



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Lab Products, Inc.

File: B-252452

Date: March 19, 1993

Michael F. Logerfo, Esq., Ferro, Doyne, Labella & Logerfo, for the protester.
Michael Colvin, Department of Health & Human Services, for the agency.
Peter A. Iannicelli, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency should award contract for ventilated rat and mouse caging systems to the protester on a sole-source basis rather than conducting an unrestricted brand-name-or-equal procurement, or that invitation for bids on a brand-name-or-equal basis should contain more restrictive specifications, is dismissed because the General Accounting Office (GAO) will not entertain arguments that agencies should use more restrictive specification since GAO's bid protest role is to ensure that the statutory requirements for full and open competition are met.
2. Protest that award of contract to any other bidder may result in awardee violating protester's patents and possible claim for damages against contracting agency is dismissed, because exclusive remedy for patent infringement by the government or by a government contractor who acts with the authorization or consent of the government is a suit against the government in the United States Court of Federal Claims.

DECISION

Lab Products, Inc. protests invitation for bids (IFB) No. 263-93-B(GE)-0216, issued by the National Institute of Health (NIH) for ventilated rat and mouse caging systems and accessories. Basically, Lab Products contends that NIH should have awarded it the contract on a sole-source basis. The protester also contends that procurement on an unrestricted, brand-name-or-equal basis may result in the

purchase of cage systems of inferior quality, and that purchase from any other bidder may result in the government being obligated to pay damages to Lab Products related to infringement of Lab Products' patents. We dismiss the protest.

According to the protester, in August 1992, NIH advertised in the Commerce Business Daily (CBD) its intention to negotiate the purchase of the cage systems from Lab Products on a sole-source basis pursuant to authority of 41 U.S.C. § 253(c)(1). In November, Lab Products learned from the contracting officer that two other firms had responded to the CBD announcement and expressed interest in competing for the contract. On December 15, NIH issued the current IFB requesting sealed bids for furnishing cage systems and accessories on an unrestricted competition. The IFB's schedule of supplies stated for each line item that a specific Lab Products's model "or equal having the salient characteristics specified" should be furnished and required descriptive literature for bids offering other than the brand name products. Lab Products filed its protest in our Office on February 24, 1992. Bids were opened on March 1.

Lab products contends that NIH's initial intention to purchase the cage systems from it on a sole-source basis was appropriate and in the best interests of the government. The protester explains that these systems are used by NIH in performing and evaluating delicate scientific and medical research. The protester further states that its cage systems have been proven effective through use by other research institutions and independent testing and evaluation, and that its cage systems are in large part protected by patents held by Lab Products. The protester asserts that acquisition of other than its brand name products may result in NIH buying cage systems that are inferior in quality to the cage systems that Lab Products manufactures. Therefore, the protester argues that NIH should buy the cage systems from Lab Products on a sole-source basis as originally planned.

We dismiss Lab Products's protest that it should be awarded the contract on a sole-source basis because its cage systems are superior to those of any other manufacturers. We will not review a protest that an agency should award a contract on a sole-source basis, since the purpose of our bid protest function is to ensure full and open competition for government contracts. See Simula, Inc., B-251749, Feb. 1, 1993, 93-1 CPD ¶ ____; Kollmorger Corp., B-221709.5, June 24, 1986, 86-1 CPD ¶ 580.

Lab Products next asserts that NIH issued amendment No. 3 to the IFB on February 11, 1993, that "renders the specifications insufficient to ensure that the government will procure the items it actually intends to procure" and argues that the amendment should, therefore, be withdrawn.

Specifically, Lab Products contends that the IFB amendment relaxes the specification for micro-isolators to prevent "penetration" of the filter media by hands or fingers, rather than preventing "contact" by hands or fingers, as was originally specified. Lab Products also protests that the amendment relaxes the IFB's test requirements, allowing the winning bidder 30 days after contract award to submit test data and certification from an independent laboratory to verify that the systems furnished will meet certain contract requirements, rather than requiring such data and certification to be submitted with bids. Lab Products also complains that the amendment deletes the IFB's original requirement that all items furnished be commercial off-the-shelf items; the protester wants this requirement to be reinstated.

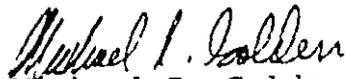
Without a showing that competition is restricted, agencies are permitted to determine how best to accommodate their needs, and are entitled to use relaxed specifications when they reasonably conclude that they can increase competition and meet their needs at the same time. See Simula, Inc., supra. Here, the amendment states that the specification modifications were made after agency representatives reviewed an agency-level protest that argued that the specifications were unduly restrictive of competition. Obviously, the amendment relaxed certain requirements, including those cited by the protester here, in an effort to make the IFB less restrictive and to encourage full and open competition. Our Office will not consider contentions that specifications should be made more restrictive, particularly where, as here, they are based on the argument that the less restrictive requirements are contrary to what in the protester's view is best for the agency. Id. As noted above, our role in reviewing bid protests is to ensure that statutory requirements for full and open competition are met, and therefore, we will not consider a protester's assertion that the needs of the agency can only be satisfied under more restrictive specifications than the agency believes necessary. Id.

Finally, Lab Products contends that award of a contract to any other firm under the IFB will likely result in Lab Products filing a claim against the United States for patent infringement damages arising out of the several patents it holds on cage systems and accessories of the type being

purchased by NIH here. The protester argues that NIH should have weighed the cost of such an action and the payment of compensation to Lab Products before NIH prepared the IFB.

A potential claim for patent infringement does not provide a basis for sustaining a protest. Odetics, Inc., B-246008, Feb. 13, 1992, 92-1 CPD ¶ 185. The exclusive remedy for a patent holder who claims patent infringement by the government or by a government contractor who acts with the authorization or consent of the government is a suit against the government in the United States Court of Federal Claims. See MRCA, Inc., B-194275, Aug. 8, 1979, 79-2 CPD ¶ 96; 28 U.S.C. § 1498(a) (1988). Therefore, this issue will not be considered by this Office.

The protest is dismissed.



Michael R. Golden
Assistant General Counsel