of NAAA's three aircraft was removed from service in 1996 and advises that NAAA's proposal included insurance policies for only two planes. Further, American Native asserts that NAAA proposed only one helicopter, which in any event was not available at the time NAAA submitted its proposal. In contrast, American Native states that it proposed to furnish four Cessna 421 C fixed-wing aircraft and four helicopters to meet the requirements.

NAAA proposed to provide rotor craft services by subcontracting with an identified approved source. Also, as indicated, NAAA proposed to meet the requirements with its existing fleet of J31 fixed-wing aircraft and to subcontract with an acceptable OAS-certified provider to provide other necessary fixed-wing aircraft transports on a short-term basis until NAAA purchased an additional aircraft. Thus, notwithstanding American Native's assertion that NAAA misrepresented that it had three fixed-wing aircraft when it owned only two, NAAA's proposal states that it intended to subcontract and purchase other needed aircraft, and there is no evidence that the agency relied upon NAAA's assertion that it owned three fixed-wing aircraft in scoring its proposal.

Although American Native asserts that NAAA's proposal should have been rated less favorably than American Native's because only two fixed-wing aircraft and no rotor

craft were actually available to NAAA at the time it submitted its proposal, the RFP did not specify a minimum number of aircraft that would be needed to successfully perform the contract work or state that the aircraft must be available at the time proposals were submitted--offerors were only required to commit to meet minimum response times and to discuss present or proposed facilities and equipment. Our review confirms that NAAA's proposal satisfied the RFP's requirements, and, on this record, we believe that IHS could reasonably conclude that NAAA with its two documented aircraft and plan to obtain additional aircraft, including rotor craft, through subcontracts with approved sources, has committed to provide sufficient aircraft to meet the agency's requirements and was entitled to full credit in this regard under the evaluation criteria.⁴

American Native argues that the chart NAAA included in its proposal of dispatch times to San Carlos and Whiteriver from Prescott Airport reflected a fixed-wing aircraft response time in excess of 45 minutes and that NAAA's proposal therefore did not meet the fixed-wing aircraft minimum response time requirement. However, NAAA's proposal showed that NAAA (like American Native) intended to meet the requirements through Williams Gateway Airport in Mesa, Arizona, where its operations and its two J31 aircraft were based (although it also stated that it could meet the response time from the Prescott Airport). NAAA explained that it could meet the requirement because of the J31 aircraft's cruising speeds, and that it had demonstrated the ability to do so to both service units under the recent contracts with IHS. We find that this commitment to meet the fixed-wing aircraft response time requirement was reasonably accepted by IHS, notwithstanding the discrepancies on NAAA's chart of dispatch times regarding flights to the units from Prescott Airport.

American Native also argues that NAAA's proposal should have been downgraded because it contained expired OAS certificates for its aircraft, OAS certificates for only three of its pilots, and did not sign many of its corporate policies. American Native notes that its proposal contained all of the required information, including current OAS certificates.

While NAAA failed to submit certain requested information,⁵ the record shows that it was generally downgraded for these omissions and that American Native's proposal similarly did not include all requested information and was also downgraded. For example, American Native's proposal did not include resumes,

⁴There is no mention of more credit being given under the evaluation scheme for proposing a higher number of aircraft than necessary to meet the RFP requirements.

⁵Although NAAA did not submit current OAS aircraft certificates in its proposal, it explained that the 1997 certification was to be completed by January 1, 1997.

certifications and licenses for certain personnel, a complete nighttime flying policy, or a detailed policy for dealing with neonatal patients.

In sum, on this record, we have no basis to object to the panel's consensus report's conclusion that the proposals were both technically acceptable and technically equivalent. American Native's arguments only represent a disagreement regarding the relative merits of the proposals and do not show that the agency's evaluation was unreasonable.

American Native argues that the agency did not adequately investigate the promises made in NAAA's proposal to verify their accuracy, and that NAAA could not in fact meet the RFP requirements.⁶ However, an agency need not conduct such an independent investigation where it can find the proposal reasonably commits the offeror to meet the RFP requirements; the issue of whether NAAA actually has the capability to perform the contract as promised in its proposal is a matter of responsibility. General Offshore Corp., B-251969.5, B-251969.6, Apr. 8, 1994, 94-1 CPD ¶ 248 at 8.

