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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: New Technology Management, Inc.

File: B-287714.2; B-287714.3; B-287714.4

Date: December 4, 2001

Richard J. Webber, Esq., and Natalie Stoney Walters, Esq., Arent Fox Kintner Plotkin & Kahn, for the protester.
Daniel N. Hylton, Esq., Department of Agriculture, for the agency.
John W. Klein, Esq., and Kenneth Dodds, Esq., for the Small Business Administration.
Tania Calhoun, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency decision that sole-source contract awarded under Small Business Administration's section 8(a) program should include only one 1-year option—as a result of which the contract value remained under the $3 million ceiling requiring competitive procurement—does not violate prohibition against dividing current requirements into separate procurements to avoid requirement for competition, where record shows that the performance period in fact reflects agency's requirements.

2. Protester's request for a recommendation that it be reimbursed the costs of filing two prior protests on the basis that the agency failed to timely implement its proposed corrective action is denied where the record shows that the agency did, in fact, timely implement the promised corrective action that prompted the dismissal of the protests.

DECISION

New Technology Management, Inc. (NTMI) protests the award of a contract for information technology "help desk" support to OASAS Learning Solutions, Inc., made by the Department of Agriculture (USDA) on a sole-source basis pursuant to the

Small Business Administration's (SBA) section 8(a) program.[1] NTMI contends that the sole-source award was improper. NTMI also seeks a recommendation that it be reimbursed the costs of filing two prior protests associated with the procurement of these services.

We deny the instant protests and the request for reimbursement of the costs of filing the prior protests.

NTMI previously performed these services pursuant to a sole-source section 8(a) contract which was to expire on December 30, 2000, but which was extended until May 31, 2001 while USDA sought to reprocure the services.

On March 8, 2001, USDA issued a "request for proposal – statement of work" for these services and asked for the submission of technical and cost proposals. On March 20, NTMI filed a protest in which it alleged that the solicitation was unclear as to which part of the Federal Acquisition Regulation (FAR) was to govern; failed to clearly state what the cost proposal should contain and how it would be evaluated; failed to include a basis for award or technical evaluation criteria; and was "hopelessly muddled" in terms of its statement of requirements. Mar. 20, 2001 Protest at 6-9. On March 22, USDA advised this Office that it planned to take corrective action. The agency stated that it would cancel the solicitation and "initiate a new contracting action within the next couple of weeks pursuant to Federal Acquisition Regulation Subpart 8.4 [Federal Supply Schedules]." Agency Letter of March 22, 2001. Since the cancellation of a solicitation renders a protest academic, Dyna-Air Eng'g Corp., B-278037, Nov. 7, 1997, 97-2 CPD ¶ 132, we dismissed the protest on March 27.

On April 26, USDA issued a request for quotations (RFQ) to obtain these services as a section 8(a) set-aside under the Federal Supply Schedule program. On May 8, NTMI filed a protest alleging that the RFQ failed to disclose the weights of the stated evaluation criteria and failed to identify the hardware and software that would be supported after agency migrations. NTMI also alleged that the contracting officer's response to a question regarding the treatment of disputes was improper, and that her responses to questions regarding the work requirements were ambiguous. On May 16, USDA advised this Office that it planned to take corrective action. The agency stated that it would cancel the solicitation and "initiate a new contracting action in accordance with the Federal Acquisition Regulation in the near future." Agency Letter of May 8, 2001. We dismissed the protest as academic on May 17.

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[1] Section 8(a) of the Small Business Act authorizes the SBA to contract with government agencies and arrange for the performance of such contracts by awarding subcontracts to socially and economically disadvantaged small businesses. 15 U.S.C. § 637(a) (1994).

The record shows that USDA immediately began considering its options--both competitive and sole-source--for the new contracting action, and that its preparations were in continuous progress up until the award of a contract to OASAS in September. In May, the agency decided to improve contractor service at the help desk by using a performance-based service contract.[2] On June 1, the information resources division began directly staffing and operating the help desk while it prepared for a performance-based service contract and arranged for a contractor to help it develop a performance-based statement of work for the services.

