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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Steriliz, LLC

File: B-410988.2

Date: May 12, 2015

Angelo Mancuso, Steriliz LLC, for the protester.
Edith M. Bowman, Esq., Department of Veterans Affairs, for the agency.
Stephanie B. Magnell, Esq., and Jonathan L. Kang, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is denied where the agency's sole-source award to a Federal Supply Schedule contractor had a rational basis, and protester fails to allege that its product satisfies the agency's requirements.

DECISION

Steriliz, LLC, of Rochester, New York, protests the decision of the Department of Veterans Affairs (VA) to award a sole-source contract to fulfill its requirement for a mercury-free, ultra-violet (UV) medical disinfecting system to Xenex Disinfection Services, LLC. Protest at 1. We deny the protest.

BACKGROUND

In April 2002, the Veterans Health Administration (VHA) issued VHA Directive 2002-018, Management of "Mercury in Veterans Health Administration Facilities," in which the VA directed its medical facilities to "[r]educe[] the number of Hg [mercury] containing products as necessary where suitable substitutes are available . . . with the ultimate goal of achieving a virtually Hg-free environment." Agency Report (AR), Tab 7, VHA Directive 2002-018, at 2. VA medical facilities were also directed to "[i]mplement[] Hg reduction into all phases of the acquisition and procurement process as well as the operation of the facility management program." Id. at 3. The directive expired on March 31, 2007. Id. at 4.

In October 2011, the Milwaukee, Wisconsin, VA Medical Center, noting the hazards of short- and long-term exposure to mercury vapor (e.g., vomiting, diarrhea, memory loss, tremors), established a policy stating that:

All Divisions . . . are hereby encouraged to minimize procurement of Mercury-containing instruments and are advised to seek safer substitutes wherever possible. Divisions are encouraged to exchange mercury containing devices with safer substitutes that already exist in the inventory on station. The goal of a mercury free environment has been outlined in VHA 2002-018, titled "Management of Mercury in Veterans Health Administration Facilities."

AR, Tab 8, Milwaukee VA Mercury Use Memorandum, at 1.

On June 24, 2013, the acting division manager for the VA environmental management services division sent a memo to VA contracting personnel that described the functional specifications of the Xenex PX-426t system. AR, Tab 9, VA Memorandum. The memorandum highlighted that the Xenex system was, "to the best of our knowledge[,] the only [UV disinfection] system that does not contain mercury."¹ Id.

On December 15, 2014, the contracting officer (CO) signed a limited sources justification (LSJ) under the under Federal Supply Schedule (FSS) provisions of Federal Acquisition Regulation (FAR) § 8.405-6, restricting purchase of a UV disinfection system and base-plus-four-year service contract to Xenex, for a total (including option years) of \$285,500.96. AR, Tab 5, LSJ, at 1-2. The LSJ stated that limitation of sources to Xenex's UV disinfecting system was required for the following reasons:

[The Xenex system] is the only product to use a non-mercury high intensity millisecond pulsed xenon UV gas bulb for disinfection of patient rooms. The UV-C produced by the xenon lamp is the only product capable of producing pulses from a spectrum of 200 nm [nanometers] to 280 nm covering the entire germicidal UV band. Xenex Healthcare Services is the only manufacturer and distributor of the Pulsed Xenon UV Disinfection System

Id. at 2. The agency determined that Xenex's product offered the best value to the government "because no other companies can meet the specifications required of a non-mercury UV disinfection bulb capable of producing pulses of 200 nm to 280 nm." Id. at 3. The VA stated that in performing its market research, "[a] search of the VA NAC and GSA Advantage contracts identified 57 contractors under [the

¹ Although the department uses two corporate names for the company, Xenex Disinfection Services, LLC, and Xenex Healthcare Services, no party has alleged that these are not simply trade names for the same entity.

relevant schedule,] but from this number only one provided a mercury free xenon lamp capable of producing UV pulses between 200 nm and 320 nm.”² Id. at 4.

On December 17, 2014, the agency posted its pre-solicitation notice and LSJ to the government’s central contracting website, www.fbo.gov, in conjunction with solicitation VA69D-15-Q-0136. CO Statement, at 1. The notice of intent to award a sole-source contract stated that the agency was executing a one-time purchase of a Xenex Pulsed Xenon Disinfectant System. AR, Tab 4, Presolicitation Notice, at 2. The notice further stated that “[i]f a firm believes it can meet the requirements [of the solicitation,] it must furnish information about its products and services, as well as references from other customers who are using these products and service[s], [to the contracting officer,] by 5:00PM (CST) December 22, 2014.” Id.

On December 17, the protester filed an agency-level protest challenging the VA’s decision to award the contract on a sole-source basis. AR, Tab 1, Agency-Level Protest. Steriliz first asserted that Xenex’s manufacturing claim that a pulsed-xenon UV disinfection system was “more powerful” than a mercury-based system, was inaccurate. Id. Next, Steriliz disputed Xenex’s claim that a pulsed Xenon system provided better germicidal results than a mercury-based system. Id. The protester argued that the agency was improperly relying on these erroneous performance representations and asked the agency to remove any requirements that reduced competition until Xenex could produce results demonstrating product efficacy. Id. The protester also alleged that there was no governmental mandate or requirement that the agency obtain a mercury-free UV disinfection system, and thus effectively argued that the agency erred in imposing this restriction without an adequate basis. Id.

On February 23, 2015, the agency denied Steriliz’s protest,³ responding as follows:

The Veterans Health Administration is currently working to eliminate[] mercury to the greatest extent possible from all VHA health care facilities in accordance with VHA Directive 2002-018. The equipment from Xenex Disinfection Services LLC is an acceptable non-mercury alternative to meet the VA’s needs. . . . Steriliz, LLC is unable to provide a non-mercury product and therefore not able to meet the Government’s requirements. For the above stated reasons, your protest is hereby dismissed.

