



Comptroller General
of the United States
Washington, D.C. 20548

513255

Decision

Matter of: Duramed Homecare
File: B-260047
Date: May 24, 1995

D. Whitney Thornton II, Esq., Seyfarth, Shaw, Fairweather & Geraldson, for the protester.
William E. Thomas, Jr., Esq., Department of Veterans Affairs, for the agency.
Sylvia Schatz, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Termination of contract for the convenience of the government was proper where, subsequent to award, the agency determined that several requirements in the solicitation did not accurately reflect its needs.

DECISION

Duramed Homecare protests the termination for convenience of contract No. V599P-2296, awarded to Duramed by the Department of Veterans Affairs (VA) under invitation for bids (IFB) No. 599-1-95 to furnish and maintain medical equipment, supplies, and oxygen.

We deny the protest.

The IFB, issued on August 1, 1994, contemplated the award of a fixed-price requirements contract for a base year and 4 option years. The schedule set forth in the IFB included 16 line items which contained estimated quantities of materials and services needed by the three requiring activities. The VA received four bids in response to the solicitation. Award was subsequently made to Duramed on the basis of its apparent low bid of \$41,027. Shortly after award, Empire Home Medical, Inc., the incumbent contractor, which had submitted the second-low bid of \$45,586, protested to the VA. It argued that award to Duramed was improper because the IFB's failure to provide estimated quantities for several items made it impossible to determine the true low bid. In response to Empire's protest, the VA reviewed its specifications and contacted the requiring activities. The contracting officer concluded, among other things, that several specifications were ambiguous and inadequate and did

not accurately reflect the agency's actual minimum needs. Accordingly, the contracting officer terminated Duramed's contract for the convenience of the government in order to recompetete the requirement on the basis of a revised IFB reflecting the government's true needs.

Duramed maintains that the IFB stated the VA's needs with sufficient accuracy, and that there thus was no proper justification for terminating Duramed's contract and recompeteting the requirement.¹

Where the decision to terminate a contract for the convenience of the government results from the agency's finding that the initial contract award was improper, we will review the protest to examine the award procedures that underlie the termination action. Special Waste, Inc., 67 Comp. Gen. 429 (1988), 88-1 CPD ¶ 520. Termination of a contract and resolicitation is proper when, subsequent to award, the contracting agency discovers that the solicitation did not properly describe the government's needs, id., or that the solicitation contains inadequate specifications which misled competitors and deprived the government of the full benefits of competition. See Flow Technology, Inc., 67 Comp. Gen. 161 (1987), 87-2 CPD ¶ 633.

The record shows that the IFB was in fact defective in numerous respects. For example, item No. 10 required offerors to submit pricing for liquid oxygen systems for veterans' home use for an "estimated average of eight patients for a period of 12 months." According to the VA, the actual intended requirement was an estimated average of two patients per month, or 24 patients per year. The VA issued an amendment intended to clarify item No. 10, but this amendment required offerors to submit pricing for the systems for an "[e]stimated home veterans 2 ea[ch] year[,]" which again misstated the real requirement for systems for an estimated 24 patients per year. As another example, item No. 14 required offerors to submit unit and total prices for 52 hours of labor for repairs to VA-owned oxygen concentrators and other VA-owned equipment not covered by manufacturers' warranties. The VA states it intended for this requirement to be eliminated from the IFB and covered by separate purchase orders on an "as needed" basis, since no repairs had been made to the equipment during the last

¹Duramed argues that termination of its contract was improper as it resulted from Empire's untimely protest. However, information justifying termination can be considered no matter when it first surfaces or should have been known. See Waste Management Env'tl. Servs., Inc., B-252553, July 12, 1993, 93-2 CPD ¶ 14.

3 years (including under the existing contract for this medical supply requirement).

As a further example, item No. 12 in the original IFB required offerors to submit pricing for 1,400 cubic feet of gas oxygen refills for "E" cylinders. This subsequently was amended to require 63,360 cubic feet. However, in verifying the amended requirement, the agency realized it was based on cylinder, rather than cubic feet, and that its actual intended requirement was 17,864 cubic feet. As further examples: item No. 2 required an estimated quantity of 60 units per month (or 720 units per year) of oxygen equipment and other life support equipment whereas the VA's actual requirement was only 23 units per month (276 units per year); item No. 8 required the rental of an estimated quantity of 61 units of cylinders, despite the agency's actual requirement for 290 units; item No. 13 required an estimated quantity of 5,600 liquid liters of oxygen, even though the VA's actual intended requirement, based on its most recent requirement, was 1,850 liters.

In support of its view that the IFB was adequate, Duramed takes issue with the agency's determinations regarding the different line items. Duramed argues, for example, that item No. 10 was adequate since it clearly required a specific number of oxygen systems per month, and offerors thus could bid on the same basis. As another example, Duramed argues that the VA improperly determined that the item No. 14 equipment repair requirement should be eliminated, since the equipment is 3 years old and repairs to it thus should be expected.

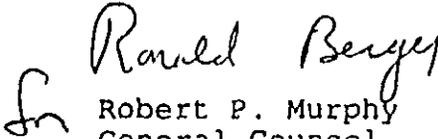
The VA properly determined that the IFB deficiencies rendered the competition invalid, and the award to Duramed improper. As discussed, the VA's actual intended requirements were misstated for many of the 16 line items. These misstatements were material, not minor, in that they overstated or understated the government's actual needs by (approximately) 200 percent (item No. 10), 250 percent (item No. 12), 150 percent (item No. 2), 350 percent (item No. 8), and 200 percent (item No. 13) and included unnecessary work (item No. 14). In light of these substantial misstatements of the government's needs, the agency properly determined that the IFB did not put bidders on notice of the VA's actual requirements. As a result, the VA could not be assured that the quantities of the items it actually needed would be furnished under the IFB as written, see Ferguson-Williams, Inc., B-258460; B-258461, Jan. 24, 1995, 95-1 CPD ¶ 39, and could not be assured that the award to Duramed would result in the lowest ultimate cost to the government. See Heritage Reporting Corp., B-248860.2, Oct. 23, 1992, 92-2 CPD ¶ 276. In this regard, the record shows that Duramed's bid was low by only \$4,559; it thus appears that

the award outcome potentially could be affected by inclusion of the accurate revised estimated quantities in the IFB.

As for Duramed's specific arguments, although firms may have bid on the same basis for the items (including item No. 10) with misstated estimates, this fact does not eliminate the fundamental justification for the agency's actions; the possibility that bidders would have competed differently had they been aware of the agency's actual needs, possibly resulting in a lower cost to the government or a different award outcome. Further, since we generally consider agencies to be the best judges of their own needs, see Sea Containers Am., Inc., B-243228, July 11, 1991, 91-2 CPD ¶ 45, Duramed's mere prediction that equipment repairs (under item No. 14) will be required, without some showing that the basis for the agency's opposite conclusion--i.e., the historical absence of a repair need--was unfounded, is not a basis for concluding that the agency's position is incorrect.

We conclude that there is no basis to question the agency's decision to terminate Duramed's contract and recompute the requirement.

The protest is denied.


Robert P. Murphy
General Counsel