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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: EBSCO Industries, Inc.

File: B-414150

Date: March 2, 2017

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Foley & Lardner, LLP, for UpToDate, Inc., an intervenor.
Tedd J. Shimp, Esq., Alexis J. Bernstein, Esq., and Col. C. Taylor Smith,
Department of the Air Force, for the agency.
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GAO, participated in the preparation of the decision.

DIGEST

Protest of the proposed award of a sole-source contract, which the agency justifies on the basis that only one responsible source will satisfy the requirement without unacceptable delay, is denied where the record reasonably supports the agency's justification.

DECISION

EBSCO Industries, Inc., of Ipswich, Massachusetts, protests a notice issued by the Department of the Air Force, Air Force Medical Services, announcing its intent to award a sole-source contract to UpToDate, Inc., of Waltham, Massachusetts for access to an online medical reference database. EBSCO challenges the justification supporting the award and argues that EBSCO's product was improperly excluded from consideration.

We deny the protest.

BACKGROUND

The Air Force Medical Service has an ongoing need for an online physician's clinical reference database for its 76 military treatment facilities. Contracting Officer's Statement of Facts (SOF), at 2. The database is a resource used by doctors and other medical professionals providing patient care to facilitate clinical

decision-making, including medical assessments, diagnoses, and plans for treatment or drug therapies. Id.

In 2013, the Deputy Secretary of Defense implemented reforms of the Military Health System and tasked the Defense Health Agency (DHA) with adopting common clinical practices and consolidating shared services to realize health system cost savings throughout the military. Id.; See generally, Agency Report (AR), Tab 3, DHA Contracting Concept of Operations. DHA established a team dedicated to providing all military services with a virtual medical library, which was to include a clinical reference database. Id. at 2-3; See generally, AR, Tab 4, Virtual Medical Library Integrated Product Team Charter. In November 2015, this team notified the component services, including the Air Force, that a number of contracts would expire at the end of the year, and that “process impediments” with DHA’s funding office meant that there was an “imminent risk” that a break in virtual medical library services would occur. AR, Tab 5, DHA Briefing Slides, at 3, 5.

As a result, the Air Force issued an interim contract to UpToDate with a period of performance running through the end of October, 2016. SOF, at 3; AR, Tab 6, Interim Contract. DHA informed the Air Force that it would not complete its procurement for the database to serve the military system prior to the end of this contract. SOF, at 3. The Air Force then initiated market research to identify sources able to provide similar web-based clinical databases to ensure its continuing needs were met. Id. at 4; See generally, AR, Tab 10, Response to Requirements Research; AR, Tab 11, Contacting Officer’s Internet Market Research.

On September 12, 2016, the Air Force posted a sources-sought synopsis on the Federal Business Opportunities (FedBizOps) website for the clinical database, seeking capability statements from potential offerors. AR, Tab 17, Sources-Sought Synopsis. The posting specified that capability statements submitted in response to this synopsis should be tailored to demonstrate a clear understanding of the requirements and describe prior experiences providing this type of medical database, including references to previous contracts. Id. at 2. Potential offerors were provided a draft statement of work reflecting the Air Force’s requirements for the database. Id., Statement of Work, at 5-10. Relevant to this protest, the draft statement of work required, among other things, that the content of the medical topics in the database be written and peer-reviewed by “expert physicians in the specialty.” Id. at 7.

On September 22, EBSCO submitted a response to the sources-sought notice offering its *DynaMed Plus* product. See AR, Tab 18, EBSCO Response. In this submission, EBSCO explained that the content of its database is written and maintained through a team effort. Id. EBSCO states:

All topics are written with team effort and maintained, as evidence changes, with a team effort. Topics are created via a combination of the content domain expert(s) involved in the topic development and maintenance, and the Deputy Editor providing oversight and final editorial approval for publication.

The [. . .] editorial team is organized to combine multidisciplinary expertise to dynamically manage content and continuously improve. The editorial team combines the skills, experience, and expertise from physicians, pharmacists, allied health professionals (such as dietitians and physical therapists), scientists, epidemiologists, medical writers, medical editors, and medical librarians.

Id. at 9.

Also on September 22, the Air Force finalized the statement of work. SOF, at 7. The final statement of work included clarifications of the requirements to meet the needs of the medical workforce. SOF, at 7; AR, Tab 19, Final Statement of Work. Among other changes, the final statement of work described the requirement as follows:

Content will be written by expert physicians in the specialty and peer-reviewed by other experts in the specialty. Credentials and affiliations of the authors and reviews will be included in the content.

AR, Tab 19, Final Statement of Work, at 2. Further, where the statement of work previously requested a “synthesized” presentation of materials, the final version required a “thorough, reasoned discussion” of topics in the database. Id. at 3; SOF, at 7.