The help desk requirement was assigned to a new contracting officer in late June. At that time, the information resources division informed the contracting officer that the contract's period of performance should be for 2 years. Prenegotiation Objectives at 2. One reason for this decision was associated with the agency's planned migration to new software over the next 2 years. The agency was concerned that the changing technology could yield a changed requirement, and that the incumbent contractor, whose identity was yet unknown, might not have the capability to provide services with the new technology. Id. Another reason for this decision was associated with the agency's uncertainty about the performance-based service contracting environment. The agency believed that a 2-year contract would give it an opportunity to assess the effectiveness of performance-based service contracting and the performance measurement methodology for contractor performance on a trial basis, and allow both it and the contractor to become more familiar with the performance-based service contracting initiative. Contracting Officer's Statement at 1.

The agency estimated the cost of a 2-year contract at $1.9 million. After considering various procurement options, including a competitive procurement, the contracting officer decided to award a sole-source contract to a section 8(a) contractor. In this regard, the section 8(a) program has both competitive and noncompetitive components, depending upon the dollar value of the requirement. See 13 C.F.R. § 124.501(b) (2001). Where the acquisition value exceeds $3 million, any section 8(a) contract must be competed among section 8(a) firms; section 8(a) acquisitions of less than $3 million generally must be noncompetitive awards. FAR § 19.805-1(a)(2); 13 C.F.R. § 124.506(a); see also SBA Comments at 2.

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[2] In performance-based contracting, all aspects of the acquisition are structured around the purpose of the work to be performed, with the contract requirements set forth, in clear, specific, and objective terms with measurable outcomes, as opposed to the manner by which the work is to be performed or broad and imprecise statements of work. FAR § 2.101; see also FAR Subpart 37.6. USDA identified the help desk requirement as a potential candidate for performance-based service contracting in response to a March 2001 Office of Management and Budget memorandum requiring the increased use of such contracting. Contracting Officer's Statement at 1.

By letter to the SBA dated August 14, the contracting officer offered to contract with OASAS for these help desk services under the section 8(a) program. The letter advised the SBA that the agency anticipated awarding a fixed-price performance-based service contract for a 2-year period at an estimated value of $1.9 million. The SBA accepted the offering on behalf of OASAS on August 20, and OASAS was awarded the contract on September 27.

NTMI contends that the award of a sole-source contract to OASAS was improper because "the natural length of the contract is five years." Protester's Nov. 8, 2001 Comments at 3. NTMI asserts that the USDA used an artificially low number of option years to circumvent the competitive threshold and, thus, violated the prohibition in FAR § 19.805-1(c) against dividing a proposed section 8(a) contract with an estimated total value exceeding $3 million into several separate actions for lesser amounts to use the section 8(a) sole-source procedures to award to a single contractor. NTMI's allegation is without merit.

The SBA explains that the provision set forth at FAR § 19.805-1(c), whose language is drawn from 13 C.F.R. § 124.506(a)(4), is inapplicable here because USDA has not divided its requirement into several separate procurement actions. The contract USDA awarded to OASAS is for the same requirement that NTMI previously performed and that USDA previously solicited; there is no other separate procurement action. SBA Comments at 3. The SBA explains that the cited regulation was written for the limited purpose that it expresses--to prevent a contracting agency from dividing its current requirement with a value exceeding the competitive threshold into several separate procurements in order to award the entire requirement on a sole-source basis to the same section 8(a) participant. Id. As the SBA states, "[n]o SBA regulation, including the one NTMI cites, requires a contracting agency to include in its valuation of the anticipated award price of a contract the value of options that could be, but are not, contained in the contract." Id. We find the SBA's analysis and conclusion reasonable.

Moreover, we are unaware of any law or regulation dictating the "natural length" of a contract. The record shows that USDA had several reasons for limiting the duration of this contract to 2 years, including its concern about the ability of a contractor to meet changing software requirements and its uncertainty about the performance-based service contracting environment. NTMI specifically challenges the reasonableness of the first reason. The protester contends that having 4 option years gives the agency more flexibility because, if the software changes were to continue into a third year or beyond, it would make sense to have on board the same contractor that began to implement the changes rather than move to a new contractor in the middle of implementing the changes. However, NTMI's contention does not address the agency's concern about a contractor's ability to meet changing requirements, which we find reasonable, and NTMI does not address the agency's concern about the performance-based service contracting environment, which we

also find reasonable. Under these circumstances, we cannot find that the agency was required to issue a solicitation providing for a performance period of more than 2 years. See Champion Bus. Servs., Inc., B-283927, Jan. 24, 2000, 2000 CPD ¶ 18 at 3-4.

