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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

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Decision

Matter of: Hyperbaric Technologies, Inc.

File: B-293047.2; B-293047.3

Date: February 11, 2004

Simon E. Dance, Esq., and Jeffrey S. Newman, Esq., Foley & Lardner, for the protester.

Phillipa L. Anderson, Esq., Philip S. Kauffman, Esq., and Dennis M. Foley, Esq., Department of Veterans Affairs, for the agency.

Paula A. Williams, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester's challenge to the scope of the agency's corrective action is denied where the corrective action undertaken was appropriate to remedy the concerns that led the agency to take corrective action.

DECISION

Hyperbaric Technologies, Inc. (HTI) protests the corrective action taken by the Department of Veterans Affairs in response to an earlier protest filed by HTI under request for proposals (RFP) No. 797-FDF3-03-0002, for the upgrade and replacement of hyperbaric chambers at Brooks Air Force Base (AFB) in Texas.

We deny the protest.

As a matter of background, we note that the current protest is one of several challenges that have been filed by HTI in connection with this procurement. HTI initially protested a previous solicitation for this acquisition, RFP No. 797-FDF4-02-0041, alleging that the agency's evaluation and award decision under that solicitation was unreasonable. HTI's protest (B-291681.2) was dismissed by our Office as academic in light of the agency's cancellation of the solicitation; the agency had determined, among other things, that the technical evaluation factors needed to be clarified and that, in any event, the agency's needs had changed substantially, warranting a resolicitation.

The RFP, as reissued on June 20, 2003, solicited proposals for the upgrade and replacement of hyperbaric chambers and for related services at the Hyperbaric

Medicine Division of the United States Air Force School of Aerospace Medicine, Brooks AFB. Award was to be made to the offeror whose proposal was most advantageous and represented the best value to the government. The RFP identified the following evaluation factors and subfactors:

1. Technical Capability	
	a. Suitability of overall upgrades/new chamber
	b. Proposal demonstrates understanding of requirements
	c. Overall quality and technical specifications
2. Past Performance	
	a. Experience
	b. Reported customer satisfaction/testimonials
3. Price	

RFP amend. 1, at 18. The RFP provided that technical capability and past performance, when combined, were significantly more important than price. Within the technical capability factors, the RFP stated that subfactor (a) was more important than subfactor (b), and that subfactor (b) was more important than subfactor (c). Under past performance, the RFP stated that subfactor (a) was stated to be more important than subfactor (b). Id.

The source selection plan, which was not disclosed in the RFP, provided that proposals would be point-scored on a 100-point scale as follows:

Factor	Subfactor	Point Value
Technical Capability	Suitability of overall upgrades/new chamber	[DELETED]
	Proposal demonstrates understanding of requirements	[DELETED]
	Overall quality and technical specifications	[DELETED]
	Total Technical Points	[DELETED]
Past Performance	Experience	[DELETED]
	Reported customer satisfaction/testimonials	[DELETED]
	Total Past Performance Points	[DELETED]
Price	Total Points	[DELETED]

Agency Report (AR), exh. 2, Source Selection Plan.

The VA received proposals from three offerors, including HTI and PCCI, Inc., which were evaluated using the numeric rating system described above. After reviewing the technical and price evaluation results, the contracting officer determined that PCCI's proposal represented the best value to the government and award was made to PCCI on September 29. Contracting Officer's Statement at 1. On October 14, after receiving a debriefing, HTI protested the award determination to our Office. In its

protest (B-293047) HTI argued that the agency misevaluated proposals, failed to follow the solicitation's stated evaluation criteria, and made an unreasonable best value determination. Protest at 2-12.

The VA subsequently decided to take corrective action based on its review of the procurement. By letter dated October 29, the VA informed our Office that it would review the solicitation provisions to ensure that they were consistent with the agency's needs, amend the solicitation as necessary, request and evaluate final proposal revisions, and make a new source selection decision. Letter from VA to GAO, Oct. 29, 2003. Because of the VA's decision to take corrective action, our Office dismissed the protest on November 5, 2003. The VA then implemented corrective action that consisted of amending the RFP's evaluation scheme and requesting proposal revisions. According to the agency, the purpose of this amendment was to conform the relative importance of the stated RFP evaluation factors to the point scoring methodology in the source selection plan, a methodology which the agency reports it always intended to use to evaluate proposals. The evaluation scheme as included in this amendment was as follows:

1. Technical Capability	
	a. Suitability of overall upgrades/new chamber
	b. Proposal demonstrates understanding of requirements
	c. Overall quality and technical specifications
2. Price	
3. Past Performance	
	a. Experience
	b. Reported customer satisfaction/testimonials

RFP amend. 3, at 2.

The amended evaluation scheme stated that technical capability was more important than price and past performance, and that price was more important than past performance. The amendment retained the original RFP language which stated that the nonprice factors, when combined, were significantly more important than price.¹ On November 12, the amendment was transmitted to the three offerors who had originally responded to the solicitation, together with a request for proposal revisions by November 17. HTI then filed this protest with our Office objecting to the scope of the corrective action.

