

Matter of: Harry Feuerberg & Steven Steinbaum

File: B-261333

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Ron Tudor, Esq., for the protester.

Kenneth A. Martin, Esq., and Michael W. Kauffman, Esq.,
Riley & Artabane, for Coastal Government Services, Inc., an
interested party.

Bryant S. Banes, Esq., Department of the Army, for the
agency.

Paula A. Williams, Esq., and Michael R. Golden, Esq., Office
of the General Counsel, GAO, participated in the preparation
of the decision.

DIGEST

1. Protest that solicitation requirement for board certified physician radiologists improperly restricts competition is denied where agency states the certification requirement is necessary to ensure the safety and reliability of patient care and protesters fail to show that the agency's justification is unreasonable.

2. Protest that solicitation provisions are unclear is denied where all provisions to which the protesters object reasonably describe the requirements and services to be performed.

DECISION

Harry Feuerberg and Steven Steinbaum protest the terms of request for proposals (RFP) No. DADA10-95-R-0025, issued by the Department of the Army to acquire radiology services at 37 military treatment facilities (MTFs) within the Army Medical Command. Feuerberg & Steinbaum, the incumbent contractors at the William Beaumont Army Medical Center in the El Paso area, allege that the RFP requirement regarding the use of board certified radiologists does not reflect the agency's actual minimum needs; that the agency failed to require medical malpractice liability insurance; that the RFP is unclear regarding the applicability of a compensation ceiling to this procurement and the Region VII definite/

indefinite requirements. The protesters also contend that the RFP impermissibly bars the selected contractor from employing any radiologist who is the subject of an investigation concerning the radiologist's qualifications.¹

We deny the protest.

The requirement was synopsisized in the Commerce Business Daily on March 1, 1995, and the agency issued the RFP on April 10 as a follow-on to current regional contracts for similar services, one of which the protesters are presently performing in El Paso. The RFP requires the selected contractor to provide qualified physicians to perform diagnostic radiology services at multiple MTF locations and regions under the control and general supervision of the MTF commander or chief of the clinic where the services are being provided.

The follow-on requirement is divided into nine geographic regions with each region having a minimum of one MTF. The RFP also contains a detailed statement of work describing the various duties and tasks required, and sets forth specific requirements concerning the types of experience and licensing radiologists must possess, including the requirement that all radiologists be board certified or board eligible for certification within 2 years following completion of radiology residency. As amended, the RFP contemplates awards of up to nine fixed-price indefinite delivery, indefinite quantity contracts for a base year with four 1-year options. On June 8, the agency issued a clarification letter to all prospective offerors which, among other things, discussed the compensation ceiling which applies to all radiologists under this solicitation.

Feuerberg & Steinbaum contend that the requirement for board certified radiologists is arbitrary and exceeds the government's minimum needs because the current contractor-provided civilian radiologists and military radiologists were not required to meet this standard. On this basis, the protesters assert that some experienced radiologists would

¹The protesters also allege that some prospective offerors gained an unfair competitive advantage over other potential competitors as a result of allegedly receiving advance copies of the RFP and question whether all incumbent contractors had been solicited for these follow-on requirements. Since Feuerberg & Steinbaum have furnished no evidence to support these allegations, and the record contains no evidence to support the protesters' allegations, we dismiss these grounds of protest.

not remain eligible for employment, thereby limiting the competitive pool of radiologists from which contractors such as itself could employ.

In preparing a solicitation for supplies or services, a contracting agency must specify its needs and solicit offers in a manner designed to achieve full and open competition, 10 U.S.C. § 2305(a)(1)(A) (1994), and may include restrictive provisions or conditions only to the extent necessary to satisfy the agency's needs. 10 U.S.C. § 2305(a)(1)(B). Where a protester alleges that a requirement is unduly restrictive of competition, we will review the record to determine whether the requirement has been justified as necessary to satisfy the agency's minimum needs. Sunbelt Indus., Inc., B-246850, Mar. 31, 1992, 92-1 CPD ¶ 325. Here, the record shows that the requirement for board certified radiologists was reasonably related to the agency's minimum needs.

The Army concedes that it did not require either civilian or military radiologists currently performing similar services to be board certified or board eligible. However, the agency explains that its decision to now require board certification was based on its obligation to ensure safe and reliable patient care and to improve the quality of its patient care mission. According to the agency, its ability to provide safe and reliable radiology services will be enhanced by establishing a measurable minimum proficiency standard for the selected contractor's radiologists that should reduce the risk of substandard or negligent patient care and limit the government's potential liability resulting from such substandard or negligent care. To that end, the agency states that in recruiting military radiologists, it now requires them to possess board certification; in addition, board certification is now required as a minimum standard for promotion and retention of Army radiologists.

