

DECISION

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

FILE: B-221879 **DATE:** June 9, 1986
MATTER OF: Arthur Young & Company

DIGEST:

Where budget reductions were ordered by the agency head for Fiscal Year 1987 for numerous military activities, an agency properly determined that urgent circumstances existed and that it must use noncompetitive procedures provided for under the Competition in Contracting Act to limit the procurement to the only firm it reasonably believes can perform the work of implementing operational improvements within the time constraints available to achieve the anticipated savings.

Arthur Young & Company (AYC) protests the sole-source award by the Department of the Navy of a letter contract, No. N00600-86-C-3072, to Coopers & Lybrand (CL). AYC contends that the Navy improperly awarded the letter contract because other capable and qualified sources allegedly were available and should have been given the opportunity to compete. We deny the protest.

Background

In 1984, the Navy awarded a contract to CL for the undertaking of a management analysis of the Naval Industrial Fund (NIF) program and activities. The NIF program encompasses a number of commercial or industrial types of activities, including those concerned with shipyards, air rework facilities, military sealift, research laboratories, and printing. These Navy commercial or industrial activities are financed by an indefinite no-year revolving fund which provides working capital and which, in turn, is funded from regularly budgeted appropriated funds of the Navy. CL was expected in performing its contract to draw upon the procedures used in the private sector to make specific recommendations for enhancing the operations of the

individual activities and of the program in general.^{1/} Under this contract, CL generally analyzed the following activities:

1. Headquarters (Office of the Secretary of the Navy and several major commands)
2. Naval Air Rework Facilities (NARFs)
3. Public Work Centers (PWCs)
4. Ordnance Stations
5. Naval Laboratories
6. Naval Regional Data Automation Centers (NARDACs)
7. Naval Shipyards

As a result of its management analysis, CL presented more than 1000 findings and recommendations to the Navy concerning potential cost savings that could be effected through more efficient operation of the activities. The Navy states that these cost savings potentially amount to billions of dollars, and that the implementation of these recommendations will not impair the performance of the mission of these activities.

CL presented these recommendations to the Navy in briefings that commenced early in 1985, and were held periodically thereafter. In view of CL's findings and recommendations, the Secretary of the Navy decided to cut the Fiscal Year (FY) 1987 budget for the shipyards by \$500 million, and by an equal amount in their FY 88 and FY 89 budgets. Drastic cuts were also made by the Navy in the budget of the NARFs and in other areas. Further, the Navy, until November 1985, fully intended to itself implement CL's management study recommendations. However, at that time, the Secretary of the Navy, after attending a briefing by CL, decided that the recommendations of the study could not

^{1/} AYC protested the award of this contract to CL. We sustained AYC's protest because we found that the protester's interpretation of a solicitation provision requiring "170,000 professional hours" as prohibiting the use of bookkeepers was as reasonable as the agency's view that the use of bookkeepers as professionals was permitted. We therefore found the solicitation ambiguous and the award improper since AYC might have been unfairly displaced in the evaluation. However, since more than 44 percent of the contract amount had been expended and since, among other things, we could not with certainty conclude that the award would have gone to a different offeror without the defect, we did not recommend termination. See Arthur Young & Co., B-216643, May 24, 1985, 85-1 CPD ¶ 598.

after all be implemented effectively in-house. In support of the Secretary's decision, the Navy advances two reasons: (1) understandable institutional resistance to the drastic changes that are required; and (2) the amount of time and effort required for implementation, if performed in-house, would impair the primary operational mission of the activities. Accordingly, the Navy states that it decided to sole-source what it considers to be a "small but vital portion" of the overall implementation program that will be eventually required. Consequently, the Navy explains that it awarded the letter contract to CL as an interim measure because CL is the only contractor the Navy believes could perform certain limited tasks immediately (based on the Navy's belief that CL alone possessed extensive knowledge of and familiarity with the NIF study and recommendations which, among other things, were based on extensive field work by CL).

The Navy further states that the portion of the implementation work which was sole-sourced to CL represents approximately 10 percent of that work, the balance of which will be acquired competitively. According to the Navy, the sole-source implementation efforts by CL will be limited to a "leader model" for the shipyards, NARFs, and PWCs, as will certain program management support to the Secretary of the Navy. Specifically, solely within the framework of this "leader model" concept, which will either be a composite model representing partial implementation of recommendations at various activities or an actual single model (the PWC at Norfolk, Virginia), the record shows that CL will generally be responsible for the following:

1. Program management support--This involves direct assistance to the Office of the Secretary of the Navy. Members of the program management support team will monitor the implementation efforts within three specific activity groups with respect to such factors as methodology and approach, measurable impact, and infrastructure to support long term improvements.
2. The Shipyard improvement project--This encompasses a number of tasks targeted at implementing recommendations already approved by the Secretary of the Navy. Shipyard improvements include job order cost accounting and materials management, development of improved procedures for planning and estimating, improved shop flow control methods, and other matters.

