Comptroller General
of the United States
Washington, D.C. 20548

147016

Decision

Matter of: Orthopedic Services, Inc.

File: B-247695

Date: June 30, 1992

Barry M. Roth for the protester.
Robert E. Beeton, Esq., Department of Veterans Affairs, for the agency.
Christine F. Bednarz, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency's allowance of a 40-day proposal preparation period was sufficient and reasonable, notwithstanding that the solicitation represented a departure from the agency's prior method of procuring the items, where solicitation only requested limited pricing information.

2. The Department of Veterans Affairs reasonably exercised its discretion in a solicitation predesignating Medicare pricing for the prosthetic devices solicited.

DECISION

Orthopedic Services, Inc. (OSI) protests the terms of request for proposals (RFP) No. M1-Q40-92, issued by the Department of Veterans Affairs (VA), for the acquisition of artificial limbs. The protester objects to the RFP's pricing structure, which designated predetermined Medicare rates that contractors may choose for prosthetic devices. The protester also claims that the time allowed for proposal preparation was insufficient.

We deny the protest.

The VA issued the RFP on January 15, 1992, and provided for a proposal receipt date 30 days later, or February 14, 1992. The RFP listed its prosthetic requirements in three separate schedules, each of which employed a different pricing format. Schedule "A" identified items based upon

codes developed by the Health Care Financing Administration (HCFA), commonly known as L-Codes, which are used as the primary system to administer prosthetic requirements under Medicare. For each L-Coded item, the RFP stated that the Medicare Fee Schedule rate in effect at the time and location of service would apply to orders under the contract. The solicitation package did not, however, include the current Medicare rates for the L-Coded items. Schedule "B" of the RFP contained items unique to VA prosthetic contracts; VA predetermined in the solicitation the prices for these items based upon the current contract prices, with an indexed increase. Schedule "C" identified nine new items and requested offerors to propose their own unit prices as the basis for negotiation.

The RFP envisioned multiple awards to all responsible offerors who agreed to furnish items at the Medicare rates, the VA rates, or the negotiated rates, depending upon the respective supply schedule. Offerors could identify any item that they would or would not provide under each schedule.

Purchase orders could be placed against applicable portions of the supply schedule of an awarded contract at any time prior to its expiration. While the RFP contemplated a 1-year basic contract period, with an option to extend for an additional year, it authorized either party to cancel the contract, in whole or in part, effective within 30 days of written notice. Contractors could also request contract modification at any time after award, including a request to delete certain products from their particular supply schedules. Contractors could also offer to reduce prices, which the government would accept at any time.

The RFP's use of Medicare codes and pricing represented a departure from VA's past prosthetic acquisitions. This change was in response to a study performed by the VA Office of Inspector General, which found administrative problems in VA's past prosthetic contracts because the specifications were not comparable with the generally recognized L-Code definitions used by Medicare and that this procedure did not lead to fair and reasonable prices for the prosthetic device items.

For example, competitors in prior acquisitions inconsistently priced the contract requirements, which contributed to a cumbersome negotiation process that ultimately had the effect of leveling prices. Specifically, during its most recent artificial limb acquisition, VA computed a median price for 19 prosthetic procedures (about 15,000 line items of information) based upon the prices received from 595 offerors. VA awarded contracts to all offerors below the median and negotiated contracts with each offeror above

the median by allowing them to match the median price in order to receive an award. The Inspector General believed that offerors had no incentive to offer competitive prices under this longstanding procedure, since VA allowed offerors with high prices an opportunity to lower their prices to a designated level, an opportunity virtually all such offerors accepted.

The Inspector General also found that a pricing clause included in the prosthetic contract exacerbated this tendency toward noncompetitive pricing. This clause only required offerors to certify that their offered price did not exceed that charged to non-governmental entities, which effectively denied VA the significantly better prices received by government-financed programs such as Medicare and Medicaid. In fact, the report took the position that "artificial limb contractors historically have used the VA contract to subsidize sales" to Medicare, Medicaid, and state rehabilitation agencies.

