

**December 17, 1999**

**P.S. Protest No. 99-19**

**PHARMCHEM LABORATORIES, INC.**

**Solicitation No. 335660-99-A-0066**

**DIGEST**

Protest of evaluation of offeror's sample drug testing devices is denied. Speculative suggestions of circumstances which may have lead to devices' failures to pass test are insufficient to support its objections to the tests; objections to use of testing firm is untimely raised; firm's previous competitive involvement with offeror does not warrant discrediting firm's description of videotape record as immaterial to offeror's theory of testing improprieties.

**DECISION**

The Purchasing and Materials Service Center, New York Metro Area, issued solicitation 335660-99-A-0066 for on-site urinalysis testing devices and related items and services. The testing device was provide a positive reaction to the following drugs at specified cut-off levels:

Amphetamines  
Cocaine metabolites  
Marijuana metabolites  
Morphine/opiate metabolites  
Phencyclidine (PCP)

Award was to be made on the basis of price and various specified proposal- and supplier-specific evaluation factors.<sup>1</sup> One of the pass/fail factors was whether the

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<sup>1</sup> Provision 4-2, Evaluation – Commercial Items, as included in the solicitation provided eight proposal-specific evaluation criteria worth a total of 100 points and two proposal-specific criteria scored pass/fail, five supplier-specific evaluation criteria to which points were not assigned, and provided that

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testing devices (of which 40 were to be supplied with each proposal) demonstrated the required ability to identify the specified drugs. According to the contracting officer's report, "[a]ll offerors were made aware through a telephone call from the contracting officer after receipt of their proposal[s] that [an independent testing laboratory,] NWT [Inc.,] would be conducting the independent reliability study and that the Postal Service would provide the offeror an opportunity to meet with [NWT's] laboratory personnel to provide any additional information which they felt might be helpful in evaluating their device."<sup>2</sup>

PharmChem protests the evaluation of the devices which it offered as failing to detect THC (a marijuana metabolite) in five of the six devices tested against control samples "spiked" with THC at a level of 150% of its device's screening cutoff, asserting that it and the manufacturer ran similar tests on devices from the lot which it submitted with positive results in each case. The protester concludes, in light of these test results, that NWT's "test procedures were somehow flawed," and suggests that NWT had a "serious conflict of interest" because Roche Diagnostics Corporation (Roche) the eventual awardee at a price higher than that offered by PharmChem, was "a principle client" of NWT. The protest seeks the re-evaluation of its product, and the adjustment of its technical score.<sup>3</sup>

The contracting officer's statement in response to the protest defended the rigor of the testing procedure and asserted that the procedure was "carefully followed." It also defends NWT's "established reputation for independence, integrity, and competence." The statement discloses that the evaluators were aware, when NWT was selected, that NWT had sold "a small quantity of on-site testing devices manufactured by Roche (approx. 1000 devices)," but that the Postal Service "determined that this activity was insignificant in the context of a multi[-]million dollar corporation and could in no way constitute a conflict of interest." The statement further notes that NWT did not stand to gain from the award to any offeror.

The copy of the contracting officer's statement furnished to PharmChem was not accompanied by documentation concerning the testing. In response to PharmChem's requests for documentation, the contracting officer undertook to provide it. In the course of doing so, the contracting officer advised that although "a photographic re-

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"[p]roposal[-] specific and supplier[-]specific performance evaluation factors, when combined, are more important than price."

<sup>2</sup> The test report was prepared by NWT Drug Testing, a division of NWT, for Bensinger Dupont & Associates, a postal consultant for the purchase.

<sup>3</sup> Dade Behring, another offeror on the solicitation, submitted a separate protest which was subsequently withdrawn. PharmChem submitted comments on that protest as an interested party.

cord was never requested by the original protocol contracted for,” NWT produced photographic data in the form of a digital videotape “on an informal, trial basis,” that NWT advised that “the images were not intended to and do not present an accurate representation of the results . . .” that the videotape would required duplication to segregate PharmChem’s results from the other results, and that such a “second generation copy would be even less representational [than the original].”

