Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Fidelity and Casualty Company of New York

File: B-281281

Date: January 21, 1999

Michael P. Coffey, Esq., for the protester.
Dennis J. Gallagher, Esq., Department of State, for the agency.
David A. Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

With regard to solicitation to select insurance carrier to furnish contractors with Defense Base Act (DBA) workers' compensation insurance coverage required for contractor employees performing public work contracts and certain other contracts outside of the United States, protest that agency improperly deleted Federal Acquisition Regulation (FAR) affirmative action clauses from solicitation is denied where FAR is inapplicable because appropriated funds would not be obligated or expended under the DBA contract to be awarded under the solicitation; FAR applies only to acquisitions by the government of supplies or services with appropriated funds.

DECISION

Fidelity and Casualty Company of New York protests the terms of request for proposals (RFP) No. S-OPRAQ-98-R-0040, issued by the Department of State (DOS) for selection of an insurance carrier to offer workers' compensation coverage to DOS contractors whose employees are performing contracts outside of the United States. Fidelity and Casualty protests DOS's determination to delete several affirmative action clauses from the solicitation and to exclude coverage of aviation support services from the scope of the contract.

We deny the protest.

Pursuant to the Defense Base Act (DBA), 42 U.S.C. § 1651(a) (1994), workers' compensation insurance coverage is required for contractor employees performing public work contracts and certain other contracts outside of the United States. By regulation, DOS has extended the required coverage to all service contracts (other than contracts for personal services) which require contractor employees to perform work outside of the United States. 48 C.F.R. § 628.305 (1998). DOS regulations provide for inserting in such solicitations standard clauses requiring the contractor to procure the required DBA insurance coverage pursuant to the terms

of DOS's contract with its selected DBA insurance carrier unless the contractor has a DBA self-insurance program approved by the Department of Labor. 48 C.F.R. §§ 652.228-71, 652.228-72 (1998).

The RFP as issued required offerors to furnish rates per $100 of employee remuneration for each of four categories: construction contracts financed by DOS, service contracts financed by DOS, aviation support services contracts financed by DOS, and additional emergency medical evacuation coverage. In addition, the RFP as issued incorporated by reference the following standard affirmative action clauses: (1) Federal Acquisition Regulation (FAR) § 52.222-25, entitled Affirmative Action Compliance; (2) FAR § 52.222-35, Affirmative Action for Special Disabled and Vietnam Era Veterans (Apr 1984) (Deviation); and (3) FAR § 52.222-36, Affirmative Action for Workers with Disabilities. DOS deleted the above FAR affirmative action clauses in RFP amendment No. 0003; based on a number of inquiries from potential offerors, DOS determined that deleting the clauses would increase competition. Agency Report, Nov. 2, 1998, at 3.

Fidelity and Casualty argues that deletion of the FAR affirmative action clauses from the solicitation was improper because they were required by the FAR. DOS responds that deletion of the clauses was proper because no funds, appropriated or nonappropriated, will be obligated or expended under the DBA insurance contract to be awarded under the solicitation, and the FAR therefore does not apply here. Id. at 21-22. The agency notes in this regard that the "FAR applies to all acquisitions as defined in Part 2 of the FAR, except where expressly excluded," FAR § 1.104, while "acquisition" is defined in Part 2 of the FAR to mean "the acquiring by contract with appropriated funds of supplies or services (including construction) by and for the use of the Federal Government through purchase or lease . . . ." FAR § 2.101. Fidelity and Casualty acknowledges that there will be no direct expenditure of appropriated funds by DOS under the DBA insurance contract, but argues that:

> there is a direct expenditure of appropriated funds to DOS contractors that perform work overseas and employ eligible employees. Such direct expenditure by the DOS is comprised, in part, of the cost of DBA insurance purchased from the DBA insurer, for the cost of DBA insurance is one of the cost elements the DOS contractor encounters. . . . Upon payment of the premium to the DBA insurance contract carrier, the contractor, in turn, submits a voucher to the DOS and receives reimbursement for the cost of the premium paid.

Protest, Oct. 11, 1998, at 3, 5.

