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DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

[Protest of VA Contract Award]

FILE: B-198738 DATE: February 2, 1981

MATTER OF: National Veterans Law Center

DIGEST:

1. Use of firm fixed-type contract is not subject to legal review since statute mandates use of such contract type absent determination to contrary by agency.

2. Solicitation provision stating that award will be made to offeror with lowest price and evaluation score of 80 points or better establishes pre-determined cut-off score which may be improper.

3. Request for proposals provision that contractor should not have been associated with prior publicized position on matters which are subject of procurement with high public interest is not overly restrictive of competition, since biased public position is implicit in restriction, and agency's desire to obtain unbiased contractor is reasonable.

4. Government's standard reservation of right to make award on basis of initial proposals does not constitute improper refusal to conduct discussions with offerors.

5. Discussions have occurred where offerors respond to agency request for explanation of offers and any necessary price revision resulting therefrom by revising technical proposals or price proposals or both.

6. Request for proposals does not place undue emphasis on price for study design that requires considerable technical expertise

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where evaluation factors indicate agency's intent to apply high standard of technical acceptability in establishing competitive range.

7. Allegation that statement in RFP that agency will itself conduct epidemiological study to be designed by contractor is restrictive of competition because many scientists will refuse to stake their reputations on study over which they have no control is without merit where it is not shown that conduct of such study by party other than study designer is unusual or beyond legitimate agency needs.

8. Allegations that study as contemplated by VA will not satisfy requirements of statute mandating study are without merit where agency plan to conduct study itself is consistent with statute.

The National Veterans Law Center (NVLC) protests the award of a contract to any offeror under request for proposals (RFP) No. 101 (134c)-8-80, issued by the Veterans Administration (VA) for a protocol (study design) for an epidemiological study of phenoxy herbicides, specifically Herbicide Orange ("Agent Orange"), as used in Vietnam. We are denying the protest.

BACKGROUND

Public Law 96-151, § 307(a)(1), 93 Stat. 1097 (1979), directs the VA to:

> "[D]esign a protocol for and conduct an epidemiological study of persons who, while serving in the Armed Forces of the United States during the period of the Vietnam conflict, were exposed to any of the class of chemicals known as 'the dioxins' produced during the manufacture of the various phenoxy herbicides (including the herbicide known as 'Agent

> Orange') to determine if there may be long-term adverse health effects in such persons from such exposure. * * *"

On March 19, 1980, the VA issued the subject RFP requesting firm fixed-price offers for the required study design. The NVLC filed the instant protest with this Office, and subsequently also filed a complaint for declaratory and injunctive relief in the United States District Court for the District of Columbia (Civil Action No. 80-1162). The court denied the plaintiff's request for a temporary restraining order but retained jurisdiction over the case. The court has requested our opinion in the matter.

We have also been requested by a member of Congress to respond to all of the issues raised by the NVLC which, in addition to alleged procurement law violations, include a claim that as presently contemplated the study itself will not comply with the requirements of Public Law 96-151.

No award has yet been made in this procurement, although it is our understanding that proposals have been received and evaluated.

ANALYSIS

Adequacy of Specifications

I. The NVLC contends that the RFP does not meet the requirement of section 1-3.802(c)(1) of the Federal Procurement Regulations (FPR)(1964 ed.) that RFPs contain specifications which are as complete as possible. The specifications are alleged to be particularly deficient because the RFP anticipates award of a firm fixed-price contract.

The NVLC has presented a number of arguments in support of its contention that the specifications are inadequate.

It is the VA's position that the specifications are as complete as possible. In addition, the VA states that it "provided a description of what was available insofar as facilities, capabilities and the like at the pre-proposal conference." The VA does not, however, deny that the RFP itself is silent concerning the available data about the population to be studied. Rather, it argues that if the work statement is "far from definite" as the NVLC contends, it is because the VA intends the

contractor to exercise its own judgment in identifying the population to be studied.

