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TRANS

DECISION

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

FILE: B-195391 DATE: March 10, 1980

MATTER OF: B&W Stat Laboratory, Inc.

DIGEST:

1. Where contract awarded on basis of inconclusive but not necessarily incorrect preaward tests and only four months remain before expiration of contract, recommendation made that contract option not be exercised and requirement be recompeted using test samples prepared in manner to remove doubt of test validity.

2. Protest over specification first filed with agency is untimely when filed more than 10 days after bid opening which constituted initial adverse agency action.

3. Where IFB states general licensing requirement, lack of particular license is not ban to award of contract.

4. Protester has not sustained burden of proof by allegation of misconduct on part of Government official since mere suspicion of wrongdoing is insufficient basis for review.

B&W Stat Laboratory, Inc. (B&W) protests against award of a contract to Precision Analytical Laboratories, Inc. (PAL) under invitation for bids (IFB) 0074-AA-65-0-9-BM (0074), issued by the District of Columbia Government (DC) for on-site laboratory urinalysis (drug detection) services for the District of Columbia Superior Court. Two bids were received. At bid opening on January 24, 1979, it was determined that PAL submitted the low bid of $75,977.20, while B&W bid $154,934.

Although a number of questions have been raised by the protester, we believe that the gravamen of

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the protest relates to the effectiveness of the DC preaward testing procedures. In this respect, we point out that this is the latest in series of protests and court actions (dating back to 1975) over the award of this and related contracts for these laboratory services brought for the most part either by PAL or by B&W, depending on which firm was found by DC to be eligible for award. Our decision Precision Analytical Laboratories, B-188627, October 10, 1978, 78-2 CPD 262, discusses some of these protests. In addition, the protest raises certain subsidiary issues regarding the specifications, the alleged violation of certain licensing requirements, an alleged "buy-in" and asserted improper conduct by a DC official.

SUBSIDIARY ISSUES

First, B&W contends that the IFB's specifications do not satisfy DC's requirements. In this respect, the record contains a letter of January 12, 1979, to DC's Director of Substance Abuse Administration in which B&W complained that the IFB's specifications did not provide for the detection of a sufficient number of drugs.

When a protest is initially filed with the procuring agency in a timely manner, Section 20.2(a) of our bid protest procedures, 4 C.F.R. 20.2(a) (1979), provides that GAO will consider a subsequent protest if it is filed within 10 days of formal notification of or actual or constructive knowledge of initial adverse agency action. The crucial date here is January 24, 1979, the date of bid opening, since on that date B&W had knowledge that DC had not taken action with respect to its January 12 protest. Bid opening here constituted the initial adverse agency action within the meaning of Section 20.2(a), and B&W had 10 days from that date to file a subsequent protest with our Office. The protest was filed on July 9, 1979, well beyond the 10-day limit. Picker Corporation; Ohio-Nuclear, Inc., B-192565, January 19, 1979,

79-1 CPD 31. Moreover, even if the January 12 letter cannot be considered a protest, this issue is still untimely since it is based on an alleged impropriety in the solicitation which was apparent prior to bid opening and thus, to be considered, it must have been filed prior to the time of bid opening. 4 CFR 20.2(b)(1).

B&W further alleges that PAL has been operating its on-site laboratory since August 20, 1979, in violation of Federal Law in that the Department of Health, Education and Welfare has not issued a license to PAL for the DC laboratory, as required by the Clinical Laboratory Improvement Act of 1967 (CLIA), 42 U.S.C. 263a (1976). B&W contends that such operation is not in compliance with paragraph 10 of the IFB's Special Conditions, which states:

> "10. PERFORMANCE. Performance under the scope of this contract shall be in accordance with good laboratory procedures and applicable Federal, State and Local Law regulations, including certifications, licenses and permits as required by the Bureau of Narcotics and Dangerous Drugs, Department of Justice, Food and Drug Administration, Department of Health, Education and Welfare, and any other Federal, State or Local Agency which would have jurisdiction over any area of performance under this contract."

In this respect, we have recognized a distinction between a general requirement that a bidder or contractor be in compliance with any applicable licensing or permit requirements and a solicitation requirement that a bidder have a particular license. In the latter case, the requirement is one specifically established for the procurement and compliance therewith is a matter of bidder responsibility, while in the former case, a bidder's failure to possess a particular license or permit is not a ban to award, since the need

of a license to perform the contract is a matter between the bidder and the licensing authority. Aetna Ambulance Service, Inc., G&L Ambulance Service, B-190187, March 31, 1978, 78-1 CPD 258.

In our view, this clause is a general licensing requirement and merely places responsibility for obtaining any licenses which may be needed upon the contractor. Under these circumstances, the determination of whether a license or permit has been obtained has no bearing on the award of the contract or the responsibility of the bidder.

B&W's allegation of misconduct is based essentially on what it perceives were the motives of the DC chemist in the preparation of the various urine samples for both the PAL and the B&W tests, and the conduct of those tests. It claims, for example, that the firms were not provided identical samples for testing purposes, yet it has not shown that this was the result of any deliberate attempt by the chemist to assist PAL or that PAL derived any benefit as a result. It also asserts that no unbiased observer was present at the PAL tests, implying but not showing to our satisfaction that the chemist was biased in PAL's favor. There are other similar unsupported allegations, none of which in our view are of any evidentiary value to support an assertion of misconduct. In this connection we point out that a protester has the burden of affirmatively proving its case, and in our opinion the record does not indicate that B&W has met this burden. The mere suspicion of wrongdoing presents an insufficient basis for a review of these charges in the context of a bid protest. Courier - Citizen Company, B-192899, May 9, 1979, 79-1 CPD 323. We therefore find no merit to this allegation.