The determination of the agency's minimum needs and the best method for accommodating those needs are primarily matters within the agency's discretion. Johnson Controls, Inc., B-243605, Aug. 1, 1991, 91-2 CPD ¶ 112. Moreover, where, as here, a solicitation requirement relates to safety concerns, an agency has the discretion to set its minimum needs so as to achieve not just reasonable results but the highest possible reliability and effectiveness. See United Terex, Inc., B-245606, Jan. 16, 1992, 92-1 CPD ¶ 84.

We find the RFP's board certification requirement to be reasonable. In its comments on agency report, the protesters do not rebut the agency's need to obtain some assurance from a source independent of the selected contractor that the proposed radiologists can demonstrate a

level of proficiency necessary to provide the required services but only asserts, based upon the prior requirement, that the certification requirement will result in reduced competition. Feuerberg's & Steinbaum's disagreement with the agency's reasoned determination is not sufficient to show that the agency's determination was unreasonable. Thus, the fact that these radiologists may have to obtain board certification does not establish that the Army's otherwise legitimate requirement was improper or that the agency acted unreasonably in requiring board certification for these follow-on services.

Next, Feuerberg & Steinbaum object to the provision concerning malpractice liability. Paragraph H.2 of the RFP entitled "Malpractice Liability" provides, in relevant part:

"This is a personal service contract. Contractor employees are subject to supervision and direction of designated government officials, . . . Malpractice allegations against contractor employees based upon performance of this contract will be processed in accordance with government policy for allegations against its own employees. The government is a self-insurer for malpractice liability. Contractor employees are not required to carry malpractice insurance, and the government will not reimburse or otherwise pay for such insurance"

The agency points out that paragraph H.2, quoted above, is entirely consistent with Department of Defense (DOD) Directive 6025.5, entitled "Personal Services Contracts for Health Care Providers," which exempts contractor personnel performing direct health care services from obtaining commercial malpractice liability insurance. Feuerberg & Steinbaum argue that notwithstanding this DOD Malpractice liability insurance exemption, the Army should require contractor-provided radiologists to carry this insurance since it is the Department of Justice (DOJ), not DOD, which has the ultimate authority to defend the government in malpractice tort claims and that DOJ may determine that contractor-provided radiologists are not covered by the government's self-insurance.

We find no merit to this objection. The government believes that under the circumstances of this contract it will be liable for any malpractice by the contractor's radiologists and that since it is a self-insurer no commercial malpractice liability insurance is required. While the protesters argue that if they choose to maintain commercial malpractice insurance for their radiologists they may not be price competitive with other competitors who choose

otherwise, that simply reflects a business decision each offeror has to make. It does not establish that there is anything unreasonable with the government's position.

The protesters also argue that the solicitation does not make clear whether a compensation ceiling applies to this contract or provide sufficient information regarding the definite quantity portion of services within Region VII.

We think the solicitation was clear regarding a compensation ceiling. The protesters primarily base their complaint that the solicitation is unclear as to whether a compensation ceiling applies on an internal memorandum inadvertently included with the agency report which suggests that a compensation ceiling does not apply. However, while the original solicitation did not state that a ceiling was applicable, the contracting officer, by amendment issued June 8 (after the protest was filed), specifically states that a compensation ceiling for radiologists does apply since this is an acquisition for personal services. The ceiling limits radiologists to a full-time equivalent annual rate of \$200,000, or a pro-rata rate of \$100 per hour. The amendment further states that while the ceiling does not apply to a corporation, any offeror is required to apply the compensation limits to each physician provider, that payment of direct rates in excess of the ceiling will constitute a breach of contract, and that the government intends to monitor compliance with the ceiling. We think this amendment resolves the issue.

The protesters state that information obtained from contract radiologists currently performing at the Bliss Army Hospital reveals that the Bliss requirements may not be purchased under the contract and that the RFP is unclear as to which hours are definite and indefinite requirements. The solicitation states the minimum quantity for Region VII is the total of routine clinic hours in the base year for contract line item numbers 0022AA, the Brooke Army Medical Center, and 0023AA, the William Beaumont Army Medical Center. Thus, the definite quantity of hours are for Brooke Army Medical Center and the Williams Beaumont Army Medical Center. Under the schedule, Bliss Army Hospital has no minimum definite quantity. We think the RFP provides sufficient information as to which services constitute definite requirements and which do not.

Finally, the protesters object to the prohibition on employing radiologists under this contract who are the subject of pending complaints. The protesters' concern is that this provision may encourage arbitrary or wrongful action by the agency in disciplining radiologists to obtain their removal from the contract. First, we see nothing objectionable in the agency's desire to prohibit the use of

radiologists who have complaints against them pending as this affects their hospital privileges and credentials. Second, regarding the protester's concern that the process can be abused, there is no evidence that the procedures have been abused under the current contract which contains the identical prohibition and we are not prepared to assume that the agency will use this process in an arbitrary fashion. We do not find this RFP provision objectionable since its purpose is to ensure that the selected contractor furnishes fully qualified radiologists.

The protest is denied.

/s/ Ronald Berger
for Robert P. Murphy
General Counsel