

13784

PL-I

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-197099

DATE: May 20, 1980

MATTER OF: Science Applications, Inc.

DIGEST:

1. [Protest of agency refusal to extend closing date for receipt of proposals] is denied where requirement was urgently needed, competition was not unduly restricted and protester has not shown that it was prejudiced by refusal.
2. Protest of requirement that all work be performed on Government site is denied where agency provided reasonable basis for requirement and protester has not shown that requirement is in excess of minimum needs or is unduly restrictive of competition.
3. Protester has not shown that requiring knowledge of specific measuring instrument is restrictive of competition or in excess of agency needs where instrument is commonly used by researchers in field, is commercially available and has been used in similar work in past by agency.
4. Requirement for and evaluation of detailed personnel resumes and "firmness of commitment" of proposed personnel will not result in prohibited personal services contract where agency shows legitimate need to evaluate proposals on that basis and Government does not gain right to dictate assignment of particular employee to specific task or to supervise employee directly.

010420

112346

5. Sole-source award of interim contract for similar requirement as pending competitive procurement is justified where agency shows that only one offeror can meet agency requirements in necessary timeframe, and performance of work without interruption is necessary.
6. Protester has not carried burden of proving allegation that competitive procurement was sham where agency has adequately explained events pointed to by protester as indications of sham and protester has offered no objective evidence disputing explanations or otherwise supporting allegations.

Science Applications, Inc. (SAI), protests the award to OptiMetrics, Inc. (OptiMetrics), of a contract for laser propagation studies and electro-optic programs in support of the Department of Defense High Energy Laser Program. The contract was awarded under request for proposals (RFP) DAAD07-80-R-0013 issued by the Department of the Army, White Sands Missile Range (WSMR), New Mexico.

Briefly, SAI protests WSMR's refusal to extend the closing date for receipt of initial proposals, the allegedly ambiguous and restrictive nature of the specifications and evaluation criteria and the sole-source award of a contract for a similar requirement which SAI alleges prejudiced it in this competition. SAI argues that these and other circumstances show that the Government "deliberately and capriciously" intended to award the contract to OptiMetrics and that this "competition was a sham."

We do not consider the protest to have merit.

BACKGROUND

The following Government entities and their relationships are relevant to SAI's protest. WSMR is a subordinate command under the Army Test and Evaluation Command. The Atmospheric Sciences

Laboratory (ASL) is a subordinate command under the Army Electronics Research and Development Command. ASL, then, is an independent command physically located on WSMR as a tenant activity under a host-tenant support agreement with WSMR. Under the agreement, WSMR will furnish ASL, on request, purchasing and contracting services as a common service for which reimbursement is not required.

Refusal of WSMR to Extend
Closing Date

The RFP was issued on November 5, 1979, with a proposal due date of December 3, 1979. On November 19, SAI wrote to WSMR requesting answers to the following questions:

(1) Is there any laser propagation research being sponsored by ASL which could be considered follow-on work to contract N0024-79-C-5343? (A contract for related services that SAI had recently performed for the Department of the Navy (Navy) High Energy Laser Program Office.)

(2) If so, what is the amount of the contract, the name and address of the contractor, and can SAI have a copy of the contract?

(3) On what basis was the procurement conducted--sole-source or competitive? If competitive, can SAI have a copy of the solicitation?

(4) If such a contract is being performed, would any data generated be useful in proposal preparation? If so, can SAI have such data?

SAI stated further that it considered the information "critical and necessary" to prepare its

proposal and requested an extension of the closing date for 15 days from its receipt of WSMR's response to these questions.

WSMR issued amendment 0001 on November 20. That amendment made a change unrelated to the request of SAI and also extended the closing date to December 10. On November 21, SAI sent a telegram to WSMR requesting the following additional information:

- (1) Descriptions of a "roto rod," a "Rosen counter," and a "mass monitor" and the availability, manufacturers and model numbers of the items.
- (2) Clarification of whether the contractor must physically go to the Arctic to take certain measurements or whether they may be mathematically extrapolated.
- (3) Description of "a Government owned horizontal path beam transmission and collection system."

