



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: United States Marshals Service--Request for
Reconsideration
File: B-224277.3
Date: April 22, 1987

DIGEST

1. A determination not to synopsize a noncompetitive award cannot itself justify statement for a noncompetitive award, which is subject to high-level approval must also contain information indicating the basis for not synopsizing.
2. A justification for using other than full and open competition which cites 41 U.S.C. § 253(c)(1) (Supp. III 1985) does not meet the requirements of a justification for using the "urgent need" exception from using full and open competition under 41 U.S.C. § 253(c)(2) (Supp. III 1985).

DECISION

The United States Marshals Service (USMS) requests reconsideration of our decision in World-Wide Security Service, Inc.; Philips Electronic Instruments, Inc., B-224277; B-224227.2, Jan. 8, 1987, 66 Comp. Gen. ____, 87-1 C.P.D. ¶ ____, where we sustained the protests of World-Wide Security Service, Inc. and Philips Electronic Instruments, Inc. and recommended corrective action. We affirm our prior decision.

We sustained the protests of World-Wide and Philips because USMS failed to synopsize the intended contract action in the Commerce Business Daily (CBD), as required under 41 U.S.C. § 416(a)(1)(A) (Supp. III 1985). We found that since USMS' justification for awarding a sole-source contract to Astrophysics Research Corporation (ARC) was based on a determination under 41 U.S.C. § 253(c)(1) (Supp. III 1985) that only one responsible source would satisfy agency needs, the agency was required by law to synopsize the contract in the CBD unless the notice requirement was waived by the agency head. 41 U.S.C. § 253(f)(1)(c) (Supp. III 1985).

038676

The USMS now requests that we reconsider that decision on the grounds that it was not required to synopsise the intended contract action. In support of its position, USMS cites the Federal Acquisition Regulation (FAR), 48 C.F.R. § 5.202(a)(1) (1986), which relieves the contracting agency from the requirement of publication whenever "[t]he synopsis cannot be worded to preclude disclosure of an agency's needs and such disclosure would compromise the national security," and submits a document entitled "Determination Not To Synopsise," which was not submitted during our initial consideration of these protests.

The existence of the document entitled "Determination Not To Synopsise" does not itself excuse the agency's actions here. The FAR does permit a contracting officer to determine that synopsizing would compromise the national security. However, a separate statement, entitled "Justification for Other Than Full and Open Competition," the justification for making a noncompetitive award, which must be reviewed and approved by an official above the level of the contracting officer, FAR, 48 C.F.R. § 6.304, must include a description of efforts made to ensure that offers are solicited from as many sources as possible, "including whether a CBD notice was or will be publicized . . . and, if not, which exception under [FAR section] 5.202 applies." FAR, 48 C.F.R. § 6.303-2(a)(b). The justification statement did not contain this information and thus was not subject to review by the approving official. Since the justification statement was required to contain this information, and since a contracting officer may not award a noncompetitive contract under 41 U.S.C. § 253(c)(1) unless such action is justified and a certified, complete justification statement is submitted and approved, 48 C.F.R. § 6.303-1(a), we believe the award under that statutory provision was not properly made.

The USMS argues in the alternative that although the "Justification for Other Than Full and Open Competition," prepared before award of the contract to ARC did not cite urgency as a basis for USMS' decision, the "spirit" of the justification demonstrates the critical and urgent need for the equipment as contemplated under the urgent need exception contained in 41 U.S.C. § 253(c)(2) (Supp. III 1985). According to the agency, therefore, the decision not to synopsise was permissible under 41 U.S.C. § 416(c)(2) (Supp. III 1985), which excuses an agency from the publication requirements of 41 U.S.C. § 416(a)(1)(A) when the contract action takes place under the authority provided in 41 U.S.C. § 253(c)(2).

We cannot conclude that USMS' justification was based on urgency. First, we note that under 41 U.S.C. § 253(f)(3)(B),

the procuring agency must cite the statutory exception under which the procurement has been excepted from full and open competition in its justification therefor. The USMS justification cites only 41 U.S.C. § 253(c)(1), and makes no reference to section 253(c)(2). Second, we are not persuaded that the "spirit" of the justification demonstrates an urgent need as suggested by the agency. While it is true that the justification does refer to an "urgent need" to acquire the best equipment available to meet a perceived security threat and to provide maximum security, the essence of the narrative addresses the agency's rationale for choosing ARC as the only responsible source of equipment which could meet its needs. Third, under 41 U.S.C. § 253(e), an agency is required to request offers from as many potential sources as is practicable under the circumstances when procuring under the "urgent need" exception. Both of the protesters here indicated interest in submitting offers at the time the solicitation was issued, and the passage of approximately 3 months from the time the solicitation was issued to the time of award provided, in our opinion, time in which to secure offers from the protesters. Finally, although under 41 U.S.C. § 253(f)(2) an agency may make the justification for an "urgent procurement" after the contract is awarded, during the 5 months since the award of this contract, the agency has failed to issue such a justification. We can only conclude that 41 U.S.C. § 253(c)(2) was not the basis for using other than full and open competition in this procurement.

USMS also requests that we modify our recommendation that USMS terminate its contract with ARC and conduct this procurement in accordance with the statutory requirements. In our decision, we noted that the contract schedule called for deliveries beginning in late January and thus we recommended termination of the entire contract. USMS reports that at the time that our decision was received by USMS, more than 50 of the units under the contract had been delivered and were operating within court facilities, and that the remainder were scheduled for delivery by March 31, 1987. USMS temporarily has suspended the contract pending our decision on its request for reconsideration, except that it had the awardee deliver one other machine on February 13 due to "critical life threatening circumstances."

In issuing our decision, we were not aware of these facts. With regard to the 50 machines that have been delivered and are in operation, there is no indication that these deliveries were made in other than good faith prior to USMS' receipt of the decision. We also have no basis to question USMS' finding that the delivery of the one additional machine

was due to critical circumstances. Accordingly, we modify our decision and recommend termination of the remainder of the contract and resolicitation of the remaining need. Our decision to award costs is affirmed.

The prior decision, as modified, is affirmed.

for Milton J. Fowler
Comptroller General
of the United States