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**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: CRAssociates, Inc.

File: B-297686

Date: March 7, 2006

Devon E. Hewitt, Esq., Pillsbury, Winthrop, Shaw & Pittman, for the protester.
Douglas Kornreich, Esq., Department of Health & Human Services, for the agency.
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participated in the preparation of the decision.

DIGEST

Protest that agency was required under the provisions of Office of Management and Budget Circular A-76, as revised on May 29, 2003, to include technically unacceptable private sector offer in the initial competitive range under solicitation issued as part of a Circular A-76 cost comparison study, is denied where solicitation clearly indicated that the agency contemplated conducting discussions only with offerors in the competitive range, and that not all offerors would be included in the competitive range; to the extent that protester believed it should be entitled to discussions even if its proposal were excluded from the competitive range, it was required to protest on this ground prior to the closing date for receipt of proposals.

DECISION

CRAssociates, Inc. (CRA) protests the rejection of its proposal as technically unacceptable, and the resultant elimination of its proposal from the competitive range, under Department of Health & Human Services (HHS) solicitation No. A-76Study01(05)AM. The solicitation was issued on August 5, 2005 as part of a cost comparison study, conducted pursuant to Office of Management and Budget (OMB) Circular A-76, as revised on May 29, 2003, to determine whether to contract out--rather than continue to have performed in-house by HHS's Health Resources and Services Administration (HRSA), Division of Immigration Health Services (DIHS) employees--medical and support services for detainees in the custody of the Department of Homeland Security, Immigration Customs Enforcement (ICE). CRA primarily asserts that members of the agency's evaluation panel had impermissible conflicts of interest, and that HHS improperly failed to provide the firm an opportunity to remedy the evaluated deficiencies in its proposal.

We deny the protest.

DIHS provides on-site medical, dental and mental health care to ICE detainees coming from more than 100 countries and speaking more than 150 languages, some of whom are extremely violent and/or display significant mental health disorders, and many of whom come from countries with a high prevalence of infectious diseases that are of public health importance. These detainees are housed in a variety of secure environments, including county or local jails, as well as ICE processing centers and contract detention facilities. Performance Work Statement (PWS) § 1.1.

The solicitation provided for use of a lowest-cost/technically acceptable source selection method. In this regard, the solicitation stated that

award will comply with the rules of OMB Circular A-76. This includes the conduct of a cost comparison between the Agency Tender and the low-cost/technically acceptable commercial offer/reimbursable tender.

RFP § M.1. Offerors were generally advised that in order to be considered technically acceptable, “all the requirements (services and service levels) and standards” in the PWS must be met. *Id.* The RFP specifically provided for the determination of technical acceptability to be based upon evaluation of the following factors: (1) technical (including criteria for (a) technical approach, (b) management approach, including staffing approach and minimizing attrition, (c) transition plan and phase-in plan, (d) quality control plan, (e) accreditation plan of actions and milestones, (f) medical deployment plan, and (g) key personnel resumes); (2) past performance; and (3) price/cost (including criteria for (a) realism and balance and (b) business capacity). Offers were to receive either an excellent, good, marginal or poor rating under the technical and price/cost criteria, or an excellent, good, none, marginal or poor rating under the past performance factor. The RFP further provided in this regard that to be considered technically acceptable, an offer “must be evaluated as good or excellent in all technical criteria, all past performance criteria, and all price/cost criteria.” RFP § M.4.¹

An agency tender based upon a most efficient organization (MEO) and a proposal from CRA were received in response to the solicitation. The agency tender was rated excellent under the transition/phase-in, quality control, accreditation and medical deployment criteria, and good under the technical approach, management approach, key personnel resumes, and price/cost realism and balance criteria, for an overall technically acceptable rating. In contrast, CRA’s proposal was rated as marginal under the quality control, accreditation, and price/cost realism and balance

¹ The agency tender was not required to include resumes for key personnel, and was not to be evaluated under the past performance factor or business capacity criterion of the price/cost factor. RFP §§ L.2.G, M.3.

criteria, and poor under the technical approach, management approach, transition/phase-in, medical deployment plan, and key personnel resumes criteria, for an overall unacceptable rating.

Among the numerous evaluated deficiencies and weaknesses in CRA's proposal was the omission of required key personnel resumes. In this regard, the solicitation specifically required private sector offerors to "[p]rovide resumes for all key personnel identified by the Offeror." RFP § L.2.5.G. The PWS defined key personnel as including, at a minimum, the project manager, alternate project manager(s), and "[h]ighest-level personnel at each site," and listed 14 medical clinics in various parts of the United States (including Puerto Rico). PWS §§ 1.4.4.4, 3.2.1. In its proposal, however, CRA only named and furnished resumes for the corporate project manager, project manager, assistant project manager, and medical director. CRA Proposal, Appendix E. CRA stated in its proposal that, "[a]lthough CRA agrees that the position of facility Health Services Administrator (HSA) should be considered a 'Key Personnel' position under any resulting contract, we take exception to the RFP requirement to provide resumes of proposed key personnel." CRA Proposal, Executive Summary. CRA explained its failure to furnish resumes on the basis that "it is uncertain whether any of the existing HSAs would be interested in continuing their current capacity as a contractor employee," "[t]he short proposal due date has made it impractical to conduct a complete search for 14 qualified candidates," and "many of the best qualified candidates are extremely hesitant to sign any commitment letters at this stage for a prospective job opportunity that is speculative, at best." Id.