Again, SAI stated that it considered the information necessary to proposal preparation and requested a 15-day extension of the closing date from SAI's receipt of the information.

WSMR issued amendment 0002 on November 27. It was received by SAI allegedly on December 3. The amendment provided the following information relevant to the protest in response to SAI's inquiries and a question from another offeror:

- (1) All work must be performed onsite.
- (2) The roto rod was manufactured by Metronics, Inc. Neither the item nor its literature currently is available commercially.
- (3) In response to SAI's questions concerning follow-on work to contract N0024-79-C-5343, WSMR stated that such work was currently being performed by OptiMetrics and that WSMR was "unable

to provide the amount of the contract or a copy." WSMR stated further that any data generated by the contract was unnecessary for proposal preparation.

WSMR also refused to extend the closing date.

SAI argues that WSMR's refusal to extend the closing date was "unreasonable" and "severely hamper[ed]" SAI's ability to respond to the RFP. SAI contends that 7 calendar days was "not sufficient time to permit SAI's evaluation of the Government's response, conduct any necessary research of equipment specifications and incorporate additional data into the proposal." SAI also argues that the misleading Government information concerning the availability of the roto rod further hampered its response. When SAI contacted Metronics, the manufacturer listed in amendment 0002, it was informed that the roto rod was no longer manufactured by Metronics, but was commercially available from Ted Brown Associates. SAI contacted Ted Brown Associates and discovered that the roto rod and technical literature were indeed commercially available. SAI received the technical literature on December 6, only 4 days before proposals were due.

SAI contends further that, notwithstanding WSMR's reference to the fact that the procurement was negotiated under the "public exigency" exception to formal advertising, 10 U.S.C. § 2304(a)(2) (1976), and any other claims of urgency by WSMR, the facts belie the existence of any real urgency that might justify refusing to extend the closing date. In that regard, SAI points out that while the original purchase request was received by WSMR on April 24, 1979, the RFP was not issued until November 5 with a performance commencement date of February 1, 1980. So, a few days' extension certainly would have been reasonable. SAI also notes that not only was the public exigency exception inappropriate because there was no urgency, but the contracting officer did not indicate on the RFP any authority for negotiation.

The Army Materiel Development and Readiness Command and WSMR have provided the following explanation which they feel supports the use of the public exigency exception and WSMR's refusal to extend the

closing date for receipt of proposals. First, WSMR points out that the omission on the RFP of the authority justifying negotiation was deliberate, since that section of standard form 33 (blocks 21 through 30) is completed by the Government only after the award of a contract.

According to WSMR, the issuance of the RFP was delayed for the following reasons. The procurement was initially synopsized in the Commerce Business Daily on May 18, 1979, with a performance period of October 1, 1979 to September 30, 1982, and an approximate issuance date of June 1, 1979. WSMR was unable to meet the initial release date because of a "heavy workload." In early July 1979, WSMR became aware that a reduction in funding for the next fiscal year for the requirement was likely, and that, therefore, the scope of work would have to be reduced. With these problems, it appeared that a contract could not be awarded by the end of the fiscal year. Consequently, the proposed RFP was canceled and a new RFP with a reduced scope of work was prepared.

At this point, ASL notified WSMR that it was attempting to have a Navy contract extended for 3 months to avoid an interruption in data acquisition. ASL also placed an Issue Priority Designator 06 classification on the requirement to indicate urgency. On October 25, 1979, the contracting officer made a determination and findings to negotiate pursuant to the public exigency exception. Essentially, that determination and findings cited the need to avoid delays in meeting milestones and deadlines in the ongoing High Energy Laser Program, imprecise specifications, and the Issue Priority Designator 06 classification as justifications for negotiating pursuant to this exception.

The RFP was issued on November 5, 1979, with a closing date of December 3 and a predicted award date of December 31. According to WSMR, amendment 0001 extended the closing date to December 10 to give WSMR time to evaluate SAI's incoming request for information and decide whether it would be necessary to provide answers to all offerors. WSMR decided that the information was not necessary for proposal preparation. In light of this fact, the

delayed state of the procurement and the urgent need for uninterrupted data collection, WSMR decided that it could not extend the closing date further.