² The reference to “320 nm” appears to be a typographical error; the upper limit of “280 nm” is otherwise consistently used.

³ The VA’s letter denying the protest is dated February 18, but the agency does not dispute Steriliz’s representation that the protester received it on February 23.

AR, Tab 2, Agency Response, at 2.

On February 27, the agency awarded the contract for purchase and maintenance of a pulsed xenon disinfection system to Xenex. CO Statement, at 1. Steriliz filed this protest on March 4. Id. at 2.

DISCUSSION

Steriliz alleges that the LSJ establishing the mercury-free preference lacks a proper foundation because (1) it is based on an expired agency directive, and (2) it is inconsistent with the agency's continued use of mercury-containing fluorescent bulbs at other VA facilities. Protest at 1. For the reasons discussed below, we find no basis to sustain the protest.⁴

Orders placed under the FSS are considered to satisfy the full and open competition requirements of FAR part 6. 41 U.S.C. § 152(3); FAR § 6.102(d)(3). See also Desktop Alert, Inc., B-408196, July 22, 2013, 2013 CPD ¶ 179 at 4. FAR part 6 also exempts such orders from the requirements regarding justification for less than full and open competition, if certain procedures are followed. FAR § 8.405-6. An agency may award a sole-source contract if "[o]nly one source is capable of providing the supplies or services required at the level of quality required because the supplies or services are unique or highly specialized. . . ." FAR § 8.405-6(a)(1)(i)(B). Specifically, an ordering activity must document the basis for the restriction in the form of an LSJ, which shall include, inter alia:

- (iii) A description of the supplies or services required to meet the agency's needs (including the estimated value).
- (iv) The authority and supporting rationale (see 8.405-6(a)(1)(i) and (b)(1)) and, if applicable, a demonstration of the proposed contractor's unique qualifications to provide the required supply or service.

* * * * *

- (vi) A description of the market research conducted among schedule holders and the results or a statement of the reason market research was not conducted.

FAR § 8.405-6(c). In addition to the above requirements, the FAR states that brand-name specifications which effectively limit the acquisition to products available from only one manufacturer "shall not be used unless the particular brand name, product, or feature is essential to the Government's requirements, and

⁴ Although we do not address each of the protester's arguments, we have reviewed them all and find that none provides a basis to sustain the protest.

market research indicates other companies' similar products, or products lacking the particular feature, do not meet, or cannot be modified to meet, the agency's needs." FAR § 8.405-6(b)(1).

Here, the VA established a performance requirement that the UV disinfecting lamp be mercury-free.⁵ AR, Tab 5, LSJ, at 1-2. The agency performed market research and found that only one firm supplies a mercury-free product that performs within the required spectrum. *Id.* at 4. Steriliz challenges the agency's preference for a mercury-free product, arguing that the mercury-reduction directive VHA-2002-018, upon which the LSJ was based, is expired and that an expired agency directive cannot serve as justification for sole-source award. Protest at 1.

We review an agency's use of a limited source justification under FAR part 8.4 for reasonableness. Desktop Alert, Inc., *supra*, at 5. *See also* XTec, Inc., B-405505, Nov. 8, 2011, 2011 CPD ¶ 249 at 5; Systems Integration & Mgmt., Inc., B-402785.2, Aug. 10, 2010, 2010 CPD ¶ 207 at 2-3.

Although the April 2002 VHA directive may have, on its face, expired in 2007, there is no claim that the October 2011 policy of the Milwaukee VHA facility is not still in force. The October 2011 policy refers to the April 2002 directive, but does not appear to rely on the directive as the sole source of its authority; instead the policy independently cites the hazards of mercury vapor exposure. AR, Tab 8, Milwaukee VA Mercury Use Memorandum, at 1. Therefore, we do not reach the question of whether an expired directive can form the basis of an LSJ. With regard to the Milwaukee VHA mercury elimination policy, the protester does not claim that the agency's findings regarding the hazards of mercury vapor exposure have been overstated. Because the agency's market research revealed only one source for a mercury-free UV disinfecting lamp, and because there is no dispute about the hazards of mercury gas exposure, we conclude that the agency's decision to award the contract on a sole-source basis to the only source of a mercury-free product was reasonable.

Steriliz also argues that the Xenex system is not as effective as claimed. Comments at 1-3. However, the protester's challenges to the performance appear to relate to Xenex's claims in product literature, rather than anything set forth in the limitation of sources document.⁶ Not only does Steriliz fail to provide any detail to

⁵ The protester's UV disinfectant lamp system uses a mercury gas bulb. CO Statement at 2.

⁶ The protest also fails because it neither claims to satisfy nor challenges the agency's requirement that a UV disinfecting lamp perform at 200 nm - 280 nm. Where a protester's product does not comply with the solicitation's salient characteristics and does not satisfy the agency's minimum needs, the protester is not eligible for award. Beckman Instruments, Inc., B-246148.2 *et al.*, Apr. 2, 1992, (continued...)

support its argument that a xenon bulb is less effective than a mercury bulb, but the protester never challenges the basis for the government's requirement that the disinfection lamp cover the 200 - 280 nm spectrum.

The protest is denied.

Susan A. Poling
General Counsel

(...continued)

92-1 CPD ¶ 340. See also Logistics Network, Inc., B-408995, Jan. 6, 2014, 2014 CPD ¶ 24 (an offer is properly rejected under a brand name or equal solicitation when the offeror fails to establish that its product meets all of the listed salient characteristics).