The contracting officer subsequently provided an affidavit of NWT’s president which amplified these issues. Noting that PharmChem and other representatives had explained to NWT that their devices demonstrated negative results by the appearance of colored lines (in PharmChem’s case, “[a] line . . . of any shade of pink [that] may be weaker or stronger than . . . the control line”) she asserted that the “tape [was] to provide an informal record that the testing was performed using the kits provided and that each kit had been assigned a unique laboratory accession number that corresponded to the number on the result report sheet.” Because of that limited purpose, NWT “did not verify if the various . . . lines . . . would in fact be discernable to the viewer of the tape.” Subsequently, at the Postal Service’s request, NWT had the tape reviewed, and the reviewer concluded “that while certain colors, shades and lines were visible, the digital video image did not include the resolution or color reproduction required to discern certain hues and narrow faint lines.” NWT did not furnish the tape to the contracting officer.

PharmChem made the following points in response to the contracting officer’s statement:

— The Postal Service has refused to product the videotape which “would almost certainly show” whether the proper procedures were followed. Instead, it has furnished the affidavit “of an NWT employee who is known to be hostile to PharmChem and who recently submitted an [a]ffidavit to the General Accounting Office in support of an NWT protest against PharmChem.”

— The material which as been provided shows that the tested were conducted in a hurried and unscientific fashion. There was a lack of a record of how or where the THC spiked samples were made and aliquoted (divided) into individual bottles; due to limited time, NWT did not validate the solutions prior to the study; the gas chromatography mass spectrometry analysis of the samples by American Medical Laboratories, a separate company in Virginia, was not completed until after NWT’s testing had begun, and was not run in duplicate. When tested by NWT, PharmChem’s device showed positive results on “real” urine samples containing THC at levels similar to those of the spiked samples which it failed; this should have alerted NWT to questions about the spiked samples, but it did not analyze those controls until the following day.

Roche submitted comments on the contracting officer’s statement as follows:

— PharmChem’s assertion that NWT’s test procedures must have been flawed “is pure conjecture,” and is not supported by the fact that NWT’s tests and PharmChem’s tests reached different results. “Absent any indication of a problem with NWT’s procedures, . . . the Contracting Officer was obviously entitled to rely on NWT’s independent test” (discussing standard of review and citing cases).

— PharmChem’s contentions are not buttressed by its contention that NWT had a conflict of interest; that claim is untimely and unfounded, as the contracting officer has noted, and, in any event, there was no conflict “because NWT had nothing to gain by the award . . . to Roche or any other offeror.” “[B]usiness relationships of the kind between NWT and Roche do not give rise to a conflict of interest.”<sup>4</sup>

Roche also submitted comments on PharmChem’s response to the contracting officer’s statement:

— PharmChem has no concrete evidence of any error in the conduct of the tests of its product. Despite its effort to obtain it, the contracting officer “has conclusively indicated . . . that there is no photographic evidence in existence which accurately documents the results achieved.”

— PharmChem has failed to meet its burden of proof; [t]here is simply no evidence which would support a finding . . . warranting reversal of the Contracting Officer’s reasonable determination.”

PharmChem submitted additional comments which restated several of its previous points:

— NWT’s report indicates that it performed the tests “under severe time constraints” and that because of time constraints, it did not “validate the [spiked] solutions” which Bensing Dupont provided to it.

— The short time between NWT’s testing and the independent analysis of the spiked solutions by the Virginia laboratory and an absence of transportation or storage records produces “a high likelihood of a labeling or aliquoting error.” Further, that lab failed to run its analysis in duplicate, “a standard scientific practice.”

— NWT’s tests produced a discrepancy between PharmChem’s negative results on the spiked samples and its positive results on “‘real’ urine samples”

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<sup>4</sup> Roche’s comments also addressed issues presented in the Dade Behring protest which need not be restated here.

with the same concentrations of THC. This should have occasioned immediate testing of the control samples, but NWT did not test them until the next day. As a result, PharmChem's evaluation was performed without contemporaneous knowledge of the THC levels in the controls.

— The contracting officer has "refus[ed] . . . to release the videotape "which would almost certainly show whether the testing procedures of . . . NWT, Inc., were in fact rigorous and carefully followed." In doing so, the contracting officer has relied on the statements of an NWT employee hostile to PharmChem who "in a recent GAO protest . . . filed an affidavit wherein she criticized . . . PharmChem's procedures and practices." The affidavit should be rejected because of her bias.<sup>5</sup>

The contracting officer submitted a final rebuttal to PharmChem's submission which made the following points:

— PharmChem's contentions that NWT must have mishandled the samples because there were a large number of them are conjecture; NWT routinely processes large numbers of samples in its laboratory. The absence of information about the making, aliquoting, storage and transportation of the stock solutions results from PharmChem failing to ask for it.

