UNITED STATES GOVERNMENT

MEMORANDUM

FORM G-115f (1-92)
RAILROAD RETIREMENT BOARD

July 1, 2015
L-2015-04.1

TO : Michael S. Schwartz
Chairman

FROM : Karl T. Blank
General Counsel

SUBJECT : Limitations to Procurement Process for Independent Medical Exam (IME) Contract

This is in response to your memorandum of June 3, 2015, requesting my analysis of ten recommendations by the Inspector General of the Railroad Retirement Board regarding disability annuity entitlement under the Railroad Retirement Act. These recommendations generally fall into three broad categories: Contract and procurement law; Questions not directly relating to evaluation of medical evidence and which recommend or require statutory or regulatory changes; and Questions relating to weight and evaluation of medical evidence. This memorandum provides my analysis of contract and procurement law as it applies to the following recommendation:

> The RRB's contract for Independent Medical Examination should be awarded to a different company at least every three years.

In preparing this response, I note that in Legal Opinion L-2015-04 (copy attached), I addressed several similar issues including conflict of interest and non-competitive bidding (sole source contracts) associated with the Disability Quality Assurance Review Contract. Because awarding the Independent Medical Examination (IME) contract to a different company every three years would, by definition, *exclude* the current contractor from bidding on the new contract each time the IME contract is posted for procurement, the first issue addressed by L-2015-04 directly relates to the present question. The United States Code, under Title 41, *Public Contracts* and the Federal Acquisition Regulation (FAR) contain additional options for ensuring that a current contractor is not awarded the same procurement contract immediately upon completing a current contract, should the Board choose to adopt the Inspector General's recommendation. This response references research from that opinion specifically tailored to the issue raised by the Inspector General.

Generally, an executive agency in conducting a procurement for services shall: "(1) obtain full and open competition through the use of competitive procedures in accordance with the

requirements of this division and the Federal Acquisition Regulation; and (2) use the competitive procedure or combination of competitive procedures that is best suited under the circumstances of the procurement." 41 USC §3301(a). However, there are certain exceptions to full and open competition in Title 41 and the FAR. 41 USC §3303 states that an executive agency may provide for the procurement of services using competitive procedures but *excluding a particular source* in very limited circumstances. The agency may do so to establish or maintain an alternative source of supply for that service if the agency head determines that to do so would—

> (A) increase or maintain competition and likely result in reduced overall cost for the procurement, or for an anticipated procurement, of the property or services;
> (B) be in the interest of national defense in having a facility (or a producer, manufacturer, or other supplier) available for furnishing the property or service in case of a national emergency or industrial mobilization;
> (C) be in the interest of national defense in establishing or maintaining an essential engineering, research, or development capability to be provided by an educational or other nonprofit institution or a Federally funded research and development center;
> (D) ensure the continuous availability of a reliable source of supply of the property or service;
> (E) satisfy projected needs for the property or service determined on the basis of a history of high demand for the property or service; or
> (F) satisfy a critical need for medical, safety, or emergency supplies.
> 41 USC §3303(a)(1).

The FAR also states that every proposed contract action excluding sources under this provision, "shall be supported by a determination and findings (D&F) signed by the head of the agency or designee. This D&F shall not be made on a class basis." FAR 6.202(b)(1). In addition, technical and requirements personnel are responsible for providing all necessary data to support their recommendation to exclude a particular source and when a reduction of overall costs is cited as the reason for excluding a particular source, the findings shall include a description of the estimated reduction in overall costs and how the estimate was derived. FAR 6.202(b)(2)-(3).

