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

FILE: B-218359.3 **DATE:** January 22, 1986

MATTER OF: Syva Company--Reconsideration

DIGEST:

Protester's continued disagreement with agency's determination that only a specific type of drug testing system will meet its minimum needs and dissatisfaction with steps that agency is taking to increase competition do not warrant reversal or modification of prior decision denying the protest of specifications as unduly restrictive of competition.

Syva Company (Syva) requests reconsideration of our decision of Syva Company, B-218359.2, Aug. 22, 1985, 85-2 C.P.D. ¶ 210, in which we denied its protest. Syva had protested that request for proposals (RFP) No. DLA120-84-R-0774, issued by the Defense Personnel Support Center, Defense Logistics Agency (DLA), for drug test systems, limited the requirement to those systems employing a radioimmunoassay test method (R-method). Therefore, Syva contended the RFP was unduly restrictive of competition. We held that the contracting agency, which we recognized is primarily responsible for determining its minimum needs, had made a prima facie showing that the protested specification was reasonably related to its minimum needs--to provide reliable drug tests--and that Syva had not carried its burden of affirmatively proving its case.

We affirm our decision.

Syva primarily contends that we erred in concluding that Syva had not shown DLA's restriction was unreasonable. Syva sells a drug test system based on the enzyme immunoassay test method (E-method). It disputes our conclusion that DLA reasonably determined the E-method to be unreliable and contends that we based our conclusion entirely on our evaluation of scientific literature submitted by DLA and Roche Diagnostic Systems (Roche), manufacturer of an R-method test system, without giving Syva an opportunity to comment on this information. Syva has attempted to establish that the E-method is reliable and functionally equivalent to the R-method by challenging the technical

documents submitted by DLA and Roche, introducing other studies for our review, and challenging the reasons cited by DLA for DLA's uncertainty about the reliability of the E-method. Syva asserts, for example, that DLA improperly relied on an inaccurate quality control report prepared by the Armed Forces Institute of Pathology (AFIP) which showed that CompuChem Laboratory, an outside contractor that performed initial drug screening tests using the E-method, had a very low correct rate on positive blind samples. Syva asserts that this report was inaccurate due to the manner in which the AFIP prepared the quality control samples.

DLA, however, disagrees with Syva's challenges and continues to maintain that the E-method is not as reliable as the R-method and therefore does not meet its minimum needs. With regard to the CompuChem matter, for example, DLA believes that the experience at CompuChem indicates a problem with the accuracy of the E-method. It states that Syva's analysis of the CompuChem experience is predicated on the fact that the E-method is a system for qualitative testing (detecting the presence or absence of drug metabolites in human urine), whereas DLA's needs are for semi-quantitative testing (measuring the concentration of drug metabolites at a specific level established for each drug). DLA concludes that Syva has failed to demonstrate that the E-method is precise and accurate enough to be used for laboratory test kits.

In our view, Syva still has failed to meet its burden of showing that DLA's decision to restrict the procurement to the R-method was clearly unreasonable. DLA reviewed clinical studies, its experience at CompuChem and its other drug testing laboratories, and the Coast Guard's experience using the E-method and determined that drug test systems employing the E-method are not accurate for semi-quantitative testing and therefore do not have the reliability critical to its needs. While Syva has challenged each reason given for DLA's determination that drug test systems employing the E-method are unreliable, we do not think Syva has shown that DLA had no reasonable basis for specifying the R-method. We therefore again cannot conclude that the agency's decision to restrict the procurement to the R-method was improper. See Polymembrane Systems, Inc., B-213060, Mar. 27, 1984, 84-1 C.P.D. ¶ 354, aff'd, Polymembrane Systems, Inc.--Reconsideration, B-213060.2, July 23, 1984, 84-2 C.P.D. ¶ 81.

Syva also contends that our initial decision improperly sanctioned DLA's decision not to test the E-method test

system because this protest was filed. Syva argues that DLA's obligation to seek out possible competition is not waived by the filing of a protest. We agree with Syva that DLA has a duty to take whatever steps are practicable to increase competition for the procurements of drug testing kits. However, as stated in our initial decision, the record indicates that DLA is taking sufficient steps to increase competition, despite the fact that it did not conduct its own test of Syva's system. Contrary to Syva's contentions, the pending protest was not the only factor contributing to the decision not to conduct the test. As noted in our prior decision, DLA experienced logistical difficulties in carrying out the tests. The record indicates that the specific factors were that Fort Meade, the location for the proposed test, had a personnel shortage at the time and, most significantly, Syva did not submit a practical plan for conducting the test and therefore failed to follow proper protocol. DLA is not required to conduct its own tests where it has demonstrated a reasonable basis for determining that the system will not meet its needs, see Biomarine Industries; General Electric Co., B-180211, Aug. 5, 1974, 74-2 C.P.D. ¶ 78, and under the circumstances here, we cannot find that DLA acted improperly by not conducting the test.

Syva next complains that, although DLA has decided that there will not be an "all or none" restriction in future solicitations, that is, firms will not have to submit an offer for all of the drug test kits solicited, this change will allow only Roche distributors to enter the competition. It argues that in order to realize cost savings, firms distributing the allegedly less expensive E-method test system should also be allowed to compete. DLA, however, states that removal of the "all or none" restriction will allow competition from firms selling their own products developed through their own R-method technology. In any event, as stated in our initial decision, since we conclude that DLA has reasonably demonstrated that a system employing the E-method will not meet its legitimate needs, the question of cost savings which might be accrued from the use of the E-method is irrelevant. RCA American Communications, Inc., B-213995, Apr. 19, 1984, 84-1 C.P.D. ¶ 450.

Syva has not demonstrated that our initial decision was based on an erroneous conclusion of law or failed to consider relevant information as required by the Bid Protest Regulations, 4 C.F.R. § 21.12(a) (1985). Thus, we affirm that decision.

We note that DLA continues to express its willingness to accept test data indicating the reliability of the E-method from Syva. In fact, while this request for reconsideration has been pending, we have been advised that Syva has presented technical data other than that submitted in connection with this protest to DLA for consideration. DLA technical personnel reviewed this data and concluded that, although the E-method met some of its needs, it was not equal to the R-method for precision and accuracy. DLA has discussed with Syva what additional information is necessary to indicate the reliability of the E-method. Thus, in our view, DLA continues to show a willingness to accept Syva's product upon a proper showing of reliability and to discuss the acceptability of Syva's products.

Milton J. Socolar

for Comptroller General
of the United States