

Matter of: Immunalysis/Diagnostixx of California Corporation

File: B-254386

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DIGEST

1. Agency reasonably limited competition to one source, without soliciting offer from the protester, where the agency properly based its action on unusual and compelling urgency and reasonably concluded that the protester would not be able to provide the supplies needed in the time required.

2. Five-month term for a sole-source contract issued on the basis of unusual and compelling urgency is not excessive in light of the anticipated unavailability of additional sources during that time period.

DECISION

Immunalysis/Diagnostixx Corporation protests the Department of the Army's award, under request for proposals (RFP) No. DADA15-93-R-0083, of a sole-source contract to Roche Diagnostic Systems, Inc. for drug test kits. Immunalysis contends that the agency lacked adequate justification to preclude the protester from competing for the contract.

We deny the protest.

This protest concerns procurements by the Army and the Navy of kits used to test individuals' urine for the presence of cannabinoids (also referred to as THC). The Army has been purchasing test kits from Roche since 1984 under various contracts. During 1992, the Army acquired some test kits from Roche under a Navy contract and other kits under monthly contracts which the Army issued, on a sole-source basis due to urgency, to Roche. In October 1992, the Navy

awarded a contract, which included a first article approval requirement, to Immunalysis; the Army is permitted to order under that contract. For reasons not explained in the record, first article approval was not obtained for several months.

In early 1993, the Army decided to consolidate its requirements for longer periods of time than the monthly blocks which had been the basis of the contracts issued to Roche in 1992. The stated reasons were the desire to eliminate "the time-consuming task of writing multiple contracts and the fact that the [kits] could possibly be purchased at a savings if a greater quantity was ordered."

In late February 1993, the Army obtained preliminary approval for the decision to issue a sole-source contract to Roche, based on the Army's urgent and compelling need for more test kits and the fact that Immunalysis had not yet completed first article testing under its Navy contract. The preliminary approval noted that Immunalysis would have a 45-day phase-in period even after first article approval, thus further delaying availability of test kits from that company. The preliminary approval was for an estimated 264 THC test kits and was contingent on the agency obtaining a final, properly authorized justification and approval (J&A) for a sole-source procurement.

Immunalysis finally obtained first article test approval under its Navy contract on March 11, and in early April the Army ordered a small batch of test kits under that contract in order to begin a certification process. That process continued through the summer of 1993, during which the Army encountered what it found to be problems with the accuracy and reliability of the Immunalysis kits. As of September 1, 1993, the Army was unable to conclude that the Immunalysis kits satisfied that agency's minimum required level of accuracy and reliability.

The final sole-source J&A was signed on April 29, and a requirements contract, No. DADA15-93-D-0014, was awarded to Roche on May 6. The final J&A cited the urgency of the Army's need for the test kits, the unavailability of Immunalysis kits before May 1993, and the fact that the instrumentation which the Army uses was calibrated only for

¹The contingent approval covered test kits for both THC and methamphetamine; only the former is covered by Immunalysis's Navy contract.

the Roche test kits. The contract covered almost 5 months (through September 30), with a 2-month option. The estimated quantity for the base period was 360 THC test kits, with an estimated quantity of 140 such kits for the option period. The protester contends that the Army's May 6 sole-source award to Roche was improper.

The Competition in Contracting Act of 1984 (CICA) permits the use of noncompetitive procedures where the agency's need for the property or services is of such an unusual and compelling urgency that the United States would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits proposals. 10 U.S.C. § 2304(c)(2) (1988). Notwithstanding the disagreement about the length of the term of Roche's May 6 contract, discussed below, Immunalysis does not appear to dispute the urgency of the Army's need for the test kits in April and May 1993, nor does it claim that the urgency was the result of a lack of advance planning, which is not a permissible basis for a determination to limit competition. See 10 U.S.C. § 2304(f)(5)(A). On this record, we conclude that the urgency of the agency's need for the test kits did constitute a proper basis for conducting the procurement without full and open competition.

²Both the J&A and the contract to Roche covered kits for testing methamphetamine as well as kits for testing THC. The methamphetamine kits are not at issue in the protest.

³Immunalysis also argues that the agency improperly failed to publish notice of the solicitation in the Commerce Business Daily. Such publication is not required where an agency properly makes the determination to limit competition under 10 U.S.C. § 2304(c)(2). FAR § 5.202(a)(2); Electro-Methods, Inc., B-250931, Feb. 26, 1993, 93-1 CPD ¶ 181.