3. The Public Works Center improvement program--This will encompass the development of a corporate business plan and the development of a model PWC at Norfolk, Virginia with substantially reduced operating costs.

4. The NARF improvement project--This includes development and implementation of an integrated system for workload planning, management information data base development and business planning, among other things.

The Navy states that the only way it could realize the cost savings already programmed into the FY 87 budget was to direct CL to perform these interim tasks which, if immediately accomplished, will satisfy FY 87 budget constraints. Accordingly, the Navy executed a "Justification & Approval for Other than Full & Open Competition", based on 10 U.S.C.A. § 2304(c)(2) (West Supp. 1985), the exception for unusual and compelling urgency, inasmuch as "delay in award would result in serious mission impairment and financial injury to the Government during FY 87 and FY 88." The Navy candidly admits that if time were not of the essence, other contractors could perform the initial implementation work. Subsequently, the letter contract was awarded on March 4, 1986. The Navy notes that CL is required under the letter contract to develop specifications for the remaining implementation work so that other than immediately necessary tasks can be competitively acquired in the future.

Contentions by AYC

Generally, AYC contends that there is no credible basis to justify the award by the Navy of a sole-source letter contract to CL. Noting that the previous contract to perform the management analysis does not encompass implementation work for the recommendations developed, AYC argues that there is no reasonable basis for the Navy's determination that CL alone can perform the necessary work since "no unique recommendations, solutions, proprietary concepts or detailed systems designs have been prepared or produced to date." Further, AYC maintains that the Navy did little or nothing to identify and evaluate possible alternatives, which might have satisfied its needs or to solicit offers from as many sources as was practicable under the circumstances. AYC also faults the Navy for not publishing any notice of the proposed contract action in the Commerce Business Daily. Additionally, AYC states that CL's advantage from its incumbency, which placed the firm in its position to receive the letter contract, arose from unfair government action because the previous contract award was found to be flawed by our Office. Finally, AYC describes

the crux of its protest as its concern that CL's performance of the current contract will place it in a position to receive additional sole-source awards in the future. We also consider additional specific arguments made by AYC in our discussion below.

Analysis

In determining the propriety of a sole-source award, the standard this Office has applied is one of reasonableness; unless it is shown that the contracting agency's justification for such an award is unreasonable, we will not question it. Dynamic Instruments, Inc., B-220092 et al., Nov. 25, 1985, 85-2 CPD ¶ 596. We do not think that the protester has shown the Navy's award of the sole-source letter contract to be unreasonable under the totality of the present circumstances.

The Navy relied on 10 U.S.C.A. § 2304(c)(2) (West Supp. 1985), to justify the sole-source award. That provision authorizes an agency to use other than competitive procedures when:

"the agency's need for the property or services is of such an unusual and compelling urgency that the United States would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits the bids or proposals;"

When using other than competitive procedures, the agency is still required to request offers from "as many potential sources as is practicable under the circumstances." 10 U.S.C.A. § 2304(e) (West Supp. 1985). Nevertheless, where compelled to do so by urgent circumstances, an agency has the authority to limit the procurement to the only firm it reasonably believes can promptly and properly perform the work. Gentex Corp., B-221340, Feb. 25, 1986, 86-1 CPD ¶ 195.

Further, concerning the Navy's justification of the award based on budgetary reasons, the implementing regulations (Federal Acquisition Regulation (FAR) § 6.302-2(b) (FAC No. 84-5, April 1, 1985)) provide that the "urgency" authority applies where "(1) an unusual and compelling urgency precludes full and open competition, and (2) delay in award of a contract would result in serious injury, financial or other, to the Government." Therefore, if failure to award the sole-source letter contract would have

resulted in serious injury, financial or other, to the Navy, we think the Navy had authority to limit the competition to meet its immediate needs.

In this respect, the justification for the use of other than competitive procedures notes that the objective of the contract is to ensure program savings estimated to be \$1.5 billion by FY 88 and that savings have already been incorporated into the President's FY 87 budget. It further states that to achieve these results performance must commence immediately and concludes that only CL could perform within the compressed timeframe because of its knowledge and understanding of the NIF program gained through its prior performance.

We think the justification advances a reasonable basis for the award of this contract on a sole-source basis, given the time constraints involved. As stated previously, the Navy candidly admits that if time were not of the essence, other contractors could perform the initial implementation work. In other words, the implementation work itself is not unique. Rather, the Navy emphasizes that what is unique is that CL is the only contractor with extensive and existing knowledge of and familiarity with the NIF study and recommendations, as well as the NIF activities where immediate actions must be taken.

