



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: DePaul Hospital and The Catholic Health
Association of the United States
File: B-227160
Date: August 18, 1987

DIGEST

1. Requirement for birth control services under request for proposals calling for operation of primary care medical facilities does not unduly restrict competition by precluding participation by Catholic health care providers where contracting agency shows that including birth control services is reasonable in order to meet its minimum needs under program intended to provide consolidated medical services to eligible beneficiaries in a more efficient, less costly manner than under agency's current health care system.
2. Protester's contention that request for proposals calling for birth control services for eligible beneficiaries under contracting agency's health care program is defective because agency's statutory authority to provide medical services does not include birth control services is untimely when first raised in protester's comments on agency report, filed well after due date for initial proposals. Contention will not be considered under significant issue exception to timeliness rules because it does not directly concern the interpretation or application of a procurement statute or regulation on a matter of widespread interest to the procurement community.
3. General Accounting Office will not consider protester's contention that requirement for birth control services in request for proposals for operation of primary care medical facilities infringes protester's right to free exercise of religion since issues involving alleged constitutional violations are for resolution by the courts.

DECISION

DePaul Hospital and The Catholic Health Association of the United States (CHA) protest any award under request for proposals (RFP) No. N00140-87-R-1013, issued by the Navy for

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health care services and facilities at several locations in the United States. The protesters contend that the requirement in the RFP for birth control counseling and prescriptions unduly restricts competition and infringes their constitutional right to the free exercise of religion. We dismiss the protest in part and deny it in part.

The RFP calls for offers to establish and operate facilities at six locations providing health care services to eligible Navy beneficiaries. The facilities, called Uniformed Services Navy Care (Navcare) Centers, are to provide "primary care" services, defined in the RFP as those involving:

". . . routine, non-emergent medical conditions that can be adequately managed by a health care provider under the medical supervision of a licensed physician. Typical conditions treated by [the] health care provider in this category of care include well-baby checks, pap smears, physical respiratory complaints, and minor injuries."

The RFP also expressly provides that the contractor's primary care program must include "routine birth control counseling [and] prescriptions."

According to the protesters, Catholic hospitals like DePaul cannot offer the full range of birth control services called for by the RFP consistent with their religious beliefs. They object to the Navy's decision to require such services under the RFP, arguing that the requirement exceeds the Navy's minimum needs and unduly restricts competition to the extent that it precludes DePaul and other Catholic hospitals from competing.

As a preliminary matter, we find that CHA is not an interested party entitled to challenge the RFP. Under the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3551(2) (Supp. III 1985), and our Bid Protest Regulations, 4 C.F.R. § 21.0(a) (1987), a protest may be brought only by an actual or prospective bidder or offeror whose direct economic interest would be affected by the award or failure to award the contract involved. Here, CHA is an association whose members are Catholic hospitals and related health care providers which are potential offerors under the RFP. Since CHA itself is not a potential offeror, however, it is not an interested party entitled to maintain the protest. American Maritime Officers Service, et al., B-224480, July 22, 1986, 86-2 CPD ¶ 96. On the other hand, DePaul, as a prospective offeror in its own right, is an interested party.

The Navy states that the Navcare program is a recent effort to provide medical services to eligible beneficiaries both more efficiently than is currently available at the Navy's own overcrowded medical facilities, and at a lower cost than under the Civilian Health and Medical Program of the Uniformed Services (Champus), under which the Navy pays for medical treatment by private physicians. The Navcare program calls for providing the full range of primary care services which currently are available at the Navy's own facilities, including birth control counseling and prescriptions. According to the Navy, birth control services historically have been some of the most heavily used services at the Navy facilities in terms of the number of consultations and health care provider workhours. In addition, the Navy states that its experience at the four existing Navcare Centers shows that birth control services are one of the major services requested. In the Navy's view, excluding birth control services from the RFP would defeat the goal of providing medical services in an efficient, cost-effective manner, since it would require patients requesting such services to return to either the overcrowded Navy facilities or the more costly Champus program. With regard to Champus, the Navy states that the cost per visit in 1986 under Champus was \$85, compared to \$35 under the Navcare Center program.