— NWT's report does recite time constraints in its testing, but does not support the conclusion that those constraints were "severe."

— NWT was contracted with to test devices using the samples provided. Whether it validated the solutions before the testing is a moot question, and PharmChem's allegations in that regard are conjecture.

— PharmChem has not met its "heavy burden of proof" to justify overturning the technical evaluation of its product (citing cases).

— Since NWT's GAO protest occurred prior to the submission of offers, PharmChem's objections to the firm's use is untimely.

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<sup>5</sup> Documentation accompanying the submission indicates that the GAO protest was ongoing in the fall of 1998. A decision subsequently issued as *NWT, Inc.; PharmChem Laboratories, Inc.*, Comp. Gen. Dec. B-280988, B-290988.2, December 17, 1998, 98-2 CPD ¶ 158. NWT and PharmChem had both offered to provide drug testing services for the Army National Guard and the Coast Guard, but the Department of the Army, the purchasing agency, decided instead to perform the services in-house at a laboratory at the Tripler Army Medical Center on the basis of a cost comparison to PharmChem's offer, which had been evaluated as most advantageous. NWT and PharmChem protested the cost comparison, and NWT also protested elements of the technical evaluation of its offer and PharmChem's offer. The GAO's decision found no basis to object to the Army's evaluation of the offers, or to the comparison the in-house costs to PharmChem's costs.

— The NWT videotape was not a record of the testing procedure, but “merely a record of what devices were tested.” NWT’s affidavit “provides a complete picture . . . why it does not present an accurate depiction of [the] testing.”

— PharmChem has not demonstrated that it would have been in line for award if its device had passed the test which it failed. Its technical score (which would not require rescoring were the pass/fail test passed) was less than Roche’s technical score (the highest technical score received) and technical factors were more significant than price in the award decision.<sup>6</sup>

## DISCUSSION

As the contracting officer and interested party Roche have noted, our review of the merits of technical evaluations is limited:

[W]e will not substitute our views for the considered judgment of technical personnel upon which such a determination is premised in the absence of fraud, prejudice, or arbitrary and capricious action

The protester bears the burden of proving its case affirmatively. This burden must take into account the "presumption of correctness" which accompanies the statements of the contracting officer, and if such allegations do not overcome the presumption of correctness, we will not overturn the contracting officer's position.

*Timeplex Federal Systems, Inc., Sprint Communications Company*, P.S. Protest Nos. 93-22; 93-24, February 2, 1994, citations omitted.

Although PharmChem offers suggestions of scenarios which may have lead to its devices’ failures to pass the required test, those suggestions are not accompanied by any affirmative evidence that the suggested circumstances occurred. Its unsupported speculations thus are insufficient to support its burden. *Canteen Corporation*, P.S. Protest No. 92-37, October 28, 1992.

That NWT has declined to furnish the videotape which it made in the course of testing the samples does not support the protester’s case. It is clear from NWT’s description of the videotape’s purpose (“an informal record that the testing was performed using the kits provided and that each kit had been assigned a unique laboratory accession number”) that it would shed little light on the circumstances which the protester sug-

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<sup>6</sup> Contrary to this contention, the record which the contracting officer has submitted is not sufficiently detailed to establish that Roche’s offer would have been entitled to the award had PharmChem’s offer not been eliminated.

gests lead to its devices' failures in the tests (errors in labeling or dividing the samples with which the tests were to be performed).

To the extent that PharmChem's protest objects to the use of NWT to evaluate the offered devices, it is untimely since it came more than ten days after PharmChem was aware of both the intention to use NWT and the basis for its objections to it. PM 3.6.4.d. The objection on the basis of its previous sale of Roche products is, in any event, without merit. *Cf. TAD Trucking Company.*, Comp. Gen. Dec. B-230211.3, August 12, 1988, 88-2 CPD ¶ 141 (offeror's previous, completed "conventional commercial transaction" with government contractor does not create organizational conflict of interest) and *Teledyne-Commodore, LLC*, Comp. Gen. Dec. B-278408.5, March 8, 1999, 99-1 CPD ¶ 60 (no appearance of conflict of interest where evaluating firm could gain no financial benefit from outcome of its evaluation). Similarly, NWT's prior competitive relationship with PharmChem such as in the Army procurement discussed above does not provide a basis to question NWT's description the videotape.

The protest is denied.

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Contract Protests and Policies