⁴Immunalysis does argue that the J&A was motivated by the desire to avoid paperwork burdens and to reduce costs. Even if we assume, arguendo, that such motivation played a role, the relevant question is whether the agency had a legitimate, urgent need for the test kits at the time the J&A was approved. Because the agency did have such a need here, the existence of additional motivation for the J&A is without legal consequence. In any event, the record does not support the protester's claim that the goal of avoiding paperwork and reducing costs was related to the decision to limit competition. Instead, that goal was mentioned only in connection with the shift from monthly contracts to longer-term contracts (whether competed or not), and nothing in the record suggests that the decision to limit competition arose from anything other than the urgent need for the test kits.

CICA requires that, even where urgency justifies limiting competition, the agency must nonetheless solicit offers from "as many potential sources as is practicable under the circumstances," 10 U.S.C. § 2304(e). An urgency determination thus does not itself justify a decision to award a sole-source contract. Instead, an agency may limit competition to one firm only where the agency has a reasonable basis to conclude that no other firm can properly perform the work in the available time. See Vega Precision Laboratories, Inc., B-252586, July 9, 1993, 93-2 CPD ¶ 12; Silco Eng'g & Mfg. Co., B-250012.6, May 7, 1993, 93-1 CPD ¶ 372.

Here, Immunalysis is essentially protesting that, while limiting competition due to urgency might have been proper, the agency should have solicited an offer from Immunalysis. The record, however, supports the reasonableness of the agency's conclusion that the test kits were not available from Immunalysis in April 1993--indeed, Immunalysis concedes that its test kits were not available before May 15. Moreover, the protester has not demonstrated that the Army improperly required Army certification of Immunalysis's test kits. Because Immunalysis's test kits were not available in April and there was no way for the Army to know when those kits might be both available and certified for Army use, the Army's April 29 decision not to solicit an offer from Immunalysis was reasonable.

The record does not support Immunalysis's suggestions that the decision to award a sole-source contract to Roche arose from any Army bias, either in favor of Roche or against Immunalysis. On the contrary, the record reflects Army intent to order test kits from Immunalysis under that company's Navy contract, once the certification process was successfully completed. In the interim, the Army determined to issue a sole-source contract to the only firm which could furnish the test kits, pending the completion of the certification process for Immunalysis.

⁵While Immunalysis correctly notes that the J&A makes no reference to the certification process and instead states that the Army was not certain that it would be able to use its laboratory equipment with the Immunalysis test kits, this has no bearing on the reasonableness of the Army's decision not to solicit an offer from Immunalysis. Because the Army does require test kits to be certified and Immunalysis's kits had not been certified as of April 29 (or, indeed, as of September 1), the Army's decision not to solicit an offer from Immunalysis was reasonable.

The final question is whether the 5-month term of the Roche contract was unjustifiably long. Immunalysis contends that, even if the Army had a legitimate need for a sole-source contract with Roche through May and June, the 5-month term of the Roche contract was longer than necessary. Immunalysis suggests generally that a 5-month term is too long for a sole-source contract justified by urgency and argues in particular that the agency has unduly delayed certifying Immunalysis's test kits, hence the sole-source contract should have been limited to the relatively short period needed to properly certify Immunalysis's kits.

An urgency justification under 10 U.S.C. § 2304(c)(2) generally does not support the procurement of more than a minimum quantity needed to satisfy the immediate urgent requirement and should not continue more than a minimum time. Tri-Ex Tower Corp., B-239628, Sept. 17, 1990, 90-2 CPD ¶ 221. Here, however, there is no reason to conclude that, as matters stood in late April, the 5-month term of Roche's contract exceeded the minimum needed. A 5-month term is a relatively short contract period. Certainly, there is no per se rule which would render a 5-month term excessive for contracts issued without competition. See, e.g., Durodyne, Inc., B-243382.3, Oct. 29, 1991, 91-2 CPD ¶ 388 (denying protest of 9-month sole-source contract based on urgency). Given that the decision to set a 5-month term to the Roche contract had been reached by April 29 and that at that time the certification process as to Immunalysis's test kits had effectively not yet begun, the decision to set a 5-month term to the sole-source contract awarded to Roche was reasonable.

The protest is denied.

James F. Hinchman
General Counsel

⁶We note that, in fact, the ensuing certification process was apparently not completed within 5 months.