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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Bausch & Lomb, Inc.

File: B-298444

Date: September 21, 2006

John F. LaFave, Esq., for the protester.

Dennis Foley, Esq., and Philip Kauffman, Esq., Department of Veterans Affairs, for the agency.

Katherine I. Riback, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency's sole-source order of ophthalmology equipment based on unusual and compelling urgency was improper where the awardee was determined to be the only responsible source, yet the capabilities of the equipment of other interested firms were not considered.

DECISION

Bausch & Lomb, Inc. (B&L) protests the Department of Veterans Affairs' (VA) issuance of sole-source purchase orders to Alcon Laboratories, Inc. for ophthalmology equipment used in cataract procedures for the VA Medical Centers (VAMC) located at Albany and Syracuse, New York.

We sustain the protest.

The Chief of Ophthalmology in the VAMC Albany facility indicated, in a memorandum dated May 31, that two patients developed eye infections due to the use of certain medical equipment used in cataract procedures because the equipment had been improperly cleaned. The doctor went on to state in the memorandum that the medical equipment was outdated in any case and required replacement and that her doctors were familiar and comfortable with the Infiniti machine manufactured by Alcon as a result of their private practice experiences. Agency Report, Tab B, VAMC Albany Memorandum (May 31, 2006).

On that same day, the VA issued a purchase order for ophthalmology medical equipment for cataract procedures to Alcon for the VAMC Albany facility. The order

was made without advertisement or competition on the basis of unusual and compelling urgent circumstances affecting patient care at the facility.

On June 14, the VA publicized in FedBizOpps an intent to award a sole-source contract to Alcon for ophthalmology medical equipment for cataract procedures for the VAMC Syracuse facility, and invited interested parties to respond by 4:30 p.m. that same day. Agency Report, Tab C, FedBizOpps Notice, June 14, 2006. On that same date, VA issued a sole-source purchase order to Alcon for the equipment.

The equipment ordered under these purchase orders has been delivered. After the awards were made, the contracting officer prepared an undated justification and approval (J&A) for other than full and open competition on the basis of urgent circumstances for the sole-source purchases of medical equipment for the VAMC Albany and the VAMC Syracuse facilities.¹ The J&A stated that the ophthalmology equipment for the two VAMC facilities was urgently needed and that its doctors have found that only Alcon could meet the needs of the government because its ophthalmology equipment was “state of the art technology,” and that other similar units on the market lacked “advanced design features,” such as a torsional phaco handpiece or the aqualase technology. The J&A also stated that the “other vendors have had no significant change in their handpiece design in 14 years.” Regarding the Syracuse VAMC facility, the J&A stated that the medical equipment in question was 12 years old and had been proven unreliable in the operating room. The J&A finally stated, without further elaboration, that B&L and another firm had expressed an interest in these acquisitions. Agency Report, Tab B, J&A.²

The protester contends that the sole-source orders to Alcon were improper. The protester states that the J&A prepared in connection with the orders was not adequately justified, and that the VA failed to request offers from as many potential sources as practicable. B&L argues that the agency’s conclusion that only Alcon’s equipment could meet VA’s requirements was inaccurate and that B&L’s Millennium equipment was the most advanced system on the market and could better satisfy VA’s requirements. B&L argues that to the extent the orders to Alcon were justified based on urgency, the urgent circumstances were the result of the VA’s lack of advance planning.

¹ The agency justified the awards of sole-source contracts to Alcon for this equipment pursuant to 41 U.S.C. § 253(c)(2) (2000) and Federal Acquisition Regulation § 6.302-2(a)(2), and implemented this justification through the issuance of sole-source purchase orders to Alcon.

² On June 14, VA also publicized an intent to award a sole-source contract to Alcon for ophthalmology medical equipment for cataract procedures for the VAMC Buffalo facility. After this protest was filed, VA terminated this purchase order.

The Competition in Contracting Act of 1984 (CICA) requires agencies to conduct their procurements using “full and open competition.” 41 U.S.C. § 253(a)(1)(A). CICA, however, permits noncompetitive acquisitions in specified circumstances, such as when the agency’s need for the services is of unusual and compelling urgency. Specifically, the exception provides as follows:

An executive agency may use procedures other than competitive procedures only when . . . (2) the agency’s need for the property or services is of such an unusual and compelling urgency that the Government would be seriously injured unless the executive agency is permitted to limit the number of sources from which it solicits bids or proposals.

41 U.S.C. § 253(c)(2); see also FAR § 6.302-2(a)(2). As noted, this exception only allows an agency to “limit the number of sources,” so that an agency may not simply ignore the potential for competition. See Worldwide Language Res., Inc.; SOS Int’l Ltd., B-296984 et. al., Nov. 14, 2005, 2005 CPD ¶ 206 at 11. The mandate for agencies to effect some modicum of competition is reiterated in 41 U.S.C. § 253(e), which provides that when an agency utilizes other than competitive procedures based on unusual and compelling urgency, the agency “shall request offers from as many potential sources as is practicable under the circumstance.” See also FAR § 6.302-2(c)(2). In addition, CICA provides that under no circumstances may noncompetitive procedures be used due to a lack of advance planning by contracting officials or concerns related to the amount of funds available to the agency. 41 U.S.C. § 253(f)(5)(A); see also FAR § 6.301(c).

The agency has not demonstrated that it had a reasonable basis to make the sole-source orders here. While at least with respect to the VAMC Albany facility, the agency has demonstrated that it had an urgent need to replace the equipment due to the fact that patients were getting eye infections as a result of the use of the faulty medical equipment,³ the agency has not reasonably demonstrated why it could not have opened the requirement up to an expedited limited competition among those firms that had expressed interest in the acquisition. There is no evidence in the record that the agency ever considered whether the cataract medical equipment proposed by B&L, or any other firm, would meet its urgent requirements. Moreover, B&L has responded in detail to the agency’s sole-source justification by noting that

³ The justification for urgency for the Syracuse VAMC is more problematic. In this regard, the record contains an e-mail from the doctor at the VAMC Syracuse facility indicating that the impetus for his purchase of this equipment was that the VAMC facilities in Albany and Buffalo were very much interested in procuring Alcon Infinity machines, “so [he] procured this by hopping on their coat tails so to speak,” and that the equipment at that site had been “behaving fairly well.” E-mail from VAMC Syracuse to B&L (June 19, 2006).

its Millennium equipment is “state of the art” cataract surgery equipment and enjoys a significant market share, and by providing many technical details as to why its equipment is the best equipment available to meet VA’s requirements. While VA was invited to respond to B&L’s comments, it has provided no response to B&L’s detailed comments as to why its equipment would satisfy VA’s requirements.

We sustain the protest. We do not recommend that the sole-source orders be disturbed inasmuch as they have been fully performed. We do recommend that the agency reimburse the protester its costs of pursuing this protest, including reasonable attorney’s fees. 4 C.F.R. § 21.8(d) (2006). The protester should submit its certified claim for costs, detailing the time expended and the costs incurred, directly to the contracting agency within 60 days of receipt of this decision. 4 C.F.R. § 21.6(f)(1).

The protest is sustained.

Gary L. Kepplinger
General Counsel