

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

A. Zuckerman
PL-2

7965

FILE: B-188627

DATE: October 10, 1978

MATTER OF: Precision Analytical Laboratories

DIGEST:

Where bid price is regarded as unreasonably high, agency's cancellation of invitation for bid was not prejudicial to bidder since bidder would not have been entitled to award in any event.

Precision Analytical Laboratories, Inc. (PAL), protests the cancellation of invitation for bids (IFB) 0117-AA-65-0-7-BM (0117) issued by the Government of the District of Columbia (DC), and the subsequent re-advertisement of the requirement under the DC "Minority Contracting Act of 1976," DC Law 1-95 (1977) (the Act). The procurement is for onsite urinalysis (drug detection) laboratory services for the District of Columbia Superior Court. PAL complains that DC has been practicing "gross discrimination against [the] Company for over two years" by preventing the company from obtaining the contract.

As a basis for its claim of discrimination, PAL points to the history of the procurement for these services and its prior protests filed with this Office. The procurement, in tandem with a procurement for similar (but offsite) services for the DC Narcotics Treatment Administrator (NTA) (now known as the Substance Abuse Administration) has a long and involved history which, insofar as it is germane to this protest, we will synopsize below.

On December 15, 1975, DC issued IFB 0151-AA-65-0-6-BM (0151) for the procurement of offsite urinalysis services for NTA, and on January 6, 1976, it issued IFB 0357-AA-65-0-6-BM (0357) for similar onsite ser-

VICES for the Superior Court (court). PAL was the incumbent contractor on the NTA contract, and B&W Stat Laboratory, Inc. (B&W) was the incumbent on the court contract. Both invitations contained a requirement for preaward evaluation testing to determine the capability of a prospective contractor to identify certain drugs.

On January 19, 1976, bids for 0151 (NTA) were received with the following result:

Bidder A	\$183,830.40
Bidder B	\$183,924.00
B&W	\$214,250.40
PAL	\$224,359.20

Thereafter, bidder A, bidder B and B&W failed the preaward evaluation test with the result that the then current contract with PAL was extended to cover DC's needs. PAL, however, was not tested under the solicitation.

On February 3, 1976, IFB 0357 (court) opened with the following result:

B&W	\$127,400.00
Bidder A	\$135,200.00
PAL	\$166,972.00

PAL protested any award to B&W claiming a conflict of interest existed in that a DC employee was asserted to be a director of B&W. This allegation was referred by DC to the District of Columbia Board of Elections and Ethics for investigation, and PAL was so advised by letter dated March 4, 1976. Both B&W and Bidder A failed their preaward tests, and PAL was not tested. The contract with B&W (the then current contractor) was extended to cover DC's needs. DC claimed that a freeze on travel funds prevented it from testing PAL (located in North Miami, Florida).

In August 1976, the DC Department of Human Resources advised the procurement office that the specifications for both solicitations were to be changed, and as a result, all bidders were advised that the IFBs would be canceled and the requirements

readvertised. PAL subsequently protested the cancellations.

On November 16, 1976, IFB 0117-AA-65-0-7-BM (0117) was issued as a substitute for the court requirement (0357), and 0051-AA-65-0-7-BM (0051) as a substitute for 0151 (NTA). Thereafter, the DC Board of Elections and Ethics rendered its opinion that no conflict of interest existed with B&W. The specification changes for the NTA contract were changed to:

1. Require the contractor to obtain a "signed statement of the date, time and number of samples collected from the employee of the District submitting the samples" to the contractor and to "submit these statements to the District within one working day." (The previous requirement was for submittal of these statements "within 48 hours of sample collection.")
2. Increase the total estimated quantities.
3. Increase the daily quantities from 600 to 900 specimens per day and the maximum capability to test from 1200 to 1400 specimens per day.
4. Change the "turnaround time" definition for collections made on Thursday and Friday.
5. Require the contractor to return samples to the District upon request (and at no cost) for retesting to verify accuracy.

Some of these changes would tend to make performance by an "out of town" contractor such as PAL more difficult and more costly.

Changes to the court requirement included:

1. The addition of a requirement to maintain an offsite facility in the District.
2. A decrease in the number of daily samples.

3. Reduction in operating time for the on-site laboratory.
4. Removal of the requirement to detect one previously required drug.
5. Require contractor to perform services at offsite facility "if onsite facility goes down through no fault of contractor" with an additional 1/2 hour allowed as "turnaround" time in that event.