The RFP Statement of Work provides in pertinent part as follows:

"STATEMENT OF WORK

"The contractor will be required to develop the design for a comprehensive epidemiological study of subjects who shall be persons who, while serving in the Armed Forces of the United States during the period of the Vietnam conflict were exposed to dioxins produced during the manufacture of various phenoxy herbicides (including 'Agent Orange'). The design will include detailed methods for analysis and interpretation of the data obtained during the study.

"In addition to providing the study design, the contractor will be expected to provide prompt justified modifications in the study's protocol in response to the several scientific or other bodies that will review it.

"Once the study has commenced, the contractor will be expected to consult with the responsible officials of the Veterans Administration on the progress of the investigation in order to assure that the objectives of the study design are being met. The epidemiological study itself will be conducted by the VA, including examination of the subjects and data collection, according to the design of the contractor.

* * * * *

"-The contractor will recommend the level of certainty that the study should reach in concluding that specific effects are or are not due to the phenoxy herbicides and/or their contaminants.

"-The numbers of study subjects and control populations required for successful completion

> of the study must be estimated by the contractor and the mechanism by which individual subjects and controls are to be chosen must be specified. The contractor will be expected to adapt the estimates of size of the study and control samples and their method of selection to the realistic constraints of facilities, staff and time under which the study must be conducted. The latter will be defined during protocol development by close collaboration with the VA contracting officer's technical representative."

No additional details regarding the source, accuracy, condition or the availablility of the data needed to identify and work with the population to be studied are specified in the RFP.

A firm fixed-price contract provides for a price which is not subject to adjustment based on the contractor's cost experience during performance, and thus places full responsibility in terms of profits or losses for costs below or above the firm fixed-price on the contractor. FPR § 1-3.404-2(a). Accordingly, firm fixed-price contracts are suitable for use in procurements when reasonably definite design or performance specifications are available and whenever fair and reasonable prices can be established at the outset, and where the uncertainties involved in contract performance can be identified and reasonable estimates of their possible impact on costs made. FPR § 1-3.404-2(b). Thus while there may be a reasonable basis under the guidelines of FPR 1-3.404-2(b) to award a cost-type contract, the use of a firm fixed-price contract is not legally objectionable. We reach this conclusion because of the language of 41 U.S.C. 254(b):

> "Neither a cost nor a cost-plus-a-fixed-fee contract * * * shall be used unless the agency head determines that such method of contracting is likely to be less costly than other methods or that it is impractical to secure property or services of the kind or quality required without the use of a cost [type] * * * contract."

We view the foregoing as creating a statutory requirement for the use of a fixed-price contract except where the agency head in his discretion finds otherwise under the circumstances described in the statute. We also do not believe the agency

head is required to make the determination that the use of a fixed-price contract is inappropriate for use in a given situation merely because a third party believes cost-type contracting would be more appropriate under the circumstances of a procurement such as this one. Thus, whether or not this Office would agree with the decision to seek a firm fixed-price contract is legally irrelevant and the decision is not subject to legal objection.

In this respect, we point out that several offers were received from offerors who were apparently willing to take the risks inherent in a firm fixed-price contract. Whether additional offers might have been received if cost-type contracting were used is legally beside the point.

We note here that the VA has argued that if modifications in a firm fixed-price contract are necessary, mechanisms exist so that adequate compensation can be agreed upon under the "Changes" clause of the contract.

We believe, however, that in view of the very general nature of the specifications the likelihood of a legally valid modification to the contract would be minimal under the "Changes" clause. Certainly a contractor would not be entitled to "get well" for any errors in judgment it may have made with respect to price because of an indefinite work statement in the RFP.

II. Next, we turn to several other allegations made by the NVLC concerning the adequacy of the specifications, which we find to be without merit. The first of these is that the RFP provides for the study to be carried out by the VA but no information is provided about the facilities or personnel available for this. The NVLC argues that it is impossible to design the protocol without this knowledge.

