



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: SouthWest Critical Care Associates

File: B-279773

Date: July 16, 1998

Bruce T. Gipe, M.D., for the protester.

John R. Osing, Jr., Esq., Department of the Navy, for the agency.

C. Douglas McArthur, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Under solicitation for health care services which directed offerors to submit comprehensive plans for ensuring continuity of service by proposed personnel, agency reasonably gave a higher rating to proposal of offeror that had entered into a formal agreement with another firm to provide emergency medical technician-paramedics, as compared with protester's proposal to use more general recruiting techniques.

2. Under solicitation that advised offerors that agency would not dictate whether health care workers provided by the contractor would be classified as "independent contractors" or "employees" for federal tax purposes, contention, raised after award, that agency unreasonably failed to take into account the tax consequences of awardee's plan to treat proposed employees as independent contractors is an untimely challenge to an alleged solicitation defect.

DECISION

SouthWest Critical Care Associates protests the award of a contract to NES Government Services, Inc. under request for proposals (RFP) No. N62645-98-R-0008, issued by the Naval Medical Logistics Command for medical services. Southwest argues that the evaluation of its proposal, as well as the evaluation of NES's proposal, were unreasonable.

We deny the protest.

On November 3, 1997, the Navy issued the RFP for a fixed-price contract to provide the services of physicians, registered nurses, and emergency medical technician-paramedics (EMT-P) for the urgent care clinic in Lemoore, California, for a 5-month base period, with five 1-year option periods. The RFP provided for award to the offeror submitting the proposal determined "most advantageous to the Government,"

considering price and other factors, with technical factors significantly more important than price. RFP § M.2.

With respect to price, the RFP provided that the agency would evaluate prices for completeness, reasonableness, and realism. RFP § M.3.(a). The technical factors were implementation plan, recruitment and retention plan, and past performance report. RFP § M.3.(b). In pertinent part, the solicitation required offerors to "submit a comprehensive recruitment and retention plan which describes in detail the strategy for providing personnel to ensure the continuity of services and care as required by the solicitation." RFP § M.3.(b)(2).

The cover sheet to the RFP contained the following legend:

Before submitting a proposal in response to this solicitation, a prospective offeror is encouraged to investigate the potential tax consequences should they elect to perform the resulting contract by using subcontractors in lieu of individuals carried on their payrolls. Under this RFP, the Navy does not dictate whether the individual health care workers provided would be classified by the successful offeror as "independent contractors" or "employees" for federal tax purposes. This determination shall be made solely by the offeror. If, subsequent to award, the successful offeror's determination is challenged, this shall be a matter to be resolved between the offeror and the Internal Revenue Service (IRS). The Navy will not consider favorably any request for equitable adjustment to the contract based upon the successful offeror's receipt of an adverse decision by the IRS.

The agency received nine proposals prior to December 5, 1997, the date set for receipt of initial proposals. It evaluated them, established a competitive range of six offers, and conducted discussions. Among the issues raised with Southwest was its failure to specify its methods of recruitment, beyond a stated plan of contacting the existing staff physicians and nurses for expressions of interest in continued employment. Attachment to Navy letter dated February 11, 1998, at 1. The agency specifically pointed out that although Southwest did plan to utilize pre-hospital services available in the community, it had no agreement with any of the local companies to provide EMT-P's. Southwest acknowledged, in its response, that it had no agreement with local providers; the protester did outline plans to create a recruiting network and to advertise opportunities for employment as EMT-P's. Protester response to discussion questions, February 17, 1998, at 5.

As a result of discussions, the protester's overall technical rating improved from yellow/marginal to green/acceptable. While the evaluators considered Southwest's response to the question of recruiting EMT-P's acceptable, they considered NES's arrangement, using an agreement with a local provider of EMT-P's, preferable.

Since NES had received the highest technical rating and had proposed the lowest price of all offerors, the Navy selected NES for award, in accordance with the RFP's stated selection criteria. This protest followed.

Southwest contends that it was unreasonable to downgrade its proposal because it had no formal written agreement with a local EMT-P provider, since the solicitation did not require such an agreement. Southwest states that it could have provided such an agreement if the RFP had required it.

In reviewing a protest against the propriety of an evaluation, we examine an agency's evaluation and selection decision solely to ensure that they were reasonable and consistent with the stated criteria. Rockhill Indus., Inc., B-278797, Mar. 16, 1998, 98-1 CPD ¶ 79 at 4. Southwest is correct that the RFP did not require a formal written agreement with a local EMT-P provider; the agency found Southwest's proposal acceptable, although the protester did not have such an agreement. We see nothing unreasonable in the agency's treatment of NES's formal written agreement to obtain EMT-P's as superior to the protester's stated plan to use general recruiting techniques to provide staffing under the contract, particularly in view of the RFP's direction to offerors to submit a comprehensive plan detailing their strategy for providing personnel to ensure continuity of services. Further, to the extent that Southwest argues that it could have provided such a written agreement if the RFP had required one, the record shows that the agency specifically directed the protester's attention to the issue and that Southwest chose not to provide such an agreement. The protester has provided nothing from which we can conclude that the evaluation of Southwest's proposal was either unreasonable or inconsistent with the stated evaluation criteria.

Southwest next argues that NES incorrectly classified its health care workers as independent contractors rather than employees for federal tax purposes. According to Southwest, this classification allowed NES to propose lower overhead costs, with a resulting price advantage over offerors like Southwest, who treated their workers as employees. Southwest argues that treating the workers as independent contractors is inconsistent with IRS guidelines and thus that award to NES is improper.

Southwest's argument is an untimely challenge to an alleged defect in the RFP. As indicated above, the RFP clearly stated that the classification of health care workers was a determination to be made by each offeror (subject, ultimately, to resolution between the offeror and the IRS) and that the Navy would not render any decision on the matter. Southwest now in essence argues that the RFP should have required offerors to classify their workers as employees for federal tax purposes; any such challenge to the Navy's position, clearly set out in the RFP, had to be raised before the time set for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1) (1998);

B & K Enters., B-276066, May 7, 1997, 97-1 CPD ¶ 166 at 3. Given that the RFP left the classification decision up to the offerors, the agency's acceptance of NES's proposal, without regard to how it chose to classify its workers for tax purposes, was consistent with the RFP.

Finally, to the extent that Southwest challenges the evaluation of NES's proposal, Southwest is not an interested party to raise such issues. The record shows that one other offeror proposed a lower price, with a higher technical rating, than did Southwest; in addition, one offeror had an equivalent technical rating and proposed a lower price. Under the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C.A. §§ 3551-56 (West Supp. 1997), and our Bid Protest Regulations, 4 C.F.R. §§ 21.0(a), 21.1(a), only an "interested party" may protest a federal procurement. A protest is not an interested party where it would not be in line for contract award were its protest to be sustained. ECS Composites, Inc., B-235849.2, Jan. 3, 1990, 90-1 CPD ¶ 7 at 1. Here, since two other offerors would be in line for award if Southwest's challenge to the evaluation of NES's proposal were sustained, Southwest is not an interested party to maintain this ground of protest. See Kaiserslautern Maintenance Group, B-240067, Oct. 12, 1990, 90-2 CPD ¶ 288 at 4.

The protest is denied.

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