



United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Phoenix Environmental Design, Inc.

File: B-411044

Date: April 27, 2015

C. Chad Gill, Phoenix Environmental Design, Inc., for the protester.
Elyse M. Griffiths, Esq., Department of Veterans Affairs, for the agency.
Peter D. Verchinski, Esq., and Nora K. Adkins, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Protester's contention that an agency procurement for brand-name pesticide improperly limits competition is denied where the agency reasonably justified that only the brand name product would meet the agency's needs.

DECISION

Phoenix Environmental Design, Inc., of Newman Lake, Washington, a service-disabled veteran-owned small business (SDVOSB), protests the terms of request for quotations (RFQ) No. VA786-15-Q-0066, issued by the Department of Veterans Affairs (VA) for Wisdom EZ lawn pesticide for Willamette National Cemetery in Portland, Oregon. Phoenix primarily contends that the solicitation, which limits the competition to the brand name item, is unduly restrictive of competition.

We deny the protest.

BACKGROUND

On January 9, 2015, the agency posted a synopsis on the federal government's FedBizOpps (Federal Business Opportunities) website, informing potential offerors of the upcoming requirement for pesticide and stating that the pesticide would be purchased on a brand name or equal basis. Shortly after the agency posted the synopsis, however, the contracting officer executed a justification and approval (J&A) to procure the pesticide on a brand name only basis. The J&A stated

Local cemetery experience has demonstrated that no other commercially available pesticide formulation approaches the effectiveness of Wisdom-EZ Granular in dealing with the species of crane fly present in the Portland Area.

Agency Report (AR), Tab 2, Justification for Brand Name, Jan. 13, 2014, at 1.

On January 14, the agency issued the RFQ as a SDVOSB set-aside under the commercial item procedures of Federal Acquisition Regulation (FAR) Part 12. The RFQ contemplated the award of a fixed-price contract for 1360 bags of Wisdom EZ lawn pesticide, and required that the pesticide be delivered in 5-7 business days following award. Award was to be made on a lowest-priced, technically-acceptable basis. RFQ at 32.

Prior to the January 21 closing time, Phoenix filed this protest, alleging that the brand name only requirement unduly restricts competition. Phoenix asserts that its product, Talstar PL, contains the “same composition and active ingredients” as Wisdom EZ and thus the agency should be procuring this product on a brand name or equal basis.¹ Protest at 5. Phoenix also challenges, among other things, the agency’s 5-7 day delivery requirement.

Approximately two weeks after Phoenix filed its protest, the agency conducted field testing of the protester’s Talstar PL product, in order to determine if the protester’s product was the “functional equivalent” of the brand name product. AR, Tab 3, Declaration of Cemetery Director, at 1. The agency explains that it tested the Talstar PL pesticide in walk-behind rotary spreaders, rather than the tractor-towed spreaders the agency will use in distributing the pesticide, because the walk-behind spreaders “adjust[] to smaller granule sizes” than the larger machines. In this regard, the agency notes that the Talstar PL granule size is approximately one-fifth the granule size of Wisdom EZ. Id.

The agency’s testing found that the Talstar PL pesticide leaked from the machine at the second lowest setting, and at the lowest setting (for smallest granule size), the pesticide failed to provide adequate coverage from a single pass. Id. The agency concluded that, had Talstar PL been used in the larger spreaders, the pesticide would have leaked out of the larger machine, resulting in not only “significant loss of product but [] localized concentration of that product on the turf beneath.” Id. at 2. The agency also noted that, given Talstar PL’s smaller granule size, the product is subject to clogging if there is moisture in the air, which is important because “light rain is common” during the annual applications of the pesticide. Id. The agency concluded:

¹ Phoenix notes that this is its fourth protest of the agency’s attempts to procure Wisdom EZ.

[i]n summary, though the active ingredient for the two products is identical in both formula and concentration, cemetery testing of Talstar PL reveals insurmountable application issues that render it ineffective in control of the European Crane Fly at this facility.

Id.

DISCUSSION

In reviewing a challenge to the agency's determination of its needs, we defer to the contracting agency, which is most familiar with its needs and how best to fulfill them, and we will question that determination only where it is shown to have no reasonable basis. Lucent Techs., Inc., B-285505, Aug. 23, 2000, 2000 CPD ¶ 140 at 3. In this regard, restricting a procurement to a particular manufacturer's product is not improper where the agency establishes that the restriction is necessary to satisfy its needs. See Lenderking Metal Prods., B-252035, B-252036, May 18, 1993, 93-1 CPD ¶ 393 at 2; Chi Corp., B-224019, Dec. 3, 1986, 86-2 CPD ¶ 634 at 3.

Here, we find no basis to question the agency's determination that Phoenix's pesticide could not satisfy the agency's particular needs. As explained above, the agency's testing has demonstrated that Talstar PL's smaller granule size makes the pesticide unfit for use in the agency's spreaders. While the protester raises several challenges to the agency's testing--for example, asserting that the agency has provided no proof that its testing used Talstar PL; that the test results should be "at best suspect" given that the testing took place after the J&A was signed; and that it was improper for the agency to test Talstar PL in a walk-behind spreader, the protester does not challenge the underlying conclusions of the agency's testing.² Protester's Comments at 3-7. In this regard, the protester provides no explanation for why the results of the testing done in smaller spreaders would not also apply to the agency's larger spreaders, nor, more fundamentally, does the protester assert

² To the extent the protester is asserting that the agency's test results should not be considered because the agency may have conducted the testing in bad faith, we note that agency officials are presumed to act in good faith. See Career Innovations, LLC, B-404377.4, May 24, 2011, 2011 CPD ¶ 111 at 7-9 (government officials are presumed to act in good faith, and a protester's contention that procurement officials are motivated by bias or bad faith must be supported by convincing proof). Furthermore, we note that the agency officials have submitted unsworn declarations made under the penalty of perjury, which have the same force and effect as sworn declarations or affidavits, that document the tests. See 28 U.S.C § 1746; ManTech Advanced Sys. Int'l, Inc., B-255719.2, May 11, 1994, 94-1 CPD ¶ 326 at 4 n.7

that its product would, in fact, work in the agency's larger spreaders. Given the protester's failure to challenge the agency's conclusion that Talstar PL is not an equal product, Phoenix has not shown the agency's conclusion that Wisdom EZ pesticide should be procured on a brand name only basis was unreasonable.

Phoenix also challenges the solicitation's 5-7 day delivery requirement, among other things. However, as set out above, because Phoenix's product does not comply with the solicitation's reasonable brand-name restriction, Phoenix is not an interested party under our Bid Protest Regulations eligible to pursue the remainder of its protest. 4 C.F.R. § 21.0(a); Carahsoft Tech. Corp., B-297112, Nov. 21, 2005, 2005 CPD ¶ 208 at 3 n.3.

The protest is denied.

Susan A. Poling
General Counsel