

\$65B DOD Health Deal Cleared Of Protester's Small Biz Claims

By **Alyssa Aquino**

Law360 (August 15, 2023, 4:51 PM EDT) -- The U.S. Government Accountability Office swept aside a contractor's renewed challenge to the \$65 billion TRICARE military health care contract, rejecting claims that the award winner had misled the Pentagon on its small business participation, according to a decision released Tuesday.

The watchdog disagreed with Health Net Federal Services' arguments that a series of purported misrepresentations in its contract bid should have disqualified TriWest Healthcare Alliance Corp. from competing for the lucrative deal. The statements Health Net claimed to be false were, "at worst," unacceptable aspects of the proposal that TriWest later corrected, or were minor inconsistencies that didn't affect the overall evaluation, the watchdog said.

"It is clear that Tri-West initially proposed an approach that did not conform to the requirements of the solicitation, but it did so forthrightly, with an explanation of what it proposed. In short, we see no basis to conclude TriWest's proposal contained material misrepresentations, but rather simply submitted a non-conforming proposal," the GAO said in a decision dated Aug. 4.

The TRICARE program provides health care to 9 million soldiers and their families. Overseen by the U.S. Defense Health Agency, TRICARE relies on a series of managed care support contracts to provide the services, with contractors establishing and maintaining networks of health care providers, processing claims and providing customer service.

Health Net, which had been the managed care contractor for the U.S.'s western region during the fourth set of TRICARE contracts, had been passed over for the fifth round of contracts for TriWest in December, spurring litigation in the GAO.

The company claimed that Health Net had artificially inflated its small business participation to reach the 25% small business subcontracting requirement of the deal. Faced with the protest, DHA agreed to pull back the contract and reevaluate the small business participation factor, offering both Health Net and TriWest the chance to revise that aspect of their proposal. TriWest submitted a new plan, which the agency accepted, saying it would re-award the deal to TriWest, according to the decision.

Health Net protested the re-award, raising more concerns with TriWest's small business participation plan.

It argued that TriWest had inappropriately treated its nonprofit, non-small-business owners as affiliates

whose subcontracting work could be excluded from the small business participation calculation. That argument rested on the Federal Acquisition Regulation Section 2.101's definition that an affiliate can exert "control" on the other. Because the regulation doesn't define control, the U.S. Small Business Administration's definition must be used, Health Net said, arguing that TriWest's owners didn't count as affiliates under the SBA rules.

But GAO said that FAR 2.101 didn't appear to incorporate that SBA regulation.

Moreover, "the protester has not clearly explained why the SBA's tests for control of a small business would be meaningful or appropriate in the context of assessing control of other-than-small businesses," the watchdog said.

Health Net had also challenged several other aspects of TriWest's bid, including its technical proposal.

Health Net and TriWest had received roughly the same adjectival ratings on most aspects of their proposal, save the technical side, with DHA evaluators finding that TriWest proposed building excess capacity into its health care network, according to the decision. But Health Net argued that officials overlooked the challenges that TriWest — which has managed care contracts for the U.S. Department of Veterans Affairs, but not TRICARE — would encounter in building a new TRICARE network.

This argument also failed to persuade GAO.

The record, GAO said, shows DHA "carefully considered" TriWest's approach and reasonably concluded that TriWest would meet the award requirements. Moreover, the request for proposals didn't require offerors to explain how they would negotiate the health care contracts, the watchdog said.

"Put another way, even if the protester is correct that some portion of TriWest's existing network will opt out of accepting TRICARE patients, TriWest's proposed network exceeded historical utilization by such a significant margin that the agency reasonably concluded that TriWest would nonetheless be able to meet — and in fact exceed — the requirements," GAO said.

Representatives for Health Net, TriWest and DHA declined to comment Tuesday.

Health Net is represented by Amy L. O'Sullivan, Robert J. Sneckenberg, Cherie J. Owen, James G. Peyster, William B. O'Reilly, Zachary H. Schroeder, Issac D. Schabes and David H. Favre III of Crowell & Moring LLP.

TriWest is represented by Robert S. Ryland, H. Boyd Greene and Ashley Pincock of Kirkland & Ellis LLP, Marcia G. Madsen, Luke Levasseur, Cameron R. Edlefsen, and Evan C. Williams of Mayer Brown LLP and Robert J. Rothwell, Robert D. Vander Lugt, Amanda J. Dietrick and Jenny J. Yang of Little Rothwell and Vander Lugt PLLC.

DHA is represented by Michael R. Bibbo, Morgan Hilgendorf, Dennis A. Dyke, Jason Smith, Justin Dalton, Bradley Richardson, Erik Troff and Song Kim of the U.S. Department of Defense.

The case is in the matter of Health Net Federal Services LLC, file numbers B-421405.2 and B-421405.3, in the Government Accountability Office.

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