The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Syncor Industries Corporation

File: B-224023.3

Date: October 15, 1987

DIGEST

1. Contention that a contracting officer is required to test the market by contacting other sources prior to exercising an option to extend the term of an existing contract is without merit because the regulations permit the determination to exercise an option to be based on a finding that the market has been stable since the award of the initial contract.

2. A firm that did not participate in a procurement despite having an opportunity to do so is not an interested party for purposes of protesting after award alleged improprieties in connection with that procurement.

3. Contract modification requiring the government to pay for alterations to awardee's facility necessary for contract performance is not a cardinal change where it does not substantially change the purpose and nature of the original contract.

DECISION

Syncor Industries Corporation protests the exercise by the Naval Supply Center, Norfolk, Virginia, of an option to extend the term of contract No. N00189-86-D-0408 with the Jonathan Corporation. We deny the protest in part and dismiss it in part.

The contract with Jonathan, awarded on August 22, 1986, is for the repair, overhaul, and modification of electronic and electrical warfare equipment, and for technical support in connection with the installation of related support systems.

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The Navy awarded Jonathan a 1-year, indefinite quantity, indefinite delivery, time-and-materials contract containing two, 1-year renewal options under request for proposals (RFP) No. N00189-85-R-0378. The agency reports that it synopsized that requirement in the Commerce Business Daily (CBD) and distributed copies of the RFP to 56 firms on the agency's mailing list. (Syncor was not on the list and did not respond to the CBD notice.) The agency received two offers--from Jonathan and from the incumbent, Superior Engineering and Electronics Co., Inc.--which the agency determined to be essentially equal technically. The award to Jonathan was based on its 3-year proposed costs of $36,912,159, almost $5 million lower than Superior's costs.1/

On July 7, 1987, the contracting officer made a determination under the Federal Acquisition Regulation (FAR), 48 C.F.R. § 17.207 (1986), that exercise of the first renewal option would be the most advantageous method of fulfilling the government's need for the required services following the expiration of the base year of the contract with Jonathan. The contracting officer cited the complex nature of the services as well as the considerable length of time required to award the initial contract. The contracting officer noted that Jonathan's option prices had been determined to be fair and reasonable when evaluated in connection with the initial award and that market conditions had not changed significantly since then.

Our Office generally will not question an agency's exercise of an option contained in an existing contract unless the protester shows that the agency failed to follow applicable regulations or that the determination to exercise the option, rather than conduct a new procurement, was unreasonable. Action Mfg. Co., B-221607.3, May 15, 1987, 66 Comp. Gen. ____, 87-1 CPD ¶ 518. Here, Syncor contends that the contracting officer violated FAR, 48 C.F.R. § 17.207, by

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1/ Superior Engineering contested the award to Jonathan on several gounds both before this Office and in an action filed in the United States District Court for the Eastern District of Virginia. We denied Superior's protest in Superior Engineering and Electronics Co., Inc., B-224023, Dec. 22, 1986, 86-2 CPD ¶ 698, and declined to reconsider that decision because of the pendency of the court action. Superior Engineering and Electronics Co., Inc.--Reconsideration, B-224023.2, Mar. 20, 1987, 87-1 CPD ¶ 318. The district court subsequently denied all of Superior's claims for relief. Superior Engineering and Electronics Co., Inc. v. United States, No. 86-860-N (E.D. Va. Aug. 31, 1987).

failing to test the market to identify alternative sources. In this connection, the protester notes that it, as well as other firms, have expressed interest in competing for an award for the option year, and that it is "highly probable" that a new competition would result in lower costs to the government. Syncor also contends that exercise of the option is unreasonable for other reasons. In addition, Syncor alleges that a modification of Jonathan's base contract was improper because it represented a cardinal change from the terms under which the initial competition was conducted.

