



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: CardioMetrix

File: B-276912; B-276912.2

Date: August 11, 1997

Robert J. Loring, Ph.D. for the protester.

Jan Rich, for CorVel Corp., an intervenor.

Ann L. Chaney, Esq., and Henry Valiulis, Railroad Retirement Board, for the agency.

Mary G. Curcio, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Contracting agency's determination not to set aside procurement for small business concerns was proper where, based on the procurement history for the solicited services, agency concluded that it could not reasonably expect to receive bids from at least two responsible small business concerns offering a fair market price.
 2. Solicitation requirement that contractor provide additional medical examiners in cases where a claimant must travel more than 50 miles to an appointment is not improper where requirement reflects the agency's legitimate needs, even though costing the requirement for proposal purposes may be difficult for offerors, resulting in significant contractor risk.
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DECISION

CardioMetrix protests certain terms of solicitation No. 97-B-2, issued by the Railroad Retirement Board (RRB) for disability examination services on a fixed-price, indefinite-quantity basis. CardioMetrix principally asserts that the solicitation should have been set aside for exclusive small business participation.

We deny the protest.

SET-ASIDE DECISION

An acquisition of services over \$100,000, such as the one at issue here, is required to be set aside for small business concerns where the contracting officer determines that there is a reasonable expectation that offers will be obtained 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(b). Here, the contracting officer's decision not to set the solicitation aside was based on the procurement

history for the same services which, he concluded, showed that it was unlikely that at least two small businesses would submit offers at a fair market price. Specifically, this information showed that three small businesses remained in the competitive range after best and final offers were submitted under the prior procurement, but that only one of those firms' offers was at a fair market price (the price was slightly higher than the government estimate). The remaining two offers were more than 50 percent higher than the low small-business offer and the government estimate. The contracting officer also considered that the current solicitation includes greater requirements for electronic data interchange (EDI)¹ and a lower guaranteed minimum dollar award than under the prior solicitation, and, unlike the prior solicitation, provided for award possibly on a regional rather than nationwide basis. Since these factors would require firms to incur the costs of implementing (or upgrading) EDI, and at the same time provide a smaller contract base over which to spread their costs, the contracting officer believed these factors would make it even more difficult for small businesses to offer fair market prices than under the prior solicitation.

CardioMetrix takes issue with the agency's investigation into the feasibility of a set-aside. Specifically, it maintains that the agency should have taken additional steps, including attempting to procure a list of potential small businesses from the PASS database, contacting the three small businesses that responded to the earlier solicitation, and conferring with the Small Business Administration (SBA), which has agreed with CardioMetrix that the procurement should be set aside.² CardioMetrix also asserts that EDI in fact is cost effective, and that the inclusion of the supposedly too high-priced small business proposals in the competitive range (under the prior solicitation) suggests that they in fact were considered to offer fair market prices.

The agency's determination was adequately supported. In determining whether to set aside a procurement for small business concerns, procuring agencies are permitted to rely on any of several types of relevant information, including past procurement history; agencies are not required to use any particular method in making their determination. CardioMetrix, B-256407, May 27, 1994, 94-1 CPD ¶ 334 at 2-3. This being the case, and since there is nothing in the record suggesting that the historical information was somehow flawed, there simply is no basis to conclude that the RRB's determination was rendered improper by its failure to obtain and consider the additional information specified by CardioMetrix.

¹This was required to allow the exchange of certain information between the computer systems of the agency and the contractor.

²The SBA also filed an appeal with the agency pursuant to FAR § 19.505(c)(2). By decision dated July 14, the agency denied the appeal on essentially the same grounds it asserts here.

As for CardioMetrix's specific points, first, the fact that the SBA believes a set-aside is appropriate does not render the agency's determination improper; as noted above, it is the agency's, not the SBA's, responsibility to make the set-aside determination. We note, furthermore, that the SBA's position did not turn on alleged errors in the agency's rationale but, rather, was based on a difference in judgment. For example, while the RRB's determination was based in part on the two high-priced small business proposals' failure to offer fair market prices, it was the SBA's view that this concern could be mitigated by stressing to offerors the importance of both price and technical factors. This disagreement with the agency's judgment does not render it unreasonable or otherwise improper. Second, with respect to EDI, the agency's focus was not on its cost effectiveness, but on the fact that implementing or upgrading EDI capability (programming and software costs) would involve added cost compared to the prior contract, while the guaranteed dollar value of the contract would be lower than under the prior contract. The agency essentially concluded that this had the effect of increasing the risk under the contract and likely would lead to even higher proposed prices than the already too high prices from the unsuccessful small business offerors under the prior solicitation. Finally, the fact that those two high-priced proposals were included in the competitive range in no way contradicts the agency's position that they did not offer fair market prices. Rather, those proposals were included despite their high prices, apparently to provide the offerors an opportunity to lower their prices. As their final prices remained significantly higher than the awardee's and the estimate, the agency reasonably viewed the proposals as not offering a fair market price.

RISK

CardioMetrix challenges a provision of the solicitation requiring the contractor to make every effort, including recruiting additional providers, to assure that claimants need travel no further than 50 miles from their residence to attend their disability examination appointments. CardioMetrix argues that the provision imposes undue risk on the contractor, since the lack of information as to how many ultimate clients live outside the 50-mile radius makes it difficult for the contractor to estimate the cost of performance. CardioMetrix acknowledges that the agency cannot provide more detailed information, and thus suggests that the solicitation be amended to allow the contractor to bill the agency a surcharge for the costs it incurs in recruiting new providers to meet this requirement.

This argument is without merit. The solicitation was intended to result in a cost-effective contract under which the contractor would furnish an established network of providers that covers the greatest geographic area (within the service area) possible. The agency asserts that permitting the contractor to bill a surcharge would defeat this intent by providing offerors an incentive to offer a more limited network with the intention of recruiting more providers on an as-needed basis; this potentially would result in a less extensive established network, and a higher cost to the agency. We find this to be a legitimate concern; we agree with the agency

that the change proposed by the protester could result in a contract which both operates differently than the agency desires, and increases the contract cost. Risk is inherent in most types of contracts, especially in fixed-price contracts such as the one here, and there is nothing improper in an agency's designing a solicitation to meet its needs and cost objectives in the manner it deems most effective, even where doing so results in the imposition of significant risk on the contractor. See National Customer Eng'g, B-254950, Jan. 27, 1994, 94-1 CPD ¶ 44 at 5; Tracor Jitco, Inc., B-220139, Dec. 24, 1985, 85-2 CPD ¶ 710 at 4-5.

MEDICAL REPORT

CardioMetrix also objects to the solicitation requirement that the contractor include a completed residual functional capacity form with its basic medical report for each claimant receiving a physician examination.³ CardioMetrix asserts that this form generally is based on a functional capacity evaluation assessment, a lengthy exam performed by a physical or occupational therapist, and that it therefore is unreasonable to require a physician to complete the form based on a normal physical exam.

Procuring agencies are responsible for defining their needs and determining how best to meet those needs. See CardioMetrix, B-270701, Mar. 13, 1996, 96-1 CPD ¶ 149 at 3. The RRB states that the form it included in the solicitation is designed to obtain a report of the functional capacity of the claimant to the extent that the physician is capable of assessing it based on his or her examination of the claimed impairments, however limited that examination may be. While it may be true, as CardioMetrix states, that the form generally is completed following a functional capacity evaluation assessment, we see no reason why the agency should not be permitted to rely on the opinion of a physician, based on a more limited physical examination.

The protest is denied.

Comptroller General
of the United States

³Residual functional capacity is a measure of exertional limitations on a patient over the course of a typical 8-hour day.