U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: National Government Services, Inc.

File: B-415700

Date: January 29, 2018

Anuj Vohra, Esq., and Andrew Guy, Esq., Covington & Burling, LLP, for the protester.
Jonathan A. Baker, Esq., and Douglas Kornreich, Esq., Department of Health and Human Services, for the agency.
Heather Weiner, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the terms of the solicitation as unduly restrictive of competition is denied where the record shows that the terms of the solicitation were reasonably necessary to meet the agency's needs.

DECISION

National Government Services, Inc. (NGS), of Indianapolis, Indiana, protests the terms of request for proposals (RFP) No. HHSM-500-2017-RFP-0016, issued by the Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS), to obtain a Medicare Administrative Contractor (MAC) to provide services for the administration of Medicare Part A and Part B (A/B) fee-for-service benefit claims. NGS challenges as unduly restrictive of competition the agency's inclusion in the solicitation of a contract award limit provision, which restricts the percentage of overall MAC workload that can be held by MAC contractors.

We deny the protest.

BACKGROUND

The RFP, issued on September 15, 2017, under the negotiated procurement procedures of Federal Acquisition Regulation (FAR) part 15, contemplated the award of a cost-plus-award-fee contract, for a base period of 12 months, with six 1-year options. RFP at 10. The RFP sought A/B MAC services--which include health insurance benefit administration services, such as Medicare claims processing and payment services, in

support of the Medicare program--in Indiana and Michigan (Jurisdiction 8). RFP at 7; Contracting Officer (CO) Statement at 1.

The RFP provided for award on a best-value tradeoff basis, considering cost and two non-cost evaluation factors: technical approach and past performance. RFP at 123. The solicitation also provided for evaluation of a third non-cost factor--business ethics, conflicts of interest and compliance--on a pass/fail basis.[1] Id. In addition, the solicitation included a "Contract Award Limitation" provision for consideration by CMS "at the time of award." Id. at 125-26. Specifically, this provision provided, with limited exceptions, that CMS would not award more than 26 percent of the national MAC workload to a single corporate entity, and would not award more than 40 percent of the workload to any single set of affiliated companies. Id. at 125.

The RFP also set forth the national MAC workload percentages that CMS ascribed to each jurisdiction as follows:

Jurisdiction	Percentage
Jurisdiction E: American Samoa, California, Guam, Hawaii, Nevada, Northern Mariana Islands	9.1%
Jurisdiction F: Alaska, Arizona, Idaho, Montana, North Dakota, Oregon, South Dakota, Utah, Washington, Wyoming	6.2%
Jurisdiction 5: Iowa, Kansas, Missouri, Nebraska	5.6%
Jurisdiction 6: Illinois, Minnesota, Wisconsin	7.8%
Jurisdiction H: Arkansas, Mississippi, Colorado, Louisiana, New Mexico, Oklahoma, Texas	13.5 %
Jurisdiction 8: Indiana, Michigan	5.9%
Jurisdiction 15: Kentucky, Ohio	5.4%
Jurisdiction J: Alabama, Georgia, Tennessee	7.0%
Jurisdiction K: Connecticut, Maine, Massachusetts, New York, New Hampshire, Rhode Island, Vermont	12.0%
Jurisdiction L: Delaware, District of Columbia, Maryland, New Jersey, Pennsylvania	11.0%
Jurisdiction M: North Carolina, South Carolina, Virginia, West Virginia	9.1%
Jurisdiction N: Florida, Puerto Rico, U.S. Virgin Islands	7.5%

RFP at 127-28; Protest at 5-6.

[1] The solicitation also required that offerors submit attestations in the areas of key personnel, security, and corporate experience, and advised that failure to submit the attestations in accordance with the solicitation may render the proposal unacceptable. RFP at 124. In addition, the RFP provided that the evaluation would include a responsibility determination pursuant to FAR subpart 9.1. Id. at 125.

On September 29, NGS submitted a letter to CMS regarding the contract award limitation provision. Agency Report (AR), Tab 4, NGS Letter to CMS (Sept. 29, 2017), at 1-5. Specifically, NGS complained that the provision violated the agency's requirement to employ full and open competition, which resulted in "competitive injury to NGS." Id. In this regard, NGS explained that it currently holds "approximately 20.4% of the national MAC workload,"[2] and expressed concern that it would be precluded by the cap from receiving additional MAC awards. Id. at 3. NGS also expressed concern that that the provision "draws a problematic distinction between single entities and sets of affiliated entities," placing single entities, such as NGS at a disadvantage." Id. at 2. Ultimately, NGS requested that:

> CMS consider ending the Policy, to ensure that all future MAC procurements are subject to full and open competition unfettered by the caps the Policy imposes.