In addition to the general statement that the information requested was not necessary for the preparation of proposals, WSMR makes several specific points. First, WSMR points out that SAI's proposal was timely submitted and was well within the acceptable range. Second, WSMR notes that SAI was the sole-source contractor for four Navy contracts for similar services in the High Energy Laser Program and thus had detailed knowledge concerning some of the questions it asked. Finally, concerning the "roto rod" question, WSMR states that the information it gave was its best current information. Also, the roto rod is a simple device, commonly used by researchers in this field, and it should have been familiar to SAI.

The determination of a date for receipt of proposals is a matter of judgment properly vested in the contracting officer and we will not substitute our judgment unless the agency's determination was arbitrary or capricious. National Small Business Association, B-184052, September 26, 1975, 75-2 CPD 196. Our concern is whether the contracting officer's actions unduly restricted competition. Solar Resources, Inc., B-193264, February 9, 1979, 79-1 CPD 95. We have recognized, however, that the proposal due date need not be extended merely to increase the opportunity for competition by accommodating a firm that has indicated interest in submitting an offer. Serv-Air, Inc., B-194717, September 4, 1979, 79-2 CPD 176; Dyneteria, Inc., B-181589, October 29, 1974, 74-2 CPD 230.

SAI has not shown that the contracting officer's refusal to extend the closing date was arbitrary or capricious. Neither has it shown that competition was unduly restricted nor that it was prejudiced by the refusal.

WSMR's chronology explaining the causes of delays early in the procurement cycle which compounded the

already urgent need for continued data-gathering has not been disputed by SAI. In our opinion, those delays, as explained by WSMR, are not sufficient evidence to support a conclusion that the citation of the public exigency exception and the general justification of urgency were a sham rather than a reasonable justification for refusing to extend the closing date.

While SAI makes general statements concerning the severe prejudice in preparing an adequate proposal caused it by the refusal to extend the closing date, the only specific problem alluded to was the misinformation provided by the Government concerning the roto rod. In this regard, SAI admits that it was able to obtain the necessary information on its own 4 days before the closing date. SAI also states that the roto rod is "* * * an extremely simple, non-technologically advanced device." Knowledge of the roto rod was not a major element of the RFP, but, rather, was mentioned under one specific subtask as an example of the type of measuring instrument with which familiarity was required. In light of those facts, SAI's claimed expertise in the field, SAI's experience under four similar contracts performed for the Navy and SAI's timely submission of an acceptable proposal, we do not see how SAI was prejudiced by the refusal to extend the closing date.

Finally, since no other offerors complained of the closing date and at least two acceptable proposals were timely received, it appears that competition was not unduly restricted by the refusal to extend the closing date.

Ambiguous and Restrictive Specifications

SAI argues that numerous RFP evaluation criteria and specifications are unduly restrictive of competition, ambiguous and intended to bias the award of the contract to a preselected vendor. SAI has provided three "critical examples."

SAI first argued that the RFP section stating that the principal place of performance will be WSMR and amendment 0002's requirement that all work be

performed at WSMR were in conflict, rendering the RFP ambiguous. However, SAI later admitted that the amendment made the requirement "absolutely clear." SAI contends, however, that the requirement unduly restricts competition to firms which have personnel near WSMR or which are willing to relocate there. Even firms willing to relocate are at a cost disadvantage. According to SAI, only OptiMetrics can reasonably comply with the requirement. SAI contends that only about 50 percent of the work must be done at WSMR. Analysis, documentation and management control could be performed elsewhere. SAI argues that requiring all work to be performed onsite is arbitrary and capricious absent a cost effectiveness evaluation of competing proposals offering different approaches to performance.

