Ahearn

144237

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: CompuChem Laboratories, Inc.

File: B-242889

Date: June 17, 1991

Paul Shnitzer, Esq., and M. Justin Draycott, Esq., Crowell & Moring, for the protester.
Herbert F. Kelley, Jr., Esq., Department of the Army, for the agency.
M. Penny Ahearn, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in preparation of the decision.

DIGEST

Protest of unequal competition in procurement for drug testing services is denied where: (1) although protester had 7 days to complete certification testing while awardee was given second 7-day period to obtain certification, nothing in solicitation prohibited retesting and any arguable benefit to the awardee did not affect the outcome of the competition; and (2) although agency learned after award that awardee was not formally certified by testing organization prior to award, as required by solicitation, this was due solely to oversight by the testing organization, which ultimately certified awardee based on test samples submitted prior to award.

DECISION

CompuChem Laboratories, Inc., the incumbent contractor, protests the award of a contract to PharmChem Laboratories, Inc. for urinalysis drug testing services by the Department of the Army, under request for proposals (RFP) No. DADA15-89-R-0027. The protester contends that PharmChem did not meet a requirement for laboratory certification by the Department of Defense's Armed Forces Institute of Pathology prior to award.

We deny the protest in part and dismiss it in part.

The RFP, issued on July 14, 1989, contemplated award of an indefinite quantity contract and requested firm, fixed prices based on various quantities of specimen testing for 1 base and 4 option years. The solicitation required laboratory certification as follows:

"All laboratories processing specimens in accordance with the contract must be certified by the Department of Health and Human Services (HHS) and certified by the Armed Forces Institute of Pathology (AFIP) before award of the contract. Loss of certification during the evaluation period can be cause for disqualification."

The RFP provided for evaluation of technical and price factors, with technical factors accorded twice the weight given to price. Award was to be made to the offeror presenting the most advantageous proposal to the government. The Army received three proposals by the August 25 closing date, including those from CompuChem and PharmChem (on the portion of the solicitation not restricted to small businesses). Based on the technical evaluation, the agency made an initial competitive range determination composed of CompuChem and PharmChem.

In connection with the AFIP laboratory certification requirement, at issue here, on October 1, 1989, AFIP sent sample specimens to both firms. The instructions for processing the samples required offerors to test half of the samples (150) by radioimmunoassay (RIA) and the remaining samples by gas chromatography/mass spectrometry (GC/MS). Essentially, the RIA testing, known as initial screening, is to determine whether a sample is positive or negative for an identified drug. The GC/MS testing, known as confirmation, is to identify and quantitate drugs in a sample. Here, each offeror was required to test 30 samples by RIA and 30 samples by GC/MS for each of 5 drug classes (amphetamines, PCP, cocaine, morphine, and marijuana) and was provided samples of each drug class in low, medium, and high concentration levels. Offerors were instructed to return their resulting data to AFIP within 7 calendar days from the date of receipt.

In its AFIP certification testing, PharmChem did not use the RIA testing method, but instead used the enzyme multiplied immunoassay technique (EMIT).1/ On the remaining half of the samples, PharmChem correctly used GC/MS testing and AFIP entered these test results into its data bank. The contracting officer, not willing to accept EMIT testing but concerned that exclusion of PharmChem would leave only one offeror for award consideration on the unrestricted portion of the solicitation, advised PharmChem that to remain in the

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1/ The record of negotiations indicates that PharmChem believed EMIT was more cost effective and could be substituted for RIA testing. The firm had previously completed RIA testing and had some RIA equipment, but intended to purchase additional equipment upon award.

competitive range it would have to submit and pass the RIA portion of the AFIP certification. Subsequently, AFIP sent a second batch of 150 samples to PharmChem for testing by RIA, again with a 7-day turn around time. PharmChem returned the results within the required time and AFIP analyzed the data, finding that the firm had properly tested the samples using the RIA method. AFIP confirmed this finding in a memorandum to the evaluation committee, dated March 14, 1990, stating that "we submitted screening certification samples to PharmChem Laboratories for radioimmunoassay screening [and] all samples were correctly identified as positive or negative for the drugs of interest."

