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DECISION

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

FILE: B-220025 DATE: December 4, 1985

MATTER OF: WSI Corporation

DIGEST:

1. Contracting agency substantially complied with procedures in the Competition in Contracting Act of 1984 for the award of a sole source contract when agency published the required notices and prepared an adequate justification which was approved by the appropriate agency official.

2. Sole source procurement was justified where the contracting agency reasonably determined that only one source could satisfy the agency's needs by the required time.

WSI Corporation protests the Air Force's decision not to issue request for proposals (RFP) No. F49642-85-R-0275 for optimized computer flight planning services for the Military Air Command, and instead obtain the services through exercise of an option under an existing contract with Lockheed DataPlan, Inc. We deny the protest.

On September 29, 1979, the Air Force entered into a contract with Lockheed calling for conversion and integration of Lockheed's Jetplan software system with the Air Force's computer system to produce optimized computer flight plans. The conversion phase, followed by prototype testing of the software, was scheduled to be completed by the end of fiscal year 1980. The contract also contained options for leasing and operation of the integrated software system, renewable annually through fiscal year 1985, a total of 5 years after the initial conversion and testing were scheduled to be completed. The contract also provided that its total duration was not to exceed 6 years.

Due to a delay of approximately 2 years in the schedule for completing the initial phase of the contract, the first option for operation of the system, originally

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to begin in fiscal year 1981, was not exercised until fiscal year 1983. In addition, the Air Force and Lockheed agreed to modify the contract to change the option period from October 1980 through September 1985, to October 1982 through September 1987. The Air Force subsequently exercised the options for operation in fiscal years 1984 and 1985.

In preparation for continuing operations in fiscal year 1986, the Air Force at first decided not to exercise the option under its existing contract with Lockheed. Instead, in February 1985, the Air Force had published a notice in the Commerce Business Daily (CBD) announcing its plan to enter into a new sole source contract with Lockheed for operation in fiscal year 1986, with options for two additional years. In response to the notice, the protester advised the Air Force that it also could provide the required flight planning services. As a result, in March 1985 the Air Force had published in the CBD another notice, this time indicating that a competitive solicitation would be issued and requesting interested offerors to submit requests for the solicitation.

The Air Force subsequently determined that it would not be possible for offerors other than Lockheed to complete the necessary software conversion in time to be operational by October 1, 1985, when services under the existing option contract with Lockheed would end. The Air Force then published a CBD notice in late July 1985, announcing that it had decided to exercise the option for services in fiscal year 1986 under the existing contract with Lockheed.

The record does not indicate why the Air Force changed its original plan to negotiate a sole source contract with Lockheed in favor of exercising the option. In any event, the effect of exercising the option in this case was equivalent to issuance of a sole source contract to Lockheed. In view of our finding, discussed in detail below, that the agreement with Lockheed was properly justified as a sole source award, we need not address whether the agreement also satisfied the requirements in Federal Acquisition Regulation (FAR), 48 C.F.R. § 17.207, for exercise of an option. See Varian Associates, Inc., B-208281, Feb. 16, 1983, 83-1 CPD ¶ 160.

In connection with the initial decision to negotiate a sole source contract with Lockheed for fiscal year 1986,

the contracting officials in early January 1985 prepared a justification substantially as required by 10 U.S.C.A. § 2304(f) (West Supp. 1985), as amended by the Competition in Contracting Act of 1984 (CICA), Pub. L. No. 98-369, 98 Stat. 1175, 1187, and FAR, 48 C.F.R. §§ 6.303, 6.304, for the use of other than competitive procedures when the property or services needed are available from only one source and no other type of property or services will satisfy the agency's needs. 10 U.S.C.A. § 2304(c)(1). Although the CICA amendments regarding the use of other than competitive procedures were not effective until April 1, 1985, the Air Force considered CICA's requirements apparently in anticipation of entering into a contract with Lockheed in September 1985.

The justification contains the principal elements required by 10 U.S.C.A. § 2304(f)(3), primarily a description of the contracting agency's need for continuous operation of the flight planning services in fiscal year 1986 and a detailed statement, discussed further below, explaining why only Lockheed could provide the necessary software and services in the required time. With regard to the Air Force's plans for subsequent procurements, the justification states that the services will be procured from an outside contractor only until fiscal year 1988, when the Air Force plans to have its own flight planning software system in place. The justification was approved by a number of Air Force officials, from the contracting officer through the head of the contracting activity, as required by 10 U.S.C.A. § 2304(f)(1)(B).

The Air Force also complied with the requirements in 10 U.S.C.A. § 2304(f)(1)(C) and 41 U.S.C.A. § 416 for publication of notice of proposed procurement actions. As noted above, the Air Force first published a CBD notice of its intent to award a sole source contract on February 4. When the protester then expressed interest in the procurement, the Air Force published a second notice on March 26, indicating that a competitive solicitation would be conducted. The third CBD notice, published on July 22, indicated that the option with Lockheed would be exercised.