We find no merit to the protester's contention that the agency failed to comply with FAR, 48 C.F.R. § 17.207. That section provides that a contracting officer may exercise a contract option only after determining, among other things, that to do so would be the most advantageous method of fulfilling the government's need, price and other factors considered. FAR, 48 C.F.R. § 17.207(c)(3). The contracting officer must base this determination on one of three specified factors, one of which does refer to "an examination of the market." FAR, 48 C.F.R. § 17.207(d)(2). There is no requirement, however, that a contracting officer in all cases contact other firms or "test the market for alternative sources," as Syncor contends. ISC Defense Systems, Inc., B-224564, Feb. 17, 1987, 87-1 CPD ¶ 172. As happened here, a contracting officer may decide that exercise of an option would be advantageous to the government based on the length of time since the initial award and the relative stability of the market. FAR, 48 C.F.R. § 17.207(d)(3); Action Mfg. Co., B-221607.2, supra. In this regard, the exercise of the option is not an opportunity for unsuccessful competitors to lower prices initially offered, ISC Defense Systems, Inc., B-224564, supra, or for other firms to seek an opportunity to compete merely by suggesting that lower prices may be obtained.

Syncor argues that the agency's exercise of the option was unreasonable on the basis that it perpetuates improprieties associated with the initial award. Specifically, Syncor contends that the contract awarded to Jonathan in 1986 indicated projected 3-year costs of $36,912,159 even though the 3-year costs as contained in Jonathan's best and final offer, and as entered on the agency's proposal abstract, were only $36,438,685. According to Syncor, this means that each of the delivery orders issued thus far under the contract has been priced incorrectly, that payments to Jonathan during the option year also will be excessive, and that the government ultimately will pay some $473,474 more over 3

years than it should.2/ Syncor also notes that while the contract provides that it is subject to the Walsh-Healey Public Contracts Act, 41 U.S.C. §§ 35-45 (1982), the Department of Labor has informed the Navy that it is the Service Contract Act of 1965, 41 U.S.C. §§ 351-358, that should apply here. The protester adds that use of the wrong labor statute restricted competition for the base year.

The agency argues that Syncor is not an interested party to raise these objections because the firm was not an offeror under the solicitation. The Navy's position is that Syncor's arguments in essence concern the propriety of the initial award and that under our Bid Protest Regulations, only an actual offeror with a direct economic interest is eligible to protest the award of the contract. 4 C.F.R. §§ 21.1(a) and 21.0(a) (1987). We agree. The arguments concerning the proposal abstract and the Service Contract Act concern the propriety of the original award to Jonathan. A party that did not participate in a procurement, despite having an opportunity to do so, does not have standing to question an agency's conduct of that procurement. Automation Management Corp., B-224924, Jan. 15, 1987, 87-1 CPD ¶ 61.3/

With respect to the issue of cardinal change, the Navy reports that, after award, it modified Jonathan's contract to provide and pay for alterations to Jonathan's facility necessary to permit proper contract performance. In our view, the change--which added $339,000 to a contract with a 3-year estimated value in excess of $39 million--did not alter the essential nature of the contract as originally awarded and therefore did not constitute a cardinal change. See Shihadeh Carpets and Interface Flooring Systems, Inc., B-225489, Mar. 17, 1987, 87-1 CPD ¶ 295.

Finally, in its comments on the agency's report in response to the protest, Syncor contends the Navy did not properly exercise the option because the contract amendment that

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2/ We reviewed Jonathan's best and final offer in camera, however, and confirmed that in fact the totals shown there are the same as the totals indicated on the contract itself.

3/ Most of Syncor's arguments are premised on its belief that the Navy's exercise of the option to extend the term of Jonathan's contract constituted an "additional award." An agency's exercise of an option contained in an existing contract, however, is not the award of a new contract. Action Mfg. Co., B-221607.2, supra.

purported to do so (which Syncor received for the first time as part of the report) did not indicate a minimum quantity, which Syncor says is required under FAR, 48 C.F.R. § 16.504. There is no merit to this position, however, since the solicitation did provide in clause H44 for a minimum ordering quantity in the amount of $50,000. This clause, just as all other solicitation terms and conditions, applies to the option years as well as to the base year.

The protest is denied in part and dismissed in part.

James F. Hinchman
General Counsel