NTMI finally argues that these reasons are not a valid basis to "circumvent the competitive threshold" and that the agency's actions were merely intended to avoid further protests from the firm. Protester's Nov. 8, 2001 Comments at 4; Protester's November 15, 2001 Comments at 1. The record does show that USDA was concerned about the potential for protests from NTMI--or any other firm--based on the delay in the procurement process that often accompanies protests. However, the record also shows that USDA long intended that the contract have a 2-year performance period. Contracting Officer's Oct. 1, 2001 Memorandum to the File. Indeed, both of the agency's prior attempts to procure these services anticipated a 2-year contract, a fact that went unchallenged in NTMI's prior protests.

We now turn to NTMI's request that we recommend it recover the costs it incurred in connection with its two prior protests associated with the procurement of these services on the basis that the agency failed to timely implement its promised corrective action.

Our Office may recommend that a protester be reimbursed the costs of filing and pursuing a protest where the contracting agency decides to take corrective action in response to the protest. 4 C.F.R. § 21.8(e) (2001). Such recommendations are generally based upon a concern that an agency has taken longer than necessary to initiate corrective action in the face of a clearly meritorious protest, thereby causing protesters to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. QuanTech, Inc.--Costs, B-278380.3, June 17, 1998, 98-1 CPD ¶ 165 at 2-3. The reimbursement of protest costs may also be appropriate where an agency does not timely implement the promised corrective action that prompted the dismissal of a meritorious protest. Louisiana Clearwater, Inc.--Recon. and Costs, B-283081.4, B-283081.5, Apr. 14, 2000, 2000 CPD ¶ 209 at 6. Where an agency implements corrective action that fails to address a meritorious issue raised in the protest that prompted the corrective action, such that the protester is put to the expense of subsequently protesting the very same procurement deficiency, the agency action, even though promptly proposed, has precluded the timely, economical resolution of the protest. Id. Here, we have no basis to recommend that NTMI recover the costs it incurred in filing its prior protests because, even if the prior protests were meritorious, USDA did timely implement the promised corrective action that prompted the dismissal of the protests.

NTMI contends that USDA's second solicitation was deficient in the same areas that it had identified as being deficient in the first solicitation, improperly putting the firm to the expense of filing its second protest. We do not agree.

Our concern in such matters is that an agency may promptly propose corrective action in response to a particular procurement deficiency only to ignore that "very same procurement deficiency" when implementing its corrective action, thereby putting the protester to the expense of again protesting "the very same procurement deficiency." Id. Here, NTMI's two prior protests are similar in that they challenge alleged deficiencies associated with the solicitation's evaluation scheme and work requirements, but they do not challenge "the very same procurement deficiencies." As noted above, NTMI's first protest alleged that the first solicitation did not make clear which part of the FAR was to govern; failed to clearly state what the cost proposal should contain and how it would be evaluated; failed to include a basis for award or technical evaluation criteria; and contained a "hopelessly muddled" statement of requirements in connection with labor positions. Mar. 20, 2001 Protest at 6-9. In contrast, NTMI's second protest alleged that the second solicitation failed to disclose the weights of the stated evaluation criteria and failed to identify the hardware and software to be supported after agency migrations, and that the contracting officer provided an improper response to a question regarding the treatment of disputes under the contract and ambiguous responses to questions about the work to be performed under the contract. In our view, the agency's first promise of corrective action cannot be held to extend to the correction of alleged deficiencies that were not identified in the first protest.

NTMI also contends that USDA's decision to issue a sole-source solicitation failed to address the meritorious issues raised in its second protest, requiring the firm to file its third protest. It is undisputed, however, that USDA promptly initiated and implemented the corrective action it promised in response to the second protest--to initiate a new contracting action in accordance with the FAR in the near future. Moreover, unlike the scenario in Louisiana Clearwater, NTMI was not put to the expense of subsequently protesting the very same procurement deficiency it had previously protested.

The protest and the request for a recommendation that protest costs be reimbursed are denied.

Anthony H. Gamboa
General Counsel