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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: CardioMetrix

File: B-259130

Date: April 28, 1995

Robert J. Loring, for the protester.
H. Charles Coburn, Esq., Department of Justice, for the agency.
Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that requirement in solicitation for clinical laboratory testing services that contractor be a qualified laboratory is sustained where the agency has not established that the requirement is reasonably necessary to meet its minimum needs.

DECISION

CardioMetrix protests that the terms of request for proposals (RFP) No. 229-0044, issued by the Department of Justice, Bureau of Prisons (BOP), for clinical laboratory services, are unduly restrictive of competition.

We sustain the protest.

The RFP is to obtain a contractor to provide clinical laboratory testing services for the Federal Correctional Institution (FCI), Fairton, New Jersey, for a base period with four 1-year options. The required laboratory tests are listed in the RFP.[1] The contractor is required to report routine test results within 24 hours of specimen pick-up and short turnaround tests (STAT) results within 2 hours or less.[2] Among the statement of work requirements is "[t]he

[1]For example, hepatitis profiles, liver profiles, thyroid profiles, and cultures.

[2]The RFP defines routine tests as tests that are usually performed at a high volume in which the results are generally required in 24 hours. STAT tests are defined as tests that are required to be specially handled, picked up,

(continued...)

contractor shall be required to have current licensing and accreditation as identified below:"

> "(a) Licenses, permits, accreditation and certificates required by law.
>
> "(b) Shall be accredited by the College of American Pathologist.
>
> "(c) Shall be certified according to the [Clinical Laboratories Improvement Act, 42 U.S.C. §263(a) (1988)] guidelines.
>
> "(d) Contractor's Laboratory Director shall be a licensed physician in pathological medicine." (Emphasis added.)

The contractor is also required to have an established "Quality Assurance Program." The RFP further provides that the contractor may subcontract any of the services, provided that all provisions of the contract are honored, that no additional charge is made to BOP, and that the contractor ensures that all services meet the specifications.[3]

CardioMetrix protests that the licensing, accreditation, and quality assurance requirements unduly restrict competition to licensed laboratories because these services can and have been successfully performed by contractors who are not licensed laboratories. CardioMetrix explains that it does not operate a clinical laboratory testing facility, but instead provides laboratory testing services by subcontracting with licensed and accredited laboratories who maintain a quality assurance program; under these contracts, Cardiometrix is responsible for "administration, management, oversight, quality controls, end-of-month billing, etc." CardioMetrix references and lists its numerous BOP contracts at other FCI facilities for identical services, including STAT tests, which it states have been successfully performed with no complaints as to the timeliness, accuracy, or integrity of the tests.

BOP reports that the requirement that the contractor be a licensed laboratory makes the laboratory directly accountable to BOP and will thereby best ensure that the

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[2](...continued)
tested, and reported, within a specified turnaround time of 2 hours or less.

[3]The contractor is required to receive approval from the contracting officer prior to subcontracting.

tests are performed in an accurate and timely manner. BOP also asserts that in emergency situations, it must be able to contact the laboratory directly to obtain expedited laboratory tests, and that if BOP is first required to contact a "third party broker," the resulting delay may affect the integrity of the tests.

A procuring agency is required to specify its needs in a manner designed to promote full and open competition, and may include restrictive provisions in a solicitation only to the extent necessary to satisfy the agency's minimum needs. See 41 U.S.C. §§ 253a(a)(1)(A) and 253a(a)(2)(B) (1988); Omega World Travel, Inc., B-258374, Jan. 13, 1995, 95-1 CPD ¶ 20. Where a protester challenges a specification as unduly restrictive of competition, it is the agency's responsibility to establish that the specification is reasonably necessary to meet its minimum needs. Id. In our review, we examine the adequacy of the agency's position not simply with regard to the reasonableness of the rationale asserted, but also the analysis given in support of the reasons advanced by the agency to assure that the agency's overall position will withstand logical scrutiny. The Kohler Co., B-257162, Sept. 2, 1994, 94-2 CPD ¶ 88.

As a general matter, the qualifications of a proposed subcontractor may be used to satisfy "accreditation" or "certification" requirements for a prime contractor offeror. See Hardie-Tynes Mfg. Co., 69 Comp. Gen. 359 (1990), 90-1 CPD ¶ 347. This principle would appear to be especially relevant here since the RFP specifically allows contractors to "subcontract any of the services." Thus, we think the RFP language, reasonably interpreted, would allow offerors to propose, as CardioMetrix has done previously, to perform the laboratory services by subcontracting the work to a laboratory which meets the RFP accreditation and certification requirements. In such circumstance, CardioMetrix's protest would be academic. Here, however, BOP argues that it intends by this RFP language to exclude firms like CardioMetrix which subcontract the laboratory services.

BOP has not established that the protested requirements are reasonably necessary to meet its minimum needs. Although the agency argues that this restriction is the best way to ensure the timeliness, accuracy, and integrity of the tests, the RFP, as previously noted, allows subcontracting of any or all of the services required under the RFP--this provision undermines the agency's assertion that it must have privity with the laboratory performing the tests.

While BOP argues that it is BOP's "policy" to require the prime contractor to be a certified laboratory, it does not explain or even address CardioMetrix's listed eight

contracts for these services performed for BOP, in which Cardiometrix subcontracted the laboratory services. Nor has BOP responded to CardioMetrix's contention that on its other successful BOP contracts, emergency laboratory services are handled directly between the agency and a designated laboratory, for which the contractor identified the individuals responsible for day-to-day contact with the agency. BOP has referenced no historical performance problems related to contracting for these services with other than a licensed laboratory, and has not rebutted CardioMetrix's assertion that nonlicensed contractors have successfully performed similar requirements for BOP by subcontracting certain services.

Based on the record, we conclude that the protested requirements are unduly restrictive. Id.; cf. CardioMetrix, B-257408, Aug. 3, 1994, 94-2 CPD ¶ 57 (Department of Veterans Affairs established the reasonableness and propriety of a contractor licensing requirement and limitation on subcontracting in a solicitation for laboratory testing services).

We recommend that BOP review its minimum needs to determine its actual requirements for clinical laboratory testing services and appropriately revise the RFP. CardioMetrix is also entitled to recover the costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1995). CardioMetrix should submit its detailed and certified claim for such cost directly to the agency within 60 days after it receives this decision. See 4 C.F.R. § 21.6(f)(1).

The protest is sustained.

\s\ James F. Hinchman
for Comptroller General
of the United States