The Air Force completed its market research on October 12, concluding that UpToDate offered the only product that would meet its needs. AR, Tab 20, Market Research Report. Specifically, the market research report noted that EBSCO’s product failed to meet the specifications because its content is not written by expert physicians in the specialty discussed, and because its content is not presented as a thorough, reasoned discussion of the topic with prioritized, recommended actions, but rather as “bullet points,” a format that was viewed as presenting data without analysis. Id. at 2.

Based on this conclusion, the agency executed a Justification and Approval (J&A) in accordance with Federal Acquisition Regulation (FAR) § 6.304(a)(2) on October 14. AR, Tab 22, J&A. The Air Force posted a special notice on the FedBizOps website regarding its intent to award a sole-source contract to UpToDate that same day. AR, Tab 23, Special Notice.

On October 17, EBSCO submitted another response to the agency, attempting to demonstrate its product's compliance with the final statement of work. See AR, Tab 21, EBSCO Response to Notice of Intent to Award Sole-Source. In this submission, EBSCO repeated the assertions quoted above, explaining that its database's content was written and maintained as a team effort, combining "content domain experts" with an editorial team to incorporate the skills, experience, and expertise from physicians, pharmacists, allied health professionals, medical writers and others. Id. at 8. Air Force personnel reviewed this new submission, and documented their conclusion that the product did not meet the requirements of the statement of work. See AR, Tab 24, Memorandum to File. In this review, agency personnel highlighted concerns that EBSCO's topics were not developed or maintained by experts in the medical specialties about which they were writing. Id. at 1. Further, the Air Force expressed a concern that the limited availability of experts in specific specialties that EBSCO indicated would be creating its database content was insufficient to meet the level of expertise required by the statement of work. Id.

On November 15, the Air Force posted a Notice of Award on the FedBizOps website which included the J&A for use of non-competitive procedures. AR, Tab 27, Notice of Award. This protest followed.

DISCUSSION

EBSCO protests that the J&A the Air Force executed is insufficient to justify the use of non-competitive procedures. Protest at 2-3. In this regard, EBSCO contends that its product was improperly excluded and that it can meet the statement of work's requirements. Id. The protester alleges that the agency evaluated its product unreasonably, arguing that the agency misunderstood the wording in EBSCO's submissions. Comments at 2-3.

The Air Force responds that EBSCO's description of how its materials were developed did not meet the agency's content creation requirements. Memorandum of Law (MOL), at 5-6. Among other findings, the Air Force concluded that EBSCO's topics were written by "content domain experts," and not "expert physicians in the specialty at issue." Id. at 6. In this regard, the Air Force states that the protester's database "offered far less medical certainty in its content" because it was neither created nor reviewed by expert physicians. Id. Because of this uncertainty, the Air Force contends EBSCO's offering did not meet the minimum requirements of the statement of work. Id.

Generally, the Competition in Contracting Act (CICA) requires agencies to obtain full and open competition in their procurements, but permits the use of other than competitive procedures where there is only one responsible source able to meet the agency's requirements. 10 U.S.C. §§ 2304(a)(1)(A), 2304(c)(1). Agencies are required to complete a written J&A including sufficient facts and rationale to support

the use of noncompetitive procedures. 10 U.S.C. § 2304(f)(1)(A); FAR §§ 6.302-1(d)(1), 6.303, 6.304. Our review of an agency's decision to use noncompetitive procedures focuses on the adequacy of the agency's rationale and conclusions set forth in the J&A. Camden Shipping Corp., B-406171, B-406323, Feb. 27, 2012, 2012 CPD ¶ 76 at 6. Where the J&A sets out reasonable justifications for the agency's actions, we will not object to the decision to limit competition. See Piedmont Propulsion Systems, LLC, B-410914.2, Mar. 17, 2015, 2015 CPD ¶ 119 at 13.

Here, the challenge to the rationale for using noncompetitive procedures centers on the agency's consideration of EBSCO's product's ability to meet the agency's stated requirements.¹ Specifically, the Air Force required that the content of the database be written and reviewed by physician experts. AR, Tab 23, Special Notice, at 5. EBSCO's own submissions indicate that the teams that write and maintain its materials do not necessarily include a physician. See AR, Tab 18, EBSCO Response, at 8; see also, AR, Tab 21, EBSCO Response to Notice of Intent to Award Sole-Source, at 9. Further, it is not clear from EBSCO's submissions that experts in the field covering a particular topic are involved in the creation or review of content relating to that issue. As a result, we find that the agency reasonably concluded that EBSCO's product will not meet the agency's requirement, and that EBSCO has provided our Office no basis to object to this sole-source award.

The protest is denied.

Susan A. Poling
General Counsel

¹ While EBSCO has raised other arguments that we do not address here, we have reviewed them and conclude that none provide a basis for sustaining its protest.