As noted by DOS, the FAR, by its terms, applies only to government acquisitions of supplies or services with appropriated funds. FAR §§ 1.104, 2.101. Since the record indicates that DOS will not obligate or expend appropriated funds under the DBA insurance contract itself, we agree with DOS that the provisions of the FAR do not

apply to the DBA contract. Simplix, B-274388, Dec. 6, 1996, 96-2 CPD ¶ 216 at 5; Good Food Serv., Inc.--Recon., B-256526.3, July 11, 1994, 94-2 CPD ¶ 16 at 2; Good Food Serv., Inc, B-253161, Aug. 19, 1993, 93-2 CPD ¶ 107 at 4. While DOS may obligate or expend appropriated funds under other contracts, the price or cost of which may be determined in part by the DBA insurance rates established under the DBA contract, this does not constitute the obligation or expenditure of appropriated funds under the DBA insurance contract; the payment to the DBA insurance contractor will be made by the DOS contractors and not by DOS. The mere fact that a contract confers a benefit on the government, as does the DBA selection by securing the best DBA insurance rate for DOS contractors and thus reducing DOS's contracting costs, does not furnish a basis for finding that there was an obligation or expenditure of appropriated funds. See generally Century 21--AAIM Realty, Inc., B-246760, Apr. 3, 1992, 92-1 CPD 345 at 4, recon. denied, B-246760.2, Aug. 6, 1992, 92-2 CPD ¶ 78 at 2-3 ("no-cost" contract for home-finding and/or relocation services for federal employees).[1] We conclude that the FAR does not apply here and that the clauses in question therefore did not have to be included in the RFP.

DOS also excluded coverage of aviation support services contracts from the scope of the DBA contract in RFP amendment No. 0003. DOS reports that potential offerors had expressed concern about inclusion of coverage for such contracts in the absence of claims history data. According to DOS, the inquiries it received in this regard led to further consideration of the matter, which ultimately resulted in deletion of coverage of aviation support services contracts when the agency concluded that the agency's aviation support services contractor was able to obtain more favorable rates from its own insurer than under DOS's DBA contract. Agency Report, Nov. 2, 1998, at 9; Supplemental Agency Report, Nov. 30, 1998, at 2.

---

[1]While Fidelity and Casualty cites the decision in G. L. Christian and Assocs. v. United States, 312 F.2d 418 (Ct. Cl. 1963), as support for its position, we find that the case does not support finding an expenditure of appropriated funds under the DBA insurance contract. In G. L. Christian and Assocs., the court read into a contract for a military housing project a standard termination clause, applicable to contracts for the procurement of supplies or services which obligate appropriated funds, where: (1) it was anticipated that the construction loans would be paid off with the quarters allowances of military personnel; (2) the loans were insured by the government; (3) on completion of the project or termination of the contract, the government agreed to take over ownership of the mortgagor-corporations and to assume liability to the mortgagee for outstanding liabilities; (4) the contractor and subcontractors looked to the government for payment of their claims and had received appropriated funds in partial settlement; and (5) the congressional authorization for the contract affirmatively recognized that appropriated funds would be involved. Id. at 424-26. Here, in contrast, neither the terms of the solicited DBA insurance contract nor the expectations of the parties included the direct payment of appropriated funds to the DBA insurance contractor.

Fidelity and Casualty alleges that "DOS may have tailored Amendment Three (deleting the aviation support services requirement) in order to eliminate the use of appropriated funds in the contract, and thereby eliminating the [affirmative action program] requirement." Protest, Oct. 11, 1998, at 7.

In drafting solicitations, agencies may include restrictive provisions or conditions only to the extent necessary to satisfy the needs of the agency or as authorized by law. 10 U.S.C. § 2305(a)(1)(B)(ii) (1994). We will question a solicitation provision only where the protester shows that it is not reasonably related to the agency's requirements and has the effect of restricting competition, since our role in reviewing bid protests is to ensure that the statutory requirement for full and open competition is met, not to protect the competitive interest a protester may have in solicitation terms that could make it more difficult for certain firms to compete. Simplix, supra, at 5-6.

The protester's challenge to deletion of the requirement that the DBA insurance carrier offer coverage of aviation support services contracts is untenable. The protester's position would require the solicitation to be modified to require more than the agency has determined it actually needs; this would tend to make the RFP more restrictive, which is inconsistent with the principle of full and open competition, and does not provide a valid basis for protest. Aerostructures, Inc., B-280284, Sept. 15, 1998, 98-2 CPD ¶ 71 at 2.

The protest is denied.

Comptroller General
of the United States