



G A O

Accountability * Integrity * Reliability

United States Government Accountability Office
Washington, DC 20548

**Comptroller General
of the United States**

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: Air Products Healthcare

File: B-298293; B-298293.2

Date: August 11, 2006

Douglas L. Patin, Esq., Robert J. Symon, Esq., and Katherine L. Ruff, Esq., Bradley Arant Rose & White, for the protester.
Dennis Foley, Esq., and Philip Kaufman, Esq., Department of Veterans Affairs, for the agency.
Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency improperly determined that protester's proposal was technically unacceptable is denied where the record shows that the agency's conclusion was reasonable, and where the agency clearly advised the protester of its concerns during discussions.

DECISION

American Homecare Supply, LLC, dba Air Products Healthcare protests the award of a contract to Rotech Healthcare Inc. by the Department of Veterans Affairs (VA), pursuant to request for proposals (RFP) No. 00241-05-00106, issued to procure home oxygen delivery and support services for veteran patients located in the VA's Veterans Integrated Service Network (VISN) 1, which includes the New England states of Connecticut, Massachusetts, Rhode Island, Vermont, New Hampshire, and Maine. Air Products argues that the VA unreasonably concluded that its proposal was technically unacceptable, failed to hold meaningful discussions, and conducted an unreasonable evaluation of past performance.

We deny the protest.

BACKGROUND

The RFP here, issued on August 10, 2005, advised potential offerors that the VA has an ongoing requirement for home oxygen services for approximately 5,220 veteran patients served by eight VA medical centers (VAMC) and associated outpatient clinics in the New England area. RFP at 27. In addition, the RFP provided a

breakdown of the estimated number of home oxygen patients served by each of the major facilities within VISN 1. Specifically, the estimated number of patients for each location is as follows:

VAMC Bedford, MA	104
VA Boston, MA Healthcare System (HCS)	1,257
VA Connecticut HCS	1,126
VAMC Manchester, NH	442
VAMC Northampton, MA	160
VAMC Providence, RI	570
VAMC Togus, ME	1,300
VAMC White River Junction, VT	261

Id. at 75 (Attach. B).

In addition to the routine patient visits and replenishment of supplies associated with providing home oxygen services, the RFP required that offerors be able to provide emergency services at a beneficiary's home within 6 hours of a call for help, and advised that most emergency services should be provided within 2 hours of a call. Id. at 28. The RFP also identified a transition period of 45 days during which the incumbent contractor would continue to provide these services while the incoming contractor is taking over. Id. at 31.

The RFP anticipated the award of a fixed-price requirements contract for these services for 1 base year, followed by up to four 1-year options. The solicitation advised that proposals would be assessed under each of three evaluation factors--technical capability, past performance, and price--and that technical capability and past performance combined would be "significantly more important than price." Id. at 64. The solicitation also advised that price would become more important as technical evaluations became more equal. Id. at 65. Under the technical capability evaluation factor, the solicitation also identified four subfactors, in descending order of importance. These were: technical approach, key management team, financial statement, and curriculum vitae for the project manager. Id. at 66.

By the September 1, 2005, closing date, the VA received three proposals--one from Rotech, one from Air Products, and one from a third offeror. The VA evaluators rated each proposal under the technical evaluation factors and subfactors, and under the past performance evaluation factor, using the ratings of A, B, C, or D. The ratings of A and B were reserved for proposals viewed as outstanding or good, respectively, while the ratings of C and D were defined as follows:

C -- Fair-Proposal marginally meets the minimum standard requirements of the rating factor.

D -- Poor-Proposal fails to meet the minimum requirements of the rating factor.

AR, Tab 17, at 5. The price factor was not rated.

In its proposal, Air Products identified three facilities it would use to provide the services required here—one in Auburndale, Massachusetts; one in Warwick, Rhode Island; and one in Stratford, Connecticut. Agency Report (AR), Tab 7, Air Products Technical Proposal at 1, 3-7. For each of these facilities, Air Products provided a detailed roster of the employees it was offering, including the employee's name, position, and years of experience. Id. at 3-7. The proposal advised that Air Products' Rhode Island and Connecticut facilities would service patients in those two states, respectively, while the facility in Auburndale, Massachusetts, would service patients in Massachusetts, Vermont and New Hampshire. Id. at 8.

