



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

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

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: North Shore Medical Labs, Inc.

File: B-310747

Date: February 6, 2008

Adam W. Downs, Esq., Welby, Brady & Greenblatt, LLP, for the protester.
Diane L. Celotto, Esq., Department of the Navy; John W. Klein, Esq., and Laura Mann Eyester, Esq., Small Business Administration, for the agencies.
Eric M. Ransom, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that the solicitation's corporate experience requirement is unduly restrictive is denied where the record shows that the provision is reasonably related to the agency's needs.
2. Agency determination not to set aside a procurement for small business was proper where the record shows that the agency conducted broad market research and responses from small business firms demonstrated that it was not likely to receive proposals from at least two responsible small businesses capable of meeting the requirements of the solicitation.

DECISION

North Shore Medical Labs, Inc., a small business, protests the terms of request for proposals (RFP) No. N00189-07-R-Z027, issued by the Department of the Navy, Fleet and Industrial Supply Center Norfolk, for Human Immunodeficiency Virus (HIV) type 1+2 screening and confirmatory testing and other testing services. North Shore contends that the RFP's corporate experience requirements are unduly restrictive and that the procurement should be set aside for small business concerns.

We deny the protest.

BACKGROUND

The RFP is for an indefinite-delivery/indefinite-quantity contract for HIV screening and confirmatory testing and other testing services on specimens provided by approximately 1,300 Navy activities and/or program blood donors worldwide. The RFP provided for an 8-month base period and four 12-month option periods, and

states a maximum quantity of tests for the base period that translates to 88,708 tests per month, over 94 percent of which are required to be completed within an 8-hour turn-around time.

Award is to be made to the responsible offeror whose proposal represents the best value after an evaluation in accordance with the evaluation factors in the solicitation. There are four technical evaluation factors, technical approach, corporate experience, past performance and socio-economic plan. Agency Report (AR), Tab 2, RFP, at 34. The first three factors are of equal importance and are significantly more important than the fourth factor. Id. Under the evaluation scheme, the technical factors are more important than price. Id.

On January 19, 2007, the agency issued a “sources sought” notice requesting that offerors possessing the requisite skills, resources, and capabilities submit executive summaries including their contact information, business size, and relevant past performance. Relevant past performance was defined as past performance (within the past 5 years) of the same or similar scope (performing HIV testing services), of the same or similar magnitude (performing services of a test quantity volume comparable to the test quantity volume of the stated requirement), and of the same or similar complexity (numbers, size, and varieties of clients supported) to that described in the notice. The agency also utilized market research techniques other than the sources sought notice, including contacting knowledgeable individuals in government and industry regarding market capabilities, querying government databases, obtaining source lists of similar items from other contracting activities, and reviewing catalogs and other generally available product literature published by industry or available on-line. AR, Tab 21, Market Research Memorandum, at 2.

Nine prospective offerors responded to the sources sought notice: seven small businesses and two large businesses. Id. at 3. After reviewing the responses to the sources sought notice and the results of other market research techniques, the agency determined that there was not a reasonable expectation of obtaining acceptably priced offers from at least two small business concerns that are capable of performing the contract. Id. at 7. The agency found that, [DELETED]. Id. Further, the agency noted that [DELETED] did not possess the full spectrum of licenses, permits and/or accreditations necessary to perform the required HIV testing services. Id. at 4.

The RFP was issued on April 18, on an unrestricted basis. The corporate experience technical evaluation factor required offerors to demonstrate relevant experience (within the past 5 years) of the same or similar scope (experience in performing initial and confirmatory HIV testing services and blood donor panel testing services), of the same or similar magnitude (60,000 to 90,000 HIV tests per month), and of the same or similar complexity (electronic test reporting and transshipment of infectious and non-infectious specimens) as that stated in the RFP. AR, Tab 2, RFP, at 35.

Between the issuance of the RFP and the filing of the protest here, the RFP was amended 15 times in response to multiple agency-level protests and supplementary market research efforts. The primary result of the amendments was a relaxation of the requirements under the corporate experience factor and a change in the structure of the procurement from unrestricted to a tiered evaluation scheme.¹ After this protest was filed, the RFP was amended again, further relaxing the definitions of similar scope, magnitude, and complexity under the corporate experience factor. Specifically, the RFP was amended to require that offerors “have experience in Moderate Complexity testing and High Complexity testing” (scope), “have performed at least 49,500 Moderate Complexity tests per month and 500 High Complexity tests per month” (magnitude), and “have performed electronic test reporting” (complexity). AR, Tab 18, RFP amend. 16, at 6.