Id. Alternatively, as a proposed solution to the alleged unequal treatment, NGS asked that CMS "impose a 40% cap across the board, both to individual and affiliated entities." Id. at 4. Finally, as another option, NGS requested that CMS "approve NGS' novating at least one of its current MAC contracts to its affiliated entity, NGS Federal, so that NGS may compete in future MAC procurements without being placed at a competitive disadvantage." Id. at 2.

On November 9, the agency responded to NGS's letter. Specifically, the agency explained that, even if NGS received the award for Jurisdiction 8, the award would not put NGS over the award limitation threshold. AR, Tab 4, Agency Letter (Nov. 9, 2017), at 6-7. In addition, in response to NGS's question regarding novation, CMS stated that the agency "would be happy to consider a novation request if submitted with the documentation required by FAR Subpart 42.12." Id. NGS' instant protest to the terms of the RFP followed on November 14. In its protest, NGS stated its intention to submit a proposal in response to the solicitation. Protest at 3. Thereafter, the agency confirmed that it received a timely proposal from NGS by the solicitation's November 15, 2017, closing date. CO Statement at 2.

DISCUSSION

NGS argues that the RFP's contract award limitation provision--which restricts the national MAC workload to 26 percent (for a single corporate entity), and to 40 percent (for any single set of affiliated companies)--is unduly restrictive of competition. Specifically, the protester contends that the 26 percent and 40 percent workload caps

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[2] Specifically, NGS is the current contractor for Jurisdictions 6 (7.8 percent of national workload) and K (12 percent of national workload). Protest at 5-6. The protester also indicates that it recently submitted a proposal in response to CMS's solicitation No. RFP-500-2017-0005, for Jurisdiction F (6.2 percent of national workload), which is currently under consideration by the agency. Id. at 6.

are "far broader than necessary" to satisfy the agency's needs. For the reasons discussed below, we find no basis to sustain the protest.

Where a protester challenges a solicitation provision as unduly restrictive of competition, the procuring agency must establish that the provision is reasonably necessary to meet the agency's needs. See Total Health Res., B-403209, Oct. 4, 2010, 2010 CPD ¶ 226 at 3. We examine the adequacy of the agency's justification for a restrictive solicitation provision to ensure that it is rational and can withstand logical scrutiny. SMARTnet, Inc., B-400651.2, Jan. 27, 2009, 2009 CPD ¶ 34 at 7. The fact that a requirement may be burdensome or even impossible for a particular firm to meet does not make it objectionable if the requirement properly reflects the agency's needs. JRS Staffing Servs., B-410098 et al., Oct. 22, 2014, 2014 CPD ¶ 312 at 7.

Here, we find that CMS has reasonably established a legitimate basis for the solicitation's contract award limitation provision.[3] The agency explains that, following the enactment of the MAC contracting authority in December 2003, pursuant to Section 1874A of the Social Security Act, 42 U.S.C. §§ 1395kk-1, CMS "leverage[d] the power of competitive contracting procedures to the significant benefit of the Medicare program and the government," but also identified two countervailing concerns--maintaining business continuity, as well as a dynamic, competitive marketplace. AR, Tab 6, Declaration of CMS Senior Technical Advisor (Dec. 14, 2017), at 2. The agency further explains that the "scope and scale of the Medicare program, and the MAC contracts, correlates directly to agency risk exposure." Id. at 1. In this regard, the agency notes that "the scale of MAC operations is significant," in that the "smallest A/B MAC contract administers well in excess of 50 million Medicare claims and $15 billion in Medicare benefit payments annually," and that under their work statements, the A/B MACs implement their operations "through very structured protocols" and must "establish working relationships (and technical connectivity) with thousands of Medicare providers and a large number of other CMS contractors and other entities." Id. at 3.