¹Other than a minor change that neither party claims has a material impact, the amendment retained the RFP's relative weighting of the subfactors of the technical capability and past performance factors. RFP amend. 3, at 2.

The crux of the protester's objections is that the agency's corrective action only focused on the RFP's stated evaluation scheme and failed to remedy various other solicitation improprieties raised by HTI in its earlier protest. Protest at 7-10; Comments at 5-7. This argument is without merit since, as discussed below, there is no requirement that the VA's corrective action address all of the issues raised by HTI in its earlier protest.

An agency has broad discretion in a negotiated procurement to take corrective action where the agency determines that the action is necessary to ensure a fair and impartial competition. Strand Hunt Constr., Inc., B-292415, Sept. 9, 2003, 2003 CPD ¶ 167 at 4; SMS Data Prods. Group, Inc., B-280970.4, Jan. 29, 1999, 99-1 CPD ¶ 26 at 2. Where an agency has reasonable concerns that there were errors in the procurement, the agency may take corrective action even if it is not certain that a protest of the procurement would be sustained. Main Bldg. Maint., Inc., B-279191.3, Aug. 5, 1998, 98-2 CPD ¶ 47 at 3. We will not object to the specific corrective action, so long as it is appropriate to remedy the concern that caused the agency to take corrective action. Id.; Networks Elec. Corp., B-290666.3, Sept. 30, 2002, 2002 CPD ¶ 173 at 3.

Our review of the record here shows that the VA reasonably decided to amend the RFP and request and evaluate final proposal revisions in order to remedy defects in the procurement process. Specifically, the corrective action was undertaken as a result of the agency's concern that it had evaluated the three proposals received using the evaluation methodology in the source selection plan described above, which was at least arguably inconsistent with the stated RFP evaluation scheme. Contrary to HTI's view, the RFP did not identify the varying importance among the individual evaluation factors and, in the absence of any indication in the RFP of the relative importance among the individual evaluation factors, they are presumed to be of equal importance.² See Maryland Office Relocators, B-291092, Nov. 12, 2002, 2002 CPD ¶ 198 at 5; Logicon RDA, B-252031.4, Sept. 20, 1993, 93-2 CPD ¶ 179 at 7. In this case, however, the record shows that the VA never intended to give equal weight to the evaluation factors, as evidenced by the actual evaluation of the initial proposals.

Rather, as the agency acknowledges, it intended to use a scoring methodology in which technical capability was more important than price (technical capability was worth a total of [DELETED] points and price was worth [DELETED] points) and price was more important than past performance (past performance was assigned

²The VA correctly notes that the Federal Acquisition Regulation (FAR) requires that solicitations set forth the relative importance of all factors and significant subfactors that will affect contract award (which the RFP had not done), as well as inform offerors (as the RFP had done) whether, when combined, the nonprice factors are either (1) significantly more important than price; (2) equal to price; or (3) significantly less important than price. FAR § 15.304(d), (e).

only [DELETED] points). Under these circumstances, we think the VA properly decided to amend the RFP evaluation scheme to remedy this defect since it is fundamental that offerors be advised of the bases upon which their proposals will be evaluated.

To the extent HTI contends that the corrective action had no effect on the competition and merely “glosses over” improprieties in the solicitation, Comments at 3-7, its disagreement with the scope of the corrective action—that the agency’s corrective action did not remedy HTI’s challenge to the agency’s evaluation of PCCI’s proposal and the award decision—does not provide a basis to question the agency’s actions. We think the VA’s decision to solicit and evaluate revised proposals and to make a new best-value determination based on that reevaluation renders academic HTI’s protest of the initial evaluation and award decision. In short, the other alleged deficiencies or improprieties identified in HTI’s earlier protest became moot where the agency’s decision to reopen the competition and make a new best value determination afforded the protester another opportunity to be considered for award.³

Further, the protester asserts that other than HTI’s price reduction, there were no changes in the revised proposals submitted to the VA in response to the amendment at issue here and that this shows that the amendment was unnecessary. However, as discussed previously, we think the agency’s corrective action was reasonable at the time it was undertaken. The fact that other offerors, other than HTI, did not revise their proposals does not establish that the agency’s decision to amend the RFP evaluation language was improper corrective action.

The protest is denied.⁴

Anthony H. Gamboa
General Counsel

³On December 22, 2003 HTI filed another protest (B-293047.4) of an award to PCCI; this protest is pending. Our Office intends to issue a separate decision addressing the merits of that protest.

⁴HTI also requests that we recommend that the agency reimburse the firm for protest costs, including attorneys’ fees. As to its earlier protest (B-293047), we deny the request because the VA took reasonably prompt corrective action. HSQ Tech.—Costs, B-276050.2, June 25, 1997, 97-1 CPD ¶ 228 at 2. As to this protest of the corrective action, because we are denying the protest, there is no basis for us to recommend reimbursement of costs to the protester.