B&W also asserts that because of the wide difference in dollar amounts between PAL's bid of $75,977.20 and B&W's bid of $154,934, "it seemed like PAL was trying to buy their way into the contract." The possibility of a buy-in is not a proper basis upon which to challenge the validity of a contract award, Mars Signal Light Company, B-193942, March 7, 1979, 79-1 CPD 164, since the

proper rejection of a bid as extremely low requires a determination that the bidder is nonresponsible. Futronics Industries, Inc., B-185896, March 10, 1976, 76-1 CPD 169. Here, an affirmative determination of PAL's responsibility was made.

In this regard, this Office does not review protests against affirmative determinations of responsibility unless either fraud is shown on the part of procuring officials or the solicitation contains definitive responsibility criteria which allegedly have not been met. Consolidated Elevator Company, B-190929, March 3, 1978, 78-1 CPD 166. In view of our discussion above on the alleged misconduct issue and our findings regarding the preaward testing question, infra, we find no merit to this allegation.

Preaward Evaluation Testing

As a prerequisite to the award of a contract, the IFB requires prospective contractors to pass certain preaward drug detection tests by analyzing urine samples specially prepared for this purpose by the DC chemist. These samples are "spiked" after collection by the controlled addition of various chemicals assumed to be capable of producing specific levels of a particular drug per milliliter of urine contained in each sample. A prospective contractor's ability to pass these tests is based on its performance in detecting and identifying these drugs. For example, the IFB states:

> "Of every 10 samples containing at least 1.0 mcg. total morphine/ml., at least 9 shall be reported to contain morphine."

In this regard, B&W contends that the PAL test samples did not conform to the IFB because the morphine content in the test samples were below the 1.0 mcg/mil level specified in the IFB. B&W alleges that the drug detection method (EMIT) used by PAL during preaward testing was incapable of detecting and identifying the

spikes at the low levels contained in the samples furnished by DC, and that the reason for the sample deficiency was the alleged failure of DC's chemist to follow recognized clinical quality control standards in the preparation of the samples.

After this present dispute developed, DC requested that the Armed Forces Institute of Pathology (AFIP) analyze the samples to verify morphine content. Although it is not clear from the record, we presume that the samples sent to AFIP were identical to those tested by PAL and B&W, since the results of these tests would be meaningless with respect to the present controversy if they were not. Based on that assumption, it is clear that none of the samples tested by AFIP contained the 1.0 mcg. morphine/ml. supposedly present in the morphine samples. Moreover, of the 9 PAL samples tested, 4 appear to be below the detectable levels the EMIT methodology (used by PAL & B&W) was supposedly capable of identifying. Thus, based on the AFIP test results B&W contends that DC could not have made a valid determination of PAL's responsibility. We do not fully agree.

In answer to B&W's first contention, it is our view that spiking the samples with drug levels lower than the minimum specification requirement did not per se prevent PAL from properly identifying the drugs in those samples. Thus to the extent the samples were properly reported, we do not believe that the failure of those samples to contain the minimum levels specified in the IFB negates the purpose of those tests--to test the bidders' ability to perform. Similarly, to the extent the lower drug levels may have contributed to B&W's inability to pass, we point out that as the high bidder, it was not entitled to award and therefore was not prejudiced by these deficiencies. We therefore find no merit to this contention.

We also do not believe that the AFIP analysis can be taken as conclusive evidence that PAL improperly identified samples as containing morphine merely because

the AFIP results indicated drug levels below those normally detectable by the EMIT method. In this respect we point out the AFIP and the PAL analyses were performed by different laboratory methods--gas chromatography in the case of AFIP and EMIT in PAL's case. According to AFIP the two methods could well result in different findings and depending on the know-how of the technician, it is possible that the EMIT method could properly detect morphine in samples where gas chromatography would indicate them to contain the drug at levels below those normally detectable by EMIT.

Nonetheless, the record indicates to us that the manner in which the samples were prepared may be suspect. For example, it appears that DC did not independently verify the drug content of these samples after "spiking" by laboratory analysis, so that it did not actually know what drug levels could reasonably be expected to be detected by the systems used by the bidders before the preaward qualification tests were run. In this respect, AFIP has advised us that the urine samples themselves could contain substances which would react with the chemicals used in the EMIT method to indicate drug content where none was actually present, i.e., the tests would indicate "false" positive test results. We therefore believe that while the PAL test results may not necessarily be considered to be incorrect, they may be inconclusive because of the uncertain nature of the samples used for testing. We therefore agree with B&W that the laboratory procedures used by DC in the preparation of these samples should be revised. We believe it is essential that DC prepare these preaward samples in such a manner as to remove any further doubt as to the validity of its testing procedures, and we are so advising the Mayor of the District of Columbia by separate letter.

Under these circumstances, we would ordinarily recommend that PAL be retested using samples prepared for that purpose in accordance with our recommendations. However, since the PAL contract expires in about four months; the contractor's employees and equipment

are in place on District property and are apparently performing to the District's satisfaction; and because the evidence does not persuade us that PAL's test results were necessarily incorrect, we believe it would not be in the District's best interest to now cast doubt on the award. Nonetheless, we recommend that the renewal option contained in contract not be exercised and that the requirement be recompeted using sample preparation procedures contained in our recommendations to the Mayor.

The protest is denied in part and sustained in part.

Milton J. Socolar

For the Comptroller General
of the United States