



Decision

Matter of: MCI Diagnostic Center, LLC

File: B-418330

Date: March 11, 2020

Kathleen D. Henderson for the protester.
Natica Chapman Neely, Esq., Department of Veterans Affairs, for the agency.
John Sorrenti, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

Protest challenging agency’s award of a sole-source contract under simplified acquisition procedures is denied where the record shows that the agency reasonably determined that there was only one source reasonably available to meet the agency’s urgent requirements for tuberculosis testing services.

DECISION

MCI Diagnostic Center, LLC (MCI), of Tulsa, Oklahoma, protests the issuance of a sole-source purchase order to Quest Diagnostics, Inc. (Quest) by the Department of Veterans Affairs (VA) for t-spot interferon gamma release assay (IGRA) tuberculosis testing services. MCI argues that the sole-source award was unjustified and unreasonable.

We deny the protest.

BACKGROUND

On August 20, 2019, the agency posted on the System for Award Management (SAM) website a sources-sought notice requesting information to enable the agency to “conduct[] market research to identify potential sources for a potential procurement of t-spot IGRA [tuberculosis] testing for the Southeast [Louisiana] VA Health Care System located in New Orleans, [Louisiana].”¹ See Protest, exh. B, Notice ID No.

¹ The SAM website is the “official [United States] government website for people who make, receive, and manage federal awards.” See <https://beta.sam.gov/help/new-to->

36C25619Q1412. The notice instructed interested companies to provide product literature on any items that would be offered to meet the requirements of the draft specifications. Id.

On August 21, 2019, MCI responded via email to the sources-sought notice, providing a capability statement, a Clinical Laboratory Improvement Amendments of 1988 (CLIA) certification, and a College of American Pathologists (CAP) accreditation. Protest, exh. C. The capability statement stated that MCI was “capable of performing reference laboratory testing services ([tuberculosis] testing),” and that it had the laboratories and vendor resources to provide these services. Id., exh. F. The CLIA certification and CAP accreditation, according to MCI, “ensures test results are meeting and exceeding industry standards for clinical laboratory testing such as required in the [s]ources [s]ought notice.” Protest at 3.

Based on the responses to the sources-sought notice, on September 5, 2019, the agency issued request for quotations (RFQ) No. 36C25619Q1470 as a service-disabled veteran-owned small business (SDVOSB) set-aside seeking a particular t-spot tuberculosis test that was proprietary to Oxford Immunotec, USA (Oxford). Id., exh. I, RFQ at 1, 4. Oxford was performing the tuberculosis testing services pursuant to an order issued under its Federal Supply Schedule (FSS) contract, and that order was set to expire at the end of September. Agency Supplement to Notice of Corrective Action and Request for Dismissal, at 2. On September 26, 2019, the agency cancelled the solicitation in its entirety, stating that it was doing so due to “a significant solicitation anomaly.”² Protest, exh. J, RFQ Amend. 0001, at 1.

After cancelling the RFQ, the agency issued another order for tuberculosis testing services under Oxford’s FSS contract. Agency Supplement to Notice of Corrective Action and Request for Summary Dismissal, at 3. This order was effective October 1, 2019 and included a 3-month period of performance, until December 31, 2019. Id. According to the agency, shortly after issuing the order to Oxford, the agency learned that Quest had purchased Oxford’s North American laboratory, and therefore Quest was the company that would provide the tuberculosis testing services. See id. at 3, n.2. As a result, the agency modified the order issued to Oxford to reflect that a new vendor

sam (last visited on Mar. 9, 2020). The SAM website merges ten separate websites that were used to track data related to the federal acquisition and award process. See id. Federal contracting opportunities that were previously posted on the FedBizOpps website are now posted on the SAM website. See id.

² The agency explains that the reason for the cancellation was because the agency had determined that “its market research was flawed calling into question its decision to compete the requirement and to set the procurement aside for SDVOSB concerns.” Agency Supplement to Notice of Corrective Action and Request for Summary Dismissal, at 3.

would provide the services, and subsequently issued an order to Quest to perform the same services. Id.

