1495-99

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Relief Services, Inc.; Radiological Physics Associates, Inc.

File: B-252835.3; B-252835.4

Date: August 24, 1993

Stan Hinton, Esq., Baker & Botts, for Relief Services, Inc.;
Theodore M. Bailey, Esq., Bailey, Shaw & Deadman, for Radiological Physics Associates, Inc., the protesters.
Joan K. Fiorino, Esq., East & Barnhill, for Med-National, Inc., an interested party.
John A. Dodds, Esq., and Major Wilbert Jones, Department of the Air Force, for the agency.
Daniel I. Gordon, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency properly determined that job classifications required to perform work under a solicitation do not call for professional employees where those classifications do not require more than 2 years of post-secondary education.

2. Agency properly decided to take corrective action by amending solicitation, reopening discussions, and soliciting revised proposals from offerors, despite the awardee's prices having been disclosed, where the agency determined that the solicitation failed to include mandatory contract clauses which might have a significant impact on offerors' proposals.

DECISION

Relief Services, Inc. and Radiological Physics Associates, Inc. (RPA) protest the decision by the Department of the Air Force to amend request for proposals (RFP) No. F22600-92-R-0133, reopen discussions, and request best and final offers (BAFOs). The protesters contend that these actions by the agency were unnecessary and improper.

We deny the protests.

Keesler Air Force Base issued the RFP on October 23, 1992, for radiation therapy services at Keesler Medical Center. As amended, the RFP anticipated award of a contract for a

6-month base period with three 1-year option periods. Price was calculated based on proposed hourly rates for an estimated number of hours of anticipated requirements. Award was to be made to the lowest priced, technically acceptable proposal. Proposals were due on November 23, 1992.

The RFP called for the services of 10 individuals, identified by job classification, including one medical physicist. Only the medical physicist position required more than 2 years of post-secondary education. The agency advised offerors that the job classifications covered by the solicitation were not subject to the Service Contract Act, 41 U.S.C. § 351 et seq. (1988) (SCA), and therefore were not subject to a Department of Labor (DOL) wage determination.

The RFP included the clause at Federal Acquisition Regulation (FAR) § 52.222-46, "Evaluation of Compensation for Professional Employees." That provision is to be included in solicitations for negotiated service contracts when the contract amount is expected to exceed $500,000 and "the service to be provided will require meaningful numbers of professional employees." FAR § 22.1103. Among other things, FAR § 52.222-46 advises offerors that the agency will evaluate offerors' total compensation plans for the professional employees covered by the solicitation in order to assess the impact of the plan on recruitment and retention of professional employees. As amended in early November 1992, the RFP also required offerors to include a compensation package consisting of at least six specified fringe benefit elements.

The agency evaluated the proposals received and conducted discussions with the offerors. On March 17, 1993, the agency awarded a contract to Relief Services on the basis of its low priced, technically acceptable proposal.

RPA and Med-National, Inc. protested to our Office alleging that the Air Force failed to evaluate Relief Services's proposed professional employee compensation plan in accordance with FAR § 52.222-46. After those protests were filed, the Air Force determined that FAR § 52.222-46 should not have been included in the RFP because the RFP did not cover "meaningful numbers" of professional employees. The agency determined that the only professional employee covered by the RFP was the medical physicist. Because the other nine employees were not exempt from the SCA as professionals, the agency determined that they were subject to the SCA and that the RFP needed to be amended to add

certain provisions required by FAR § 22.1006 for contracts subject to the SCA. In addition, the agency determined that it was required to request a wage determination from DOL for the positions subject to the SCA.

In an April 30 letter, the agency advised our Office that it intended to amend the RFP to delete FAR § 52.222-46 and the requirement for six specified elements of fringe benefits; add a wage determination and those FAR provisions required for contracts subject to the SCA; conduct further discussions with the offerors; and then solicit BAFOs. Our Office dismissed the protests as academic on May 4.

Relief Services subsequently filed this protest, contending that the decision to amend the RFP was improper because there was no showing that other offerors had been prejudiced by the inclusion of FAR § 52.222-46 or by the absence of clauses relevant to the SCA, or that award to Relief Services was otherwise improper. In addition, Relief Services argues that, because DOL had not yet issued its wage determination and it might develop that Relief Services was proposing compensation higher than the level ultimately required by the wage determination, the other offerors could not be found to have been prejudiced by the earlier absence of a wage determination.

In addition, RPA filed a new protest, contending that FAR § 52.222-46 was properly included in the RFP, because the contract services involved meaningful numbers of professional employees. According to RPA, all 10 individuals are professional employees, because 1 of them is required to have a master's degree and the other 9 are required to have 2 years of post-secondary education. RPA also contends that it contacted DOL and was informed that no wage determination exists for any of the job classifications covered by the RFP.

Pursuant to the SCA, the FAR generally requires solicitations for service contracts to include certain contract clauses, and it requires the contracting officer to advise DOL of the contracting agency's intent to award a service contract. FAR Subpart 22.10. That notice to DOL constitutes a request that DOL either issue a wage determination which will govern the procurement, determine that no wage determination is in effect for the locality of contract performance, or find that the SCA does not apply to the positions covered by the procurement. FAR § 22.1011.

Although the SCA applies to blue-collar service workers and some white-collar service workers, it does not cover bona fide executive, administrative or professional employees. FAR § 22.1101. An employee is exempt from the SCA if the person is employed in a bona fide professional capacity.