Based upon these findings, the Inspector General concluded that the adoption of Medicare's L-Code descriptions and pricing would resolve VA's administrative burdens and promote fair and reasonable pricing. This recommendation followed, in part, from VA's discussion with representatives of the American Orthotic and Prosthetic Association (AOPA), which advised that approximately 85 percent of its 1,200 members participated in Medicare and billed on the basis of the L-Code descriptions. In addition, a VA-initiated audit of 7 large prosthetic suppliers showed that Medicare revenue constituted 30 to 40 percent of their income. The Inspector General's report estimated that conversion to the Medicare system would save VA almost $2 million annually on the $24 million program.

On February 4, 1992, VA held a preproposal conference, which was attended by 6 AOPA trade association members and the representatives of 20 contractors, including the protester. Among other things, the contracting officer responded in depth to the conferees' objections to the new pricing methodology. The contracting officer also answered a conferee's question regarding the availability of the 1992 Medicare price lists, advising that offerors could obtain the lists from the HCFA Regional and Central Offices or the VA Marketing Center. The contracting officer also explained that the Medicare price lists were not available to VA when it issued the solicitation, but that copies were now available upon request, including via facsimile transmission. The contracting officer informed conferees that VA would extend the proposal receipt date from February 14 to February 24, 1992. VA issued a solicitation amendment to

this effect on February 10, 1992, and mailed the text of Questions and Answers from the preproposal conference on February 14, 1992.

On February 7, 1992, OSI filed an agency-level protest contesting the RFP's use of Medicare pricing, as well as the adequacy of the proposal preparation period. OSI reiterated its concerns to VA's legal counsel and procurement staff on February 20, 1992. On February 21, 1992, the contracting officer denied OSI's protest.

On February 24, 1992, the agency received 618 offers in response to the RFP, including proposals from the protester's eastern and midwestern subsidiaries. On the same date, shortly before the closing time, OSI protested the RFP to our Office. Notwithstanding this protest, VA authorized the award and performance of the multiple contracts in accordance with the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3553(c)(2), (d)(2) (1988), and conveyed this determination to our Office.

OSI maintains that offerors could not fully comprehend the RFP's new format within the 40-day response period, especially since VA allegedly did not timely apprise offerors of where to obtain the 1992 Medicare Fee Schedule rates applicable to Schedule "A" and did not promptly provide offerors with the questions and answers from the preproposal conference. Where a protester contends that the agency allowed insufficient time for the preparation of proposals, we require a showing that the time allowed violated pertinent statutory requirements, or was otherwise unreasonable or insufficient. Cajar Def. Support Co., B-240477, Aug. 3, 1990, 90-2 CPD ¶ 100.

It is true that the RFP reflected a material change from VA's past artificial limbs contract. However, the revisions simply reflected Medicare's pricing policies, with which most offerors presumably were familiar. For this reason, it is not clear why knowledgeable offerors would not know where to obtain copies of the 1992 Medicare Fee Schedule without specific guidance from VA. In any event, VA advised offerors of the availability of this information at the February 4 preproposal conference, held 20 days before the proposal receipt date, and mailed the information to absentees on February 14, 10 days before the proposal receipt date. VA further advised offerors that they could receive the Medicare rates by facsimile transmission.

Furthermore, assuming, as the protester claims, offerors were unable to obtain the Medicare rates until near the proposal receipt date, we do not view this RFP as especially complex and believe that offerors could have reasonably responded within a relatively short time-frame. Except

for the nine items listed in Schedule "C", the RFP did not require offerors to price the contract requirements. Rather, the RFP merely invited offerors to accept the predetermined prices, which were explicitly established for at least one-third of the contract line items in Schedule "B" and were referenced to the Medicare rates for the remaining contract line items in Schedule "A." Moreover, since the questions and answers at the preproposal conference did not result in any material changes in the RFP, VA was not required to extend further the February 24 closing date.[1] It is also notable that the agency received 618 proposals in response to the RFP, which is indicative that sufficient time was provided. Under the circumstances, we do not believe that the proposal response time allowed by the agency was restrictive of competition or otherwise unreasonable. See Control Data Corp., B-235737, Oct. 4, 1989, 89-2 CPD ¶ 304 (agency's allowance of only 31 days for a complex research and development contract found sufficient for preparation of proposals.)

