



Comptroller General
of the United States

135197

Washington, D.C. 20548

Decision

Matter of: CardioMetrix
File: B-260747
Date: July 18, 1995

Robert J. Loring, Ph.D., for the protester.
John R. Tolle, Esq., and William T. Welch, Esq., Barton,
Mountain & Tolle, for The Orkand Corp., an interested party.
Rick Beaman, Thomas F. Doyon, Esq., and Kurt D. Schuman,
Esq., Department of the Air Force, for the agency.
Paula A. Williams, Esq., and John Van Schaik, Esq., Office
of the General Counsel, GAO, participated in the preparation
of the decision.

DIGEST

Protest against decision not to set aside a procurement exclusively for small business competition is denied where agency reasonably determined, after analyzing the procurement history, that it would not receive offers from responsible small business offerors at fair market prices and where the agency's small business specialist and the local Small Business Administration procurement center representative concurred with the decision.

DECISION

CardioMetrix protests the terms of request for proposals (RFP) No. F05611-94-R-2014, issued by the Air Force Academy for the Department of Defense Medical Examination Review Board (DODMERB) for professional medical examination services. CardioMetrix, a small business, primarily contends that the Air Force improperly failed to set aside the procurement for small business.

We deny the protest.

The RFP, which contemplates award of a fixed-price requirements contract for a base period with 4 option years, calls for a contractor to provide all personnel, supervision, equipment, and materials necessary to provide complete medical, dental, audiometry, and optometric examinations for applicants to the service academies, Reserve Officers' Training Corps (ROTC) scholarship programs and the Uniformed Services University of the Health Sciences. The RFP contains a detailed performance work statement describing the various tasks contemplated by the

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solicitation which are listed as separate contract line items. The Air Force published a synopsis in the Commerce Business Daily (CBD) on October 31, 1994, announcing its intent to procure the medical services on an unrestricted basis, and issued the unrestricted solicitation on February 27, 1995.

In determining whether to issue the RFP as a small business set-aside, the contracting officer considered the scope of services required, such as the need to establish medical examination centers in 235 locations in 46 states, the number of medical examinations required each year (approximately 16,000), and the extensive scheduling and administrative requirements set forth in the RFP. The contracting officer also considered that the solicitation requires a contractor to have a \$1 million liability insurance policy which, based on the agency's experience under similar solicitations with higher insurance requirements, the agency believed might prevent small businesses from submitting competitive prices. In addition, he considered the bids received on the previous solicitation for medical examination services at DODMERB, which had been issued on an unrestricted basis. Of the six bids received, although five of the six bids received were from small businesses, none of those five bids was considered price competitive since they were approximately 11 to 65 percent higher than the award price. Based on these considerations, the contracting officer determined that there was not a reasonable expectation of receiving two or more offers from responsible small business concerns at acceptable prices, and issued the RFP as unrestricted. This determination was reviewed by the agency's small business specialist and the local Small Business Administration (SBA) procurement center representative, each of whom concurred with the contracting officer's determination.

An acquisition of services is required to be set aside for exclusive small business participation if the contracting officer determines that there is a reasonable expectation that offers will be received from at least two responsible small business concerns and that award will be made at fair market prices. Federal Acquisition Regulation (FAR) § 19.502-2(a). Generally, we regard such a determination as a matter of business judgment within the contracting officer's discretion, which we will not disturb absent a clear showing that it has been abused. Raven Servs. Corp., B-243911, Aug. 27, 1991, 91-2 CPD ¶ 203; MVM, Inc. et al., B-237620, Mar. 13, 1990, 90-1 CPD ¶ 270. However, an agency must undertake reasonable efforts to ascertain whether there is a reasonable expectation that two or more responsible small business concerns will actually submit proposals. Stay, Inc., 69 Comp. Gen. 730 (1990), 90-2 CPD ¶ 248.

While the use of any particular method of assessing the availability of small business is not required in making such a determination, such factors as the government's estimate, the procurement history for the solicited services, the current market climate, and advice from the agency's small business specialist and technical personnel may all constitute adequate grounds for a contracting officer's decision not to set aside a procurement. FKW Inc., B-249189, Oct. 22, 1992, 92-2 CPD ¶ 270.