The determination of the Government's minimum needs, the method of accommodating them and the technical judgments upon which those determinations are based are primarily the responsibility of the contracting officials who are most familiar with the conditions under which the supplies and services have been used in the past and will be used in the future. On-Line Systems, Inc., B-193126, March 28, 1979, 79-1 CPD 208; METIS Corporation, 54 Comp. Gen. 612 (1975), 75-1 CPD 44. This is particularly the case when highly technical supplies or services are involved as is the case here. Therefore, our Office will not question agency decisions concerning those matters unless they are shown to be clearly unreasonable. Particle Data, Inc.; Couler Electronics, Inc., B-179762; 178718, May 15, 1974, 74-1 CPD 257. A mere difference of opinion between the protester and the agency concerning the agency's needs is not sufficient to upset agency determinations. Julian A. McDermott Corporation, B-191468, September 21, 1978, 78-2 CPD 214. The protester has the burden of affirmatively proving its case. Reliable Maintenance Service, Inc. -- request for reconsideration, B-185103, May 24, 1976, 76-1 CPD 377.

Regarding restrictions on competition, while needs should be determined so as to maximize competition, we have held that requirements which limit competition are acceptable so long as they are legitimate agency needs, and a contract awarded

on the basis of those needs would not violate law by unduly restricting competition. Educational Media Division Inc., B-193501, March 27, 1979, 79-1 CPD 204. We have also held that a geographical restriction is not unduly restrictive of competition so long as the limitation represents the agency's actual needs. Leo Kanner Associates, B-194327, November 5, 1979, 79-2 CPD 318.

According to WSMR, all work must be done onsite because "the experimental measurement concept makes it impossible to divorce the measurement process from the analysis process without compromising the result." WSMR contends that the reduction and analysis of the data interacts with the development of measurement techniques and, therefore, the processes cannot be performed independently by widely separated individuals. WSMR also notes that this requirement was taken from SAI's previous sole-source Navy contracts and SAI had no problem meeting the requirement at that time. Also, SAI's proposal complied with the requirement.

In our opinion, SAI has not shown that requiring all work to be performed onsite is unreasonable. WSMR has provided reasonable justifications for the requirement and SAI has done no more than provide general disagreeing statements and thus has not carried its burden of proof.

SAI argues that the RFP section requiring familiarity with "roto rods" is restrictive because there are other devices that can be used to collect the same kind of data. SAI also objects to the "heavy emphasis" in the evaluation criteria placed on the use of this specific device rather than on the analysis of the data collected with it.

WSMR points out that there is not a great emphasis on the roto rod; that, in fact, it is only a minor example of the type of instrumentation with which familiarity is required. The emphasis referred to by SAI refers to the weighting of all technical factors, including data analysis, in

relation to the importance assigned to management and cost factors. The roto rod is a standard meteorological data-collection device which ASL has used frequently over several years. Knowledge of the roto rod is required only insofar as the instrument might be required to be used to obtain samples for analysis. WSMR also notes that, as a self-described expert in the field and as a former ASL contractor, SAI certainly should be aware of the use of roto rods.

Again, we do not feel that SAI has shown that the requirement for knowledge of roto rods is in excess of WSMR's minimum needs or is unduly restrictive of competition. SAI was able to obtain the necessary information concerning roto rods and presumably any other offeror could have done the same. Since the roto rod is admittedly a technologically simple device which is commercially available, we do not see how competition was restricted. Also, even if there are equally acceptable methods of gathering data, which SAI has asserted but not shown, requiring knowledge of this particular instrument as part of a range of knowledge of data-gathering instruments does not seem unreasonable, especially in light of ASL's long term use of roto rods.

Concerning the allegedly undue weight placed on data-gathering, we think that SAI has misread the clear language of the solicitation. As WSMR has pointed out, the weighting complained of by SAI refers to all technical factors, including analysis.

Finally, SAI argues that evaluation of proposals on the basis of the name, background and firmness of commitment of proposed personnel is restrictive, biased and will result in a prohibited personal services contract. SAI contends that such detailed information may only be used for "verification of contractor capability representations and not for qualitative ranking of proposals." In this case, asserts SAI, the specifications have been displaced by the personnel requirements. SAI also complains that there is no objective measure of "firmness of commitment such as a 'key personnel clause.'" So, while WSMR is intending to award the contract based

on these personnel qualifications, it appears to have no intention of enforcing them after award.