Best and final offers were received and evaluated. While CompuChem's technical score was 14 percent higher than PharmChem's, CompuChem's total price of $42,939,442 for the base and 4 option years was 60 percent higher than PharmChem's total price of $26,365,877.2/ Even after consideration of the higher weight accorded technical factors over price, PharmChem's price advantage was determined to outweigh CompuChem's technical advantage.3/ Therefore, the evaluation committee recommended award to PharmChem as most advantageous to the government. The contracting officer agreed and, relying on the March 14, 1990 AFIP memorandum as evidencing AFIP certification, made award to PharmChem on February 1, 1991.4/

After CompuChem filed this protest, the Army discovered that AFIP actually had not made its final analysis of PharmChem's previously submitted GC/MS data until February 5, 4 days after award. The record indicates that at that time AFIP retrieved and analyzed PharmChem's October 1989 GC/MS data and determined that PharmChem passed the GC/MS testing. AFIP made this post-award analysis of the PharmChem data in connection with a separate requirement for post-award DOD

2/ The agency determined that PharmChem's offered prices were realistic.

3/ The evaluation committee determined that either contractor had the ability to successfully perform the contract. The principal reason for PharmChem's lower score was its lack of experience in doing high volume RIA testing. However, after visiting PharmChem's facility, the evaluation committee determined that PharmChem was capable of making the necessary modifications, in terms of increased procedures and equipment, to perform the contract at the desired volume should it receive the award.

4/ The reason for the delay in award is not evident from the record, and is not in issue.

laboratory certification, not at issue here; it did not realize the significance of its actions in terms of AFIP certification of PharmChem for this procurement, and did not notify the Army.

CompuChem contends that it was improper for the agency to allow PharmChem a second 7-day time period to perform the RIA testing, while CompuChem had only 7 days to do both the RIA and GC/MS tests simultaneously. The protester maintains that the additional testing time given to PharmChem resulted in unequal competition.

A basic principle of competitive negotiation is that offerors must be treated equally. Union Carbide Corp., 55 Comp. Gen. 802 (1976), 76-1 CPD ¶ 134. This generally means that offerors must be given identical statements of the government's requirements and be informed of any changes to those requirements and to what may be termed the "ground rules" of the procurement, id., that they must submit initial and revised proposals by a common cut-off date, Phoenix Research Group, Inc., B-240840, Dec. 21, 1990, 90-2 CPD ¶ 514; Seer Publishing, Inc., B-237359, Feb. 12, 1990, 90-1 CPD ¶ 181, and that discussions, when held, must be conducted with all offerors whose proposals are in the competitive range, Microlog Corp., B-237486, Feb. 26, 1990, 90-1 CPD ¶ 227, and must not be "prejudicially unequal." SeaSpace, B-241564, Feb. 15, 1991, 70 Comp. Gen. ___, 91-1 CPD ¶ 179. It does not mean, however, that all offerors must be dealt with in precisely the same way. For example, the extent of discussions held with competing offerors may vary depending upon the specific concerns, if any, an agency has with the proposals submitted. See Holmes & Narver, Inc., B-239469.2, B-239469.3, Sept. 14, 1990, 90-2 CPD ¶ 210; Federal Data Corp., B-236265.4, May 29, 1990, 90-1 CPD ¶ 504. Also, in a similar vein, agencies are permitted to delay award for a reasonable period to allow vendors in line for award to cure their noncompliance with requirements for such things as a license, B-178043, July 27, 1973; a security clearance, Ameriko Maintenance Co., B-208485, Aug. 27, 1982, 82-2 CPD ¶ 184; and Department of Agricult[illegible]lant approval. Right Away Foods Corp., B-216199, Jan. [illegible]85, 85-1 CPD ¶ 15. We have also recognized that test da[illegible]earing on vendor responsibility may be submitted after the date specified in the solicitation. See Raymond Eng'g, Inc., B-211046, July 12, 1983, 83-2 CPD ¶ 83 (where the delayed submission resulted from the need for a second test after the vendor failed the first test).

