GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

Protests of:

Greater Washington Dental Services, Inc.	)	
	)	
Quality Plan Administrators, Inc.	)	CAB Nos. P-0675 and P-677
	)	
Under Solicitation No. DCBE-2002-R-0047	)	

For the Protesters: Greater Washington Dental Services, Inc., Kristen E. Ittig, Esq. and David P. Metzger, Esq., Holland and Knight, LLP; Quality Plan Administrators, Inc., Carol L. O'Reiordan, Esq. and Jonathan T. Williams, Esq., The O'Riordan Bethel Law Firm, LLP. For the Intervernor, Connecticut General Life Insurance Company, Thomas C. Papson, Esq. and Michael A. Hopkins, McKenna Long & Aldridge LLP. For the District of Columbia Government: Howard Schwartz, Esq., and Warren J. Nash, Esq., Assistants Corporation Counsel.

Opinion by Administrative Judge Matthew S. Watson, with Chief Administrative Judge Jonathan D. Zischkau concurring.

OPINION

(*Courtlink Filing ID 2591870*)

Greater Washington Dental Services, Inc. ("GWDS") and Quality Plan Administrators, Inc. ("QPA") protested award of a contract for dental insurance benefits for District of Columbia Government employees to Connecticut General Life Insurance Company ("CIGNA"). As the awardee, CIGNA intervened and has moved to dismiss the protest on the basis that neither GWDS nor QPA is properly qualified and licensed in the District of Columbia or the states of Maryland and Virginia to offer the services requested and therefore lack standing to protest as aggrieved parties entitled to award. The District supports the CIGNA position. Although the specifications regarding licensing are confusing and the District aggravated the confusion during negotiations, we conclude that the protests should be dismissed. The Board notes, however, that the requirement for licensing may have been inadvertently created by the District's drafting of specifications and that confusion as to required licenses was fostered by the District in negotiations with the protesters. In addition to the confusion created by the District as to licensing requirements, although the Board has not reached any decision on the merits of the protests, it appears that there is a substantial question as to whether the acceptance of a proposal whose benefits varied significantly from the specifications contained in the RFP was unfair to other offerors. The Board therefore recommends that the District not exercise any options to extend the contract after its first year and immediately begin reprocurement of the services to commence at the conclusion of the base period. The Board further recommends that the agency consult with the District of Columbia Insurance Commissioner as to licensing requirements.

BACKGROUND

On August 19, 2002, the District issued RFP DCBE-2002-R-0047 (RFP), requesting proposals for a Dental Health Maintenance Organization (DHMO) plan[1] for District Government employees. (Agency Report ("AR"), Ex. 1). The District issued five amendments to the RFP including extending the closing date for offers to September 27, 2002. (*Id.*). Five offerors submitted proposals. (AR, Ex. 2). The Technical Evaluation Panel (TEP) conducted its initial evaluations between September 2002 and January 2003. (*Id.*). By letter dated April 3, 2003, the District notified all offerors that the District intended to conduct discussions, (AR, Ex. 2), and on April 11, 2003, the District requested best and final offers ("BAFO"), due April 17, 2003. (AR, Ex. 2). In April and May 2003, the TEP reviewed the BAFO proposals and developed consensus scores for each offeror. (AR, Exs. 3, 4 and 5).

In the Business Clearance Memorandum (BCM) dated May 22, 2003, the contracting officer reviewed the proposals and the TEP scoring, and made an independent assessment of the proposals. (AR, Ex. 2). In that independent assessment, the Contracting Officer concurred with the TEP's recommendation to award the contract to CIGNA. (AR, Ex. 2).

On July 7, 2003, the City Council approved the contract with CIGNA. (AR, Ex. 7). On July 8, 2003, the District awarded the contract to CIGNA and sent notice to the unsuccessful offerors. (AR, Ex. 6). On July 14, 2003, the District debriefed GWDS and QPA and on July 21 and July 24, 2003, respectively, QPA and GWDS filed timely protests with the Board. Both protests were supplemented on August 4, 2003.