With respect to the estimated 1,300 home oxygen patients located in Maine, the proposal stated that Air Products would "open a fourth facility in Maine to service the patients of the Togus [ME] VAMC." Id. at 3. The proposal did not identify any employees for the Maine facility, but represented that the Maine facility would be "well staffed with experienced and competent personnel." Id. at 7. The proposal also advised that Air Products expected to locate its Maine facility in either Portland, Bangor, or Augusta. (The Togus VAMC is located in Augusta.) Air Products' initial proposal does not identify any facility, or branch office, in the states of Vermont or New Hampshire. Id. at 8-10.

In assessing Air Products' initial proposal, three of the five VA evaluators assigned the proposal a rating of D under the technical approach subfactor (the most-heavily weighted subfactor), while the remaining two evaluators assigned a rating of C. AR, Tab 6. These ratings were averaged to a rating of C- under the technical approach subfactor. Under the other three technical subfactors, Air Products received average ratings of C+, C+, and B-/C+. Under the past performance evaluation factor Air Products received a rating of C/B-.¹ AR, Tab 6. In addition, the record reflects that all five of the evaluators added narrative comments to their scoresheets expressing

¹ Under the past performance evaluation factor, an offeror's past performance on VA contracts was assessed separately from its past performance on other contracts; thus, there are two ratings for each offeror's past performance score. RFP at 66; AR, Tab 6. In contrast, the B-/C+ rating referenced above for the fourth technical subfactor, curriculum vitae for the project manager, is an attempt by the evaluators to strike a midpoint between the B and C ratings; it does not reflect two separate scores, as with the past performance rating.

concern about whether Air Products' approach would provide adequate coverage throughout the geographical region covered by the contract.² Id.

By letter dated October 21, 2005, the VA provided nine discussion questions to Air Products, and requested that the company submit a "best and final offer" by November 4. AR, Tab 10. Two of these questions are relevant here:

1. How do you intend to provide home oxygen services for an entire VISN, when your previous contracts are with individual VA Medical Centers?

* * * * *

8. Based on your technical proposal, it appears that your company lacks the staff to provide adequate coverage for Vermont, New Hampshire and Maine. How do you intend on providing coverage for these areas?

Id.

In its response, Air Products provided a one-paragraph general answer to the first question, advising the VA that "with the establishment of two new facilities and the hiring of additional personnel, we are positive we will have more than sufficient resources available to meet the needs of the entire VISN." AR, Tab 12, at 2. Air Products' answer to question No. 8 states:

It is our intention to open new depots in White River Junction, VT and Biddeford, ME or alternate locations that would best fit the needs of the VA beneficiaries to be serviced. We currently cover all of New Hampshire out of our Manchester, NH facility. We believe we can open the two new facilities and have an interim JCAHO [Joint Commission on Accreditation of Hospital Organizations] Accreditation for both within [deleted] days of notice of award. Until these two new facilities are opened and accredited, we have adequate inventory on our vehicles and in short-term storage facilities to meet the needs of the VA.

Id. at 5. In an additional five sentences provided in answer to question No. 8, Air Products indicated that it will hire additional personnel to meet the needs of the VA, and explains that the company has successfully opened more than 20 new locations over the last 2 years.

² In comparison, Rotech's initial proposal received average ratings of A-, A-, B, and A-, under the four technical subfactors, with average ratings of C+/Not Applicable, under the past performance evaluation factor.

In assessing Air Products' final proposal, four of the five VA evaluators assigned a rating of D under the technical approach subfactor of the technical evaluation factor. AR, Tab 11, at 1. The remaining evaluator assigned a rating of B, although he wrote a narrative comment indicating that, in his view, Air Products lacks the capacity to perform this contract, and that "their [Air Products'] responses do not warrant any changes in my score."³ Id. at 1, 3. Averaging the four ratings of D, with one rating of B, the technical evaluators assigned an average rating of C- to Air Products under the technical approach subfactor. The remaining technical subfactor ratings were C+, C+, and B-. The ratings assigned for past performance were C/B-, with an average overall rating for Air Products of C.