While we agree with the NVLC that this information is crucial since the protocol must take into account the facilities available for conducting the study as designed, we believe that the RFP contains sufficient information in this regard to allow for intelligent competition.

Specifically, the RFP provides that the facilities, staff and time under which the study will be conducted will be worked out during protocol development by close collaboration between the contractor and the VA. Consequently,

all prospective offerors were advised that the exact facilities available had not yet been determined, but that the contractor's needs would be considered in establishing them along with the needs of the VA. Moreover, it was clear that the contractor would not be expected to complete development of the protocol before these necessary determinations were made. We think that this provided an adequate basis on which to submit a proposal.

The NVLC also argues that the RFP is deficient because it lacks details about the "end point symptoms" it seeks to study and contains only a cursory list of organ systems which should be considered. In this regard, the RFP specifically provides as follows:

> "The variables chosen for the study should include organ systems theoretically most often affected by exposure to the chemicals in Herbicide Orange (e.g., liver, kidney, skin and nervous systems)."

It is our understanding that the diseases and symptoms which may result from exposure to "Agent Orange" are largely unknown and that this is, in fact, a primary reason why there is a need for an epidemiological study such as the one mandated by Public Law 96-151. Thus we find nothing objectionable in the RFP's lack of detail in this regard. We believe that the VA has sufficiently advised offerors of the general scope of the requirement and intends that offerors use their individual judgment in arriving at their own approach to the problem. There is nothing objectionable in this. Complete Irrigation, Inc., B-187423, November 21, 1977, 77-2 CPD 387.

Last, the NVLC contends that the specifications are inadequate because the RFP indicates that time and price will be heavily weighted factors in selecting the contractor, yet no indication of time or price expectations is offered.

At the outset, we note that while the NVLC has identified particular portions of the RFP as containing these inadequate specifications, we are unable to identify where it is provided that time will be a heavily weighted selection criterion. The RFP does provide, however, that offerors must estimate how long it will take to complete the study. We assume that it is this requirement to which the NVLC refers.

We recognize that the length of the study can vary widely depending upon what type of study is proposed. For example, a contractor could propose a study to be conducted at a particular point in time or one which would take place over a number of years, or both. It is apparent, however, that the VA intended this to be a matter for the contractor's judgment, and we believe that it is implicit in this requirement that the VA would find either or both approaches acceptable, if they were properly justified. Thus we must conclude that offerors were sufficiently informed in regard to the Government's time expectations.

With regard to the lack of any price expectation in the RFP, we are aware of nothing which requires the inclusion of such information in a solicitation. Consequently, we must conclude that this allegation is without merit.

Pre-Determined Competitive Range

The RFP provides that award will be made to that offeror with the lowest price and with an evaluation score of 80 points or better. The NVLC argues that this establishes a pre-determined cut-off score and is improper under the decisions of this Office. The VA contends that this 80 point factor is a "qualifying score" and that it was cited only to apprise offerors of the relative importance the VA attaches to the areas of evaluation. The VA states that it does not view this as establishing a competitive range in advance and, further, that such factors have been determined to be acceptable by this Office in the past, citing to our decision in 52 Comp. Gen. 382 (1972).

A pre-determined cut-off score is one arrived at in advance of proposal evaluation and subsequently used to establish the competitive range. One example is a solicitation provision requiring that prior to consideration of price as a determining factor, a proposal must receive a numerical score placing it within the top three eligible proposals. Donald N. Humphries & Associates; Master Tax, Inc.; Innocept Inc., 55 Comp. Gen. 432 (1975), 75-2 CPD 275. In this case, prior to consideration of price as a determining factor, a proposal must receive a score of 80 or above. We fail to perceive any difference between this so-called qualifying score and a pre-determined cut-off score.

We have held that the practice of using a pre-determined cut-off score to establish the competitive range is improper.

Donald N. Humphries & Associates; Master Tax, Inc.; Innocept, Inc., supra; 50 Comp. Gen. 59 (1970). Rather, the competitive range should be determined by examining the array of scores from all proposals submitted and borderline proposals should not automatically be excluded from consideration. Id.