Here, we fail to see how unequal competition resulted from the agency's allowing PharmChem, prior to award, to run the RIA portion of the AFIP testing. The RFP placed no restriction on an offeror's reattempting AFIP testing as many times as

necessary; it required only that AFIP certification be obtained prior to award, and there is no any indication in the record that AFIP restricted retesting in any way. Thus, no "ground rule" of the procurement was violated.

Second, the additional testing opportunity did not benefit PharmChem, or prejudice CompuChem, in the technical evaluation. The RFP evaluation criteria made no provision for technical evaluation of the AFIP testing, and there is no indication that the testing was to simulate actual performance conditions in terms of testing volume and time frame. The RFP provided only that offerors' capabilities in volume drug testing, as demonstrated in their proposals, would be evaluated under the corporate experience and quality of work technical factor.5/ Thus, an offeror's ability to satisfactorily perform both tests simultaneously within a 7-day period was not a consideration in the technical evaluation.

Third, CompuChem was not prejudiced in the cost evaluation. As indicated above, PharmChem's proposed price was lower than CompuChem's by 60 percent ($16,573,565). Even if it was more expensive for CompuChem to complete the testing within 7 days (CompuChem does not argue that this was the case), any additional cost clearly would not have affected this substantial cost advantage.

The protester argues that the AFIP certification testing is analogous to benchmark testing and that where, as here, an offeror does not pass a benchmark initially, it cannot be determined responsible. To the extent that the testing here can be said to be analogous to benchmark testing (in that both consist of preaward testing), we have previously emphasized the need for flexibility in the application of benchmark and other demonstration-type test requirements and the concomitant undesirability of "pass/fail" benchmark tests leading to the automatic exclusion of otherwise potentially acceptable offerors. OAO Corp.; 21st Century Robotics, Inc., B-232216; B-232216.2, Dec. 1, 1988, 88-2 CPD ¶ 546; International Computaprint Corp., B-207466, Nov. 15, 1982, 82-2 CPD ¶ 440. We have instead recognized that benchmark testing should become an inherent part of the negotiation process, during which deficiencies should be pointed out and then corrected if possible. See CompuServe Data Sys., Inc., 60 Comp. Gen. 468 (1981), 81-1 CPD ¶ 374. Further, we have recognized the

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5/ While the instructions sent with the AFIP specimens to be tested provided for a 7-day time period for completion of the testing, this appears to have been because of AFIP's mistaken belief that the testing would be used in the evaluation of proposals.

desirability of rerunning that portion of a benchmark necessary to correct a deficiency in order to maximize competition. The Computer Co., B-198876, Oct. 3, 1980, 80-2 CPD ¶ 240, aff'd, 60 Comp. Gen. 151 (1981), 81-1 CPD ¶ 1. The manner in which the Army conducted the testing here is consistent with the flexible approach we have endorsed for benchmark-type testing.

Finally, CompuChem complains that the contracting officer unreasonably relied on the March 14, 1990, AFIP memorandum as preaward AFIP certification, since it covered only half of the necessary RIA testing. We find nothing objectionable in this respect. At the point the Army discovered that PharmChem's GC/MS test results had not been finalized by the AFIP, the AFIP already had retrieved and analyzed the PharmChem GC/MS data that existed at the time of award and determined that the firm passed this portion of the testing. Thus, the record shows that all necessary testing had been performed by PharmChem, and the resulting data received by AFIP, prior to award. Under these circumstances, we think PharmChem properly was deemed to have satisfied the AFIP certification requirement prior to award. This being the case, the contracting officer's reliance on the AFIP March 14 memorandum as evidence of complete AFIP certification is irrelevant.

The protest is denied in part and dismissed in part.

James F. Hinchman
General Counsel