In addition to the letter ratings assigned to Air Products' final proposal, the evaluators expressed on-going concerns in contemporaneous narrative comments prepared for the record. With respect to the issue of Air Products' ability to cover the entire geographical area, the Price Negotiation Memorandum notes:

In Air Products' original proposal they stated they had facilities in MA, CT and RI. They planned on covering NH and VT out of the MA office and they planned on opening an office in ME. In the BAFO response they revised their proposal by saying they would open a facility in VT too. They also mention in their BAFO that they have a facility in NH but no information on the facility's size was given. Because no information on this facility is given and it was not mentioned in the original proposal the question arises does it exist? And even if it does, how big is the facility? How many staff is there?

Of major concern is the time it will take to open any proposed facilities in ME and VT and meeting the time requirements, i.e., responding to emergency calls within 6 hours and servicing all of VISN 1 while these new facilities are being opened.

AR, Tab 17, at 8-9.

Reviewing the final evaluation ratings, the contracting officer (CO) agreed with the four evaluators who assigned a D rating to Air Product's final proposal under the technical approach subfactor, and concluded that the B rating assigned by the remaining evaluator was in error. CO's Statement at 4. As a result, the CO reduced

³ This evaluator initially assigned a rating of C to Air Product's proposal under the technical approach subfactor of the technical evaluation factor. Compare AR, Tab 6, at 3 (showing an initial rating of C from this evaluator for Air Products under the technical approach subfactor) with AR, Tab 11, at 3 (showing a final rating of B, despite the narrative comment quoted above).

the average rating for the technical approach subfactor from C- to D, and concluded that the proposal was unacceptable.⁴ Id.

At the conclusion of the final evaluation, both Air Products' proposal, and that of the third offeror, were viewed as technically unacceptable. AR, Tab 16, at 3. As a result, the CO recommended award to Rotech on the basis that its proposal was technically acceptable, and that its price of \$45.5 million was reasonable. AR, Tab 17, at 10-11. In contrast, Air Products' price was \$42.2 million, and the price of the other unacceptable offeror was \$37.8 million. Id. Since Rotech's proposal was viewed as the only acceptable offer, the CO did not make a cost/technical tradeoff.

By letter dated May 2, Air Products was provided with a debriefing, and this protest followed.

DISCUSSION

Air Products argues that the agency unreasonably concluded that its proposal was technically unacceptable because of an apparent concern about how long it would take the company to open new facilities. Air Products also argues that the VA failed to provide meaningful discussions because the agency did not advise the company of this concern. In addition, Air Products contends that the agency improperly abandoned the evaluation scheme when it found the proposal unacceptable despite the proposal's average rating of C- under the technical approach subfactor, and average rating of C overall. As set forth below, we think Air Products has recast the VA's concerns about its proposal more narrowly than the evaluation record warrants, and we disagree with the protester's contentions that the agency acted unreasonably in concluding that the proposal was technically unacceptable.

In reviewing a procuring agency's evaluation of an offeror's technical proposal, our Office's role is limited to ensuring that the evaluation was reasonable and consistent with the terms of the solicitation and applicable statutes and regulations. Urban-Meridian Joint Venture, B-287168, B-287168.2, May 7, 2001, 2001 CPD ¶ 91 at 2. Our Office will not question an agency's evaluation judgments absent evidence that those judgments were unreasonable or contrary to the stated evaluation criteria. Kay & Assocs., Inc., B-291269, Dec. 11, 2002, 2003 CPD ¶ 12 at 4.

⁴ This decision uses the average ratings noted on the summary sheet contemporaneously prepared by the technical evaluation panel, rather than the slightly-lower average ratings reflected in the CO's Statement prepared in response to this protest. Compare AR, Tab 11, at 1 (the technical evaluation summary sheet showing an average rating of C- for this subfactor) with CO's Statement at 4 (claiming the average rating was D+/C- for this subfactor).

In support of its argument that the VA was primarily concerned about the time it would take to open facilities, and that the VA failed to advise it of this concern, Air Products correctly quotes a comment in the final evaluation materials stating:

Of major concern is the time it will take to open any proposed facilities in ME and VT and meeting the time requirements, i.e., responding to emergency calls within 6 hours and servicing all of VISN 1 while these new facilities are being opened.

AR, Tab 17, at 9. In our view, despite the VA's description of the time needed to open facilities as a "major concern," its concern was much broader than this more limited matter.

