



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Americorp
File: B-231644
Date: October 6, 1988

DIGEST

1. Where the procuring agency establishes that Standard Form 98 was sent to the Department of Labor (DOL) in the proper form and DOL determined that there was no wage determination applicable to the procurement, the protester's contrary allegation is without merit. The accuracy of the wage determination is a matter for DOL, not the General Accounting Office.
2. Where solicitation provides for the contractor to monitor employees and ensure that its employees meet the requirements of the solicitation, any contract awarded under the solicitation will not result in an illegal personal services contract.
3. Allegation that contracting officer's technical representative, not contracting officer, is improperly approving and disapproving personnel changes under protesters current contract involves contract administration, and is not relevant to that persons roll, if any, under contract not yet awarded pursuant to protested procurement.
4. Requirement that offerors provide signed letters of commitment from proposed employees is not unreasonable where the solicitation lists personnel qualifications as an evaluation criteria and an offeror's proposed employees are integral to the contractor's performance under the contract.
5. Allegation that procuring agency improperly issued solicitation as a small business set-aside instead of a small disadvantaged business (SDB) set-aside is denied where under previous solicitation for requirement issued as a SDB set-aside the low offeror's price exceeded the fair market price by more than 10 percent.

043481/137005

DECISION

Americorp protests alleged defective specifications in request for proposals (RFP) No. N00612-88-R-0365, a total small business set-aside, issued by the Regional Contracting Department, Naval Supply Center, Charleston, South Carolina, for technical and professional non-personal services to support the Family Service Center program at the Marine Corps Air Station in Beaufort, South Carolina. The protester is the incumbent contractor.

We deny in part and dismiss in part the protest.

The Navy initially solicited this requirement as a small disadvantaged business (SDB) set-aside on October 28, 1987. However, after evaluating proposals, the Navy determined that the lowest priced technically acceptable proposal exceeded the fair market price by more than 10 percent and the Navy withdrew the SDB set-aside and reissued the solicitation as a total small business set-aside on April 8, 1988. The RFP contemplated a firm, fixed-price contract with a base period from July 1 to September 30, 1988, and two option years.

Americorp contends that several defects, irregularities, and improprieties appear in the RFP. Americorp alleges that the Navy did not file a Standard Form 98, "Intention to Make a Service Contract and Response Notice," with the Department of Labor (DOL) and that, if it did, the Navy intentionally did not provide sufficient job description information about certain employees so that DOL could make an accurate wage determination. In particular, Americorp argues that the Hire-a-Teen Coordinator, Secretary/Receptionist, Information and Referral Specialist, Retirement Affairs Specialists, and Employment Resources Specialist are not professional employees and that the Navy did not furnish this information with the form.

However, the Navy's report establishes that Standard Form 98 was sent to DOL on May 18, 1988. The job positions cited by the protester are referenced in the form and the Navy reports that the appropriate pages of the solicitation that described the qualifications, job requirements, and duties of these positions were attached to the form. In response to the form, DOL indicated that there was no wage determination applicable to the specified locality and classes of employees. Since Americorp has not provided any evidence other than alleging that the Navy did not properly file Standard Form 98, we have no basis to conclude that the Navy improperly filed the form. Moreover, if Americorp is

concerned about the accuracy of DOL's wage determination, it must pursue the matter with DOL because we do not review the accuracy of DOL wage determinations. See West Coast Fire Service Inc., B-228170, Dec. 16, 1987, 87-2 CPD ¶ 599.

Americorp further contends that the Navy should not have included section L39, Notice of Compensation for Professional Employees and section L40, Evaluation of Compensation for Professional Employees, in the RFP because the contract will not exceed \$250,000. Americorp states that it currently is providing the requirement to the Navy for less than \$250,000 per year. These provisions are included in solicitations for negotiated service contracts when the contract amount is expected to exceed \$250,000 and the service to be provided will require a meaningful number of professional employees. See Federal Acquisition Regulation (FAR) § 22.1103 (FAC 84-32). The Navy reports that the government estimate for the base year and two option years was over \$250,000.

Although Americorp contends that the ensuing contract will not exceed \$250,000 per year, we find that FAR § 22.1103 does not make the application of sections L39 and L40 contingent upon the cost per year of the contract but the total expected amount of the contract, which we believe contemplates factoring in option years when the option year prices, as here, are evaluated for award purposes. Although the Navy did not furnish Americorp with the government estimate because of the pendency of procurement, our review of the Navy's rationale for determining the estimate provides us with no basis to question the estimate. Moreover, Americorp's price for the canceled solicitation, covering the same length of time, exceeded \$250,000. Therefore, we find that the Navy properly included sections L39 and L40 in the RFP.

Americorp lists several sections of the RFP to show that the Navy improperly is attempting to convert the RFP from a non-personal services contract into a personal services contract. FAR § 37.104(b) states that agencies should not award personal services contracts unless specifically authorized by statute to do so. Further, FAR § 37.101 states that a non-personal services contract is a contract under which the personnel rendering the services are not subject, either by the contract terms or by the manner of its administration, to the supervision and control usually prevailing in relationships between the government and its employees. A personal services contract is defined as a contract that, by its express terms or as administered, makes the contractor personnel appear, in effect, government employees. See FAR § 37.101.

We have carefully examined the protester's allegations in regard to the specific provisions of the RFP and we find no basis to conclude that the Navy is attempting to procure an unauthorized personal services contract. In order for such a situation to occur, the contract must provide for detailed government direction or supervision of the contractor's employees. See McGregor FSC, Inc., B-224634, Nov. 7, 1986, 86-2 CPD ¶ 537.

