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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Health & Human Services Group

File: B-294703

Date: December 15, 2004

Michael B. Pons for the protester.

Michael I. Goulding, Esq., Department of Homeland Security, Bureau of Customs & Border Protection, for the agency.

Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that combination of two requirements under single solicitation constituted improper bundling under Small Business Act is denied where the requirement was set aside for award to a small business, there was expression of interest by small businesses, and the agency in fact made award of the contract to a small business.

DECISION

Health and Human Services Group (HHS) protests the terms of request for proposals (RFP) No. HSBP1004R0079, issued by the Department of Homeland Security, Bureau of Customs and Border Protection, to acquire services in connection with the agency's Employee Assistance Program (EAP) and Drug Free Workplace Program (DFWP). The protester asserts that the RFP impermissibly bundles these two requirements together in a manner that precludes performance of the requirement by a small business in contravention of the requirements of the Small Business Act, and in a manner that raises what the protester describes as ethical concerns. HHS also maintains that other aspects of the RFP are improper.

We deny the protest.

The RFP, a 100-percent small business set-aside, seeks proposals to perform, on a time-and-materials basis, a contract for EAP and DFWP services. The EAP services include a wide range of counseling and training type services for employees experiencing personal problems and productivity issues that may adversely affect their workplace performance; such services include problem identification and assessment, referral, short-term counseling, problem resolution, and follow-up

services. The RFP also contemplates the development and delivery of training and education awareness on a wide array of EAP topics, as well as the provision of organizational development interventions, and individual and group debriefings for employees involved in traumatic or critical incidents. The DFWP services include the provision of alcohol and drug testing program site coordinators who will provide oversight for the agency's specimen collection activities (primarily to ensure that specimen collection is performed in accordance with applicable departmental rules and in a manner designed to ensure the quality of the results) as well as occasionally performing specimen collection activities.

HHSG principally asserts that combining EAP and DFWP activities under a single contract constitutes a bundling of two requirements in a manner that inhibits small business competition, which is to be avoided under the Small Business Act, 15 U.S.C. § 631(j) (2000).¹

We find that there is no improper bundling here. Where there is a consolidation of two or more agency requirements, the Small Business Act, as amended, requires that agencies avoid bundling them together where the result would be a single contract that is likely to be unsuitable for award to a small business concern. 15 U.S.C. § 632(o)(2). On the other hand, where, as here, the record shows that the agency has reserved its requirement for small businesses, and there is an expression of interest in the requirement by legitimate small businesses, there is no basis to conclude that the consolidated requirement is "unsuitable for award to a small business" within the meaning of the Small Business Act. Phoenix Scientific Corp., *supra*, at 9. Here, the agency proceeded with the acquisition notwithstanding the protest, and on October 1, 2004, made award of a contract for the consolidated requirement to a small business concern. Under the circumstances, we have no basis to conclude that the agency's consolidation of these requirements into a single contract was improper or inconsistent with the Small Business Act.

HHSG also asserts that combining the two requirements presents an ethical concern. According to the protester, the concern arises from the fact that, while the EAP services require the contractor to provide beneficial services to employees in personal matters, and thus require that employees' information be kept confidential, the DFWP services require the contractor to provide the agency with confidential employee drug or alcohol testing information. HHSG concludes that there is an inherent conflict between the two roles.

¹ The protester does not assert that the alleged bundling here is inconsistent with the requirements of the Competition in Contracting Act, 41 U.S.C. § 253a(a)(2)(B) (2000). Compare Phoenix Scientific Corp., B-286817, Feb. 22, 2001, 2001 CPD ¶ 24 at 5. Accordingly, our decision here is limited to considering whether the agency's consolidation of the EAP and DFWP requirements is impermissible under the Small Business Act.

This argument is without merit. The agency explains that it is aware of the need to maintain confidentiality regarding employee information, and that safeguards have been built into the solicitation toward this end, including the following: the contractor's DFWP personnel will occupy different office space than its EAP personnel (RFP at 8, 17); DFWP personnel will not have access to EAP records (RFP at 15); EAP information will be discussed only in accordance with strict confidentiality requirements (RFP at 14); and EAP personnel will not have access to DFWP personnel's travel plans for purposes of performing drug or alcohol testing (RFP at 17), or to drug or alcohol test results (RFP at 18), except in the case of a positive test result, in which case referral of the employee to the EAP staff is required (RFP at 9-10). The protester has not established that these measures are inadequate to address any confidentiality problems that might arise under the contract. In the final analysis, the solicitation requires the contractor to furnish two separate sets of personnel, one to perform EAP services that require confidentiality, and a second to perform DFWP services that require disclosure of testing information; the mere fact that the contractor is providing both sets of employees does not, in and of itself, present a potential conflict in light of the RFP's safeguards relating to the location of these personnel and their records (as well as the EAP personnel's confidentiality obligations). There thus is no basis to conclude that combining the two functions is improper.

HHSO raises numerous additional arguments relating to various portions of the RFP, and also questions the agency's making award during the pendency of this protest. Under our Bid Protest Regulations, a protester must be an interested party, that is, an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. § 21.0(a) (2004). HHSO explicitly states that it cannot and will not submit an offer in the event that EAP and DFWP services are combined under a single solicitation. Specifically, it states that "HHSO is not and has never been even remotely in the drug testing or specimens collection monitoring business in which the [DFWP personnel] engage . . . HHSO cannot, for ethical and professional reasons . . . provide such services." Protester's Comments, Oct. 25, 2004, at 6. Elsewhere, the protester states that "we have no capability of providing what amounts to enforcement of mandated drug testing procedures, and administering the almost clerical nature of the [DFWP personnel's] duties along with providing professional, law enforcement oriented EAP counseling services. . . . That is why we did not submit an offer." *Id.* at 7. Given these statements and our conclusion above that there is nothing objectionable in combining these two services into a single contract, HHSO is not a prospective offeror; accordingly, HHSO is not an interested party for purposes of raising its additional arguments.

The protest is denied.

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General Counsel