In 52 Comp. Gen., supra, we found that in a procurement where proposals were required to receive a score of at least 85 points in order to be considered technically acceptable, a decision to exclude an offeror from the competitive range was not improper when that offeror's score fell well below the acceptable cut-off score and was low in comparison to the array of scores achieved by other offerors. Thus, where offerors are not prejudiced by the application of such a cut-off score, there is no basis to sustain a protest in that regard. This does not mean, however, that we approve of the use of such a device. Rather, since it cannot be prospectively determined that the actual application of such a cut-off score will prove to be non-prejudicial in any given case, we believe that including such a score in an RFP, for whatever reason, is inconsistent with sound procurement policy.

Nonetheless, we point out that neither the offerors nor any of the parties solicited objected to this provision or advanced this as a reason for not participating in this procurement. In addition, our examination of the record plainly indicates that none of the offerors was in fact prejudiced by the use of this device since those who were not within the competitive range had scores significantly below the 80 point cut-off score. B-171857, May 24, 1971.

Restriction Against Offerors Associated With Prior Publicized Positions

The NVLC argues that the inclusion of the following statement in the RFP is ambiguous and overly restrictive of competition:

> "In view of the sensitive nature of this study, the contractor should not have been associated with a prior publicized position regarding the effects of phenoxy herbicides and/or their constituents on human health."

The NVLC contends that this restriction is ambiguous because it could be read to cover not only academic articles but also meetings or organizations in which an offeror, or

someone with whom he is associated, took any position on "Agent Orange" or any related chemical. The protester further argues that this phrase, while attempting to eliminate bias, does not necessarily do so, while excluding people who are not biased.

The VA states that due to the publicity surrounding the "Agent Orange" issue and the agency's desire to obtain an unbiased contractor, the requirement contained in the RFP was an essential part of the minimum needs of the Government. The VA further points out that this Office has frequently stated it will not question an agency's determination of what its minimum needs are unless there is a clear showing that the determination has no reasonable basis.

We believe that the VA's desire to obtain an unbiased contractor is reasonable, and the NVLC does not in fact question this. Rather the NVLC's concern lies in the alleged ambiguities in this requirement and its consequent effect on competition.

We do not find this provision to be either ambiguous or overly restrictive of competiton. While a literal reading of the clause in question may be interpreted to exclude any person or organization that has previously conducted and published or reported upon a scientific inquiry into the effects of phenoxy herbicides in any respect (there have been a number of such inquiries conducted on behalf of or by various agencies including the Environmental Protection Agency), we think a reasonable interpretation of the language, in the context of the RFP, cannot be viewed as so all inclusive. Thus a "biased public position" is implicit in the restriction if it is to be reasonably applied. We are not persuaded by anything in the record that the competition was limited by the provision in question.

We recognize, however, that the clause in question does not exclude all persons from participating in the procurement where a potential conflict of interest may exist such as an individual or organization which had been a paid consultant for one of the manufacturers of "Agent Orange." There is no evidence, however, that this conflict in fact occurred among the offers received.

Additional Grounds of Protest

The NVLC has raised several other allegations concerning the conduct of this procurement which we find to be without merit. We will discuss each issue briefly.

First, the NVLC alleges that the VA does not intend to negotiate with all responsible offerors as required by section 1-3.805-1(a) of the FPR. In this regard, we note that the RFP reserves the right to make award on an initial proposal basis.

This reservation is consistent with FPR § 1-3.805-1(a) which provides that in certain enumerated situations an agency may make award on the basis of initial proposals without holding discussions with offerors. Thus, we have held that the Government's reservation of the right to make award on the basis of initial proposals does not constitute refusal to conduct discussions with offerors. North American Telephone Association, B-187239, December 15, 1976, 76-2 CPD 495.

