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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Coulter Corporation; Nova Biomedical; Ciba Corning Diagnostics Corp.

File: B-258713; B-258714

Date: February 13, 1995

Jay P. Urwitz, Esq., Hale and Dorr, for the protesters.
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DIGEST

1. Where protesters' response to the agency report fails to address specific arguments concerning unduly restrictive requirements raised in the initial protest and responded to in the report, General Accounting Office considers such issues abandoned.

2. Protest that agency has no need for item being procured, a mobile laboratory for use in Department of Veterans Affairs hospitals, is denied where record shows that agency's determination of its needs--explained in a detailed statement from the agency's director of pathology and laboratory services--is reasonable.

DECISION

Coulter Corporation, Nova Biomedical, and Ciba Corning Diagnostics Corporation protest the terms of solicitation No. M6Q-26-94, issued by the Department of Veterans Affairs for the acquisition of blood analysis equipment to be used as part of a mobile laboratory; Coulter and Nova Biomedical protest the terms of solicitation No. M6Q-28-94, for acquisition of a cart and other blood analysis equipment, which are also to be used as part of the mobile laboratory. The protesters initially challenged the solicitations as unduly restrictive of competition and later argued that the agency has no need for a mobile laboratory.

We deny the protests in part and dismiss them in part.

The mobile laboratory was developed by the agency as a self-contained laboratory unit that will permit physicians making rounds or operating clinics to obtain quick and

efficient results from basic chemistry, hematology, coagulation, and urinalysis testing. The current configuration is the result of a VA study, in which the agency defined those tests most often needed at the point of care and identified the potential for performing those tests on equipment fitting on a mobile cart. The Sysmex mobile instrument cart, one of the items being procured under solicitation No. M6Q-28-94, is the largest cart available in the market, and the remainder of the selected configuration consists of hardware selected because it will fit on that cart. The laboratory, operated by one qualified medical technologist, is designed for mobility in confined spaces, such as inpatient clinical wards, ambulatory care clinics, and outpatient areas.

In developing the concept of the mobile laboratory, the agency evaluated products for size and their ability to provide the most needed tests. The agency completed its survey and prototype testing in July 1994, and identified a cart and seven items of equipment that would meet its needs; each item was identified with a brand name, and the agency executed a justification and approval (J & A) for the use of other than full and open competition as required by the Competition in Contracting Act of 1984 (CICA), 41 U.S.C. § 253(f) (1988). This J & A identified the Mallinckrodt Gem Premier blood gas analyzer and the Sysmex mobile instrument/analyzer cart, manufactured by Baxter Scientific Products, as two of the designated brand name products in the mobile laboratory configuration.

The August 10 Commerce Business Daily (CBD) contained a notice of the procurements and the issuance of brand-name solicitations and advised potential contractors that the agency would furnish a copy of the solicitations to parties that wished to identify their interest and capability to respond to the solicitations. Each solicitation, issued on August 23, provided for award of a firm, fixed-price contract to the lowest-priced responsible offerors meeting the requirements of that solicitation.

Section C of solicitation No. M6Q-26-94 contained a description of the desired characteristics associated with the Gem Premier blood gas analyzer; section C of solicitation No. M6Q-28-94 contained a description of the desired characteristics associated with the Sysmex K-1000 hematology analyzer and cart. Both solicitations contained a "Brand Name or Equal" clause and allowed offerors to submit descriptive literature for the purpose of demonstrating that any product offered, other than the brand name products, met the salient characteristics of the solicitations. The closing date for submission of offers was September 23.

By letter dated September 22, the protesters and two other equipment manufacturers expressed their interest in and capability of meeting the agency's needs. This letter also complained that the specifications were unduly restrictive of competition; the protesters contended that they could furnish less expensive products than the brand name products if the specifications were relaxed and that, even if they could not, the life cycle costs for those products would be lower because annual material costs would be lower. The letter also raised a general challenge to the mobile laboratory as wasteful--duplicating equipment already in use--and inflexible, imposing a standard configuration upon VA hospitals regardless of their individual resources and requirements.

The agency received three offers in response to solicitation No. M6Q-26-94 from Mallinckrodt, Ciba, and Nova. On September 30, Ciba and Nova filed a protest with our Office, alleging that the solicitation was unduly restrictive of competition and identifying specific elements of solicitation No. M6Q-26-94 as overly restrictive. Similarly, Coulter and Nova were the only offerors apart from the brand-name manufacturer, Baxter, to respond to solicitation No. M6Q-28-94, and filed a protest on September 30 with our Office, identifying the specific elements of that solicitation that they regarded as overly restrictive.

