



B-176077(1)

JAN 26 1973

Law Offices  
Magee & Bulow  
Suite 308, Riddell Building  
1730 K Street, N.W.  
Washington, D.C. 20006

Attention: Warren E. Magee, Esquire

Gentlemen:

Further reference is made to the June 19, 1972, letter of B&W Stat Laboratory, Incorporated, and to your subsequent correspondence on its behalf, protesting against the rejection of its proposal submitted under request for proposals (RFP) DADA17-72-R-0602, issued by the United States Army Medical Research and Development Command, Washington, D.C.

The solicitation was for laboratory urinalysis screening in connection with the Department of Defense drug abuse program. Section D of the RFP provided for an initial evaluation of written proposals on the basis of answers to technical questions set forth in that Section, followed by an evaluation of reasonableness of price. The third phase of the evaluation involved the submission of quality control specimen samples to those offerors within a competitive range for laboratory processing. Eleven of the 27 offerors submitting proposals were selected for this laboratory testing, and two of those firms, Washington Reference Laboratory, Inc. (WRL), and Biochemical Procedures, achieved an accuracy rating of over 90 percent. Contracts were subsequently awarded to WRL and Biochemical Procedures for \$2.31 and \$2.19 per specimen processed, respectively. Your protest and those of five other unsuccessful offerors were then filed with this Office.

You challenge the evaluation of the specimen testing that was conducted, claiming that the samples were contaminated, stale, and improperly prepared, and that an improper and misleading scoring method was used. In addition, you assert that WRL should not have been eligible for the award because of its past performance on other contracts. You also question award to WRL in view of the differences between its price and B&W's proposed price of \$0.98 per specimen. Finally, you suggest an

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impropriety because the president of WRL is also a consultant to the Walter Reed Army Institute of Research (WRAIR), and you point out that it was a division of WRAIR that prepared the quality control test samples and scored the results.

The question of contaminated samples arose from the Army's use of a paraffin sealant on the sample containers to prevent leakage during transit. You state that paraffin was present in the specimens brought to the B&W Laboratory for testing and that paraffin distorts the results of gas liquid chromatography analysis, the primary screening method used by B&W. You further state that because of this, the testing was halted and different samples were brought to your laboratory on the following day. You claim that this second set of specimens was six weeks old, had not been sealed or preserved in any way, and had so deteriorated that detection of amphetamines and barbiturates was impossible.

The contracting officer reports that because of the possibility of contaminated samples that would interfere with B&W's testing, another set was furnished, but he denies that this second set was putrefied. He states that it was "an identical aliquot of the original set," was "under refrigeration since its preparation" and was of "the same concentration and age as the original set," but was not sealed with paraffin. He further states that B&W's difficulties in properly identifying amphetamines and barbiturates "was not due to putrefaction of the specimens but rather a lack of sensitivity" in its screening system.

The record shows that B&W correctly identified 87 of the 113 specimens (77 percent accuracy) used in the quality control testing evaluation phase, and that most of those that it failed to identify accurately contained amphetamines or barbiturates. However, there is a conflict in the record as to whether this was due to putrefied samples or to B&W's screening methodology. While B&W has presented some evidence tending to support its position, the Army has presented at least equally credible evidence to the contrary. Therefore, we can only conclude that the validity of your allegation has not been established. However, the record does reflect that the results of the quality control testing were documented by WRAIR personnel and then referred to a Board of Awards, which carefully considered the test results and made appropriate recommendations to the contracting officer. The contracting officer's proposal to award contracts

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on the basis of the Board's recommendations was approved by the head of the procuring activity, and awards to WRL and Biochemical Procedures followed. In these circumstances, it is our view that the contracting officer acted reasonably and in good faith in relying upon the Board and the technical personnel from WRAIR and, therefore, we cannot conclude that his action in making these awards was improper.

