The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: SEAVAC International, Inc.

File: B-231016, B-231457

Date: August 11, 1988

DIGEST

1. Sole-source extension of contract pending completion of competitive procurement was reasonable since there was inadequate time to conduct negotiated acquisition of bridge-period services and ongoing services would have been interrupted. Record shows that extension was necessitated by change in small business size standard attributable to protester's appeal to Small Business Administration and not to a lack of advance planning.

2. Withdrawal of set-aside was proper where contracting officer, based on survey of firms on bidders list and experience with prior procurement, could not conclude that there was a reasonable expectation of receipt of offers from at least two small businesses with the capacity and capability to perform the contract.

DECISION

SEAVAC International, Inc., protests the Department of the Navy's sole-source extensions of contract No. N00024-84-D-4014 with Seaward, Inc., for ship hull cleaning services while the procurement of contracts is pending under request for proposals (RFP) No. N00024-88-R-4010(Q). SEAVAC also protests the withdrawal of the small business set-aside restriction under the latter RFP. We deny the protest in part, and we dismiss it in part.

The Navy awarded the existing contract, for worldwide ship hull cleaning services, to Seaward on January 1, 1984, after a competitive procurement set aside for small business using a size standard of less than 500 employees. The services required included the cleaning of all forms of marine growth from ships' hulls and sonar domes, stabilizers, running gear

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and other appurtenances, and the performance of underwater television and nondestructive testing services. As originally awarded, the contract contained options which could extend performance until September 30, 1986. Through subsequent modifications extending the contract and adding additional options, performance was extended from October 1, 1986, until June 30, 1988, pending release of the RFP and award of replacement contracts.

The RFP was issued on October 7, 1987, as a 100 percent small business set-aside, using the same size standard used in the prior procurement. The RFP provides for the services to be furnished worldwide in what are called east and west coast zones, covering most of the major waters of the world. The east coast zone, for instance, covers the Gulf of Mexico, Atlantic ports on both sides of the ocean, and Mediterranean and Red Sea ports. The Navy may award a contract for each zone or a single contract for both zones. The RFP contemplates cleaning approximately 300 vessels per year in each zone; the Navy estimates, based on the existing contract, that each zone will generate about $5 million per year in revenue.

The closing date for the receipt of proposals was December 7, 1987. In November of 1987, SEAVAC filed an appeal with the Small Business Administration's Office of Hearings and Appeals (SBA/OHA) in which SEAVAC challenged the size standard employed in the RFP. On January 22, 1988, SBA/OHA determined that the appropriate size standard was no more than $3.5 million average annual receipts (AAR) over the last 3 years.

The Navy issued several amendments to the RFP to extend the closing date pending the outcome of the SBA/OHA hearing and to give the Navy time to assess the results of that hearing. In amendment 5, dated March 29, 1988, the Navy withdrew the small business set-aside because the Navy did not expect adequate small business competition under the $3.5 million AAR size standard, as discussed below. In addition, on April 5, 1988, the Navy published a notice in the Commerce Business Daily (CBD) advising that the Navy intended a further sole-source extension of Seaward's contract for a period of 6 months beyond June 30, 1988, with an option for an additional 3 months, to provide a "bridge" period until the competitive procurement under the RFP could be awarded. On April 12, SEAVAC submitted a proposal to the Navy for the bridge period in which SEAVAC proposed prices based on the statement of work in the RFP for the replacement contract, offered an accelerated 8-week phase-in schedule, and stated SEAVAC's willingness to negotiate "at any time." SEAVAC's

proposal did not identify SEAVAC's facilities or equipment, experience of its personnel or management, or explain how the expedited phase-in might be accomplished. The Navy returned SEAVAC's proposal on April 15 with advice that the CBD notice "was not a request for competitive proposals." The RFP for the replacement contract ultimately closed on May 18, 1988.

By letter dated March 1, 1988, SEAVAC protested to the contracting officer against any further extensions of the RFP and against the repeated sole-source extensions, since October 1, 1986, of the Navy's contract with Seaward. The contracting officer's denial of SEAVAC's protest was received by SEAVAC on March 10.

On April 13, SEAVAC filed a protest with our Office against the sole-source extension of the contract announced in the CBD on April 5. SEAVAC also filed, on May 16, a protest of the withdrawal of the set-aside as implemented by amendment 5 to the RFP. Because these matters are so closely related, we will consider both protests in this decision.