Based on the information available, there is not a national defense interest in the IME contract nor is there a history of high demand for IME providers. Excluding the RRB's current IME contractor would not satisfy exceptions (B), (C), or (E). Exception (A) under § 3303 involves a determination that excluding the current contractor would result in maintaining competition in the IME marketplace and potentially lower costs associated with the procurement. It is noteworthy that the Social Security Administration (SSA) utilizes contract services for IMEs in the adjudication of disability cases under SSA jurisdiction. There is no question that the SSA disability program is much larger than the RRB's disability program. The greater demand by SSA for IME's impacts competition in the marketplace far more than the relatively few number of IMEs contracted through the RRB. It is unlikely the RRB IME contract would significantly impact either competition or cost in the overall IME marketplace.

Similarly, exception (D) would not apply to the RRB's IME contract. Exception (D) is used to ensure a continuous availability of a reliable source of supply of the service. As indicated with exception (A), SSA already performs the vast majority of IME contracted exams and SSA's

contracts already preserve a reliable source of supply of doctors performing IMEs under government contracts.

Finally, an example of exception (E) would be where only two or three pharmaceutical companies manufacture a specific vaccine. In order to guarantee that one of the companies does not stop producing the vaccine, the government could exclude the other company from bidding on a vaccine contract to make sure that both companies continue to produce the vaccine in anticipation of an epidemic breaking out where both companies will be called upon to produce the vaccine. It is critical to maintain two or three sources of supply of the vaccine, which creates the medical exigency. It is clear that exception (E) would not apply because contracted IMEs are not critical emergency medical events.

The Inspector General recommends periodic rotation in the IME contractor to reduce the likelihood of fraud in the RRB's disability program. While the FAR does not provide a fraud prevention exception per se, the most viable basis for exclusion would be that under exception (A) of § 3303, the RRB IME marketplace is separate from the SSA IME marketplace and that excluding the current contractor would result in maintaining competition in the IME marketplace and potentially the lower RRB's costs associated with the procurement. Under this theory, the Chairman as Agency head for the purpose, or his designee, would be required to make a written determination and finding in support of the decision.

As an alternative to excluding a particular source, 41 USC §3304 provides for the use of a noncompetitive procedure for procurement. Many of the same exceptions apply to using §3304 as apply when using exclusion procedures under §3303, however, §3304 also allows for the use of noncompetitive procedures when the head of the agency determines that there is a necessary public interest to use procedures other than competitive procedures and notifies Congress in writing that such a determination has been made (see 41 USC §3304(a)(7)). Use of this exception requires the head of an executive agency to make a written determination to use this authority and that the authority to make the written determination may not be delegated (see FAR 6.302-7(c). If required by the head of the agency, the contracting officer shall prepare a justification to support the determination (FAR 6.302-7(c)(3)).

Addressing the present recommendation in the context of §3304, the Chairman could make a written finding based on Congressional concern, that it is in the public interest to rotate the contract from one provider to another every three years in order to reduce the risk of fraud in the RRB IME marketplace. It would appear unlikely that Congress would object to a notice on this basis. However, in order to use §3304, an IME contract provider must be identified and willing to take the IME contract and provide these services to the RRB. Moreover, the fraudulent medical evidence in the Long Island Railroad prosecutions was not provided by physicians under the IME contract.

Finally, I note that an additional option may also be available to the RRB to fulfill the intent of the Inspector General's recommendations. As you know, the current IME contractor does not employ any of the doctors that perform the exams. Therefore, a new contractor could be awarded the contract for IME services by the RRB and that new contractor could potentially award subcontracts for the IMEs to the same individual doctors who were performing IMEs for

the current contractor. It is important to note that IME provider contractors do not directly employ doctors. Rather, providers receive requests for an IME from the RRB and then locate a doctor willing to do the IME and subcontract the IME to the individual doctor within a certain mileage radius of the disability applicant.

Consequently I suggest another method of rotating the doctors performing the exams. The next IME contract could be posted for full and open competition; however, the contract would specify that the successful offeror would be required under some protocol to rotate doctors that provide the exams under the contract. If feasible this method would both allow for full and open competition in the procurement process and ensure that the same doctors are not utilized over and over again for RRB IMEs. A contract provision requiring the rotation of doctors performing the exams would address the Inspector General's concern of fraud or collusion in the RRB's disability process while maintaining the statutorily required full and open competition for the IME provider contract. I should add however, this limitation may be subject to availability of doctors or of specialists in a particular location.

