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DECISION



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

FILE: B-209660

DATE: June 1, 1983

MATTER OF: Philadelphia Biologics Center

DIGEST:

1. Where the protester alleges that the solicitation's specification for a gauze bandage, which requires the bandage to have a woven edge, is unduly restrictive of competition, the contracting agency is required to make a prima facie case that the specification is related to its minimum needs. However, once the agency has made a prima facie case, the protester must make a clear showing that the agency's determination has no reasonable basis. A mere difference of opinion with the agency's technical judgment, as is the case here, does not satisfy the protester's burden of proof.
2. Sole-source negotiations were proper since the legitimate needs of the Government can only be satisfied by a single source; the agency did not have to compromise those needs in order to obtain competition.
3. GAO has no basis to disregard the substantive information in the agency's administrative report merely because the report was not submitted within GAO guidelines for intermediate case development; moreover, in view of GAO's conclusion, the protester was not prejudiced by the lateness of the report.

Philadelphia Biologics Center (PBC) protests a sole-source award to Miles Pharmaceuticals (Miles) under request for proposals (RFP) No. M1-Q9-83 issued by the Veterans Administration (VA) Marketing Center, Hines, Illinois.

We deny the protest.

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The RFP solicited an offer from Miles for 23,000 rolls of "bandage, gauze, calamine-gelatin-glycerin-zinc oxide" with a woven edge. Miles manufactures this item under the name Dome Paste. PBC argues that the RFP's specification is restrictive and that we should direct the VA to use a specification which will allow greater competition.

According to PBC, it is distributor for a product manufactured by Graham-Field Surgical Co., Inc. (Graham-Field), which meets all military standards, has Food and Drug Administration (FDA) approval, and has been found by an independent testing laboratory to compare favorably with Dome Paste; however, the VA refuses to consider the Graham-Field product and insists that "this item must be procured in this restrictive manner because 'the doctors request this brand.'" PBC also states that the VA has justified its restrictive specification on the grounds that the last time the VA conducted a competitive procurement, it only received a bid from one supplier and that it was unaware that competition was available. In PBC's opinion, these reasons do not justify the restrictive specification or the sole-source award to Miles.

In rebuttal, the VA argues that PBC has completely misunderstood its actions. The key point, according to the VA, is that Dome Paste has a woven edge. The woven edge is significant because the bandage is to be used on open wounds and the woven edge reduces the danger of loose threads from the bandage getting into the wound. The Graham-Field bandage which PBC offers is a cut gauze bandage which has the potential for leaving loose threads in the wound which become foreign objects and may be a medical concern.

According to the VA, its doctors request woven edge bandages for medical reasons and, as far as the VA has been able to determine, only Miles' Dome Paste has this feature. The VA notes that Dome Paste has the national stock number (NSN) 6510-00-450-5605, while the cut gauze bandage which PBC can supply is listed under NSN 6510-01-047-0115. The VA points out that it also purchases cut gauze bandages and that it has tried to procure this type of bandage on a competitive basis in the past, but that it only received one bid--from Beiersdorf, Inc. After that, the VA has conducted sole-source negotiations with Beiersdorf for its cut gauze bandages because it did not believe that there were any other sources. Now that it is aware of PBC's interest, the VA invites the protester to compete in the VA's future procurements for this item.

However, in regard to the woven edge bandage, the VA believes that the specification reflects its minimum needs and that, therefore, it is justified in negotiating with the only supplier--Miles--on a sole-source basis. In effect, the VA argues that it does not have to compromise its minimum needs, as PBC appears to argue, by accepting cut gauze bandages in lieu of the woven edge type.

We agree. It is well recognized that the contracting agency has the primary responsibility for determining its minimum needs and for drafting specifications which reflect those needs. Romar Consultants, Inc., B-206489, October 15, 1982, 82-2 CPD 339. This is because the agency is in the best position to ascertain its needs due to familiarity with particular requirements and the environment in which the product will be used. Polymer Chemicals, Inc., B-207396, September 21, 1982, 82-2 CPD 250. Our Office will not question an agency's determination of its minimum needs, or the technical judgment forming the basis for that determination unless it is clearly shown to be unreasonable. Municipal & Industrial Pipe Services, Ltd., B-204595, January 18, 1982, 82-1 CPD 39.

However, when a protester challenges a specification as unduly restrictive of competition, the burden is on the procuring agency to establish prima facie support for its contention that the restrictions it imposes are needed to meet its minimum needs. But once the agency establishes this prima facie support, the burden is then on the protester to show that the requirements complained of are clearly unreasonable. Walter Kidde, Division of Kidde, Inc., B-204734, June 7, 1982, 82-1 CPD 539.

In our opinion, the VA has established prima facie support for a specification requiring a woven edge bandage. As noted above, the VA doctors find such bandage necessary in order to reduce the danger of loose threads getting into an open wound which, if it occurs, can apparently cause the wound to become infected. In light of this, the burden of proof therefore shifts back to the protester to show that this requirement is clearly unreasonable.

PBC has not made such a showing. It appears that PBC simply believes that its cut gauze bandage is just as safe as Miles' woven edge type. This does not show that the VA's requirement is unreasonable, but only that PBC disagrees with the VA's technical judgment. However, we have held that a mere difference of opinion between the protester and the agency over the agency's technical conclusions does not

invalidate those conclusions. Stacor Corporation, B-204364.2, January 8, 1982, 82-1 CPD 24. PBC therefore has failed to carry its burden of proof on this issue.

Based on the foregoing, we conclude that the VA specification for RFP No. M1-Q9-83 was not unduly restrictive since it reflected the agency's minimum needs and further note that, where the legitimate needs of the Government can be satisfied by only a single source, the law does not require that those needs be compromised in order to obtain competition. Lanier Business Products, Inc.--Reconsideration, B-193693, August 3, 1979, 79-2 CPD 78. Therefore, there was nothing improper with the VA's sole-source negotiations with Miles since that firm is the only known source for a woven edge bandage.

Finally, PBC complains that the VA administrative report in response to this protest was not issued within the timeframe specified in our Bid Protest Procedures. Under our Procedures, we request an agency to submit a report on a bid protest as expeditiously as possible--generally within 25 working days. 4 C.F.R. § 21.3(c) (1983). Nevertheless, we have held that the late receipt of an agency report does not provide a basis for disregarding the substantive information in the report or for sustaining the protest on an inadequate record. Armidir, Ltd., B-205890, July 27, 1982, 82-2 CPD 83. Therefore, even though the VA did not issue its report within 25 working days, it was proper for us to consider the information contained in the report in reaching our decision. Moreover, in view of our conclusion that the specification was not restrictive, PBC was not prejudiced in any way by the lateness of the report.

Protest denied.

for 
Comptroller General
of the United States