PROTESTS PERTAINING TO PRIOR EXTENSIONS

Some of the questions raised by SEAVAC, particularly those concerning an alleged lack of advance planning by the Navy, pertain to contract extensions prior to the current one. Our Bid Protest Regulations, however, require that when any protest is filed with the contracting agency, a subsequent protest to our Office must be filed within 10 working days of knowledge of initial adverse agency action. 4 C.F.R. § 21.2(a)(3) (1988). As we noted above, on March 10 SEAVAC received the Navy's denial of SEAVAC's protest against prior (and future) extensions of the current contract; SEAVAC did not file any protest with our Office until April 13, 1988. Because the protest pertaining to earlier extensions were not raised with our Office within 10 working days of SEAVAC's receipt of the Navy's denial, SEAVAC's contentions pertaining to extensions other than the current one are untimely and will not be considered. A.B. Dick Co., B-228242.2, Oct. 30, 1987, 87-2 CPD ¶ 420.

EXTENSION OF EXISTING CONTRACT

The Navy asserts that it was necessary to extend the existing contract while the procurement of the replacement contract was pending because ongoing necessary services would otherwise have been interrupted and only the incumbent could meet the Navy's needs within the required time. In support of this contention, the Navy states that there was insufficient time between the withdrawal of the set-aside on

March 29 and the June 30 termination of the existing contract to issue an RFP for the bridge period, evaluate technical and cost proposals, conduct discussions, evaluate best and final offers, and select and phase-in a new contractor.

SEAVAC contends that the Navy could not properly extend Seaward's contract on a sole-source basis because competition was available. SEAVAC argues that the Navy had only to get prices and determine the responsibility of the low offeror in order to award the "bridge" contract, and contends that the Navy had plenty of time to do this between March 29 and June 30. SEAVAC also contends that the Navy awarded the sole-source extension to Seaward without considering SEAVAC's proposal submitted in response to the April 5 announcement, in violation of the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2304(f)(1)(C) (Supp. IV 1986), and asserts that the sole-source extension of the existing contract was attributable to a lack of advance planning, which CICA also precludes. 10 U.S.C. § 2304(f)(5).

The sole-source extension of an existing contract, pending the outcome of a competitive procurement, is justified where: (1) ongoing necessary services would otherwise be interrupted, (2) the agency reasonably determines that only the incumbent can meet the government's needs within the required time, and 3) the noncompetitive extension is not the result of a lack of advance planning by the contracting agency. Cerberonics, Inc., B-225626 et al., Apr. 30, 1987, 87-1 CPD ¶ 463. We find that the Navy's decision to extend Seaward's contract was reasonable in light of those standards.

Initially, we find no evidence that the Navy would not have completed the replacement procurement without the necessity for the protested extension were it not for SEAVAC's appeal to the SBA/OHA. We also see no reasonable way the Navy could have anticipated SEAVAC's appeal or its outcome, particularly since the 500-employee size standard had been used in the prior procurement of these services without objection. In these circumstances, we do not find that the sole-cource extension was attributable to a lack of advance planning.

SEAVAC's contention that the Navy need only obtain prices and assess the responsibility of the low offeror in order to award the "bridge" contract is without merit. The services contemplated here, whether as part of the existing contract, the bridge contract, or the replacement contract, are

complex and worldwide in scope, a point SEAVAC has not contested. In recognition of the complexity and scope of these requirements, the RFP provides for the technical evaluation of offerors' experience and facilities. SEAVAC does not contest these evaluation factors in the RFP and makes no effort to demonstrate why the identical services under a bridge contract would be any less complex or substantial so as to require a less critical assessment.

The Navy's concern was whether there was adequate time to conduct a competition for the bridge period. Although SEAVAC may have indicated interest in competing for this period, SEAVAC's proposal submitted in response to the Navy's April 5 CBD announcement did not identify the facilities, equipment and resources with which SEAVAC might perform the services, provided no evidence of managerial capabilities or experience with substantial contracts, and did not explain how SEAVAC, which presumably satisfies the $3.5 million AAR size standard, would complete the phase-in to a $10 million per year contract for worldwide services in just 8 weeks. In this connection, we note that SEAVAC's protest identified just 17 Navy vessels that SEAVAC cleaned in the 14 months from February 1987 through April 1988, substantially fewer than the 600 per year contemplated under the RFP. In order to provide even minimal competition and assure the continuity of services beyond June 30, the Navy would have had to prepare an RFP, get proposals from at least the incumbent and SEAVAC, evaluate technical and cost proposals, conduct discussions, get revised proposals, evaluate them and select the bridge services contractor in just over 2 weeks from SEAVAC's April 12 proposal, in order to accommodate even SEAVAC's proposed 8-week phase-in. In this situation, we think the Navy could reasonably conclude this was not possible and reject SEAVAC's submission.