You also state that the barbiturate specimens were improperly prepared in that several different barbiturates were added together to make up the contract level concentration of 1.0 mcg/ml., so that detection of the individual barbiturates at that concentration was impossible. The contracting officer denies that a mixture of barbiturates was used, and states that only one, phenobarbital, was utilized. Our review indicates that some of the original 156 specimen samples did contain a mixture of phenobarbital and amphetamine, a non-barbiturate, but that these were not included in the 113 samples upon which the quality control evaluation was based. Although you point out that the test report sheets contain the word "Barbiturates" to indicate the contents of several of the specimens that were used, we do not believe the use of that pluralized word establishes that a mixture of more than one barbiturate was present in the samples.

You claim that the scoring method used was defective because false positives and accurate identification of negative samples were not considered. It appears that the initial computations did not reflect these items. However, the contracting officer states, and the report sheets and our review confirm, that in the final evaluation of all offerors false positives, false negatives, and correct negative readings were taken into account in computing percentage scores, so that credit was given to all correct identifications but not for any incorrect identifications. The contracting officer has also explained that where a laboratory reported the presence of two different drugs in a specimen, only one of which was present, credit was given for correct identifications, but the incidence of false positive readings in such situations was thoroughly considered by the Board of Awards before it made its recommendations. We can perceive no objection to this method.

You also claim that WRL's previous performance under prior contracts should have precluded award to it. You

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assert that WRL's accuracy record was only 51 percent on a then current drug screening contract with the Army and that it was performing poorly on other contracts. You state under such circumstances the contracting officer abused his discretion in regarding WRL as a responsible offeror. The contracting officer states that he was well aware of WRL's past performance, and made his affirmative responsibility determination on the basis of WRL's past performance, in accordance with ASPR 1-903.1(111).✓

We have long recognized that a contracting officer is vested with a considerable degree of discretion in determining an offeror's responsibility to perform a Government contract. We will not question that determination in the absence of convincing evidence that such discretion has been abused. 51 Comp. Gen. 233✓(1971). Thus, even where an offeror's past performance may have been less than satisfactory, we will not substitute our judgment for a contracting officer's determination of responsibility that is based upon consideration of both negative information concerning prior performance and sufficient current affirmative information as to the prospective contractor's capability. B-173562,✓ June 1, 1972. In the instant case, we believe it is clear that the contracting officer had sufficient affirmative information regarding WRL's performance capability and, therefore, the responsibility determination is not subject to question by our Office.

You further claim that award to WRL was inappropriate because of the great disparity between its price and B&W's. Unlike formal advertising, which generally requires award to the lowest bidder, competitive negotiation requires consideration of price and "other factors" which, in a proper case, may result in an award to one offeror rather than to another offeror submitting a lower price. 10 U.S.C. 2304(g);✓ASPR 3-101;✓50 Comp. Gen. 110✓(1970). Here it is clear that price was considered, but that it was not to be the controlling factor in view of the level of technical competence required for successful performance of the contract. Accordingly, after it was determined which offerors were within a competitive range, both technically and with regard to price, award was made to the offerors achieving the highest scores for accurately identifying laboratory quality control samples. The contracting officer has informed us that the award prices

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are within the Army's cost estimate (\$2.37 - \$2.50 per specimen) for this procurement. We also note that on the initial technical evaluation of the written proposals B&W scored below the cut-off point for negotiations, but was considered to be within the competitive range because of its low price. For that reason alone B&W was afforded the opportunity to process the quality control specimens. B&W did not receive an award because it scored substantially lower than other offerors on this final phase of the evaluation.

Finally, you protest against the use of personnel from WRAIR on the evaluation process because the president of WRL is a consultant to WRAIR and teaches classes there. You claim that this association makes the award to WRL "suspect." The contracting officer reports that WRL's president is a consultant to WRAIR's Division of Academic Operations and teaches there one week per year, but has no connection with the Division of Biochemistry, which provided personnel to prepare and evaluate the test specimens. Furthermore, there is nothing in the record which indicates that the evaluation was conducted in anything other than good faith or that the decision to award a contract to WRL was influenced by its president's connection with WRAIR.

We have carefully reviewed the entire record before us and based upon that record, we are unable to conclude that Army officials acted in bad faith in rejecting B&W's proposal or that the awards were otherwise illegal or improper. Accordingly, B&W's protest is denied.

Very truly yours,

(SIGNED) ELMER B. STAATS

Comptroller General  
of the United States