For example, the evaluation materials in the record note (one page prior to the quotation set out above) that Air Products originally stated that the company: (1) had facilities in Massachusetts, Connecticut and Rhode Island; (2) planned on providing services to patients in New Hampshire and Vermont out of the Massachusetts facility; and (3) planned on opening a facility at an, as yet, undetermined location in Maine. Id. at 8. This approach led the agency to ask Air Products during discussions how the company would provide coverage throughout the region, and especially how it would provide coverage to patients located in Vermont, New Hampshire and Maine. AR, Tab 10.

In its answer, Air Products did not clear up these matters, but instead, further clouded them. Specifically, in its final response, Air Products, for the first time: (1) referenced a Manchester, New Hampshire facility nowhere mentioned in its initial proposal; (2) promised to open a facility in White River Junction, Vermont, to provide services to patients in that state; and (3) advised that it expected to be able to open, and obtain accreditation for, the new facilities in Vermont and Maine "within [deleted] days of notice of award." AR, Tab 12, at 5. Apparently recognizing the fact that the stated [deleted] period was [deleted] the 45-day transition period identified in the solicitation, Air Products also advised that "[u]ntil these two new facilities are opened and accredited, we have adequate inventory on our vehicles and in short-term storage facilities to meet the needs of the VA." Id.

This record as a whole—from the initial evaluations, including the narrative comments prepared by all five VA evaluators; to the discussion questions ("it appears that your company lacks the staff to provide adequate coverage for Vermont, New Hampshire and Maine" AR, Tab 10); to the final evaluation conclusion that the proposal is unacceptable—evidences a consistent and clearly-stated concern about Air Products' capacity to provide home oxygen services to veteran beneficiaries located throughout the New England region. In our view, this record effectively refutes the protester's contention that the evaluation was unreasonable, and refutes any claim that the discussion questions here failed to reasonably advise the protester

of the nature of the VA's concerns. See Poly-Pacific Techs., Inc., B-293925.2, Dec. 20, 2004, 2004 CPD ¶ 250 at 4.

With respect to the protester's contentions that the VA could not reasonably conclude that its proposal was unacceptable given its average rating of C- under the technical approach subfactor, and average rating of C overall, we again disagree.

In this regard, we note that four of the five VA evaluators assigned a rating of D to the proposal under the most heavily-weighted technical subfactor, indicating their view that the proposal failed to meet the RFP's minimum requirements. In addition, the one remaining evaluator, who assigned a B rating--which was averaged with the four ratings of D to produce a consensus rating of C- under this subfactor--added a narrative comment indicating that he, too, thought Air Products lacked the capacity to perform this contract, and that nothing in the company's final response provided a basis to change his earlier rating of C under this subfactor. AR, Tab 11, at 1, 3. Under these circumstances, we see nothing unreasonable about the CO's decision to change Air Products' average rating under this subfactor to a rating of D, or his conclusion that the proposal was technically unacceptable, and could be excluded from further consideration. See Property Analysts, Inc., B-259853.2, B-259853.3, June 13, 1995, 95-1 CPD ¶ 270 at 4 (CO reviewed evaluations and proposals, noticed inconsistent scoring, and reasonably adjusted the scoring to reflect his view of the proposals).

Finally, to the extent that the VA does express a concern in its final evaluation materials about the amount of time Air Products anticipates for opening, and gaining accreditation for, new facilities, we note that the final proposal's information about timeframes was inconsistent with both the initial proposal and the requirements of the RFP. Moreover, by providing this new and inconsistent information in its final response, Air Products cannot reasonably fault the agency for failing to raise the matter during discussions.⁵ See Mine Safety Appliances Co., B-242379.5, Aug. 6, 1992, 92-2 CPD ¶ 76 at 6-7 (agency is not required to reopen discussions to allow offerors to address problems first introduced in an offeror's final offer).

The protest is denied.

Gary L. Kepplinger
General Counsel

⁵ Air Products also raises arguments regarding the past performance evaluation here. Since we conclude that the agency reasonably decided the protester's proposal was technically unacceptable, we need not consider these arguments. See ProMar; Urethane Prods. Corp., B-292409 et al., Aug. 25, 2003, 2003 CPD ¶ 187 at 8 n.11.