Here, American Native not only contends that NAAA is incapable of successfully performing the contract because it will not deliver what it promised in its proposal, but also asserts that NAAA also could not be found responsible because it lacks

⁶For example, American Native complains that the agency did not "independently verify" that NAAA had the number of aircraft or subcontract arrangements claimed in its proposal or that it would in fact comply with the RFP's subcontracting limitation.

integrity⁷ and because its price was unreasonably low.⁸ Nevertheless, the record evidences that the IHS affirmatively determined and documented that NAAA was a responsible contractor. We will not review an affirmative determination of responsibility absent a showing of possible fraud, or bad faith on the part of contracting officials or that definitive responsibility criteria in the solicitation have not been met. 4 C.F.R. § 21.5(c); Mitel, Inc., B-270138, Jan. 17, 1996, 96-1 CPD ¶ 36 at 4.

American Native argues that the affirmative responsibility determination of NAAA was motivated by bias. However, we do not attribute unfair or prejudicial motives to government officials on the basis of inference or supposition, because those officials are presumed to act in good faith. Advanced Sciences, Inc., B-259569.3, July 3, 1995, 95-2 CPD ¶ 52 at 17. Thus, where a protester alleges bias on the part of government officials, the protester must provide credible evidence clearly demonstrating bias against the protester or for the awardee and that the agency's bias translated into action that unfairly affected the protester's competitive position. Id. We have reviewed the documents provided by American Native in support of its allegations of bias⁹ and none demonstrates that IHS acted with bias in favor of NAAA.

Finally, Native American argues that the agency improperly failed to conduct discussions. We agree. The solicitation announced that the agency would evaluate

⁷For example, American Native questioned NAAA's prior billing practices and contends that NAAA may have misappropriated its proposal through industrial espionage. The agency has reviewed American Native's claims regarding NAAA's asserted lack of integrity and affirmed that it considers NAAA to be responsible. We also note that the misappropriation issue presents a dispute between private parties that our Office will not consider. Applied Communications Research, Inc., B-270519, Mar. 11, 1996, 96-1 CPD ¶ 145 at 2-3.

⁸The submission of a below-cost offer is not itself legally objectionable. Whether a contract can be performed at the offered price is a matter of the offeror's responsibility. Hughes Georgia, Inc., B-272526, Oct. 21, 1996, 96-2 CPD ¶ 151 at 7. Where, as here, the technical evaluation criteria do not provide for consideration of price in the technical evaluation, a protester's claim that an offered price is so low as to render a proposal technically unacceptable is not a valid basis of protest. Akal Sec., Inc., B-261996, Nov. 16, 1995, 96-1 CPD ¶ 33 at 5-6.

⁹For example, American Native asserts that NAAA obtained a copy of the RFP earlier than the protester and references a number of documents that evidence that the agency regarded NAAA as a potential acceptable source for these type of services.

proposals and make award after conducting discussions. Under 41 U.S.C. § 253b(d)(1) (1994) and Federal Acquisition Regulation §§ 15.610 (a)-(b), an agency is required to conduct discussions unless the solicitation notified offerors that the government intends to evaluate proposals and make award without discussions. Since the RFP did not so notify offerors, the IHS' decision to make award without conducting discussions was improper.¹⁰ Nevertheless, the record demonstrates that the protester was not prejudiced by the agency's failure to conduct discussions.

Our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions, that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996).

American Native states that if discussions had been conducted, it could have persuaded the agency that its proposal was technically superior to NAAA's and that NAAA's prices were unreasonably low. However, American Native misunderstands the nature of the requirement for meaningful discussions; an agency is not obligated, and is indeed precluded from, disclosing to an offeror a competitor's technical approach or price; the items to be discussed are the weaknesses and deficiencies in the offeror's own proposal relative to solicitation requirements, not the merits of a competitor's proposal. Westinghouse Elec. Corp., B-250486, Feb. 4, 1993, 93-1 CPD ¶ 229 at 16. Moreover, while American Native now claims that it would have lowered its price for Level III transport to match NAAA's if it had been provided an opportunity to submit a best and final offer (BAFO), the fact is that American Native would not (and should not) have been aware during discussions of its competitor's lower price. In any case, American Native advises that it would not have lowered its price for Level I and II transports, because it believed NAAA's prices for those services to be unreasonably low. Since the proposals were rated technically equal, based upon the equally high technical scores, and because the record shows that American Native could not have substantially improved its already high technical score and would not have lowered its price to a level below NAAA's if it had been provided discussions and the opportunity to submit a BAFO,

¹⁰The record evidences that discussions may have been conducted only with American Native, which allowed that firm to supplement its proposal with various documents, thereby raising its point score.

we find no basis to conclude that American Native was prejudiced by IHS' failure to conduct discussions. See General Physics Fed. Sys., Inc., B-275934, Apr. 21, 1997, 97-1 CPD ¶ 171 at 6.

The protest is denied.

Comptroller General
of the United States