The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: North American Biologicals, Inc.

File: B-234583

Date: May 22, 1989

DIGEST

Before modifying existing contract because no other source could meet the agency's needs, agency published notice in the Commerce Business Daily (CBD) requesting capability statements from other firms with qualifications to perform the work. Agency decision that protester is not qualified to perform the work is reasonable where firm submitted statement after 45 days allowed by CBD notice and statement did not indicate that firm understood requirements or had qualifications to perform the work.

DECISION

North American Biologicals, Inc., protests the decision by the National Institute of Child Health and Human Development that North American is not qualified to perform work that the Institute proposes to add by modification to its existing contract No. N01-HD-8-2917, with Theobold Smith Research Institute. We deny the protest.

On September 30, 1988, the Institute awarded contract No. N01-HD-8-2917 to Theobold Smith for the development of technology to test the prevalence of the human immunodeficiency virus (HIV) in women at childbirth. The contract called for the design of the technology and for a study to test it on a sample population. Shortly after the start of Theobold Smith's contract, the Institute decided to obtain comparative data from a foreign country using the same technology. According to the agency, its scientists believed, and continue to believe, that only Theobold Smith, which developed the applicable technology and has gained experience under its contract in transferring that technology to medical personnel in New England and North Carolina, is qualified to conduct the additional study. Thus, the agency proposes to accomplish the additional study by modifying Theobold Smith's contract.

In a November 16, Commerce Business Daily (CBD) notice, the Institute announced its intention to modify Theobold Smith's contract to require that firm to identify a foreign country and plan a seroepidemiologic survey of two or three geographical regions of that country and solicited capability statements to be submitted within 45 days from sources interested in performing the work. According to the notice, the agency plans to proceed under the Competition in Contracting Act of 1984 (CICA), 41 U.S.C. § 253(c)(1) (Supp. IV 1986), which allows the use of other than competitive procedures when the necessary services are available from only one responsible source and no other services will satisfy the agency's needs. The notice indicated that the new study was to be analogous to that undertaken by Theobold Smith in New England and North Carolina using dried blood samples of newborn blood which had been collected as part of routine screening.

The notice also indicated that the agency anticipated modifying Theobold Smith's contract because Theobold Smith has developed procedures adaptable to micro-quantities of blood from newborn specimens already routinely collected on filter paper for a customary newborn screening procedure and has demonstrated proficiency in its access and ability to handle routinely collected samples from New England and North Carolina. The notice also stated that the contractor that performs the additional study must be able to expand this technology to a foreign country that has a newborn screening program in place so that country can satisfactorily carry out the same type of serological testing.

On January 17, 1989, more than 45 days after the November 16, 1988, CBD notice, North American submitted a response stating that it has the capabilities and qualifications to perform the study. North American explained that it can perform analyses of dried blood samples using a testing method developed by Abbott Laboratories and that it has developed packaging and handling systems to assure the safe transportation of specimens through courier and mail systems. Further, North American said that it contacted four hospitals in three geographic regions of Canada to obtain dried blot specimens. The firm's statement listed four Canadian children's hospitals. According to North American, at that time it had received a positive response from two hospitals contacted and it would pursue further if consideration was given to its capabilities.

Although North American submitted its statement after the 45 days specified in the CBD notice, the Institute's scientists evaluated it. Based on that evaluation, in a letter dated February 13, 1989, the contracting officer informed North American that the firm did not present the qualifications to perform the work set forth in the CBD notice. Specifically, the contracting officer indicated that North American provided no evidence that it has any expertise or experience in the transfer of the relevant technology. Also, the contracting officer indicated that North American's proposal to perform a survey using samples obtained from children's hospitals did not meet the CBD notice requirements. In this respect, the contracting officer explained that the CBD notice specifically called for a survey like the one done in New England because a population-based obstetric survey is necessary.

North American argues that the reasons stated by the contracting officer for rejecting the firm's qualifications go beyond the CBD notice. With respect to the first reason given by the contracting officer, the protester says that the CBD notice did not request any evidence of expertise or experience in the transfer of technology. Further, in response to the explanation that an unbiased survey is necessary, the protester says that this requirement would be met by its approach because Canada uses socialized medicine resulting in unbiased sampling simply by contracting with hospitals in various areas.

After North American protested, the Institute suspended all further action on the procurement pending resolution of the protest. Thus, it has not yet prepared the justification required by 41 U.S.C. § 253(f)(1) for the use of other than full and open competitive procedures.

We closely scrutinize sole-source procurements under 41 U.S.C. § 253(c)(1). Where the agency has complied with the procedures prescribed by 41 U.S.C. § 253, we will object to a sole-source award if it is shown that there is no reasonable basis for the contracting agency's stated grounds for using that exception to the requirement for full and open competition. A/E Group, Inc., B-227886.2, Nov. 5, 1987, 87-2 CPD ¶ 447. Here, up until the protest was filed, the agency had complied with all of the CICA procedural requirements by advising potential offerors of its needs in the CBD notice and evaluating the only response it received.

Further, as far as the actual evaluation is concerned, we think the Institute's decision to reject North American as an alternative source was a reasonable exercise of its scientific judgment. First, it was clear from the CBD

notice that the contractor is to expand or transfer the procedures developed by Theobold Smith for the domestic survey to a foreign country so that the required analysis can be performed by medical personnel in that country. Nonetheless, although North American's response to the CBD notice stated that it could assure the safe transport of the specimens, it included no indication that it has experience transferring medical procedures or how it would propose to expand the technology.

The CBD notice also stated that the foreign country survey, like Theobold Smith's domestic survey, would use blood samples of newborns which have been collected as part of routine newborn screening. The reason for this requirement is that data from the foreign study is to be used for comparison with the results of the domestic survey and thus must use the same procedures.

North American's response stated that it could provide blood specimens from four children's hospitals in three geographic regions of Canada. The Institute says that the method proposed by North American would provide a biased sample since babies not born in children's hospitals would not be screened. Although North American says that the "socialized" medical system of Canada would assure that unbiased sampling occurs, the study required universal routine screening, not just screening of some hospitals and we have no basis upon which to disagree with the Institute's judgment that the use of only children's hospitals would bias the survey as a result of self selection among subjects. Since the CBD notice called for samples collected as part of routine newborn screening and cited the domestic survey which used samples from delivery services, it was incumbent upon North American to show in its response that it understood and was capable of meeting those requirements.

Finally, in its comments in response to the agency's report on the protest, North American says that the CBD notice only asked for a brief statement, that it intended all along to use blood samples from Canada's universal newborn screening program and that the CBD notice was written to ensure the exclusion of other sources. While the CBD notice did state that the response should be brief, it also clearly indicated that the response would be evaluated in the context of expanding Theobold Smith's population based survey work to another country. The protester's submission was not rejected because it was short, but because it simply did not address the main points cited in the notice. As far as the Canadian samples were concerned, the protester's response only listed four hospitals as contact points and made no

mention of a universal screening program. Moreover, North American submitted its response after the 45-day period allowed by the CBD notice and there is no indication in the record that the firm otherwise contacted the Institute during or after the 45-day period to inquire about the required survey or to offer any additional information. Under the circumstances, although responses to the CBD notice were to be brief, North American should not have expected multiple opportunities to explain its qualifications after the 45-day period allowed by the CBD notice.

The protest is denied.

for Seymour Efros
James F. Hinchman
General Counsel