DISCUSSION

Although previous contracts provided similar dental benefits to District employees as the subject contract, this solicitation represented a significant change in the nature of the services and the division of risk between the District and the contractor.

> [Prior procurements] . . . have been awarded on an "Administrative Services Only" basis. As such, they were structured so that the District retained exclusive responsibility for compensating service providers (e.g., dentists) for services (exclusive of the participant's co-payment obligations). In such cases, the administrator acts merely as a conduit for the District's transfer of funds in payment to the providers, and the administrator bears no responsibility for payment of the providers.
>
> . . . The subject procurement did not contemplate award on an Administrative Services Only basis, but rather award on a "fully insured basis". That term as regularly used within the plan administration

[1] The initial solicitation also requested proposals for a Dental Preferred Provider Plan (DPPO), which was subsequently deleted. (AR, Ex 1 - Amendment 4, March 27, 2003).

> industry, refers to an award in which the plan administrator contracts to assume any and all costs of service, apart from required co-payments and deductions, associated with the performance of that plan, "insuring" the plan's sponsor (in the instant procurement, the District of Columbia) against the need to fund such costs of service.

(Affidavit of Milton D. Bernard, DDS, President of Protester QPA, QPA Opposition to Motion to Dismiss, Ex. A).

This understanding is consistent with the Contracting Officer's response to potential offerors' questions.

> QUESTION 4: Would your organization consider a response for a dental program on an "Administrative Services Only" (ASO) basis?
>
> RESPONSE: No, the District requests that all offerors submit a proposal based on a fully insured plan.
>
> * * *
>
> QUESTION 10: What funding type are you proposing that we quote (fully insured-participating or non-participating or ASO)?
>
> RESPONSE: We are requesting you offer a non-participating fully insured plan.

(AR, Ex. 1 - Amendment 001, August 29, 2002).

Insurance is a highly regulated industry. Although the basic nature of the plan changed from an "Administrative Services Only" to a fully insured plan, the District does not appear to have considered the licensing implications. Further, the District was not sufficiently forthcoming in responding to potential offerors' questions as to licensure requirements. When specifically asked in Question 32B (Amendment 002); to state licensure requirements and specifically requested to give "an elaborated response . . . with appropriate jurisdiction and code references, and a discussion of any authority of the District to waive requirements," the Contracting Officer generically responded that "All providers of service must be licensed in accordance with the jurisdictions that govern their practice." (*Id.*).

The confusion as to required licenses was compounded during negotiations. The misunderstanding by the offerors should have been apparent to the District when the documentation supporting the proposals was reviewed. In the process of negotiation, each of the proposers was requested in written questions to "provide evidence of regulatory approval of your proposed plan in DC, MD and VA. (Motion to Dismiss, Ex. A). The intervenor and the two protesters each submitted totally different licenses alleged to support their authority to offer their dental plans.

CIGNA submitted licenses from the insurance departments of all three jurisdictions.[2] (*Id.*). GWDS is not licensed by the insurance department of any jurisdiction. GWDS submitted only general corporate certificates of authority from all three jurisdictions. (*Id.*, Ex. 2). QPA submitted a Maryland Insurance Administration license, not as an insurer, but rather as a third party administrator and statements from the District and Virginia insurance departments that third party administrators were not licensed in their jurisdictions. (*Id.*, Ex. 3).

Notwithstanding that the District had specifically stated that "a response for a dental program on an "Administrative Services Only" (ASO) basis" was unacceptable, the Business Clearance Memorandum found without explanation that submission of an Administrator's license was satisfactory evidence of regulatory approval. (AR, Ex. 2, p. 6). The BAFO evaluation identically rated CIGNA, GWDS, and QPA as fully meeting Evaluation Subfactor "M.4.1.1.3, "Offeror had received regulatory approval from District of Columbia, Maryland and Virginia" even though between the three companies, no two licenses submitted as documentation of qualification were the same.

