

Kozior



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Abbott Laboratories

File: B-230220

Date: May 18, 1988

DIGEST

Although the Competition in Contracting Act of 1984 mandates that agencies obtain "full and open competition" in their procurements through the use of competitive procedures, the proposed sole-source award of a contract is not objectionable where the contracting agency reasonably determined that only one source could supply the desired product, the protester has not shown that the solicitation's technical requirements are unreasonable, and the protester is given a subsequent sole-source award for a portion of the requirements to test its offered products for possible future competitive procurements.

DECISION

Abbott Laboratories protests the proposed award of a sole-source contract to Sandoz Crop Protection, Inc., under request for proposals (RFP) No. R6-88-480, issued by the Forest Service. The procurement is for the acquisition of Thuricide 32LV, an insecticide manufactured by Sandoz to be used by region 6 of the Forest Service to help control western spruce budworm infestations in the Pacific Northwest. Abbott complains that the proposed sole-source action improperly denies the firm its right to full and open competition because its own insecticide products are equivalent to the Sandoz insecticide for purposes of meeting the Forest Service's budworm control requirements.

We deny the protest.

BACKGROUND

On October 7, 1987, the Forest Service advertised in the Commerce Business Daily (CBD) seeking sources for aqueous (water-based) formulations of Bacillus Thuringiensis (BT) insecticide meeting certain conditions, one of which was that it could be applied at the rate of 16 Billion International Units (BIU) undiluted and sprayed at the rate of 64 ounces per acre. On December 18, 1987, the

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procurement was synopsisized in the CBD, giving notice that the Forest Service intended to negotiate on a sole-source basis with Sandoz for the purchase of Thuricide 32LV. The synopsis and the subsequent RFP identified essentially the following salient characteristics of this product: (1) water-based formulation of BT insecticide; (2) registered with the United States Environmental Protection Agency for use in aerial applications against the western spruce budworm; and (3) applicable in undiluted form at a rate of 16 BIUs in 64 ounces per acre.^{1/}

Abbott met with Forest Service representatives on numerous occasions throughout January 1988, to discuss the selection of Thuricide 32LV and the proposed sole-source award to Sandoz. Abbott repeatedly presented its arguments for the use of its water-based or oil-based insecticides, claiming that although none of its products met all of the stated technical requirements for selection, its insecticides would be effective in the budworm suppression project. To answer concerns raised by the Forest Service about potential handling and spraying problems, which had previously been encountered with Abbott's oil-based spray, Abbott supplied the Forest Service with data and recommendations for spray application of its products. The Forest Service again reviewed Abbott's proposal, including the special handling recommendations, but informed Abbott on January 29 that it had decided to procure the Thuricide 32LV insecticide from Sandoz on a sole-source basis for approximately 75 percent of the acreage (about 700,000 acres) in need of spraying. The Forest Service then proposed a sole-source award to Abbott for the remaining approximate 25 percent of the acreage (about 200,000 acres) in order to test its water-based and oil-based formulations for possible future competitive procurements.

A written justification for the use of other than full and open competition was approved on February 4, 1988, prior to negotiations, to purchase approximately 300,000 gallons of Thuricide 32LV from Sandoz. The justification provided that only one responsible source was known to supply the required product and that no other supplies would satisfy the agency's requirements. See 41 U.S.C. § 253(c)(1) (Supp. III 1985). The justification further provided that the Forest Service planned to test one of Abbott's water-based insecticides (Dipel 6AF), one of its oil-based insecticides

^{1/} The protester does not dispute that only Sandoz produces a water-based insecticide that is applicable in undiluted form at a rate of 16 BIUs in 64 ounces per acre. Rather, the protester asserts that these salient characteristics overstate the agency's minimum needs.

(Dipel 6L) and another water-based Sandoz product (Thuricide 48LV) for their effectiveness in controlling western spruce budworm in an attempt to increase competition for BT formulations in future years. This protest followed. In light of the severe time constraints on this procurement due to the short period of time available to treat the infested areas and the threatening consequences of delays, the Forest Service issued on March 10, 1988, a written determination of urgent and compelling circumstances necessitating the award of the contract to Sandoz notwithstanding the pendency of this protest.

ANALYSIS

The Forest Service justifies its sole-source action under the authority of the Competition in Contracting Act of 1984 (CICA), 41 U.S.C. § 253(c)(1), which permits an agency to use noncompetitive procedures where there is only one responsible source that can satisfy the government's needs. This statutory provision is implemented by the Federal Acquisition Regulation § 6.302-1 (FAC 84-28).

Because the overriding mandate of CICA is for "full and open competition" in government procurements, 41 U.S.C. § 253(a), this Office will closely scrutinize sole-source procurements under the exception to that mandate provided by 41 U.S.C. § 253(c)(1). C&S Antennas, Inc., B-224549, Feb. 13, 1987, 66 Comp. Gen. _____ (1987), 87-1 CPD ¶ 161. Where, however, the agency has substantially complied with the procedural requirements of CICA for the written justification for, and higher-level approval of, the contemplated sole-source action and publication of the requisite CBD notice to solicit offers, we will not object to the sole-source award unless it is shown that there is no reasonable basis for it. Id.

