McAuliffe

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: John Short & Associates, Inc.; Comprehensive Health Services, Inc.

File: B-236266; B-236266.4

Date: November 9, 1989

DIGEST

1. Protest that solicitation requirement for $3,000,000 liability insurance coverage under contract for medical examinations and related services is unduly restrictive is denied where the agency determined that requirement was necessary to protect its interests, and the record supports the reasonableness of that determination.

2. Solicitation requirements that bidder have experience in providing similar medical examination services and that bidder list intended place of performance are matters of responsibility, not responsiveness, and they can be satisfied at any time prior to award.

DECISION

John Short & Associates, Inc. (JSA), protests the terms of invitation for bids (IFB) No. F05611-89-B-0206, issued by the Department of the Air Force for medical examinations and related supplies and services. JSA contends that the solicitation's requirement that a contractor have liability insurance of at least $3,000,000 per occurrence is excessive and unduly restricts competition. Comprehensive Health Services, Inc. (CHS), the third-low bidder under the IFB, protests that the low and second low bids should be rejected as nonresponsive.

We deny both protests.

JSA Protest

The IFB, which was issued May 26, 1989, contemplated a fixed-price requirements type contract for medical examinations, including related supplies and services, for U.S. Service Academy and Reserve Officer Training Corps

(ROTC) scholarship applicants. The clinical examinations to be performed include dental x-rays, blood testing, pelvic examinations (including PAP smear testing for females), 12 lead electrocardiograms, audiometric tests and complete eye examinations. The IFB provided that the contractor will fully indemnify the government "with respect to any liability producing acts or omissions by it or by its employees or agents." The IFB further provided that the contractor and all subcontractors "shall maintain liability insurance . . . in the amount of not less than $3,000,000 per occurrence during the term of this contract."

This protest was filed before bid opening. JSA, which did not submit a bid, argues that the $3,000,000 liability insurance requirement is excessive of the agency's needs, especially in view of the low risk associated with medical physical examinations. JSA argues that many states limit the amount of recovery by a plaintiff in a medical malpractice claim to below $1 million. According to the protester, the Air Force should have required medical liability insurance in an amount equal to the minimum required by the state where performance is to occur.

The Air Force reports that in accordance with Federal Acquisition Regulation (FAR) §§ 37.403 (FAC 84-42) and 52.237-7 (FAC 84-44) the contracting officer here, in her discretion, determined the dollar amount of medical liability insurance deemed necessary to protect the government's interests. Specifically, based upon the risk associated with performing blood testing and pelvic examinations, the contracting officer determined that the $3,000,000 requirement accurately reflected the agency's needs. The Air Force specifically states that this requirement is necessary to protect the government's interest in light of the current state of medical malpractice settlements and judgments, since the Air Force paid at least $20,000,000 for such claims in fiscal year 1988. Given the young age and high earning potential of the groups of individuals to be examined under this contract, the Air Force determined that a "failure to detect an abnormality in this group that results in shortened life expectancy or permanent injury would generate significant damages . . . [and] can result in payment of hundreds of thousands of dollars or more." The Air Force also states that the fact that six firms (none of which took exception to the $3,000,000 liability insurance requirement) submitted bids by bid opening on July 21, indicates that the requirement is not restrictive.

Under FAR § 52.237-7 (FAC 84-44), the contracting officer is specifically authorized to establish insurance coverage for

the contractor in an amount higher than the standard coverage prevailing in the local community so long as the contracting officer "deems [it] necessary to protect the [g]overnment's interests." The contracting officer, therefore, has broad discretion in establishing insurance coverage amounts. We note that there is nothing in the record to show that the liability insurance coverage required by the IFB is not available in the commercial marketplace. Six firms submitted bids, and the record shows that the low bidder submitted reasonable prices for the services.

Absent a showing that the competing firms have not been able to obtain the insurance or that insurers have quoted prohibitive premium rates, we have no basis for concluding that the insurance requirement significantly restricted the protester's ability to submit a competitive bid. Furthermore, even assuming such an insurance requirement will restrict the field of competition, this does not demonstrate that the insurance requirement is unreasonable where the record shows that the agency, in good faith, determined that such insurance is necessary to protect the government's interest. Cf. Crown Management Servs., Inc., B-234563, May 5, 1989, 89-1 CPD ¶ 429. Given the young age and high earning potential of the individuals to be examined, the protester has not shown that the contracting officer in any way abused her discretion in establishing the agency's insurance needs. Contrary to the protester's assertion, the contracting officer is simply not required to establish insurance levels at the minimum level required by the state where performance is to occur. Accordingly, JSA's protest is denied.