OSI also objects to the RFP's designation of Medicare rates because those rates allegedly do not provide adequate compensation for the required services. In particular, the protester claims that the RFP's use of Medicare pricing is inappropriate because the contractor may not refuse to treat patients if reimbursement is inadequate, as may a Medicare provider. In this regard, the protester asserts that under Medicare, a provider who does not execute a Participation Agreement may treat the Medicare patient on an "assigned" basis, accepting the Medicare rate as full reimbursement, or may treat the patient on an "unassigned" basis, charging its customary rate and requiring the patient to seek Medicare reimbursement. The protester claims that most Medicare providers do not execute Participation Agreements so that they can control their overall revenue mix between the low Medicare rates and the higher customary rates.[2] The protester states that the VA contract will unfairly deprive

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[1]In any case, given that the protester attended and actively participated in the preproposal conference, it was not prejudiced by the VA's failure to disseminate earlier the results of the preproposal conference.

[2]OSI makes the related claim that VA's Inspector General, in recommending conversion to Medicare pricing, incorrectly assumed that 85 percent of AOPA trade association members execute Medicare Participation Agreements. Actually, the report author merely stated that 85 percent of AOPA's membership "participate" in Medicare, not that they execute formal Participation Agreements. AOPA agrees that 85 percent of its membership treat Medicare patients.

contractors of this flexibility because it will not allow contractors to refuse VA patients at the Medicare rates once an award is made.

VA enjoys a broad grant of statutory authority in the acquisition of prosthetic appliances and services, which may be procured in any manner as VA "may determine to be proper, without regard to any other provision of law." 38 U.S.C.A. § 8123 (1991), renumbered, Pub. L. No. 102-40, 105 Stat. 238 (1991). Here, VA properly exercised its discretion under the statute finding that the adoption of the generally-recognized Medicare definitions and pricing would alleviate its burdensome negotiation process and that the use of Medicare rates was necessary to obtain fair and reasonable pricing.

Although the protester argues that the RFP unfairly deprives offerors of the ability to control the amount of business they will accept at the Medicare rate, offerors are free under the RFP to indicate any item that they do not wish to provide, and the contracting officer made clear at the preproposal conference that offerors could delete any item on Schedule "A" with unsatisfactory reimbursement levels without affecting their eligibility for award. There is also some possibility of flexibility over the amount of Medicare business the contractor must accept once an award has been made, since the RFP provides that contractors may seek modification of their contracts after award, including the deletion of any item from their supply schedule. Also, contractors can cancel their contracts, in whole or in part, by providing 30 days written notice, after which the government may not place further orders against that contract's supply schedule. We also think that the protester's argument against VA's use of Medicare pricing--that it will upset offerors' revenue mix between governmental and retail pricing--tends to support the Inspector General's conclusion that contractors have historically used the VA contract to subsidize the lower rates accorded to Medicare patients.

It is not unduly restrictive of competition for the agency to predesignate pricing in order to protect legitimate government interests. See Laidlaw Envtl. Inc., B-245587; B-245587.2, Jan. 16, 1992, 92-1 CPD ¶ 82, recon. denied, B-245587.4, June 12, 1992, 92-1 CPD ¶ ___. Nor is an agency prohibited from offering to competitors a proposed contract imposing substantial risk upon the contractor and minimum administrative burdens upon the agency. J&J Maint., Inc., B-244366, Oct. 15, 1991, 91-2 CPD ¶ 333; LBM, Inc., 70 Comp. Gen. 493 (1991), 91-1 CPD ¶ 476.

As a final point, we underscore the fact that VA received 618 offers in response to this solicitation, an increase over the number of offers submitted in response to its

former artificial limb solicitation. In our view, a solicitation that imposed an unreasonable degree of risk, as claimed by the protester, would not have elicited such a favorable response from the contracting community. Under the circumstances, particularly given VA's broad grant of procurement authority, we have no basis to question this solicitation's provisions.

The protest is denied.

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for James F. Hinchman
General Counsel