With regard to solicitation No. M6Q-28-94, Coulter and Nova objected to a requirement for solenoid technology in lieu of pinch valves; the protesters argued that an alternative design, utilizing different technology--peristaltic pumps and positive displacement--would meet the agency's needs. Coulter and Nova also challenged the mandate for the use of noncyanide hemoglobin reagents, arguing that hemoglobin cyanide was the industry standard. In addition, Coulter and Nova protested a requirement that the analyzer operate at a rate in excess of 70 samples per hour; the protesters argued that no medical technologist could actually use an analyzer at such a rate, and that the overall throughput was constrained by the processing rate of the slowest instrument on the cart--the Mallinckrodt Gem Premier blood gas analyzer, with a throughput of only 12 samples per hour. The protesters did not repeat the argument, made in the September 22 letter, that the solicitation should be canceled because the agency had no need for the mobile laboratory.

With regard to solicitation No. M6Q-26-94, Ciba and Nova protested the size restriction, i.e., that the device be no larger than 12 inches by 10.5 inches by 16.5 inches and weigh no more than 12.5 pounds. Ciba and Nova also objected to the requirement that the analyzer use a cartridge with

electrochemical sensors, calibrating and rinse solutions, a sample stylus and a waste bag providing for 7 days operation; the protesters argued that a cartridge neither simplified operation nor improved the quality of the test data and that the requirement simply reflected the Mallinckrodt commercial brochure. Ciba and Nova also challenged the requirement for a "power interrupt feature," which, the protesters asserted, was merely Mallinckrodt's method of describing its data storage capability. Ciba and Nova also objected to the requirement for one-point calibration every 2 minutes for 12 hours and two-point calibration every 60 minutes for 20 hours; the protesters contended that this exceeded the industry standard of one-point calibration within 30 minutes and two-point calibration every 2 hours. Again, the protesters did not repeat the argument made in the September 22 letter, that the solicitation should be canceled because the agency had no need for the mobile laboratory.

On November 15, the agency filed its report in response to the protests. With regard to the Coulter and Nova protest of solicitation No. M6Q-28-94, the agency responded to each of the protesters' contentions regarding the requirements. The agency asserted that the environment in which the analyzer would be used required high reliability with low maintenance; the protesters' designs, involving pinch valves and peristaltic pumps that impede or compress tubing, cause the tubing to deteriorate and, by their nature, require increased maintenance and cause more frequent equipment malfunction. The agency disputed the protesters' assertion that cyanide was the industry standard for reagents, defending the requirement for noncyanide reagents as providing a safer and more hazard-free environment for patients and VA employees. The agency also pointed out that the protesters' argument that throughput was dependent upon the speed of the slowest instrument made the inherently erroneous assumption that every instrument on the cart will be involved in every analysis.

The agency also responded to Ciba's and Nova's arguments regarding No. M6Q-26-94, defending electrochemical cartridge technology as meeting basic needs of safety, low maintenance, and small size. Cartridge technology, the agency asserted, eliminates the need for compressed gases, which present danger not only from explosion, but by exposure, for patients with pulmonary disease. The power interrupt feature, the agency argued, did more than store data; it preserved calibration settings, so that the instrument would not have to be reset every time it was moved, and therefore allowed for the more efficient use of the operator's time. The agency also defended the size and weight restrictions and noted that both protesters met the calibration requirements.

The protesters' comments on the agency report, filed with our Office on December 5, 2 months after the initial protest, did not respond to the agency's arguments regarding cartridge technology, the power interrupt feature, solenoid technology, and the sample rate. Where protesters submit a response to the agency report and fail to address issues to which the agency report responded, we consider such issues abandoned. Datum Timing, Div. of Datum Inc., B-254493, Dec. 17, 1993, 93-2 CPD ¶ 328. We therefore have no basis to find that the requirements under solicitation No. M6Q-26-94 for cartridge technology and a power interrupt feature or the requirements under solicitation No. M6Q-28-94 for solenoid technology and a sample rate of 70 per hour are unduly restrictive. Since the record shows that the products proposed by the protesters do not meet these requirements, the protesters are not interested parties to challenge the other requirements. See Motorola, Inc., B-247913.2, Oct. 13, 1992, 92-2 CPD ¶ 240.