Although award was apparently made without consideration of compliance with insurance laws, and companies not licensed as insurance companies were evaluated as fully acceptable, the District has belatedly come to the conclusion that licensure as an insurance company is required for award. (District Response to Motion to Dismiss, 4). Protester QPA argues that that is not the case. In responding to the motion to dismiss QPA states:

> Nothing in the Solicitation or in the District of Columbia's governing authority accords the term "fully insured plan" a meaning different than the standard definition recognized within the plan administration industry. See Third Affidavit of M. Bernard, ¶ 4 (attached as Exhibit A hereto); Third Affidavit of A. Davidson, ¶ 4 (attached as Exhibit B hereto). Indeed, there is no mention of the term in any relevant authority or any suggestion that the term as utilized in the Solicitation should be accorded the novel meaning that CIGNA now seeks to attribute to it, and by which CIGNA would bootstrap independent (and irrelevant) insurance licensing requirements that are nowhere mentioned in the Solicitation as issued or amended.
>
> No special regulatory approval is needed for a "fully insured plan" because that term defines the way in which costs and risks are apportioned between the contractor/administrator and the plan sponsor, and not the type of entity eligible to perform the contract. The District's plan as expressed in the RFP anticipates that the participants will pay for services rendered through co-payments established by the contract as awarded, and that the District's only financial obligation will be to pay the contractor a fee on a capitated basis (calculated per plan participant). In turn, the

[2] CIGNA is licensed as a "Limited Health Maintenance Organization" in Virginia and as an insurance company in the District and Maryland.

> contractor will ensure that a network of providers is assembled and available to provide the services, will enter into independent contracts with the providers and will assume all risk of payment to the providers for services, relieving the District of the risk that it has borne under some prior plans.

(QPA Opposition to Motion to Dismiss, 3-5).

In the absence of a specialized definition or any evidence that something other than the term's ordinary meaning was intended, it is appropriate to view a solicitation or contract term in accordance with its plain and ordinary meaning. Restatement (Second) Contracts § 202(3); *George Hyman Constr. Co. v. United States*, 832 F.2d 574 (Fed. Cir. 1987). The plain and ordinary meaning of insurance is the transfer of risk from a person or entity, which has a potential obligation to another entity, which agrees to assume that obligation. *See Black's Law Dictionary* (7th ed. 1999), "insurance". Protester admits that that is exactly what was intended in the solicitation by stating that the contractor "will assume all risk of payment to the providers for services, relieving the District of the risk that it has borne under some prior plans." Entities offering insurance are required to be licensed by the respective insurance departments in all three jurisdictions. (*See e.g.* Code of Virginia, Title 38.2, Insurance, Chapter 43, Health Maintenance Organizations).

The Maryland law makes the licensure clearest with regard to dental plans. Title 14 of the Maryland Insurance Code is entitled "Entities Which Act as Health Insurers" and includes subtitle (4) captioned "Dental Plan Organization Act." For purposes of that subtitle "Dental plan organization" means a person that provides directly, arranges for, or administers a dental plan on a prepaid or postpaid individual or group capitation basis. (§14-401(c)). Unless otherwise authorized by statute to perform dental services, (§14-401), "[a] person may not establish, operate, or administer a dental plan organization or sell, offer to sell, solicit offers to purchase, or receive advance or periodic consideration in conjunction with a dental plan, unless the person has a certificate of authority issued by the Commissioner under this subtitle." (§14-403).

Notwithstanding the fact that neither the solicitation nor the discussions made the licensing requirements clear, (see GWDS Opposition to Motion to Dismiss, 2), the Board agrees with CIGNA and the District that, as a matter of insurance law, a dental insurance plan must be licensed by state insurance departments as an insurer or as a dental health plan. QPA asserts that it could perform the required services pursuant to its license as a Third party administrator. Acting as a Third party administrator would conflict with the insured plan contemplated by the solicitation. The solicitation provided that the only obligation of the District is to pay a fixed amount per covered employee per month. The District has no obligation to pay excess costs if the contractor's costs for covered dental service exceed the contractor's revenue and, conversely, the District has no entitlement to a refund if the contractor's costs are less than its revenue. Upon receipt, payments by the District to the contractor are the property of the contractor, which it may commingle with its own funds and use as it pleases. Such a relationship is inconsistent with the role of a Third party administrator. The Maryland Insurance Code, for example, provides in § 8-

316 entitled "Prohibited activities of administrator" that . . . "[w]ith respect to a plan, an administrator, directly or indirectly . . . may not deal with the assets of the plan in the administrator's own interest or for the administrator's own account."