On November 26, 2019, the agency posted on SAM another sources-sought notice, again seeking information to enable it to conduct market research to identify potential sources for a potential procurement of t-spot IGRA tuberculosis testing. Protest, exh. K, SAM Notice ID No. 36C25620Q0141. The draft Statement of Work (SOW) included with the notice stated that the purpose of the procurement was “to provide the Oxford [t-spot tuberculosis] test, a proprietary test owned by Oxford Immunotec.” See id., SOW at 1. The notice also included an unsigned justification for a single-source award, which stated that the agency intended to make a sole-source award to Quest for tuberculosis testing. See id., Justification for Single Source Award, dated Nov. 19, 2019.³ The sole-source award would be for a 3-month base period starting on January 1, 2020, with two 3-month option periods and a total estimated cost of \$75,000 including the option periods. Id. The justification explained that the agency had to make a sole-source award after it had to cancel the competitive solicitation seeking procurement of a year’s worth of testing. The justification further stated that the agency was “directed by VA [p]rocurement [o]fficials to obtain needed testing services through the incumbent, Oxford Immunotec, or use the Reference Lab to whom they had sold their testing facilities[,] Quest Diagnostics.” Id.

On December 6, 2019, MCI filed a protest with our Office challenging the agency’s decision to award a sole-source contract to Quest. MCI’s protest was based on the November 26 sources-sought notice, and argued that the justification included with that notice “fail[ed] to contain sufficient facts and explanation to support the use of a sole-source award” to Quest. Protest at 1.

On January 6, 2020, the agency filed a notice of corrective action and request for summary dismissal with our Office. Supplement to Notice of Corrective Action and Request for Summary Dismissal.⁴ In the notice, the agency stated that it would not move forward with the sole-source award to Quest as described in the November 26 notice posted to SAM. Id. at 5. Instead, the agency explained that it had issued a 3-month sole-source “bridge contract” (i.e., a temporary, short-term contract) to Quest to provide tuberculosis testing services from January 1, 2020 through March 31, 2020 “during the pendency of the current protest and implementation of corrective action.” Id. at 8. The total value of that contract was \$25,075. Agency Report (AR), Tab 1, Quest

³ The SOW and sole-source justification were not included in the record. However, they are publicly available on the SAM website page for the November 26 sources-sought notice.

⁴ The agency initially filed a notice of corrective action and request for dismissal on January 3, 2020. We convened a conference call with the parties and stated that we would not dismiss the protest because we did not find that the agency’s initially proposed corrective action rendered the protest academic. Three days later, the agency filed a supplement to its notice of corrective action and request for dismissal.

Contract, at 9. The agency asserted that this was a “separate procurement” from the one described in the November 26 notice because that notice sought to award up to a 9-month contract (a 3-month base period with two 3-month option periods) while Quest’s bridge contract was for only a 3-month period of performance. Supplement to Notice of Corrective Action and Request for Summary Dismissal, at 8-10.

On January 7, 2020, the protester filed an objection to the agency’s notice of corrective action and request for summary dismissal. The protester argued that the agency did not address the allegations raised in the December 6 protest, and that the 3-month contract awarded to Quest was not a bridge contract but rather was an unjustified sole-source contract. Protester’s Objection to Notice of Corrective Action, at 4. On January 8, 2020, our Office held a conference call with the parties during which we again explained that we would not dismiss the protest because the supplement to the agency’s initial proposed corrective action still did not render MCI’s protest academic. We further explained that we interpreted MCI’s January 7 objection to the corrective action to be a supplemental protest challenging the agency’s 3-month sole-source bridge contract to Quest, and we directed the agency to file an agency report addressing this issue. The agency report contained a justification which stated that the agency awarded Quest’s bridge contract in accordance with section 13.106-1 of the Federal Acquisition Regulation (FAR) because Quest was the only source reasonably available to provide the tuberculosis testing services. AR, Tab 2, Justification for Single Source Award, dated Jan. 8, 2020, at 1.

DISCUSSION

The protester argues that the 3-month bridge contract awarded to Quest is improper because the agency has failed to demonstrate that there is only one source reasonably available. MCI asserts that it was available to meet the requirements for the tuberculosis testing and therefore, the agency cannot justify a sole-source contract to Quest on the basis asserted.

The agency argues that its award was reasonable because it can make a sole-source award where the requirement “is of such an unusual and compelling urgency that the government would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits proposals.” Memorandum of Law (MOL) at 2. The agency also contends that under FAR part 13, it “may solicit from one source if the contracting officer determines that the circumstances of the contract action deem only one source reasonably available where the procurement does not exceed the simplified acquisition threshold.” Id. The agency concludes that the award was therefore proper because Quest “was the only contractor that could provide the required services on an ongoing basis without unacceptable delay and disruption, and a resulting significant adverse impact to the agency’s mission and public health threat.” Id. at 3-4.