In any event, the record in this case reveals that the VA did in fact conduct discussions with all offerors. Although the VA has characterized these as "clarifications," the test of whether discussions have occurred is whether an offeror has been afforded an opportunity to revise or modify its proposal. CEL-U-DEX Corporation, B-195012, February 7, 1980, 80-1 CPD 102. In this case, after receipt and preliminary evaluation of initial proposals, the VA wrote to each offeror asking for additional explanation of its proposal and stating that any necessary price revisions should accompany the response. Each offeror responded to this request. Some offerors revised their cost proposal, some revised their proposed staffing, and some did both. It is, therefore, clear that discussions were in fact held with all offerors. See 51 Comp. Gen. 479, 481 (1972).

The NVLC also alleges that the criteria for the selection of the contractor put undue emphasis on price. The protester argues that price is not properly the deciding factor where scientific expertise, rather than a fungible item, is being purchased. In support of this position, the NVLC cites FPR § 1-3.805-1, which provides that while lowest price is properly the deciding factor in many contracting decisions, it need not be the primary consideration in the award of research or special or professional services contracts. The NVLC concludes that this "shortsighted" focus on price is arbitrary and unreasonable.

The selection of evaluation factors and the relative weights assigned to them are matters primarily for consideration by the contracting agency, and our Office will not substitute its judgment for that of the agency unless it is clearly and convincingly shown that the agency's actions in establishing and

applying such factors and weights are arbitrary, capricious, or not reasonably supported by the facts. Houston Films, Inc., B-184402, December 22, 1975, 75-2 CPD 404.

Notwithstanding that we have found the VA's use of an 80 point pre-qualifying score inappropriate as a general matter, in our view it does reflect an intent to employ a high standard for determining technical acceptability, rather than a minimum one. That intent appears to be consistent with the indication in Public Law 96-151 that the study design should be of a high caliber.

The NVLC next contends that the VA's plan to carry out the study itself discourages potential offerors. The NVLC points out that the contractor is expected to serve as a consultant to the VA during the conduct of the study, yet control over the study apparently will be entirely in the VA's hands. It is argued that many scientists will not submit offers under these conditions since they are asked to stake their reputations on a study over which they have no control.

This "lack of control" by the study's designer would exist whether the VA or another contractor conducted the study. Moreover, we understand that unlike a "laboratory" study the conduct of an epidemiological study by a party other than the designer is not unusual. In any case, the fact that some potential offerors may hesitate to submit proposals because of the VA's intent does not render the solicitation improper or the specifications unduly restrictive of competition so long as the specification represents the legitimate needs of the agency. See H.M. Sweeney Company, B-197302, June 12, 1980, 80-1 CPD 413. Thus, we must conclude that this allegation is without merit.

The NVLC also alleges that the RFP limits the length of proposal submissions to three pages only. This page limitation is alleged to be arbitrary and inappropriate for selection of a contractor best suited to the Government's needs.

Our examination of the record shows that the RFP calls for offerors to submit a three page summary of the components of the proposal. There is no limitation on the length of the proposal itself and the record shows that all offerors submitted proposals which were considerably longer than three pages in length. Thus, we find no merit to this allegation.

The NVLC also asserts that the study as presently contemplated by the VA will not comply with the statutory mandate of

Public Law 96-151. The NVLC has raised several allegations in this regard. These can be characterized as follows: (1) the RFP contemplates adapting a general study design to meet VA capabilities and facilities, but such a design will not produce a scientifically valid study; (2) the VA plan to carry out the study is unscientific and will not comply with the statute because VA personnel are biased, such a study will not be credible, and veterans will refuse to go to VA facilities; (3) the study contemplated by the RFP is not a scientifically valid epidemiological study as required by the statute, but a clinical screening study instead.

In support of its first allegation, the NVLC argues that the VA plans to select a contractor on the basis of a general submission in response to inadequate specifications, and after the contractor and design are selected, work with the contractor to fit the design to the study. This allegedly will not produce a scientifically valid study since the study design should be made to fit the problem to be investigated rather than be predetermined and then adapted to the problem at hand.