While notice of the agency's intent to issue a sole source contract generally is to precede preparation of the justification under 10 U.S.C.A. § 2304(f)(1)(C), we do not believe that the issuance of the notice in this case after the justification had been prepared affected the validity of the justification. Specifically, there is no indication that the Air Force's needs had changed or that other

sources lacking the necessary software in January when the justification was prepared could or did develop it in the intervening few months. Moreover, the purpose of the notice requirement--to advise potential offerors of the opportunity to compete--was served in this case since the protester was notified of the Air Force's plans. The Air Force subsequently considered the protester's proposal, as required by 10 U.S.C.A. § 2304(f)(1)(C), and then issued the notice of competitive solicitation in March. In addition, the Air Force complied with the requirement in 41 U.S.C.A. § 416, as added by CICA, that award not be made until at least 45 days after the solicitation notice is issued, since the option with Lockheed was not exercised until September 29, more than 45 days after the final CBD notice was published on July 22. Thus, in our view, the Air Force substantially complied with the procedures prescribed by CICA before award of a sole source contract.

With regard to the substance of the Air Force justification, the primary reason for procuring the services from Lockheed was that that firm was the only source capable of providing the services within the required time. As the Air Force explains, no firm except Lockheed currently has software compatible with the Air Force's hardware, and a substantial, time-consuming conversion effort would be required before any other firm's software would be ready for operational use. Specifically, the justification concludes that a competitive procurement of the operation services would require an additional 4 to 7 years for development of a statement of work by the Air Force, negotiation of the contract, and the software modification, development and testing necessary before an offeror other than Lockheed could begin operations.[1] In the interim, the Air Force would have to revert to using its prior outdated software, with projected losses of $13 million annually in fuel cost savings. In addition, the Air Force found that its ability to meet its wartime requirements would be adversely affected, since without the flight plans, its aircraft would be operating under less than optimal cargo to fuel load ratios.

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[1]While the justification did not specifically state that no other type of services could meet the agency's needs as required by 10 U.S.C.A. § 2304(c)(1), it is clear from the justification that the basis of the agency's decision to contract with Lockheed is that any other contractor would have to develop its own software, i.e., provide another type of service, and that could not be accomplished within a reasonable time.

We will closely scrutinize sole source procurements under 10 U.S.C.A. § 2304(c)(1). Where, however, the agency has substantially complied with the procedural requirements of 10 U.S.C.A. § 2304(f), we will not object to the sole source award unless it is shown that there is no reasonable basis for the contracting agency's stated grounds for using that exception to the requirement in 10 U.S.C.A. § 2304(a)(1)(A) that the agency obtain full and open competition through use of competitive procedures. In our view, the agency properly justified the award to Lockheed on the basis that the services were available from only one responsible source and no other type of services will satisfy it needs. First, it was reasonable for the Air Force to conclude that it required continuous services as of October 1, 1985, in view of the significant cost savings and enhanced performance realized through use of the optimized flight plans. In addition, while the protester challenges the agency's ultimate determination that timely conversion of any other offeror's software was not possible, the protester has presented no evidence to support its claim that its software could be converted in time to provide continuous service. In fact, the protester recognizes that some lead time would be necessary for developing a competitive solicitation and for offerors to complete the preparatory work necessary before operation could begin, and for this reason does not contend that Lockheed's current contract for 1986 should be terminated.

The protester argues, however, that the Air Force would not allow it to demonstrate its software and therefore had no basis on which to conclude that the software conversion could not be done in a reasonable time. According to the Air Force, however, at a meeting with Air Force officials on March 15, the protester conceded that its software was capable of performing only three of the 12 elements of the flight planning services required. In addition, the Air Force officials concluded that in terms of its compatibility with the Air Force hardware, the protester's software would require a significant conversion effort. Since the protester has offered no evidence other than its bare representations to rebut this technical determination, we see no basis on which to question the Air Force's findings. Accordingly, we find that it was reasonable for the Air Force to enter into a sole source contract with Lockheed on the basis that only Lockheed could provide the necessary services in the required time. See Rolm Corp., B-213865, July 9, 1984, 84-2 CPD ¶ 23.

Finally, the protester argues that, rather than continuing to make sole source awards to Lockheed, the Air Force should develop a competitive solicitation in fiscal year 1986 and then conduct a competitive procurement in subsequent years, an approach which we have approved in appropriate cases. See University Research Corp., 64 Comp. Gen. 273 (1985), 85-1 CPD ¶ 210. We do not find it appropriate to require such an effort in this case. The Air Force states that it is developing its own software system to be operational by late fiscal year 1988, so that operation services will be procured from an outside contractor for only 2 more years after the 1986 agreement with Lockheed expires. Based on the Air Force's estimate of 4 to 7 years of preparatory work, which the protester has not rebutted, it would not be feasible to conduct a competitive procurement and perform the necessary software conversion in time for another offeror to provide operation services in fiscal years 1987 and 1988.

The protest is denied.

for Seymour Efros
Harry R. Van Cleve
General Counsel