The simplified acquisition procedures established under FAR part 13 are designed to promote efficiency and economy in contracting, and to avoid unnecessary burdens for agencies and contractors where, as here, the value of the acquisition is less than

\$150,000. See FAR § 13.002. When using simplified acquisition procedures, agencies are required to obtain competition to the maximum extent practicable. FAR § 13.104; Europe Displays, Inc., B-297099, Dec. 5, 2005, 2005 CPD ¶ 214 at 3; Information Ventures, Inc., B-293541, Apr. 9, 2004, 2004 CPD ¶ 81 at 3. Under the maximum extent practicable standard, an agency “may solicit from one source if the contracting officer determines that the circumstances of the contract action deem only one source reasonably available (e.g., urgency, exclusive licensing agreements, brand-name or industrial mobilization).” FAR § 13.106-1(b)(1). We review protests of sole-source determinations made in these procurements for reasonableness. Europe Displays, Inc., supra., at 4.

In its justification for a single-source award, the agency states that the New Orleans VA Medical Center had an “urgent and compelling need” for the tuberculosis testing services to avoid a break in services on January 1, 2020. AR, Tab 2, Justification for Single-Source Award, dated Jan. 8, 2020, at 1. The justification explains that the award to Quest is meant to be a 3-month bridge contract to cover the time between when the protest was filed and when a decision on the protest is due, and that the agency intends to use competitive procedures to obtain the long-term testing requirements. Id. The justification also states that because Quest had performed the tuberculosis testing from October to December 2019, “they are the incumbent and the logical company for the sole-source bridge contract.” Id. Accordingly, the agency awarded the 3-month contract to Quest “to maintain the status quo and place a short-term bridge contract into effect to maintain critical supplies and services.” Id.

We find that the agency has demonstrated a reasonable basis for awarding the 3-month contract to Quest that is consistent with FAR § 13.106-1(b)(1). As explained in the justification, the agency determined that Quest, as the incumbent, was the only source reasonably available to meet the urgent tuberculosis testing requirement. In concluding that Quest was the only source reasonably available, the agency also argues that MCI was “neither capable nor authorized by the test manufacturer to immediately begin performing those [tuberculosis] tests.” MOL at 5.

MCI asserts that the award was improper because MCI was “more than reasonably available to meet the unusual and compelling urgency” of the tuberculosis testing services. Protester’s Comments at 1. In support of this, the protester points to its response to the agency’s initial August 21 sources-sought notice, when it submitted the CLIA certification and CAP accreditation. Id. at 2. MCI also submits a letter from Oxford, and claims that the letter shows that Oxford had authorized MCI to perform the t-spot tuberculosis testing. Id. at 3-4. The record does not support the protester’s argument.

Neither the CLIA certification nor the CAP accreditation confirms that MCI is readily available to provide the specific proprietary tuberculosis testing sought by the agency. Indeed, as explained by MCI, the CLIA certification and CAP accreditation demonstrate only that MCI can meet and exceed industry standards for clinical laboratory testing.

Protest at 3. In addition, the letter from Oxford does not show that MCI was authorized to perform Oxford's t-spot tuberculosis test. The letter states:

It is possible for Oxford Immunotec USA, Inc. and MCI Diagnostic Center to enter into negotiations with MCI Diagnostic Center intending to establish contractual terms related to the purchase of [t-spot tuberculosis] kits and accessories. These contractual terms would, among other things, authorize MCI Diagnostic Center to perform the [t-spot tuberculosis] test in their laboratory.

Protester's Comments, exh. C.1, Letter from Oxford to MCI. Thus, contrary to MCI's position, the letter demonstrates that Oxford and MCI have agreed only to enter into negotiations to establish a contract. The letter itself is not a contract that authorizes MCI to perform Oxford's tuberculosis test, nor is there any contract or agreement between MCI and Oxford in the record that shows MCI is authorized to perform this testing. Accordingly, based on our review of the record, we find that MCI has not shown that it is readily available to perform the required tuberculosis testing, and thus has not shown that the agency's determination that there is only one reasonably available source was unreasonable.

The protest is denied.

Thomas H. Armstrong
General Counsel