The Army Materiel Development and Readiness Command points out that in a negotiated procurement responsibility factors, such as a contractor's proposed personnel, may be used to qualitatively compare proposals. The detailed descriptions and the firmness of commitment requirement are required to prevent contractors from vaguely proposing scientific personnel with impressive credentials, scoring highly and then not delivering quality people. These requirements allow WSMR to evaluate the proposals fairly.

The clause objected to by SAI states that:

"The offeror's proposals will be evaluated to determine the offeror's current or planned availability of sufficient personnel with the required skills and experience; extent to which personnel for assignment to work are identified by name and by summary of experience and background, and firmness of commitment of such personnel. The proposal will be evaluated to determine the availability of personnel with the following qualifications:"

This is followed by detailed descriptions of the kind of experience required for the personnel proposed for each specific subtask of the requirements.

It is our opinion that these requirements do not make the resulting contract a prohibited personal services contract. In Hew Es Co., Incorporated, B-183040, April 18, 1975, 75-1 CPD 239, the protester argued that provisions requiring submission of detailed employee resumes with proposals, assignment of those employees to any resulting contract and Government permission to substitute employees created an impermissible personal services contract. The agency contended that, because the procurement was for highly specialized technical services, the skills and experience of a prospective contractor's

work force were essential subjects of evaluation. We found that there was no personal services contract as these requirements did not permit the Government to dictate that a particular employee be assigned to perform services. Rather, the offeror was free to propose the personnel that it felt would satisfy the evaluation criteria and to propose substitutes subject only to the Government's right to determine that the substitutes also met the criteria.

We believe that this case falls within the holding of Hew Es. The provisions in the RFP here give the Government even less control over potential employees than the provisions did in Hew Es. Also, here the RFP involves highly specialized technical services making evaluation of the skills and experience of potential contractor's work forces necessary. Additionally, we have not objected to evaluating the degree of commitment of an offeror's proposed work force so long as proposals are not downgraded solely because a proposed employee has not been hired prior to award, which does not appear to be the case here. See Government Sales Consultants, Inc., B-193477, August 9, 1979, 79-2 CPD 103; Field Maintenance Services Corporation, B-185339, May 28, 1976, 76-1 CPD 350; Management Services, Inc., 55 Comp. Gen. 715 (1976), 76-1 CPD 74.

Sole-Source Award of Interim
Contract to OptiMetrics

SAI was performing laser propagation research for ASL under a Naval Sea Systems Command contract which terminated on September 30, 1979. On October 26, 1979, SAI submitted an unsolicited time and materials proposal to WSMR "* * *" to assist the Government in continuing the previous research efforts with minimal interruption pending award of the subject solicitation." On November 7, WSMR rejected the proposal as too closely resembling the work contained in the pending competitive RFP, citing Defense Acquisition Regulation § 4-910(a).

According to WSMR, the following sequence of events was occurring about the same time. When it became apparent to WSMR that the competitive procurement was not going to result in an award by

October 1, 1979, WSMR notified ASL that it would attempt to have SAI's Navy contract extended for 3 months. ASL, however, advised WSMR that the Naval Sea Systems Command had been contacted and refused to extend the contract because it was issuing a competitive solicitation for the same type of work.

ASL then discovered that the Naval Research Laboratory had an existing contract with OptiMetrics. The Navy contracting officer advised ASL that its requirement could be added to the Naval Research Laboratory contract for the necessary 3-month period. WSMR states that after that time its contracting officer had no further involvement with the interim contract, because it assumed that ASL had satisfied its need for continued research in the interim period between contracts. What did occur was that the Naval Research Laboratory contract was not modified, but, rather, the Navy awarded a sole-source contract to OptiMetrics for a 3-month period for performance of the ASL requirement.

SAI argues that the award of that contract was improper because the work was the same as for the pending competitive solicitation, the same reason that its unsolicited proposal was rejected. SAI contends that the award of the contract "* * * severely prejudiced SAI's ability to compete for award under the subject solicitation," because it established OptiMetrics as the incumbent.