ANALYSIS

The protester first contends that the existence of a firm “magnitude” requirement in the corporate experience factor is unduly restrictive and improperly favors the incumbent laboratory.² The protester argues that the agency’s evaluation of corporate experience should consider each laboratory’s licensure compliance, plan for contract implementation, available operating capital, and past quality, but not quantity, of work.

Agencies enjoy broad discretion in the selection of evaluation criteria, and we will not object to the use of particular evaluation criteria so long as they reasonably relate to the agency’s needs in choosing a contractor that will best serve the government’s interests. Leon D. Matteis Constr. Corp., B-276877, July 30, 1997, 97-2 CPD ¶ 36 at 4. The determination of a contracting agency’s needs and the best method for accommodating them are matters primarily within the agency’s discretion. Tucson Mobilephone, Inc., B-250389, Jan. 29, 1993, 93-1 CPD ¶ 79 at 2. Where a protester alleges that a solicitation provision is unduly restrictive, we will review the record to determine whether the provision is reasonably related to the agency’s needs. See Systems Application & Techs., Inc., B-270672, Apr. 8, 1996, 96-1 CPD ¶ 182 at 3.

Here, the agency has determined to include in the evaluation criteria a requirement that each prospective offeror “have performed at least 49,500 Moderate Complexity tests per month, and 500 High Complexity tests per month.” AR, Tab 18, RFP amend. 16, at 6. The agency argues that this provision is reasonably related to its needs. We agree.

¹ The terms of the tiered evaluation scheme are described further below.

² The protester also challenged the corporate experience complexity requirement, but withdrew that basis of protest after the agency issued Amendment 16 to the solicitation.

The agency requires HIV screening and confirmatory testing services from a contractor with the capability to perform up to 88,708 tests per month, on specimens shipped from approximately 1,300 submitting activities, with over 94 percent of the tests being completed and the results provided to the government within an 8-hour turn-around time. The agency has stated that it is critical that the contractor be able to successfully perform the high quantity HIV screening requirements of the resultant contract, as failure to do so would severely impact health force protection and Naval operational and deployment readiness. AR, Tab 32, Supplemental Market Research Memorandum, at 8. With regard to successful performance, an expert in Navy Clinical Laboratory Medicine consulted by the agency in the course of market research advised the agency that relevant experience is a key indicator of the readiness of a laboratory to successfully assume testing responsibilities, particularly for high volume testing, and that “[t]he more closely a laboratory’s experience mirrors the services to be provided under the resultant contract, the more confidence we can have that the laboratory in question can handle the required testing and test volumes.”³ AR, Tab 38, Declaration of Navy Expert, at 2.

Based on the very high volume of testing required by the RFP, the importance of the requirement, and the value of experience in very high volume testing as an indicator of successful performance, we conclude that the agency’s decision to incorporate a corporate experience magnitude requirement into the RFP is reasonable, and the current magnitude requirement is reasonably related to the agency’s needs.

With regard to the protester’s argument that the magnitude requirement improperly favors the incumbent, there is no requirement that an agency equalize or discount an advantage gained through incumbency, provided that it did not result from preferential treatment or other unfair action by the government. Navarro Research and Eng’g, Inc., B-299981, B-299981.3, Sept. 28, 2007, 2007 CPD ¶ 195 at 4; see also LaQue Ctr. for Corrosion Tech., Inc., B-245296, Dec. 23, 1991, 91-2 CPD ¶ 577 at 6-7. Neither preferential treatment nor other unfair action is alleged or evident here.

The protester next challenges the agency’s decision not to conduct the procurement as a total small business set-aside. The protester specifically alleges that the agency performed inadequate market research, that at least two qualified small businesses have submitted responses to the agency’s market research, and that the procurement is therefore required to be set aside for small business pursuant to Federal Acquisition Regulation (FAR) § 19.502-2(b).⁴

³ The expert in Navy Clinical Laboratory Medicine is a Commander in the Medical Service Corps of the United States Navy, the Associate Director for the Department of Defense Center for Clinical Laboratory Medicine, and the Navy Specialty Leader for Medical Technology. AR, Tab 38, Declaration of Navy Expert, at 1.

⁴ As noted above, the agency amended the RFP to include a tiered evaluation scheme under which the procurement will be treated as a total small business set-aside if

(continued...)