Against this backdrop, with regard to the agency's concerns regarding business continuity, the agency first points to "external" threats--such as hurricanes, floods, and cyber-threats--explaining that, while MACs are required to have robust operational recovery plans in place, CMS has "sufficient experience with business continuity threats in the Medicare claims administration environment to take the possibility [of such threats] very seriously." Id. at 3. In addition, the agency points to "internal" business continuity risks, which the agency explains, includes "the potential that the internal

[3] Although the parties disagree as to whether the statute authorizing CMS's administration of the Medicare program excepts CMS from the requirements of the Competition in Contracting Act (CICA) pertaining to full and open competition, we need not decide this issue here. Even accepting the protester's arguments as true--that the agency was required to comply with CICA's requirements for full and open competition--we conclude that the agency has provided a reasonable basis for including the contract award limitation in the RFP. Accordingly, we find no basis to sustain the protest.

controls and compliance of the MAC itself may go awry," such that "the MAC may consequently need to be replaced." Id. As an example, the agency notes that, during the 1990s and early 2000s, "several Medicare claims administration contractors paid fines and/or large settlements relating to administrative integrity-type issues." Id.

With regard to the agency's concerns regarding maintaining a competitive, dynamic marketplace, the agency notes that the MAC acquisition environment is one where "entry (and re-entry) is difficult." Id. at 4. In addition, the agency maintains that it is concerned that a single entity, given too large a share of the Medicare national workload, "could exert significant leverage in business dealings and in pricing." Id. Specifically, the agency points to an example, where "a large insurance company decided to pull out of its several Medicare claims administration contracts at year end, and was able to extract significant business concessions from the agency." Id. at 4-5. While the agency notes that the structure of the current MAC contracts "somewhat mitigates the range of scenarios" in this regard, it further asserts that, the use of competitive procedures alone do not "create a fully competitive marketplace." Id. at 5.

During 2010, CMS issued two requests for information (RFIs) that, as relevant here, solicited industry input on potential structures for a MAC award limit. Both RFIs articulated the agency's concerns, noted above, with various forms of program continuity and marketplace risk that would be associated with an entity obtaining a higher than threshold number of A/B MAC contracts. AR, Tab 2A, RFI (July 22, 2010), at 7; AR, Tab 2B, RFI (Aug. 24, 2010), at 3. The July 22 RFI provided rationale for a 26 percent award limit threshold. AR, Tab 2A, RFI (July 22, 2010), at 7 (stating that, with a 26 percent award limit, a single entity could be awarded up to two of the large Round II A/B MAC contracts, or up to three of the small Round II A/B MAC contracts). The August 24 RFI provided a 2-tier award limit, with the first tier applying to a single company, and a second tier applying to affiliated companies. AR, Tab 2B, RFI (Aug. 24, 2010), at 4.

After reviewing the input received, the agency considered several scenarios for the workload limitation. For example, CMS considered not imposing a limit, but decided that this option did not adequately address the risks identified in the RFIs. AR, Tab 6, CMS Senior Technical Advisor (Dec. 14, 2017), at 7. CMS also contemplated the continuation of the "case-by-case basis procedure" that CMS used in the initial MAC solicitations, but rejected this idea "due to concerns that MACs would not be able to make plans if no clear policy was established." AR at 6; CMS Senior Technical Advisor (Dec. 14, 2017), at 7 ("CMS found this policy difficult to administer in practice; this framework also provided no transparency ('bright lines') to the companies interested in A/B MAC contracts."). Another option considered was applying the 26 percent limit per entity without regard to affiliation, but the agency found that this approach would not "adequately address the business continuity concerns"[4] because "[t]wo affiliated

[4] For example, the agency explains that affiliated companies might each face their own individual/unique business continuity threats, such as--if not geographically proximate, "one entity might be affected by a disaster event while the other is unaffected." AR, (continued...)

companies could control 52%, and three could [manage] 78% of the MAC workload." Id.

Ultimately, after the review of industry responses, and extensive internal discussion, the agency determined that the best approach would be to apply a 26 percent limit to each entity regardless of affiliation, and a 40 percent limit to all affiliated companies. Id. The agency explains that, in establishing a different threshold for affiliated companies than for single entities, the agency recognized that "the kinds of business continuity risks with which it is concerned increase/aggregate somewhat across affiliated companies." Id. at 9. Accordingly, the agency states that it set the award limitation for affiliated companies at 40 percent, or "approximately 1.5 [times] the award limitation that applies to a single company." Id. The agency further explains that this would allow affiliates to have contracts for, at most, 3 large MAC jurisdictions, or 5-6 of the smaller jurisdictions. Id.