I trust this will be of assistance to you.

Attachment

UNITED STATES GOVERNMENT

MEMORANDUM

FORM G-115f (1-92)
RAILROAD RETIREMENT BOARD

January 28, 2015

L-2015-04

TO : The Board

FROM : Karl T. Blank
General Counsel

SUBJECT : Current Contractor Bids on a New Solicitation

This memorandum is in response to the request by Chairman Michael Schwartz for my advice as to whether companies (specifically QTC and/or CEL) which have current contracts with the Railroad Retirement Board may be allowed to bid on a new Disability Quality Assurance Review Contract. There are several laws and regulations which may affect this decision and this memorandum lays out the issues before the Board.

Generally, an executive agency in conducting a procurement for services shall: "(1) obtain full and open competition through the use of competitive procedures in accordance with the requirements of this division and the Federal Acquisition Regulation; and (2) use the competitive procedure or combination of competitive procedures that is best suited under the circumstances of the procurement." 41 USC §3301(a). This is true except for the provisions of sections 3303 and 3304(a) which are discussed below.

Exclusion of a Particular Source- 41 USC §3303

An executive agency may provide for the procurement of services using competitive procedures but *excluding a particular source* in very limited circumstances. The agency may do so to establish or maintain an alternative source of supply for that service if the agency head determines that to do so would—

> (A) increase or maintain competition and likely result in reduced overall cost for the procurement, or for an anticipated procurement, of the property or services;
> (B) be in the interest of national defense in having a facility (or a producer, manufacturer, or other supplier) available for furnishing the property or service in case of a national emergency or industrial mobilization;
> (C) be in the interest of national defense in establishing or maintaining an essential engineering, research, or development capability to be provided by an educational or other nonprofit institution or a Federally funded research and development center;

(D) ensure the continuous availability of a reliable source of supply of the property or service;
(E) satisfy projected needs for the property or service determined on the basis of a history of high demand for the property or service; or
(F) satisfy a critical need for medical, safety, or emergency supplies.
41 USC §3303(a)(1).

The Federal Acquisition Regulation (FAR) also states that every proposed contract action excluding sources under this provision, "shall be supported by a determination and findings (D&F) signed by the head of the agency or designee. This D&F shall not be made on a class basis." FAR 3.202(b)(1). In addition, technical and requirements personnel are responsible for providing all necessary data to support their recommendation to exclude a particular source and when a reduction of overall costs is cited as the reason for excluding a particular source, the findings shall include a description of the estimated reduction in overall costs and how the estimate was derived. FAR 3.202(b)(2)-(3).

Based on the information provided, it does not appear that excluding QTC and/or CEL would satisfy one of the provisions which would allow for exclusion of a particular source. If there is information I am unaware of and the Board finds that exclusion would satisfy one of these provisions, the Chairman would have to make a formal determination and finding supporting such a conclusion.

This statute also allows for the categorical exclusion of "other than small business concerns" in furtherance of the Small Business Act (15 USC §638). If the RRB were to use this and accompanying FAR provision, it would have to identify small businesses in the market place that have the capacity to perform the work requested, most probably resulting in delay of issuance of the solicitation.

Use of Noncompetitive Procedures- 41 USC §3304

Rather than exclude a particular source from an otherwise competitive bid, the Board may use noncompetitive procedures for obtaining bids. Again, this can only be done in limited circumstances and many of them are similar to §3303 referring to national security and critical need. But §3304 also allows for the use of noncompetitive procedures when, "the head of the executive agency (who may not delegate the authority under this paragraph): (A) determines that it is necessary in the public interest to use procedures other than competitive procedures in the particular procurement concerned; and (B) notifies Congress in writing of that determination not less than 30 days before the award of the contract." 41 USC §3304(a)(7). FAR provisions state that "a written determination to use this authority shall be made...by the head of any other executive agency. This authority may not be delegated." FAR 6.302-7(c). If required by the head of the agency, the contracting officer shall prepare a justification to support the determination. FAR 6.302-7(c)(3). Any justification for a contract awarded under this authority, regardless of dollar amount, shall be considered approved when the determination by the head of the agency is made. FAR 6.304(b).