For example, with respect to shipyards alone, CL previously reviewed eight naval shipyards. CL's report and subsequent recommendations are based on more than 1,400 interviews, extensive independent observations, and thorough document analysis conducted by personnel experienced in both public and private sector industrial functions. Further, CL developed nearly 300 issues with recommendations for change during its NIF shipyards visits. These issues were documented in more than one thousand study point papers describing a particular problem, providing necessary background information, recommending solutions and identifying expected benefits from the changes. Accordingly, we think that it is reasonably obvious that a contractor with intimate familiarity and knowledge of the NIF program can immediately commence the implementation work while a contractor without such familiarity would have to acquire it before commencing the implementation work. In this regard, we also note that the protester has failed to present any evidence or otherwise explain how it could immediately commence work, as CL is able to do, without taking perhaps a considerable time period for familiarization. Thus, we find persuasive the Navy's contention that to permit another contractor to become sufficiently familiar with the organizational structure and trade practices of the Navy NIF

activities would result in none of the implementation work being completed in FY 87.

While it is true that CL's incumbency placed it in the position of being the only source to perform because of the time factors involved and that its incumbency was gained through a procurement that this Office previously found to be flawed, the record shows that a bona fide urgency existed. We therefore think that the circumstances justified an award to CL using other than competitive procedures even taking into consideration the flaws in the previous procurement. However, we do expect the Navy, as it has represented to our Office, to continue to limit the sole-source portion of the implementation effort to its immediate urgent needs.

We are not convinced by AYC's argument that the urgency was not legitimate because the Secretary of the Navy created the "urgent need" by "fiat," that is, by his decision to drastically reduce the budget for certain activities. Given the realities of the federal budget and the requirement that it be reduced, it was well within the Secretary's discretion to select operations within his control where he believed substantial, measurable savings could promptly be achieved. Once the Secretary of the Navy decided to cut the budget and have the recommendations implemented by an outside entity, we think that the urgency reasonably existed.^{2/} The Navy then determined that only CL had the immediate knowledge and experience to perform the work on time. We have upheld such a determination under similar circumstances. See Interaction Research Institute, Inc., B-193518, Apr. 26, 1979, 79-1 CPD ¶ 289; Systems Analysis and Research Corp., B-184222, Nov. 25, 1975, 75-2 CPD ¶ 348.

^{2/} AYC also argues that inaction by the Navy caused the urgency because the decision to employ an outside firm to implement the recommendations occurred several months after the Navy encountered internal resistance to implementation of the recommendations. In this respect, we note that the Secretary of the Navy decided to employ an outside firm for the implementation work in November 1985, reversing the Navy's prior policy decision to implement CL's recommendations in-house. There is no evidence that the urgency resulted from lack of advanced planning by the Navy. Additionally, AYC also argues that the Navy failed to mention in its report budget reductions for certain PWC line items and that, therefore, the PWC implementation work is not urgent. The Navy filed a supplemental response in which it stated that budget reductions have occurred for PWCs in the form of cost savings which have been "plowed back" into the overall budget and which is why the overall budget line item does not reflect the reduction.

AYC also argues that the Navy failed to synopsise its proposed contract action. Specifically, AYC contends that when services are "available from only one responsible source," then the Competition in Contracting Act, 10 U.S.C.A. § 2304(c)(1) (West Supp. 1985) requires publication. Alternatively, AYC argues that if the urgency exception is invoked (10 U.S.C.A. § 2304(c)(2) (West Supp. 1985)), the agency, unlike what occurred here, must request offers from as many potential sources as is practicable. We disagree. Under the urgency exception (10 U.S.C.A. § 2304(c)(2)), an agency may limit the procurement to the only firm it reasonably believes can promptly and properly perform the work, without invoking the exception contained in 10 U.S.C.A. § 2304(c)(1)). This is what occurred here and the agency is not required to synopsise contract actions which are of unusual and compelling urgency. See FAR § 5.202(a)(2) (FAC No. 84-5, April 1, 1985).

Further, AYC argues that if CL develops competitive specifications under the letter contract, there will be an organizational conflict of interest which should bar CL from future competitive procurements. The Navy states that it is aware of the problem, that it is considering it, and that the matter will be resolved before issuing any competitive solicitations. Since we have no reason to believe that the Navy will not take the appropriate steps to avoid any potential conflicts of interest resulting from the current award, we have no basis to object to the present award because a potential conflict of interest may arise in the future.

AYC also objects to two modifications by the Navy of an existing contract with CL, because AYC considers these modifications as beyond the scope of the contract and as constituting additional and related sole-source awards by the Navy that were made in concert with the award of the letter contract. However, the Navy does not dispute AYC's allegations that these modifications were outside the scope of the contract; rather, the Navy states that both modifications were considered to be new procurements, and it executed a "Justification & Approval for Other than Full & Open Competition," which described each modification as a "sole-source modification." Further, the Navy advances the identical factual and legal justifications for the modifications as it does for the propriety of the noncompetitive letter contract. Accordingly, we need not separately consider the propriety of these modifications since we have already decided the same issue in AYC's challenge of the Navy's noncompetitive award of the letter contract.

The protest is denied.

Harry R. Van Cleve
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General Counsel