Again, these changes would obviously increase the costs of performance for an out of town laboratory as it would be required to establish an "in-town" facility as a standby, while a local laboratory would obviously not have to bear these costs. The District never explained why these "cogent and compelling" changes were required, but after a series of meetings, it was agreed that DC would reinstate the original NTA invitation (0151), test and evaluate PAL thereunder, and cancel the substitute invitation (0051). As a result, PAL withdrew its protests, was tested and was subsequently awarded the NTA contract.

Bids for the court services under 0117 opened on January 21, 1977, with the following result as compared with the original bids received one year earlier:

Qual-Med, Inc.	\$145,460	--
B&W	\$146,005	\$127,400 (original)
PAL	\$344,944	\$166,972 (original)

Both B&W and Qual-Med subsequently protested DC's post bid opening actions, i.e., rejecting B&W's bid as nonresponsive and refusing to retest Qual-Med after it had failed its preaward qualification test some months earlier. These protests were sustained by our decision B-188627, August 26, 1977, 77-2 CPD 151; the District's request for reconsideration was denied by this Office on November 9, 1977. Again PAL was not tested, as its bid was determined to be "out of range of the District's available funds."

During the course of the protests the Superior Court's new building reached the stage of completion where it became apparent that the site of performance

would change, and D.C. Law 1-95 became effective. We were advised by DC that for those reasons and because almost one year had elapsed since bid opening, DC intended to cancel the second solicitation and readvertise the requirement under amended specifications (the site change) and DC Law 1-95. It is this latest action that is the subject of the protest.

DC Law 1-95 establishes a District of Columbia Minority Business Opportunity Commission, whose purpose is to "foster local minority business opportunities consistent with ensuring that the interests of the District of Columbia Government are protected." (sec. 4(a)) (Emphasis added.) Among other things, the Act establishes certain goals for minority contracting; provides for "sheltered market" procurements, e.g., set-asides restricted to minority business participation only; authorizes the Commission to certify prospective contractors as eligible for participation in "sheltered market" procurements; and establishes certain criteria for that certification. Pursuant to that authority, DC set aside this latest solicitation (No. 0339-AA-65-0-F-BM), and B&W and one other firm were certified as eligible for participation.

B&W was the sole bidder under the third (set-aside) solicitation, although as indicated above, one other firm was certified as an eligible minority contractor for the bid. B&W has yet to pass the preaward qualification test, and no contract has been awarded for these services. B&W has, however, been performing, first under extensions of its original contract and then on the basis of individual purchase orders issued without competition.

At first blush it would appear that PAL has a legitimate complaint with respect to DC's failure to award it a contract under 0117 and instead to cancel the invitation as both of the lower bidders failed the preaward tests. However, the record does not persuade us that PAL would have been entitled to award of the contract in any event. In this regard, Paragraph 12 of the "Instructions to Bidders" contained in the IFB provides in pertinent part that:

"The contract will be awarded to the lowest responsible bidder complying with all of the provisions of the

Invitation, provided the bid price is reasonable and it is in the interest of the District to accept it. * * *
(Emphasis added.)

We believe that the District's finding that PAL's \$344,944 bid was "outside the range of the District's available funds" evinces a determination by DC that PAL's bid price was unreasonable, particularly when compared to its earlier bid of \$166,972 for essentially the same services. Although PAL implies its higher bid price resulted from the requirement to maintain a local offsite facility, DC could nonetheless properly conclude PAL's bid price was unreasonably high. Thus, DC's cancellation of the invitation was not, in our opinion, prejudicial to PAL. See, e.g., The Wessel Company, B-189629, August 26, 1977, 77-2 CPD 152.

Moreover, the events of which PAL now again complains regarding the initial IFB (0357) for these services--such as its failure to be tested under that invitation--are not matters we will consider since PAL withdrew its original protest upon DC's agreement to reinstate the original NTA solicitation and test PAL thereunder, an agreement adhered to by DC.

Although we find no legal basis to sustain this protest, we question why DC has continued to obtain these services for the past several years from B&W on a non-competitive basis when B&W has been unable to pass the qualifying tests deemed essential for award on the competitive solicitations. In view of the record we are, by separate letter today, calling this procurement to the attention of the Mayor of the District of Columbia and are making recommendations to him. In addition, we plan to continue our audit investigation of the circumstances surrounding the procurement.

R. F. K. 11/11/77
Deputy Comptroller General
of the United States