Here, the Forest Service has complied with the statutory procedural requirements under CICA calling for the written justification for, and higher-level approval of, the contemplated sole-source action and publication of the requisite (CBD) notice. The propriety of the agency's decision to procure these services on a sole-source basis therefore rests on whether or not it was reasonable to conclude that only one source was available. As stated above, the Forest Service contends, and Abbott admits, that only Sandoz can meet the solicitation's technical specifications (salient characteristics) concerning concentration (16 BIUs) and rate of application (64 ounces per acre). Abbott explains that since its water-based product is more concentrated, for it to be applied at 16 BIUs, its rate of application would be 43 ounces per acre, which Abbott contends would reach an equally effective

level of budworm control. Abbott therefore contends that the solicitation's required rate of 64 ounces per acre is unduly restrictive of competition since only one contractor, Sandoz, is capable of meeting the specification. Abbott also contends that the Forest Service has improperly limited the procurement to only a water-based spray. Accordingly, since admittedly only Sandoz can meet the specifications, the sole-source award to Sandoz must be viewed as proper unless the specifications at issue are unduly restrictive of competition.

A protester contending that a solicitation requirement is unduly restrictive has a heavy burden of proof. The contracting agency has broad discretion in determining its minimum needs and the best methods of accommodating those needs. The Trane Co., B-216449, Mar. 13, 1985, 85-1 CPD ¶ 306. Where, as here, a protester challenges a specification as unduly restrictive of competition, the initial 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. Once the agency establishes prima facie support, the burden is then on the protester to show that the requirements complained of are clearly unreasonable. Polymembrane Systems, Inc., B-213060, Mar. 27, 1984, 84-1 CPD ¶ 354. The fact that not every potential competitor is able to meet a specification demonstrates no impropriety where the specification reflects the agency's minimum needs. See Gerber Scientific Instrument Co., B-197265, Apr. 8, 1980, 80-1 CPD ¶ 263.

In our view, the Forest Service has presented prima facie support for its position and Abbott has not demonstrated that the agency's requirement for an aqueous formulation of BT applicable at 16 BIUs at 64 ounces per acre is unreasonable. The record clearly indicates that the Forest Service consulted private insecticide producers, including Sandoz and Abbott, its own technical experts, and relied on its previous budworm spraying experience in formulating its specifications and insecticide criteria. Further, the record clearly shows that a determination of what type and concentration of insecticide to use in a given forest environment, such as the Pacific Northwest, is, at best, an inexact science. In determining the appropriate insecticide requirement, countless technical and environmental factors have to be taken into consideration and qualified experts can reasonably disagree. For example, the Forest Services here decided to use a water-based formulation because the viscosities of oil formulations change substantially in the range of temperatures under which application is conducted in the Pacific Northwest region--32 degrees to 70 degrees Fahrenheit. At low temperatures, oil formulations sometimes exhibit viscosity "comparable to honey" and cannot

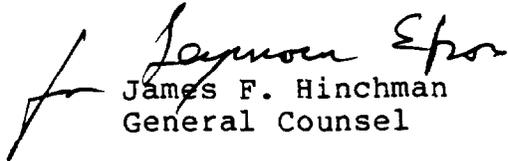
effectively be applied unless the oil-based formulation is heated. In this regard, the Forest Service's data showed that in many locations specified, the minimum June temperature (the time applied) is less than 40 degrees 18 percent of the time. The protester argues that the Forest Service's concerns are "exaggerated," that the oil formulations, with proper equipment and storage, can be kept at an appropriate temperature, and no significant changes in flow rate would be experienced. In response, the Forest Services states that insulation material, and certain equipment, may not be available to properly store and apply the oil formulations at the proper temperature.

As another example, concerning the rate of application, the record shows that the Forest Service used its best judgment based on available testing data (which are by no means conclusive) as to the appropriate application rate. Although neither Sandoz's Thuricide 32LV nor Abbott's Dipel 6AF have been exhaustively tested on large budworm spray projects at these concentration and application rate levels, the record indicates that Abbott's water-based Dipel 6AF and Dipel 8AF products have not been tested at all undiluted at 16 BIUs at 64 ounces per acre, whereas Sandoz's Thuricide 32LV product has been tested at 15.3 BIUs at 64 ounces per acre at a dilution ratio of 10 parts BT to 1 part water with successful results. The Forest Service experts, in their professional judgment, determined that based on previous experience, 64 ounces per acre provided excellent control of western spruce budworm and lower volumes gave poorer results, and that its present requirement for 64 ounce applications would be best effective to meet its needs. Abbott disagrees.

Both parties have submitted extensive technical literature in support of their respective positions. Based on our review of the record and the technical determinations involved, we are unable to conclude that the Forest Service's decision is unreasonable. In this regard, a mere difference of technical opinion, which we think is present here, does not invalidate the agency's conclusions. See Syva Co., B-218359.2, Aug. 22, 1985, 85-2 CPD ¶ 210. In our view, Abbott has failed to meet its burden of showing that the specifications do not reflect the agency's needs and that the agency's decision to restrict the procurement to Sandoz, the only known supplier of a product meeting the specifications, was clearly unreasonable. Yet, we recognize that even the Forest Service views Abbott as a potential competitor for this requirement in the future, and that its product may meet the agency's minimum needs after appropriate testing. We expect that the Forest Service's comparative testing, through the subsequent sole-source award to the protester, will be impartial and as

comprehensive as the circumstances allow, and that, if the results are ultimately favorable to Abbott, that the Forest Service's future BT requirements for western spruce budworm suppression shall be acquired through competitive procurement.

The protest is denied.

 James F. Hinchman
General Counsel