The Air Force's actions, described above, to ascertain whether there would be sufficient small business competition at acceptable prices to warrant a set-aside clearly were reasonable, as was its ultimate determination. The Air Force reviewed the results of the competition under the previous solicitation for the same services; the fact that five small business bids were received does not require a different result since the contracting officer concluded that those bids provided no indication that an award could be made at fair market prices to a small business since the bids were not within 10 percent of the award price.¹ Moreover, although the protester argues that the small business second low bidder under the previous solicitation and itself are able and likely to submit competitive offers for the current requirement, the record indicates that the other firm did not request a copy of the protested solicitation in response to the CBD notice and, although a solicitation was mailed to that firm, it was returned by the Postal Service as undeliverable. Consequently, the contracting officer does not expect the firm will submit a proposal for this requirement. In addition, as discussed previously, the agency conferred with the SBA's representative who reviewed the available information and concurred with the contracting officer's decision to issue the solicitation unrestricted; we generally give great weight to the views of the SBA's representative in these matters. MVM, Inc. et al., supra.

In sum, we conclude that the information available provided a reasonable basis for the contracting officer to determine that a small business set-aside was not appropriate.

CardioMetrix also argues that numerous provisions in the solicitation either are objectionable or require

¹Although CardioMetrix argues that it was arbitrary to use 10 percent as a cut-off to determine whether award could be made to a small business at fair market prices, we have upheld agency decisions to not set aside where the lowest eligible small business price exceeded the basis of comparison by less than 10 percent. See Western Filter Corp., B-247212, May 11, 1992, 92-1 CPD ¶ 436.

clarification or correction. For example, CardioMetrix questions the need for RFP provisions which give the agency authority to reject contractor personnel and subcontractors and give the government authority to use the contractor's equipment to perform services itself in an emergency. CardioMetrix also complains that numerous performance requirements of the solicitation needed to be clarified. In objecting to these provisions, the protester does not allege that these solicitation provisions prevent it from competing and are therefore restrictive of competition. Rather, the protester asserts that these provisions either should be clarified or they are unreasonable, "subjective" requirements which are "contrary to normal business practices."

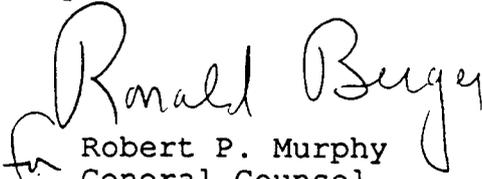
In response to these allegations, the Air Force provided an April 12 letter to CardioMetrix to explain and clarify numerous of the questioned requirements. In addition, the agency explained that other solicitation provisions, in particular those concerning the agency's authority to reject contractor personnel and subcontractors and concerning agency authority to perform services itself in an emergency, are necessary to ensure satisfactory performance of the contract. CardioMetrix, in its comments on the agency report, did not dispute the agency's position on these issues but simply asked that the protest be decided on the existing record.

The determination of the government's minimum needs and the best methods for accommodating those needs are generally the responsibility of the contracting agency which is most familiar with the conditions under which the products or services will be used. Purification Env'tl., B-259280, Mar. 14, 1995, 95-1 CPD ¶ 142. Although an agency is required to satisfy its needs in a manner designed to achieve full and open competition, and is required to include restrictive provisions only to the extent necessary to satisfy its needs, without a showing that competition is restricted, we will not substitute our judgment for that of the agency. Id.

Here, since CardioMetrix has not shown, or even alleged, that the solicitation provisions of which it complains are restrictive of competition, the protester has provided no basis to challenge these provisions. Id. Moreover, although the agency explained and clarified numerous provisions of the solicitation and reported that other questioned provisions were included in order to ensure satisfactory performance of the contract services, in its response, CardioMetrix did not refute the agency's explanation; instead, the protester merely requested that the protest be decided on the existing record. Based on our review of the record, we believe the agency's determination

that these provisions should be included in the present solicitation is reasonable. While the protester disagrees with the agency's determination, it has not shown that the Air Force's rationale fails to support this determination.

The protest is denied.


for Robert P. Murphy
General Counsel