DePaul argues that the Navy has not shown that providing birth control services at the Navcare Centers is necessary to meet its minimum needs, or that breaking out the birth control services from the other services available at the Navcare Centers would significantly burden the Navy's own facilities or greatly increase the cost of such services through use of the Champus program. With regard to cost, DePaul argues that the Navy's comparison of total per visit costs under Champus and the Navcare Center program is not persuasive because it does not separately show the per visit costs for birth control services under each program.

Under CICA, a contracting agency must specify its needs in a manner designed to achieve full and open competition, 10 U.S.C. § 2305(a)(1)(A)(i) (Supp. III 1985), and include restrictive provisions or conditions only to the extent necessary to satisfy the agency's needs. 10 U.S.C. § 2305(a)(1)(B)(ii). Thus, where as here, the protester contends that acquiring certain services as part of a total package rather than breaking them out unduly restricts competition, we will object only where the agency's choice of a total package approach as necessary to meet its minimum needs lacks a reasonable basis. See The Caption Center, B-220659, Feb. 19, 1986, 86-1 CPD ¶ 174. We see no basis to object to the Navy's decision to include birth control services within the scope of services to be provided under

the RFP since making those services available through the Navcare program is reasonable in order to meet the Navy's minimum needs.

Consolidating primary care services, including birth control counseling and prescriptions, in individual Navcare Centers is consistent with the Navy's goal of providing medical services to eligible beneficiaries on a more efficient, less costly basis. Breaking out from the total package of services any heavily used component such as birth control services in our view necessarily would detract from the Navy's goal of reducing patients' use of the Navy's own medical facilities and the Champus program. In addition, requiring patients to seek birth control services from providers other than the Navcare Centers would detract from the convenience of the Navcare program, and to the extent that DePaul suggests acquiring the services through a separate procurement, would increase the burden of contract administration for the Navy.

DePaul contends that the Navy has not established that breaking out the birth control services would have an adverse impact since the Navy has not provided the statistical data underlying its statements that birth control services are heavily used and that the Navy medical facilities in the areas covered by the RFP are overcrowded. However, the Navy's conclusions are supported by an affidavit from the program manager of the Navcare program, whom we regard as competent to attest to the facts supporting the Navy's position. In addition, with regard to the significance of the Navy's cost figures comparing the Champus and Navcare programs, it is not significant, as DePaul suggests, that the figures do not separately show the per visit cost of birth control services, since in our view it is reasonable to assume that additional use of the overall more costly Champus program for a heavily used component such as birth control services will increase the Navy's cost.

DePaul also argues that the Navy has not shown that birth control services necessarily fall within the scope of the "primary care" services which the Navy seeks to provide at the Navcare Centers. In support of its position, DePaul states that by referring to "medical conditions," the definition of primary care services in the RFP impliedly excludes services such as routine birth control counseling and prescriptions. We disagree. As noted above, the RFP lists "well-baby checks" and pap smears as examples of primary care services, both of which are not necessarily related to a specific illness or medical condition.

Further, while DePaul does not dispute that birth control services currently are available at Navy facilities, the

protester argues that the applicable Navy regulations recognize that physicians and other health care providers will not be compelled to furnish birth control services, if doing so would violate their ethical or religious beliefs. As a result, DePaul argues, the Navy is required to make the same accommodation in connection with services at the Navcare Centers by breaking out the birth control services. We disagree. The fact that the Navy regulations excuse individual health care providers from furnishing birth control services does not mean that the services are not available at the Navy facilities; they clearly are. See 32 C.F.R. § 728.32(b)(9) (1986). Thus, including birth control services in the range of services under the Navcare program is consistent with the Navy's goal of providing services equivalent to those available at Navy facilities.

Finally, with regard to the effect on competition of including birth control services in the RFP, the Navy states that it received a total of 44 proposals from 14 offerors for various combinations of the 6 sites covered by the RFP. In view of the number of offers received, we see no basis to conclude that the degree of competition achieved was inadequate.