Under this provision, the Board may go forward with a noncompetitive bid for the Disability Quality Assurance Review Contract if the Chairman determines that it is necessary in the public interest to use procedures other than competitive procedure for the contract. He must also notify Congress in writing of such a determination not less than 30 days prior to the awarding of the contract and may request that the Chief Contracting Officer prepare justification to support the determination. Again, I do not have sufficient information regarding the solicitation to give conclusive advice as to whether the Chairman should exercise this provision but if the Board makes the determination to go forward with noncompetitive procedures, the above-referenced process must be followed.

It should be noted that if the RRB were to go forward with a non-competitive bid, it would result in a single source procurement and the Bureau of Acquisition Management would have to determine what the appropriate source would be. If the Board is concerned with the appearance of a conflict of interest, this single source procurement may not accomplish this goal.

Conflict of Interest

The above-referenced authorities are regarding the preclusion of companies from the bidding process. Once bids are solicited, the FAR also states that there is an underlying principle of preventing the existence of conflicting roles that might bias a contractor's judgment. FAR 9.505(a). Under the FAR, the contracting officer has discretion to make proposals for avoiding or neutralizing conflicts of interest and such concerns may be addressed in the solicitation, negotiations, or in the contract clauses. In addition, the contracting officer shall award the contract to the apparent successful offeror unless a conflict of interest is determined to exist that cannot be avoided or mitigated. FAR 9.504(e).

Specifically in the situation at hand, contracts for the evaluation of offers for services shall not be awarded to a contractor that will evaluate its own services without proper safeguards to ensure objectivity to protect the Government's interests. FAR 9.505-3. If the Board believes that QTC and/or CEL may bid on the solicitation and that a conflict of interest may exist at that time, a solicitation provision addressing this issue should be considered. For example, in the Consultative Medical Opinion Contract that was awarded to CEL, the following Conflict of Interest provisions are included:

Conflict of Interest

a. Contracts involving advisory and assistance services shall not generally be awarded to contractors that would evaluate or otherwise advise the Government concerning their own products or activities without proper safeguards to ensure objectivity and protect the Government's interests. The Contracting Officer has determined that this particular acquisition involves a significant potential organizational conflict of interest and that Federal Acquisition Regulation (FAR) Subpart 9.5 shall apply to this procurement action.

b. This solicitation requires the successful offeror to -

1. Review medical evidence received in support of disability-based claims;

2. Consider residual functional capacity (RFC) assessments from treating or consulting physicians; and

3. Prepare advisory medical opinions based on that review.

Medical evidence may be obtained from many sources including the providers of disability examination services under the Board's current Contract No.RRB08C003 with QTC Medical Services, Inc. The participation of the providers of medical evidence could substantially conflict with the Contractor's duties under the contract resulting from this solicitation.

c. Offerors who have provided medical evidence or RFC assessments (as certified under Section V.R.) shall include with their business proposal a discussion of the potential conflict of interest participation under this acquisition could create. The discussion must include a comprehensively supported statement as to whether the potential for a conflict exists and, if so, a clear and compelling explanation as to how the offeror would be able to furnish impartial assistance or advice to the Government and how the offeror's objectivity in performing contract work would not be otherwise impaired.

As you can see, the potential conflict of interest between consultative opinions and consultative medical exams was identified in the solicitation and addressed in the contract through conflict of interest provisions. Similar language should be considered for this solicitation and final award.