Whether or not the District initially understood that an insurance carrier license was required, the insurance law of the three jurisdictions requires licensing in order to perform as required by the contract terms. Since licensing is a mandatory legal requirement to perform the contract, it is by definition a definitive standard of responsibility since it must be a precondition for award[3] and a requirement for a prospective contractor to be able to perform the contract. See *M.C. Dean, Inc.*, CAB No. P-505, Dec. 3, 1997, 45 D.C. Reg. 8664. Evidence that a prospective contractor meets a definitive standard of responsibility may be required before award. The District requested documentation from all offerors as to their licensure. Neither QPA nor GWDS showed the legally required licenses in the three jurisdictions and thus were not eligible for award. The Board has consistently held that only offerors or potential offerors that can receive award have standing to protest. See, *e.g., MTI-Recyc, a Joint Venture,* CAB No. P-287, Oct. 1, 1992, 40 D.C. Reg. 4554. Since we find that neither QPA nor GWDS possessed licenses necessary for award we dismiss their protests for lack of standing.

RECOMMENDATION

While the Board dismisses the protests, the Board believes that there were problems in the procurement and award that impeded full and fair competition. As noted above, the District itself was confused as to the required licensure. Although qualified insurance providers should be expected to understand the regulatory environment, the District's failure to give guidance when requested and erroneous approval of unacceptable documentation as being fully compliant could certainly have improperly led the protesters to believe that they had made acceptable offers.

In addition, the District did not make clear that it would consider offers that differed radically from the two specified plans included in the solicitation. Although the solicitation did state offerors could deviate from the plans specified in the solicitation, it is not unreasonable to read the solicitation as a whole as permitting only minor deviations and not a totally different plan. Section C.3 stated that "[t]he plans shall *identically* match the proposed . . . programs designs and benefits as stated in Section C.5. [emphasis supplied]" The section went on to state that it is only where the offeror is "unable" to match the prototype plans that it may propose deviations. There is no indication that CIGNA was "unable" to offer the stated plan benefits, only that for business reasons it chose not to do so. In its answer to questions, the District did not make clear that it would accept major deviations. In fact, the District implied the opposite. In the answer to question 3 in Amendment 3 it was specifically stated that "[t]he District will choose one of the two plans based on its evaluation of the associated costs. (AR, Ex. 1). It is

[3] Indeed, it could be argued that a Certificate of Authority from the Maryland Insurance Commissioner is required prior to bidding. Maryland Insurance Code §14-403 requires that "a person may not offer to sell . . . a dental plan, unless the person has a certificate of authority issued by the Commissioner under this subtitle."

alleged that the CIGNA plan that was accepted is substantially different from either plan 1 or plan 2. It would therefore appear from the solicitation that, prior to selecting CIGNA, the District should have revised the solicitation. Section L.2.5 entitled Plan Deviations stated:

> Proposals shall be based on the specifications of Section C of the solicitation. Exceptions to any part of this solicitation should be stated separately in Attachment J.9. Any exceptions, if accepted, would constitute a change in the scope of the work and an amendment would be issued. Each Offeror would be asked to submit a revised proposal.

No amendment was ever issued to encompass CIGNA's deviations and no revised proposals were requested. In light the confusion as to licensing requirements and the failure to follow the procedures outlined in the solicitation, the Board recommends that the District not exercise the options contained in the protested contract and immediately institute a new procurement so that a new contract can be in place at the expiration of the initial term of this contract. The Board further recommends that to avoid the regulatory confusion in formulating the new procurement that the agency request the assistance of the Department of Insurance and Securities Regulation.

SO ORDERED.

DATED: October 22, 2003

/s/ *Matthew S. Watson*
MATTHEW S. WATSON
Administrative Judge

CONCURRING:

/s/ *Jonathan D. Zischkau*
JONATHAN D. ZISCHKAU
Chief Administrative Judge