An acquisition with an anticipated dollar value of more than \$100,000 must be set aside for small business concerns if the agency determines that there is a reasonable expectation that offers will be received from two or more responsible small business concerns, and that award will be made at a fair market price. FAR § 19.502-2(b). Generally, we regard such a determination as a matter of business judgment within the contracting officer's discretion, and we will not sustain a protest challenging the determination absent a showing that it was unreasonable. McSwain & Assocs. Inc. et al., B-271071 et al., May 20, 1996, 96-1 CPD ¶ 255 at 2. However, an agency must undertake reasonable efforts to ascertain whether it is likely that it will receive offers from at least two small businesses capable of performing the work. Rochester Optical Mfg. Co., B-292247, B-292247.2, Aug. 6, 2003, 2003 CPD ¶ 138 at 4. Our Office will review a protest of an agency determination not to set aside a procurement to determine whether a contracting officer has undertaken reasonable efforts to ascertain the availability of capable small businesses. Id.

Here, the agency's initial market research consisted of issuing a sources sought notice, contacting knowledgeable individuals in government and industry regarding market capabilities, querying government databases, obtaining source lists of similar items from other contracting activities, and reviewing catalogs and other generally available product literature published by industry or available on-line. Based on this market research the agency received responses from seven small businesses. However, the agency determined that, [DELETED] and that [DELETED] did not possess the full spectrum of licenses, permits and/or accreditations necessary to perform the required testing.

After an agency-level protest resulted in the relaxation of the solicitation requirements, the agency conducted supplementary market research, including consultation with two experts in Navy Clinical Laboratory Medicine at the Navy Central HIV Program, and Army contracting staff regarding an Army procurement of HIV testing services. AR, Tab 32, Supplemental Market Research Memorandum, at 3. Based on these consultations, the agency further relaxed the solicitation requirements. AR, Tab 14, RFP amend. 12. The agency then contacted the firms that had responded to the initial sources sought notice to request further information about their authorizations and corporate experience in light of the revised requirements. AR, Tab 32, Supplemental Market Research Memorandum, at 4-5.

(...continued)

two or more responsible small businesses submit technically acceptable, reasonably priced offers. If two such small business offers are not received, the procurement remains unrestricted. The protester does not challenge the use of this specific tiered evaluation scheme or any of its particular features, but rather argues that any tiered evaluation is inappropriate because a total small business set-aside is required here.

Five firms responded to the agency's follow-up market research request, one large business and four small businesses, including the protester. Id. at 5. The agency then sent the firms' responses to the experts at the Navy Central HIV Program for comment. Id. at 7. The experts concluded that, in addition to the one small business already deemed capable of providing the required services, [DELETED]. Id. at 8. The contracting officer reviewed this conclusion but, based on [DELETED] and on the fact that the Program experts had reviewed only one part of [DELETED], the contracting officer [DELETED]. Id.

On the information available, the contracting officer concluded that the market research was inconclusive to determine that the procurement should be set aside for small business. Id. The contracting officer did not believe there was a reasonable expectation of receiving offers from two capable responsible small businesses, but in light of the Navy HIV Program experts' view, did believe there was a small chance that offers might be received from two capable responsible small businesses. AR, at 49. Therefore, in accordance with the Defense Federal Acquisition Regulation Supplement (DFARS) § 215.203-70, "Requests for proposals – tiered evaluation of offers," the contracting officer determined to include a tiered evaluation of proposals provision in the RFP. Id. at 49-50.

After the protest was filed, our Office solicited the comments of the Small Business Administration (SBA) on the issue of the agency's market research and the appropriateness of its small business set-aside decision. In its response, the SBA noted that it was concerned with the degree to which the agency scrutinized the small business responses, but concluded that the agency's broad market research efforts were reasonable and did not object to the contracting officer's decision not to set aside the procurement. SBA Comments, at 5.

In determining the availability of responsible small business concerns for set-aside purposes, the contracting agency's investigation goes not only to the existence of the businesses, but also to their capability to perform the contract. Information Ventures, Inc., B-279924, Aug. 7, 1998, 98-2 CPD ¶ 37 at 3. The fact that multiple small business responses are received in the course of market research is not necessarily determinative. See The Protective Group, Inc., B-310018, Nov. 13, 2007, 2007 CPD ¶ 208 at 3. Given the comprehensive market research conducted in this procurement, the consideration given to the market research responses and the opinions of Navy HIV Program experts, as well as the position of the SBA on the matter, we cannot conclude that the contracting officer's decision not to set the procurement aside was unreasonable or an abuse of discretion.

The protest is denied.

Gary L. Kepplinger
General Counsel