We find no indication in the RFP that the contractor will be required to provide a general study design and then adapt it to the problem at hand. While, as we have previously discussed, the RFP does require the contractor to adapt study and control sample size to the realistic constraints of the facilities, staff and time under which the study will be conducted, this adaptation is to take place during, not after, protocol development.

The NVLC's second allegation stems from the RFP provision that the epidemiological study itself will be conducted by the VA. It is argued that the scientific validity of the study is contingent on the neutrality of the fact gatherers, yet VA personnel are biased by the prior positions taken by VA officials on the "Agent Orange" issue and by the possible negative implications for the VA of finding a positive relationship between "Agent Orange" exposure and veterans' health problems.

This "bias" allegedly will also result in a study lacking credibility since the VA's conclusions will inevitably be viewed with suspicion. As a result, it is argued, the study will not dispel the suspicion, doubt and innuendo which were underlying concerns that prompted enactment of the statute. Finally, the NVLC alleges that veterans will refuse to participate in the study because they are alienated by the VA's past actions, such

as ignoring the Agent Orange issue and trying to keep information away from veterans and the general public.

At the outset, it must be recognized that Public Law 96-151 specifically provides that "the Administrator of Veterans Affairs shall design a protocol for and conduct an epidemiological study * * *." (Emphasis added.) Consequently, we cannot conclude that a decision by the VA to conduct the study itself is contrary to the statutory mandate. In fact, it is entirely consistent with that mandate. Moreover, we do not believe there is any basis upon which to presume that a study conducted by the VA will be scientifically invalid.

We are aware that the Senate version of the provision under consideration here would have provided for the Department of Health and Human Services (HHS) to conduct the study and that the provision's sponsor felt that in terms of scientific objectivity and validity, HHS was the best equipped agency to conduct the study. See 125 Cong. Rec. S 17,994 (daily ed. Dec. 6, 1979) (remarks of Senator Cranston). Nonetheless, the compromise version as passed by both Houses substituted the VA for HHS.

The explanatory statement accompanying the compromise agreement makes it clear that the VA was regarded as the most appropriate Federal agency to conduct the study. This statement also shows, however, that Congress did not intend to limit the VA from contracting-out any portion of the study. The pertinent portion of the explanatory statement provides as follows:

> "In addition, the Committees note their views that the VA, by virtue of its traditional mandate to provide services and benefits for veterans and their survivors is the Federal agency most likely to carry out the needed study with the requisite sympathy and understanding for the individuals concerned. The Committees also note that the VA has the authority, pursuant to section 213 of title 28, to enter into contracts with private or public agencies or persons for any necessary services for or in connection with any portion of the mandated study." 125 Cong. Rec. S 17,997 (daily ed. Dec. 6, 1979). (Emphasis added.)

In this respect, the VA has stated that no final decision has yet been made concerning what parts of the study will be

performed by whom, nor will such a decision be made until the protocol has been approved. While we view this statement as inconsistent with the RFP provision on which the NVLC has predicated its allegation, it does reflect a willingness on the part of the VA to reconsider its position if a different approach is required.

The NVLC's last allegation is that the study contemplated by the RFP is not the scientifically valid epidemiological study ordered by the statute, but rather a clinical screening study.

In this respect we note that the solicitation continuously refers to the study as epidemiological and that no mention is made of a clinical screening study. Moreover, our examination of the proposals actually submitted in response to the RFP reveals that these offerors apparently understood the RFP to contemplate an epidemiological study rather than a clinical screening study. We find no merit to this assertion.

It is our understanding that there are a number of factors which can influence the validity of the study, some of which are beyond anyone's control. For example, the ability of any scientist or scientific group to arrive at a valid means of determining how to actually measure exposure to Agent Orange will have a decisive effect on the validity of the study. As the NVLC itself recognizes, this may be an impossible task.

The protest is denied.

Milton J. Socolar

Comptroller General
For the of the United States