In their response to the agency report, the protesters raise a general argument concerning alleged inconsistencies in the agency's definitions of its needs--for example, that cartridge technology was chosen for certain items and not for others, that some solicitations specify power requirements, and that others specify particular interfaces with existing computer equipment. Because this argument was not raised until the comments on the agency report, it is untimely. See 4 C.F.R. § 21.2(a)(1) (1994). In any event, while the agency's determination of its requirements was driven by its identification of particular brand-name products as essential to the purpose of the mobile laboratory, there is nothing inherently improper in this approach, where, as here, the requirements are necessary to meet the agency's needs.

The protesters also challenge the agency's need for a mobile laboratory. In this regard, the record contains a detailed statement from VA's director of pathology and laboratory medicine, confirming that she identified the requirement and initiated the development and procurement of the laboratory. The director states that she conceived the idea more than 8 years ago and ran pilot studies in which she determined that the system was necessary to innovate and improve the timeliness, delivery, and accessibility of diagnostic tests for patients in the VA medical care system. In developing the ultimate configuration, the agency constructed and tested several prototypes and tested them at hospitals in Baltimore, Maryland, and Hines, Illinois; the mobile laboratory reduced patient and physician waiting time by 75 percent, from 83 to 20 minutes. While acknowledging that each VA hospital has different overall needs, she points out that all hospitals have the same basic need for the results of commonly performed tests; to the extent that the

hospitals have needs that cannot be satisfied through the mobile laboratory, they are free to procure those needs locally.

The protesters raised their challenge to the agency's need for a mobile laboratory for the first time in their comments on the agency report. This argument does not arise from anything in the agency report; the protesters make some of the same points in their September 22 letter to the agency, and, in any event, the protesters' comments on the agency report were filed more than 10 days after they received the report. See 4 C.F.R. § 21.2(a)(2). Further, we disagree with the protesters' assertion that their challenge to the mobile laboratory program is inherent in their protests of the specific solicitation requirements. The initial protests clearly focused on the agency's specification of certain identified features as requirements for the equipment being procured. That issue is distinct from the argument made in the protesters' comments that the mobile laboratory, in concept, exceeds the agency's minimum needs. Accordingly, since the challenge to the agency's need for a mobile laboratory was not raised until the protesters filed their comments on the agency report, this argument is untimely. See 4 C.F.R. § 21.2(a)(1).

In their comments on the agency report, the protesters also argue that the agency did not conduct a market survey and that the decision to purchase the brand-name products was driven by an improper effort to make award prior to the expiration of funds. These new and independent allegations are untimely since they were raised more than 10 days after the protesters received the agency report, which, at the latest, put them on notice of these grounds for protest. See 4 C.F.R. § 21.1(a)(2).[1] In any event, the record here supports neither allegation.

CICA requires that agencies use market research during the planning stage for the procurement of property or services. 41 U.S.C. § 253a(a)(1)(B). A market survey is an attempt to ascertain whether other qualified sources capable of satisfying the government's requirements exist and may be informal, i.e., phone calls to federal or non-federal experts, or formal, i.e., sources-sought announcements in the CBD or solicitations for information or planning purposes. Federal Acquisition Regulation § 7.101. As noted above, the record shows that the agency conducted its market

[1]Although the protesters received an extension of time for filing their comments, such an extension does not waive the timeliness requirements of our Bid Protest Regulations. CH2M Hill Southeast, Inc., B-244707; B-244707.2, Oct. 31, 1991, 91-2 CPD ¶ 413.

survey through the construction and testing of prototypes at VA hospitals; the testing process consumed the better part of a 2-year period. During that time, the agency tested potential candidates, including the protesters' products, for the mobile laboratory. The agency therefore clearly satisfied the statutory and regulatory requirements for a market survey; even if we concluded otherwise, we would not sustain a protest on a such a basis where, as here, the agency considered the protesters' products and the record otherwise supports the agency's determination that the protesters cannot meet the solicitation requirements. See, e.g., Greenbrier Indus., Inc., B-241304, Jan. 30, 1991, 91-1 CPD ¶ 92.

Finally, regarding the availability of funding, while the record reflects steps taken by the agency to accelerate the procurement to avoid the expiration of funding, there is no evidence that these steps affected the agency's determination of its needs or its decision to issue a brand-name solicitation.

The protests are denied.

Ronald Berger

Robert P. Murphy
General Counsel