FAR § 37.104(c)(2) states that the key question is always whether the government will exercise continuous supervision and control over the contractor personnel performing the contract. Here, the RFP provides that the contractor shall monitor employees and ensure that employees meet the requirements of the RFP and that the Family Advocacy Counselor/Program Coordinator, not the government, has the duty and responsibility of overseeing employees and coordinating and carrying out the agency's programs or services under the RFP. Therefore, we find no basis to conclude that the Navy is attempting to award an unauthorized personnel services contract.

Americorp also argues that the RFP improperly requires the contractor to provide medication services, without requiring the contractor to possess a medical practitioner's license. However, the Navy reports that the word medication was a typographical error and should have been mediation, which has been corrected by amendment Nos. 0003 and 0005. Similarly, Americorp also objected to the use of the terms "random selection" and "other duties" as being ambiguous. However, amendment No. 0005 deleted these words from the RFP and, therefore, we find that these allegations are moot.

While Americorp argues that the life of the contract, as stated on page 37 paragraph 4d, from May 15 through August 30 is misleading, we disagree. Page 37 of the solicitation pertains to the Hire-a-Teen program coordinator, whose responsibility is to assist teenagers in obtaining jobs and thus is geared to meet the needs of school-aged youth by operating during the above stated period, i.e., the summer months for the contract year and option years. Page 2 of the solicitation clearly shows the basic contract period from July 1, 1988 through September 30, 1988, with two option years from October 1, 1988 to September 30, 1990. The Hire-a-Teen Coordinator was listed as a separate line item for each contract period and option year for 2 months and 3.5 months, respectively.

Americorp alleges that under its current contract the contracting officer's technical representative (COTR) has

been approving and disapproving personnel without the contracting officer's approval and that the contract only authorizes the contracting officer to make these decisions. Americorp states that the same COTR is designated in the RFP, and should be removed from that position. Americorp states that the COTR was formerly an employee of an Americorp affiliate and was terminated under less than favorable conditions. Americorp alleges that the COTR vowed to get even with the company and that he improperly interfered with the evaluation process during the initial solicitation for this requirement. Therefore, Americorp argues that the COTR will not render impartial oversight if it is awarded the contract.

Since the allegation that the COTR improperly has been approving and disapproving personnel under its current contract is one of contract administration, which our Office does not review. Such a complaint would have to be filed under the Disputes Clause of that particular contract. See Engineered Air Systems, Inc., B-230878, July 25, 1988, 88-2 CPD ¶ 77.

In regard to the COTR's role in the current procurement, the Navy reports that the individual was removed from the current evaluation process and, further, that the Navy referred the protester's allegation that he committed improprieties during the prior evaluation to the Naval Investigative Service (NIS) for review. The NIS reports that after interviewing the relevant parties there was no credible evidence to support any wrongdoing on the part of the individual. In light of the Navy's decision to remove the individual from participating in evaluating the contract and the NIS's report, we do not find that naming the individual as the COTR was improper.

Americorp argues that of the RFP requirement that the offeror provide, along with the resume, a signed commitment of employment for any proposed employee not currently working for the offeror is inconsistent with paragraph L45 of the RFP which requires that names or other personal identification data shall be obliterated. Americorp also argues that requiring a signed commitment letter violates the Privacy Act, 5 U.S.C. § 552a (1982).

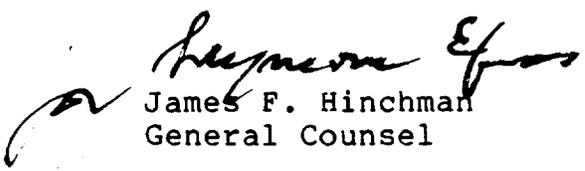
We note that the responsibility for formulating solicitation requirements that reflect the minimum needs of the government is primarily that of the contracting agency, and such requirements are unobjectionable in the absence of a showing that they do not reflect the agency's minimum needs. Winanday Greenhouse Co., Inc., B-208876, June 7, 1983, 83-1 CPD ¶ 615. The contracting agency is most familiar with the

conditions under which the supplies or services have been or will be used, and our standard of reviewing protests challenging agency requirements has been fashioned to take this into account. Minority Communications, Inc., B-228230.2, Jan. 29, 1988, 88-1 CPD ¶ 88.

We do not find that Americorp has presented a legal basis to object to the Navy requiring offerors to provide signed letters of commitment from proposed employees. The Navy reports that offerors were required to submit employment letters with their proposals so the agency could determine whether the offeror had competent people to fill the positions under the RFP. The Navy reports that the Family Service Center has an extremely important function on the base and that it must be certain that the contractor providing the counseling services can, in fact, provide these services in a truly competent and professional manner. Since the RFP lists personnel qualifications as an evaluation criteria, we do not find that it was unreasonable for the Navy to require offerors to establish that the personnel evaluated were in fact committed to performing the duties listed in the RFP. We have not objected to requiring offerors to have contractual relationships with certain employees where those employees are integral to performing the agency's requirements and we regard employment agreements as a permissible method for achieving this objective. See Skyland Scientific Service, Inc., B-229700, Feb. 9, 1988, 88-1 CPD ¶ 129. Americorp's base contention, without more, that this requirement violates the Privacy Act is denied.

Finally, Americorp contends that the agency improperly withdrew the SDB set-aside because there was adequate competition and price reasonableness under the prior contract. The Navy reports that the low SDB's price in the prior procurement exceeded the fair market price--reflected in the government estimate--by more than 10 percent. The regulations permit withdrawal of an SDB set-aside where the low offer exceeds the fair market price by more than 10 percent. See 48 C.F.R. §§ 219.502-72(d) and 219.506(a) (1987). Since, as previously indicated, we found no basis to question the government estimate, we do not find that the Navy improperly withdrew the SDB set-aside.

The protest is denied in part and dismissed in part.


James F. Hinchman
General Counsel