FAR § 22.1102. The latter term includes "professions having a recognized status based upon acquiring professional knowledge through prolonged study." Id.

These protests turn on the characterization of the job classifications under the RFP as professional, and therefore exempt from the SCA, or nonprofessional, and therefore covered by the SCA. If, as RPA contends, all 10 individuals covered by the RFP are professional employees, the entire procurement is effectively exempt from the SCA and FAR § 52.222-46 was properly included in the solicitation. In that case, there would be no need to obtain a wage determination or to add to the RFP the FAR provisions applicable to contracts subject to the SCA. If, however, some of the employees are not professional employees, the SCA applies to those employees and the Air Force properly concluded that it was required to include the appropriate FAR clauses and to request a wage determination from DOL; that wage determination, rather than RFP provisions relevant to professional employees, would govern the compensation of nonprofessional employees.

The specific dispute concerns the number of years of professional study needed for the particular job classifications covered by the RFP. As noted above, job classifications qualify as "professional" only if they require "prolonged study." The Air Force points out that DOL takes the position that medical technologists must have successfully completed 4 years of relevant study in accredited post-secondary institutions in order to be recognized as satisfying the requirement for "prolonged study." 29 C.F.R. § 541.302(e)(1) (1992). The Air Force's determination that nine of the individuals subject to the RFP are not professionals because their job classifications require only 2 years of post-secondary education is thus consistent with DOL regulations.[1]

RPA takes exception to the Air Force's position that 2 years of professional study is insufficient to establish an SCA-exempt job classification on the basis that: (1) the cited provision in the DOL regulation refers to medical technologists, and does not name the precise job classifications listed in the RFP; and (2) DOL has found that individuals who have completed shorter courses of study may be found to qualify as professionals. RPA's position is without merit.

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[1]DOL is accorded deference in the interpretation both of the SCA as a statute that has been committed to DOL for implementation and enforcement and of the regulations it has issued in implementing the SCA. Commercial Energies, Inc., 70 Comp. Gen. 44 (1990), 90-2 CPD ¶ 319.

RPA essentially offers no justification for classifying the nine individuals other than the medical physicist as professionals. RPA does not suggest that any provision of the applicable DOL regulation is more appropriate than the reference to medical technologists, which requires 4 years of post-secondary education. Moreover, while the regulation notes that nurses have been found to be professionals even where their courses of study are concentrated and therefore shortened, RPA does not contend that the classifications at issue here generally involve longer periods of study which may sometimes be concentrated into 2 years. Instead, RPA appears to recognize that 2 years of study constitute the norm for all of the job classifications at issue here. It is thus essentially undisputed that 9 of the 10 individuals who will work under the contract do not qualify for exemption from the SCA as professionals.[2] Accordingly, we deny RPA's protest.

Once the Air Force determined that 9 of the 10 individuals performing under the contract would be subject to the SCA, the only question was whether it was proper for the agency to amend the RFP, reopen discussions, and afford offerors the opportunity to submit proposals based on the amended solicitation. Relief Services contends that it was improper for the Air Force to do so without first establishing that the other offerors would be prejudiced by a failure to amend the RFP and reopen discussions. We disagree.

Speculation as to the effect of a change in the wage determination governing a procurement should be avoided where possible. Dyneteria, Inc., 55 Comp. Gen. 97 (1975), 75-2 CPD ¶ 36. The impact of the shift in this solicitation from the requirements governing compensation of professional employees exempt from the SCA to those governing compensation of employees covered by the SCA may be at least as great as the impact of a change in the applicable wage determination, and thus we think speculation regarding the effect of that shift on offerors' proposals is similarly to be avoided.

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[2]Although the Air Force's determination is thus reasonable, we note that, if there were any doubt concerning the applicability of the SCA to those job classifications, such doubt would properly be resolved by referring the matter to DOL--which is precisely what the Air Force did in notifying DOL of the Air Force's intent to award a service contract. Where there are unresolved questions concerning the applicability of the SCA, the proper step is for the contracting activity (not one of the private parties, as RPA suggests) to request a determination from DOL. See FAR § 22.1003-7.

Relief Services appears to concede that other offerors would have been prejudiced if the wage determination, when issued, set wage levels higher than those proposed by the awardee (Relief Services). Relief Services argues, however, that because prejudice would arise only in that situation, prejudice could not be determined until the wage determination was issued. We do not agree that prejudice could arise only if the wage determination set compensation levels higher than those proposed by Relief Services. A wage determination setting minimum compensation levels lower than those proposed by Relief Services might lead another offeror to submit a technically acceptable proposal at a lower price than Relief Services's, which, under the RFP evaluation criteria, would generally require award based on that other proposal.

Accordingly, there existed a reasonable possibility that other offerors were prejudiced by the agency's failure to request a wage determination and by the RFP provisions imposing compensation standards appropriate for professional employees for all of the job classifications under the contract. As the Air Force correctly notes, where such a possibility exists, it is proper to amend the solicitation and reopen discussions, even after an awardee's price has been exposed. See Unisys Corp., 67 Comp. Gen. 512 (1988), 88-2 CPD ¶ 35. We therefore deny Relief Services's protest.

The protests are denied.

for James F. Hinchman
General Counsel