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Decision

Matter of: iMed Biomedical, Inc.

File: B-416195

Date: July 3, 2018

Kathy Van Every, Esq., Law Offices of Kathy Van Every, for the protester. Deborah K. Morrell, Esq., and Donald C. Mobly, Esq., Department of Veterans Affairs, for the agency. Kenneth Kilgour, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that the agency has not properly justified a proposed sole-source award is denied where the agency executed a justification and approval (J&A) and the protester does not demonstrate that the agency's rationale for the J&A was unreasonable.

DECISION

iMed Biomedical, Inc., of Carrollton, Texas, protests the award of a sole-source contract to NovaMed Corporation, of Trumbull, Connecticut, under solicitation No. 36C25618R0378, issued by the Department of Veterans Affairs (VA) for maintenance of Bayer MEDRAD injectors for the Houston, Texas VA Medical Center. iMed asserts that the agency's decision to award a sole-source contract lacks a rational basis because more than one viable source was available to fulfill the requirement.

We deny the protest.

BACKGROUND

The agency issued a sources sought notice seeking potential offerors to provide all labor, tools, materials, parts, equipment, supervision, software, license, certification, transportation, management, and personnel required for preventive maintenance on government MEDRAD equipment. Agency Report (AR), Tab 3, Sources Sought Notice; Tab 4, Statement of Work, at 1. As relevant to this protest, the sources sought notice required that the contractor "be an authorize[d] vendor, trained technician, possess licenses and certification for proprietary equipment and services to meet all government requirements and objectives." *Id.* at 2. The sources sought notice further required the

vendor to “be an [original equipment manufacturer (OEM)], authorized dealer, authorized distributor or authorized reseller” for the equipment to be maintained, “verified by an authorization letter or other documents from the OEM.” Id. In addition to publication of the notice, the contracting officer performed a search of the VA’s vendor information page portal and emailed directly at least three firms that were either service-disabled veteran-owned or serviced-disabled small businesses. AR, Tab 5, Justification and Approval (J&A), at 3.

Four firms, including the protester and the awardee, responded to the sources sought notice. Contracting Officer’s Statement (COS) at 1. iMed communicated that “[d]ue to the competitive nature of the medical device service industry, it is very difficult for small/veteran owned businesses to receive OEM ‘authorizations’ that directly compete with OEM provisions.” Protest, attach. D, iMed Response to Sources Sought Notice. The protester also advised the agency that iMed understood “that your medical staff wish[es] to have full confidence in the service personnel that [are] responsible for the equipment they use each day. iMed is able to provide OEM equivalent quality of service at a more affordable cost.” Id. Because iMed’s response did not advise the agency that iMed had either OEM certified technicians or a contractual relationship with the OEM, Bayer, the agency concluded that iMed’s response “places the risk on the government versus the contractor.” AR, Tab 5, J&A, at 4.

Only one firm, NovaMed, produced a letter stating that it had a master service agreement with Bayer. See id. Such an agreement, the agency concluded, would decrease the risk to the government. Id. at 5. The agency’s J&A documented the market research that had been conducted, as well as the conclusion that only NovaMed could meet the requirements set forth in the sources sought notice. See generally id. Because NovaMed was the only firm that provided evidence that it could meet all of the requirements of the notice, the contracting officer issued a sole-source award to NovaMed “as allowed by simplified acquisition procedures” in Federal Acquisition Regulation (FAR) subpart 13.5. COS at 2; see also AR, Tab 5, J&A, at 2 (sole-source award issued pursuant to FAR subpart 13.5). The estimated value of the award is \$411,752. AR, Tab 5, J&A, at 1.

This protest followed.

DISCUSSION

The protester asserts that the VA failed to consider “that [OEM] certification was unnecessary and in practical terms, meaningless,” and because of that, the sole-source award was without a rational basis, because iMed could perform the requirement. Protest at 3. Moreover, iMed argues that “[e]vidence that a contractor is qualified to perform is not solely limited to a formal contractual relationship with an OEM.” Id. The agency contends that the sources sought requirements are reasonable, given “the agency’s discretion” and the “agency’s need to consider any impact on patient care.” Memorandum of Law at 6.

As noted, these services are being procured under the simplified acquisition procedures of FAR subpart 13.5. AR, Tab 5, J&A, at 2. When conducting a procurement utilizing simplified acquisition procedures, contracting officers must promote competition to the maximum extent practicable to obtain supplies and services from the source whose offer is the most advantageous to the government. 41 U.S.C. § 3305(d); FAR § 13.104; Information Ventures, Inc., B-293541, Apr. 9, 2004, 2004 CPD ¶ 81 at 3. As an exception to the general competition requirement, a contracting officer may solicit from one source if the contracting officer determines that the circumstances of the contract action deem only one source was reasonably available (e.g., urgency, exclusive licensing agreements, brand-name or industrial mobilization). FAR §13.106-1(b)(1)(i). We review an agency's decision to limit competition under such circumstances for reasonableness. Critical Process Filtration, Inc., B-400746 et al., Jan. 22, 2009, 2009 CPD ¶ 25 at 3. Provided that there is a reasonable basis for the agency's determination of its actual needs, we will not question the agency's requirements. Military Agency Servs. Pty., Ltd., B-290414 et al., Aug. 1, 2002, 2002 CPD ¶ 130 at 4. Moreover, when a requirement relates to human safety, the agency has the discretion to define solicitation requirements to achieve not just reasonable results, but the highest possible reliability and effectiveness. Id. at 5.

The agency has explained that it required "services from either OEM Bayer or [an] authorized representative" because the equipment being maintained is "critical for patient care." AR, Tab 5, J&A, at 5; COS at 1. The protester does not challenge the agency's assertion that the performance of the contract--maintenance of the Bayer MEDRAD injectors--implicates VA patient safety. Consequently, the agency has the discretion to define the requirement for the maintenance of that equipment to achieve the highest possible reliability and effectiveness, and we find the requirements here to be reasonable.

In response to the sources sought notice, iMed offered only an assertion that it is able "to provide OEM equivalent quality of service at a more affordable cost." Protest, attach. D, iMed Response to Sources Sought. IMed did not provide any evidence that it was an authorized OEM representative or distributor; only NovaMed produced the required documentation. We thus have no basis on which to question the reasonableness of the sole-source award, where the requirements were reasonable, and the record contains no dispute that NovaMed's response to the sources sought notice was the only one to offer full compliance with the agency's stated requirements.

The protest is denied.

Thomas H. Armstrong
General Counsel