We find that the protester has not shown that the agency's decision to provide birth control counseling and prescriptions as part of the Navcare program in order to meet its minimum needs is unreasonable. We therefore see no basis to object to the Navy's decision to include the services as a requirement under the RFP.

In its comments on the agency report and the conference, DePaul contends for the first time that birth control services are outside the scope of 10 U.S.C. §§ 1076, 1077, and 1079 (1982), the statutes which specify the range of medical services which the Navy is authorized to provide to eligible beneficiaries. DePaul has offered no reason why the issue was not raised initially; as a result of its failure to do so, the Navy had no opportunity to respond to DePaul's contention. In any event, the issue clearly is untimely. Under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1), since the issue concerns an alleged solicitation defect, it should have been raised before the date initial proposals were due, May 27. DePaul did not raise the issue until July 13, however, when it filed its comments on the Navy's June 24 report and the conference held on July 7.

DePaul requests that we consider the issue on the merits under 4 C.F.R. § 21.2(c), which provides that untimely protests may be considered if they raise issues that are significant to the procurement system and have not been

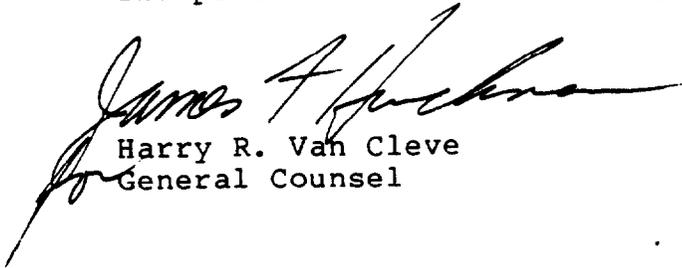
considered previously. In order to prevent the timeliness rules from becoming meaningless, the significant issue exception is strictly construed and seldom used. In our view, invoking the exception is appropriate only where the untimely issue directly concerns the interpretation or application of the procurement statutes or regulations on a matter of widespread interest to the procurement community. See Adrian Supply Co.--Reconsideration, B-225440.2, Mar. 30, 1987, 66 Comp. Gen. ____, 87-1 CPD ¶ 357; Association of Soil and Foundation Engineers, B-199548, Sept. 15, 1980, 80-2 CPD ¶ 196. Here, in contrast, the issue DePaul raises primarily concerns the scope of the Navy's statutory authority to provide medical services to eligible beneficiaries; the procurement-related component of DePaul's argument--that the RFP is defective for exceeding the Navy's statutory authority--is not the central issue. Under these circumstances, we do not believe it is appropriate to consider the untimely issue under the significant issue exception.

DePaul finally contends that the requirement for birth control services infringes on its constitutional right to the free exercise of religion by requiring that it either compromise its religious beliefs or not participate in the competition.

Under CICA, 31 U.S.C. § 3552, our Office is authorized to decide protests concerning alleged violations of a procurement statute or regulation. Consistent with this authority, we have considered and found to be without merit DePaul's contention that the RFP violates the requirement in CICA for full and open competition. DePaul's additional argument, regarding the impact of the RFP on its free exercise of religion, involves an alleged constitutional violation, not a violation of a procurement statute or regulation. In support of its position, DePaul cites several Supreme Court decisions involving the denial of unemployment benefits to individuals whose religious beliefs prevented them from working under the conditions required by their employers, either by working on their Sabbath, e.g., Sherbert v. Verner, 374 U.S. 398 (1963), or by participating in the manufacture of armaments. Thomas v. Review Board, 450 U.S. 707 (1981). The cases cited by DePaul do not relate directly to the rights of a prospective government contractor. In the absence of a clear judicial precedent on this issue, we decline to consider DePaul's challenge to the RFP on constitutional grounds; the issue is a matter for the

courts, not our Office, to decide. See D.J. Findley, Inc.,
B-226804, July 31, 1987, 87-2 CPD ¶ ____.

The protest is dismissed in part and denied in part.



Harry R. Van Cleve
General Counsel