The final version of the agency's contract award limitation provision was published in an RFP issued in October 2010. Id. at 7. Specifically, the provision provided that "[a] single company could be awarded up to 26.0% of prime contract A/B MAC workload," and "[a] set of affiliated companies could be awarded up to 40.0% of prime contract A/B MAC workload." Id. The agency explains that it has included this award limitation provision in 13 separate A/B MAC solicitations, and this is the first protest it has received regarding the provision. Id. at 10.

NGS generally disagrees with the agency's rationale for the contract award limitation, arguing that the agency's justifications are "so all-encompassing" that they could justify "any anticompetitive solicitation term," and that CMS has failed to explain why "caps of 26% and 40% (as opposed to some other, less-restrictive numbers)" are appropriate to address its concerns. Comments at 12. As noted above, however, the agency explained that, with a 26 percent award limit, a single entity could be awarded up to two larger Round II MAC contracts, or three smaller Round II MAC contracts. AR, Tab 2A, RFI (July 22, 2010), at 7. With regard to the 40 percent limit for affiliated companies, the agency explained that it determined that a higher threshold was warranted for affiliated companies, and decided to set the award limitation for affiliated companies at approximately 1.5 times the award limitation that applies to a single company.[5] Id. at 9.

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Tab 6, CMS Senior Technical Advisor (Dec. 14, 2017), at 8. While the agency acknowledges that "[t]hese kinds of scenarios somewhat mitigate risk," it also notes on the other hand that, there are other types of continuity issues that threaten "not just one affiliate or the other, or the parent company, but the enterprise--raising aggregate risk." Id.

[5] Although NGS also argues that the lower percentage cap for single entities is improper because it results in unequal treatment of single entities compared to affiliated entities, we find no merit to this argument. We conclude that the agency has provided a reasonable basis for distinguishing between the contract award percentage caps for
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In addition, while the protester contends that "the risks CMS has identified are entirely hypothetical," and that "CMS has not identified a time when the MAC landscape was a 'less-than-competitive environment,'" Comments at 13, NGS has not shown that the risks identified by the agency are unreasonable or unfounded. Moreover, although the protester argues in favor of a "case-by-case" analysis, the record reflects that the agency considered and rejected this approach, in part, due to concerns that MACs "would not be able to make plans if no clear policy was established." AR at 6; AR, Tab 6, CMS Senior Technical Advisor (Dec. 14, 2017), at 7. To the extent NGS challenges the contract award limitation provision, the protester's disagreement with the agency's assessment of its needs and how best to accommodate them, without more, does not show that the agency's judgment was unreasonable. AAR Airlift Group, Inc., B-409770, July 29, 2014, 2014 CPD ¶ 231 at 3.

The above considerations support the reasonableness of the contract award limitation provision. The record reflects that the requirement is reasonably related to business continuity concerns and maintaining a competitive, dynamic marketplace. The record is replete with evidence that the agency considered these concerns, including the agency's issuance of numerous RFIs, dating back to 2010, in which CMS sought and incorporated industry input on the workload limitation and the agency's concerns. See, e.g., AR, Tab 2A, RFI (July 22, 2010); Tab 2B, RFI (Aug. 24, 2010); Tab 3A, July 22, 2010 RFI Summarized Responses; Tab 3B, Aug. 24, 2010 RFI Summarized Responses; Tab 2C, RFI (Mar. 19, 2014); Tab 2D, RFI (Dec. 18, 2015); Tab 2E, RFI (Aug. 5, 2016). While the protester argues that the workload caps "effectively create a partial set-aside for less-qualified offerors," Comments at 19, it has not shown that the requirements here lack a rational basis or that the agency's justifications are otherwise unreasonable. Moreover, as noted above, that certain entities, including NGS, may be precluded from receiving an additional award, does not mean that the contract award limitation provision is objectionable. See JRS Staffing Servs., supra. As a result, we find that CMS reasonably concluded that the contract award limitation restriction is necessary to meet the agency's minimum needs, and is not unduly restrictive.

The protest is denied.

Thomas H. Armstrong
General Counsel

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single entities and affiliated companies. Accordingly, we find no basis to sustain the protest.