CHS Protest

CHS, the third-low bidder under the IFB, contends that the low bid, submitted by Orkand Corporation, and the second low bid, submitted by Creative Medical Management, should be rejected as nonresponsive. CHS argues that Orkand's bid is nonresponsive to the terms of the IFB since it does not indicate that Orkand is now or has recently been engaged in the performance of medical examination contracts. In this regard, the IFB stated that offers would only be considered from responsible organizations or individuals currently or recently engaged in the performance of medical examination contracts "comparable to those described in this solicitation." CHS also states that Orkand's bid should be rejected as nonresponsive because Orkand failed to indicate in the IFB's Place of Performance clause (FAR § 52.214-14 (FAC 84-40)) that Orkand will perform at more than one location as required in the IFB. Additionally, CHS contends

that Creative's bid should be rejected as nonresponsive for failing to specify the required acceptance period of at least 90 days.

Initially, with regard to the protester's allegations concerning Orkand's bid, we note these solicitation requirements, regarding a prospective contractor's experience and the place of performance clause, are matters which relate to a bidder's responsibility, rather than responsiveness, and they can be satisfied at any time prior to award. See Antenna Prods. Corp., B-227116.2, Mar. 23, 1989, 88-1 CPD ¶ 297; Radionic Hi-Tech, Inc., B-219116, Aug. 26, 1985, 85-2 CPD ¶ 230. We also note that the IFB experience requirement (current or recent comparable experience) establishes a definite standard deemed necessary for contract performance, and, as such, constitutes definitive responsibility criteria. See Antenna Prods. Corp., B-227116.2, supra. Where an allegation is made that definitive responsibility criteria have not been satisfied, we will review the record to ascertain whether evidence of compliance has been submitted from which the contracting officer reasonably could conclude that the definitive criteria have been met. Western Roofing Service, B-232666.3 Apr. 11, 1989, 89-1 CPD ¶ 368. The relative quality of the evidence, however, is a matter for the judgment of the contracting officer. Id.

CHS essentially contends that since Orkand stated in its bid that its primary business is "Consulting, ADP Support Services, Data Collections and Operation Support," and since Orkand's bid indicated the firm is an "other corporate entity" rather than a "[c]orporation providing medical and health care service," Orkand failed to show that it has the requisite experience or that it is now engaged in the business of providing medical services. CHS also argues that since Orkand stated in its bid (i.e., in the place of performance clause) that it plans to perform the contract at 1 location, without mentioning the approximate 290 medical examination locations to be serviced under the contract, Orkard failed to meet the IFB's terms. We disagree.

In response to the agency's pre-award survey request for information about Orkand's experience, Orkand explained that it has been providing health and allied services to federal and commercial agencies since 1974. Orkand listed 11 of its past and present medical services contracts, and explained that 3 of these projects currently involve daily communications and a close working relationship with various medical examiners providing services similar to those required here.

The evaluation of Orkand's pre-award survey responses by the Air Force's technical experts found that Orkand had a thorough understanding of the technical requirements and that the key personnel it provided had substantial experience in performing similar projects. Although CHS claims Orkand lacks appropriate experience, the record clearly shows that Orkand's medical services contracts were sufficiently comparable to the present requirement. We therefore believe that the evidence submitted by Orkand was sufficient for the contracting officer to reasonably conclude that the definitive criteria had been met.

Similarly, regarding Orkand's alleged failure to properly complete the IFB's place of performance clause, Orkand explained during the pre-award survey that the reference to 1 place of performance in its bid reflects that its corporate headquarters is the central location for the administration of the medical examinations to be provided in the approximate 290 locations nationwide. In this regard, Orkand states that it contacted more than 500 physicians and clinics across the country for subcontract services under this contract and that it has obtained letters of intent for the services. Under the express terms of the IFB, the actual places of performance will ultimately depend upon the government's designation of the required locations for its testing centers. Based upon the record before us, we have no reason to question the Air Force's determination that Orkand intends to and is capable of performing its medical examinations at the places to be specified by the agency.1/

The protests are denied.

James F. Hinchman
General Counsel

1/ Since we find that the agency reasonably determined the low bidder responsive and responsible, we need not review the merits of the protester's responsiveness challenge to the bid of the second-low bidder, Creative. 4 C.F.R. §§ 21.0(b), 21.1(a) (1989).