In view of the deficiencies and weaknesses in CRA's proposal, which led to unacceptable ratings under 8 of 10 evaluation criteria and an unacceptable rating overall, HHS excluded CRA's proposal from the competitive range. According to the agency's competitive range determination, "[m]any of [CRA's] weaknesses were considered so substantive (including their exception to providing the identity of many key personnel . . .) as to preclude the possibility of improving their score to an acceptable level without a major rewrite of their proposal which would be tantamount to submission of a new proposal." Competitive Range Determination at 1-2. Upon learning of the exclusion of its proposal from further consideration, CRA filed this protest with our Office.

CONFLICT OF INTEREST

CRA asserts that three of the seven evaluators on the agency's Technical and Past Performance Review Panel and two of the four evaluators on the Cost Evaluation Review Panel were employed within DIHS, and thus had a conflict of interest that should have precluded their participation in the evaluation. HHS responds that the evaluators in question held positions that were inherently governmental, and that therefore were outside the scope of the A-76 study.

In conducting government business, including the evaluation of proposals as part of an A-76 study, the general rule is to avoid any conflict of interest or even the appearance of a conflict of interest. Federal Acquisition Regulation (FAR) § 3.101-1. In applying this general principle, we have held that at least the appearance of a conflict of interest exists where, in an A-76 cost comparison, an evaluator holds a position that is within the scope of the study and is subject to being contracted out. See DZS/Baker LLC; Morrison Knudsen Corp., B-281224 et al., Jan. 12, 1999, 99-1 CPD ¶ 19 at 5. However, we have also held that the appointment of evaluators who hold positions in the function under study is not necessarily improper if the positions are not directly affected, that is, are not in jeopardy of being contracted out. IT Facility Servs.--Joint Venture, B-285841, Oct. 17, 2000, 2000 CPD ¶ 177 at 12.

Circular A-76, as revised, itself specifically provides for the agency to appoint an evaluation team, referred to as the Source Selection Evaluation Board (SSEB), and specifies that:

Directly affected personnel (and their representatives) and any individual (including, but not limited to, the [Agency Tender Official], [Human Resource Advisor], MEO team members, advisors, and consultants) with knowledge of the agency tender (including the MEO and agency cost estimate) shall not participate in any manner on the SSEB (e.g., as members or advisors).

OMB Circular A-76, attach. B, § D.2.c (May 29, 2003). Circular A-76 defines “Directly Affected Government Personnel” as “[g]overnment personnel whose work is being competed in a streamlined or standard competition.” OMB Circular A-76, attach. D.

Here, the record indicates that four of the seven evaluators on the agency’s Technical and Past Performance Review Panel, and two of the four evaluators on the Cost Evaluation Review Panel occupy positions outside DIHS, the organization whose functions are under study. In addition, according to HHS, while the remaining evaluators on the panels occupy positions within DIHS, these positions are inherently governmental and thus not within the scope of the A-76 study. Specifically, the four reportedly inherently governmental evaluators (one individual served on both panels) are members of the U.S. Public Health Service Commissioned Corps, and occupy the following, managerial, DIHS positions: DIHS Chief Pharmacist and Telehealth Coordinator, Associate Director for Management and Budget for DIHS, program manager for the DIHS Detention Management and Control Program, and DIHS Information Technology Manager. Agency Comments, Jan. 24, 2006, at 2-3, Declaration of DIHS Competitive Sourcing Management Analyst.

CRA challenges HHS’s characterization of these four evaluators’ positions as inherently governmental, asserting that the agency’s claim is inconsistent with HHS’s 2004 inventory of positions, published as required under the Federal Activities Inventory Reform (FAIR) Act of 1998, 31 U.S.C.A. § 501 note, which directs federal

agencies to issue annually an inventory of all commercial activities performed by federal employees. Specifically, CRA argues, since the 2004 FAIR Act inventory indicates (without specifying the specific position in question) that only 10 positions within all of DIHS are inherently governmental, and a number of these inherently governmental positions undoubtedly are those of the DIHS director, deputy director, chief of staff, and various branch chiefs, it is unlikely that the positions held by the evaluators here also were inherently governmental.

