



Decision

Matter of: Seaborn Health Care, Inc.

File: B-400429

Date: October 27, 2008

Kathy C. Potter, Esq., and Janine S. Benton, Esq., Benton Potter & Murdock, PC, for the protester.

John W. Gannan II, Esq., Department of Veterans Affairs, for the agency.

Frank Maguire, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is sustained in Federal Supply Schedule (FSS) acquisition where request for quotations (RFQ) requires that competing vendors offer non-FSS services (specific on-site supervisory personnel) as part of their quotations, since non-FSS products and services may not be purchased using FSS procedures.

DECISION

Seaborn Health Care, Inc. protests the terms of request for quotations (RFQ) No. VA 769-08-RQ-0041, issued by the Department of Veterans Affairs (VA) for pharmacists and pharmacy technicians, to be provided by Federal Supply Schedule (FSS) contract vendors at VA's consolidated mail order pharmacies (CMOP). Seaborn asserts, among other things, that an RFQ requirement that the contractor provide on-site supervisory personnel at no cost is improper because supervisory personnel are not included under the FSS contract for pharmacists and pharmacy technicians.

We sustain the protest.

VA issued the RFQ on June 17, 2008 to establish Blanket Purchase Agreements (BPA) for pharmacists and pharmacy technicians at seven CMOPs across the country. RFQ at 2. Only holders of valid FSS contracts for the services requested are eligible to submit quotations. *Id.* The RFQ advises that VA intends "to establish no more than one BPA for each CMOP (i.e. a maximum of seven BPAs established with seven FSS contractors.)" *Id.* The RFQ provides for issuance of BPAs to vendors based on a "best value" evaluation, with technical factors significantly more

important than price. RFQ at 15. The deadline for submission of quotations was August 22. AR at 2. This protest was filed on August 4.

ON-SITE SUPERVISORY PERSONNEL

In addition to pharmacists and pharmacy technicians, the RFQ requires that the contractor provide, “at the Contractor’s expense,” an “on-site Facility Administrator,” who will be responsible for “all personnel actions necessary to maintain an excellent and productive working environment.” RFQ at 4. The facility administrator must have a “minimum of 5 years human resources experience and 3 years supervisory experience.” Id. Similarly, the contractor must provide, “at the Contractor’s expense,” an “on-site supervisor” for every 50 contracted positions per shift, who will “supervise the contractor personnel in the production working environment.” This supervisor must have a minimum of 2 years of supervisory experience. Id.

Seaborn argues that the RFQ’s call for specific on-site supervisory personnel constitutes an improper requirement that vendors price non-FSS services as part of their quotations. Protest at 5-7. Seaborn cites Simplicity Corp., B-291902, Apr. 29, 2003, 2003 CPD ¶ 89, and other decisions of our Office, for the proposition that non-FSS products and services may not be purchased using FSS procedures; instead, their purchase requires compliance with generally applicable procurement laws and regulations, including those requiring the use of competitive procedures. See, e.g., OMNIPLEX World Servs. Corp., B-291105, Nov. 6, 2002, 2002 CPD ¶ 199; Pyxis Corp., B-282469, B-282469.2, July 15, 1999, 99-2 CPD ¶ 18 at 3-4. VA responds that it is “not attempting to procure supervisory services for VA employees or other contractors,” but rather is providing for appropriate contract administration and supervisory services that are inherent in the cost of properly administering the contract. AR at 5. VA points out that, in a non-personal services contract, it cannot provide government supervision of contractor personnel. Id.¹

We agree with the protester. The RFQ calls for the successful vendor to supply specifically designated and qualified on-site supervisors. As noted, the required personnel are described in detail in the RFQ and have specific minimum experience, capability, and performance requirements. RFQ at 4, 8. Our review of the pertinent FSS contract, “621 I, Professional and Allied Healthcare Staffing Services,” reveals no provision for on-site supervisory personnel or services, and VA points to no such provision.² We are not persuaded by the agency’s argument that the specified

¹ VA explains the need for these supervisory services as follows: “Given prior problems associated with the lack of supervision of pharmacy services providers at CMOP facilities, it has become commonplace for the VA to require on-site, no cost supervisors within the terms of its agreements.” AR at 2.

² See <http://www1.va.gov/oamm/oa/nac/fsss/fssproftrain.cfm#ordering> and <http://www.gsaibrary.gsa.gov/ElibMain/home.do>. Schedule 621 I.

supervision is unobjectionable because, essentially, supervision by the contractor is inherent in non-personal services contracts. Even if the agency is correct that some level of supervision necessarily must be provided by the contractor under a non-personal services contract, this “inherent” supervision is something quite different, we think, from an agency’s specifying that specific personnel are to be provided and that supervision will be performed in a particular manner. Even where non-FSS products and services are viewed as incidental or integral to FSS items, they may not be purchased using FSS procedures. SMS Sys. Maint. Servs., Inc., B-284550.2, Aug. 4, 2000, 2000 CPD ¶ 127 at 2 n.2, citing Pyxis Corp., *supra*, at 3-4; see Tarheel Specialties, Inc., B-298197, 298197.2, July 17, 2006, 2006 CPD ¶ 140 (issuance of FSS task order was improper where RFQ requirements for a “site supervisor” and other labor positions were not “listed in or mapped to” the successful vendor’s FSS contract). Accordingly, we sustain the protest on this ground.

RECOMMENDATION

We recommend that the agency cancel the RFQ and resolicit this requirement consistent with our decision.³ We also recommend that the protester be reimbursed the costs of filing and pursuing the protest, including reasonable attorneys’ fees. 4 C.F.R. § 21.8(d)(1) (2008). Seaborn should submit its certified claim for costs, detailing the time expended and cost incurred, directly to the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Gary L. Kepplinger
General Counsel

³ In light of our recommendation that the agency resolicit the requirement, the other issues raised by the protester are academic, and we do not consider them.