Sometime before the termination date of its Navy contract, six SAI employees resigned to accept employment with OptiMetrics. According to SAI, the employees told SAI that they had heard that SAI would be awarded no further work at ASL. SAI contends that these resignations in addition to the improper sole-source award to OptiMetrics show that WSMR intended from the beginning to award the competitive procurement to OptiMetrics and the "competition" was a sham. As further evidence of this, SAI argues that no prudent small business like OptiMetrics would hire six additional employees unless it knew that it would be awarded a contract on which they would work.

The Navy sole-source justification, dated September 27, 1979, cites three basic justifications for the award to OptiMetrics. First, OptiMetrics has "* * * unique and extensive experience * * *" in data measurement and analysis associated with ongoing research programs at ASL. Second, key OptiMetrics personnel are "* * * uniquely qualified by virtue of many years of directly applicable experience" to perform the work. Finally, "OptiMetrics is prepared to address the required tasks immediately." This justification was accompanied by a statement of urgency basically stating that if data collection and analysis did not continue after the termination of SAI's contract, the entire High Energy Laser Program would be adversely affected by the slippage of deadlines.

Concerning the employee resignations, OptiMetrics states that none of the employees who resigned and joined OptiMetrics ever stated that they were told that SAI would receive no further work at ASL. According to OptiMetrics, the resignations were submitted to SAI during the first week in September 1979 for terminations effective at the end of SAI's contract. OptiMetrics suggests that the reason for the resignations was that the employees were aware that the current SAI contract was ending and it was natural for them to consider employment with "* * * a company whose mainstream technical interests parallel their own, and which had job openings independent of the ASL support."

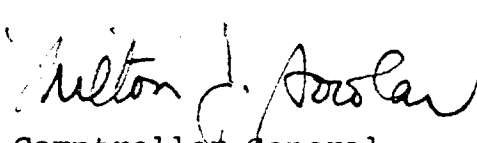
The standard of review to be applied in determining the propriety of a sole-source procurement is reasonableness. Bingham Ltd., B-189306, October 4, 1977, 77-2 CPD 263. Unless the protester can affirmatively prove that the contracting agency acted without a reasonable basis, we will not question a sole-source award. Pioneer Parachute Co., Inc., B-190798, B-191007, June 13, 1978, 78-1 CPD 431. Additionally, we have recognized that a sole-source award is justified where time is of the essence and only one known source can meet the Government's needs within the required timeframe. Design and Evaluation, Inc., B-193128, June 28, 1979, 79-1 CPD 466. This includes situations where the awardee possessed special expertise gained from prior contract performance which

would facilitate meeting the Government's requirements within the necessary time. Iroquois Research Institute, B-188267, May 20, 1977, 77-1 CPD 355.

In this situation, it appears that the key to performing the requirement within the necessary time-frame was the possession of the employees who resigned from SAI and joined OptiMetrics. Those employees tendered their resignations in early September. The sole-source justification was dated September 27, after the employees were committed to OptiMetrics. It is our opinion that the Navy has provided a reasonable basis for the sole-source award which SAI has not overcome. While SAI has argued that it was prejudiced by that award in competing under the subject RFP, it has not specified how it was prejudiced nor has it provided any evidence of prejudice. Our Office has recognized that a contractor may enjoy a certain advantage by virtue of its incumbency or performance of other Government contracts and that there is no requirement that this advantage be equalized unless it is shown to result from preference or unfair Government action. Western Design Corporation, B-194561, August 17, 1979, 79-2 CPD 130.

SAI has not provided evidence supporting its allegations concerning the reasons for the resignations of its employees and, therefore, has not carried its burden of proving its allegations. See Reliable Maintenance Service, Inc. -- request for reconsideration, supra. Also, we do not think that the sole-source award, the resignations and the subsequent hiring by OptiMetrics show, absent objective evidence, that the competitive procurement was a sham, since all of those events have been adequately explained by the Government and OptiMetrics.

The protest is denied.


For the

Comptroller General
of the United States