We point out that CICA does, as SEAVAC contends, preclude the use of noncompetitive procedures unless all proposals received in response to the required CBD announcement are considered. 10 U.S.C. § 2304(f)(1)(C). This proscription means that such proposals must be considered in conjunction with the agency's initial determination that only one contractor can satisfy the government's needs within the required time. See, e.g., C&S Antennas, Inc., B-224549, Feb. 13, 1987, 66 Comp. Gen. ____, 87-1 CPD ¶ 161; American Systems Corp., B-224008, Dec. 22, 1986, 86-2 CPD ¶ 697; see also the General Services Administration Board of Contract Appeals' (GSBCA) decision in Businessland, Inc., GSBCA No. 8586-P, Aug. 19, 1986, 86-3 BCA ¶ 19,268. Unlike the situation in Businessland, Inc., however, this was not an instance in which the agency was confronted with a proposal

that evidenced a substantial likelihood of ability to perform the necessary services within the required time. We think the Navy was reasonable in concluding that only the incumbent could satisfy the Navy's requirement for continued services.

WITHDRAWAL OF SMALL BUSINESS SET-ASIDE

The Navy's withdrawal of the small business set-aside was premised on two principal factors: First, the Navy's experience indicated that only a limited number of firms were qualified and capable of doing the work. In this regard, the contracting officer noted that in the prior procurement, using a less stringent size standard, there were only 7 respondents out of 91 firms solicited, and of those submitting acceptable proposals, only one satisfied the $3.5 million AAR size standard. Second, on January 29, after the SBA/OHA ruled that the applicable size standard was $3.5 million AAR, rather than the less-than-500-employees standard that the Navy applied, the Navy sent a letter to firms on the bidders list asking if they met the new standard. Of the 41 firms that responded, 32 indicated they did so. A Navy survey of these firms, however, based on information obtained through a recognized commercial reporting service (Dun & Bradstreet, Inc.), indicated that few of these firms were likely candidates as offerors. The contracting officer was unable to conclude that there was a reasonable expectation of receipt of two technically acceptable offers from responsible small businesses and concluded, under the provisions of the Federal Acquisition Regulation (FAR) § 19.506 (FAC 84-31), that it would be in the best interests of the government and in the public interest to withdraw the set-aside.

SEAVAC argues that since the prior procurement was conducted as a small business set-aside, the only permissible basis for the Navy's objection to a repetitive small business set-aside is an affirmative finding that there is not a reasonable expectation that offers will be received from at least two responsible small businesses and that award will be made at an acceptable price. SEAVAC contends that the Navy could not reasonably make this determination since the Navy received 32 responses, which SEAVAC characterizes as "expressions of interest" from self-certifying small businesses in response to the Navy's January 29 size inquiry.

The regulations covering small business set-asides stipulate that a total small business set-aside is inappropriate unless there is a reasonable expectation that (a) offers

will be obtained from at least two small business concerns offering the products of different small business concerns and (b) award will be made at no more than the fair market price. FAR § 19.502-2 (FAC 84-37). The determination as to whether adequate competition reasonably may be expected and that a set-aside is warranted is essentially a business judgment within the contracting officer's discretion, which we will not disturb absent a clear showing of abuse of discretion. The Quality Inn Midtown, B-219312.3 et al., Apr. 4, 1986, 86-1 CPD ¶ 324. SEAVAC has made no such showing here.

SEAVAC's characterization of the responses to the Navy's January 29 size inquiries as "expressions of interest" is misleading, at best. Firms were placed on the bidders list involuntarily and the Navy's letter does not inquire into their interest in the procurement. Moreover, the respondents included firms ranging from a manufacturer of underwater electrical conductors to diving businesses with only two employees with a high improbability of interest in this procurement. In short, this appears to have been nothing more than a survey of firms on the bidders list in diving, hull cleaning, and other maritime industries, without indication or implication of interest one way or the other.

We find three factors far more persuasive in assessing the propriety of the Navy's determination. First, the prior procurement, conducted under the less stringent 500-employee standard, produced only one acceptable offeror which is still available and would have satisfied the $3.5 million AAR size standard. Second, the Navy's survey of available commercial reports on the respondents to its January 29 inquiry showed very few small businesses in the appropriate line of endeavor with evidence of the likely capability to perform the requirements of the RFP. Finally, the determination to withdraw the set-aside was approved by the Navy's SBA representative.

In our estimation, the contracting officer undertook reasonable efforts to ascertain whether it was likely the Navy would receive offers from at least two small businesses with the capability and capacity to perform the work. Given the information before the contracting officer at the time, we conclude that his determination to conduct an unrestricted procurement was reasonable. Moreover, we note that the SBA representative concurred in the Navy's decision. See, e.g., Automated Datatron, Inc., B-218284, May 9, 1985, 85-1 CPD ¶ 516; Tufco Industries, Inc., B-189323, July 13, 1977, 77-2 CPD ¶ 21. We therefore see no legal basis to object to the withdrawal of the set-aside and are not persuaded otherwise by the Navy's ultimate receipt of two small business offers. since the determination to withdraw a

set-aside must be assessed as of the time it was made. The subsequent receipt of two small business offers does not impugn its reasonableness. See, e.g., Hopkinsville Aggregate Co., B-227830, June 16, 1987, 87-1 CPD ¶ 600.

The protest is denied.

James F. Hinchman
General Counsel