HHS responds by explaining that the mission of DIHS was enlarged in fiscal year 2005, resulting in an increase in the number of FTEs assigned to DIHS, and that, in preparation for the 2005 inventory, the process used to define the functions performed within HHS was revised. As a result, the number of inherently governmental positions within DIHS reported in the draft 2005 inventory increased significantly above the number in the 2004 inventory, to approximately 35 positions. HHS Comments, Feb. 3, 2006.

Having reviewed a copy of the relevant worksheet of inherently governmental positions within DIHS, as included in HHS's submission of the 2005 inventory to OMB for review, we find no basis to question HHS's assertion that the four evaluators occupy inherently governmental positions and thus are outside the scope of the A-76 study. In this regard, we note that the worksheet for the 2005 inventory specifically identified the positions held by the four evaluators in question as inherently governmental. *Id.* Accordingly, there is no basis to conclude that a number of the evaluators should have been precluded from participating in the evaluation on account of conflicts of interest.

PROPOSAL DEFICIENCIES

CRA asserts that HHS was required under Circular A-76 to afford it an opportunity to remedy the evaluated deficiencies in its proposal. In this regard, CRA cites the following:

If the [contracting officer] perceives that a private sector offer, public reimbursable tender, or agency tender is materially deficient, the [contracting officer] shall ensure that the [Agency Tender Official], private sector offeror, or the public reimbursable tender official receives a deficiency notice. The [contracting officer] shall afford the [Agency Tender Official], the private sector offeror, or the public reimbursable tender official a specific number of days to address the material deficiency and, if necessary, to revise and recertify the tender or offer. . . . If the [contracting officer] determines that a private sector offeror or public reimbursable tender official has not corrected a material deficiency, the SSA may exclude the private sector offer or public reimbursable tender from the standard competition.

OMB Circular A-76, attach. B, § D.5.c(3).

Here, the agency acted consistently with the terms of the solicitation. As noted by HHS, the solicitation set forth the following FAR provision, included in section L, “Instructions, Conditions, and Notices to Offerors or Quoters”:

The Government intends to evaluate proposals and award a contract after conducting discussions with Offerors whose proposals have been determined to be within the competitive range. If the Contracting Officer determines that the number of proposals that would otherwise be in the competitive range exceeds the number at which an efficient competition can be conducted, the Contracting Officer may limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals. Therefore, the Offeror’s initial proposal should contain the Offeror’s best terms from a price and technical standpoint.

FAR § 52.215-1, Instructions to Offerors--Competitive Acquisition, Alternate I (Oct. 1997). We agree with HHS that this solicitation provision clearly indicated that the agency contemplated conducting discussions only with offerors in the competitive range, and that not all offerors would be included in the competitive range.

Our Bid Protest Regulations contain strict rules requiring timely submission of protests. These rules specifically require that protests based upon alleged improprieties in a solicitation that are apparent prior to the time set for receipt of proposals be filed prior to that time. 4 C.F.R. § 21.2(a)(1) (2005). At best, there was a patent ambiguity in the solicitation between the Circular A-76 requirement that a private sector offeror be provided an opportunity to address material proposal deficiencies (arguably incorporated into the solicitation by the statement that “award will comply with the rules of OMB Circular A-76,” RFP § M.1), and the clear notice in the solicitation instructions that not all proposals would be included in the competitive range for discussion purposes. Such an ambiguity constitutes a solicitation impropriety; thus, if CRA believed it should be entitled to discussions even if its proposal were excluded from the competitive range, it was required to protest on this ground prior to the closing date for receipt of proposals. Because CRA did not protest until after its proposal was rejected, its protest in this regard is untimely and will not be considered. See University Research Co., LLC, B-294358.6, B-294358.7, Apr. 20, 2005, 2005 CPD ¶ 83 at 19 n.17.²

² Given the solicitation language here, we need not address what the significance of the Circular A-76 language cited by CRA would be in other circumstances.

In any case, our Office will not sustain a protest absent a showing of a reasonable possibility of prejudice, that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. McDonald Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 103 F.3d 1577, 1581 (Fed. Cir. 1996). We find no prejudice from the agency's failure to conduct discussions with CRA. Although CRA was furnished with the nine-page list of proposal deficiencies and weaknesses during its debriefing, see CRA Protest at 5, 9, CRA has made no showing that it would or could have remedied the numerous shortcomings in its proposal through discussions. This is especially significant since: (1) by admission in its proposal, it was unable to meet the solicitation requirement for resumes for the "[h]ighest-level personnel" at each of the 14 medical clinic sites, notwithstanding that it agreed with the agency that such "facility Health Services Administrator[s] should be considered a 'Key Personnel' position," PWS §§ 1.4.4.4, 3.2.1; CRA Proposal, Executive Summary; and (2) it was required under the terms of the solicitation to raise each of its eight marginal or poor evaluation ratings to good or excellent in order for its proposal to be considered acceptable. RFP § M.4.

The protest is denied.

Anthony H. Gamboa
General Counsel