



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Advance Business Systems
File: B-237728
Date: March 16, 1990

Richard C. Burke, for the protester.
Donna L. Judd, for The Copy Man, an interested party.
Herbert F. Kelley, Jr., Esq., Department of the Army, for the agency.
Katherine I. Riback, Esq., Paul Lieberman, Esq., and John F. Mitchell, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency properly may elect to order a non-mandatory item from a Federal Supply Service contract where the agency has a reasonable basis to determine that the burden and cost of a new procurement would exceed a \$222 cost savings which it appeared might be available by using a competitive procurement.

DECISION

Advance Business Systems (ABS) protests the decision of the Utah Air National Guard to purchase maintenance services for several Konica Royal 1803-ZMR copy machines from The Copy Man (TCM), under that firm's non-mandatory General Services Administration (GSA) federal supply schedule (FSS) contract. ABS, a non-FSS contractor, argues that it can perform at a lower price and should be awarded the contract.

We deny the protest.

On October 14, 1989, the National Guard issued a renewal order for maintenance services for Konica's copy machines to TCM under its FSS contract. ABS had previously submitted an unsolicited proposal to provide similar maintenance services for the copiers quoting a price of \$6,068 versus TCM's price of \$6,290 under its FSS contract. The contracting officer determined that award of the contract to TCM under the FSS was in the best interest of the government, because ABS was not an authorized Konica dealer and also because of ABS'

prior poor performance of a copier maintenance contract at Hill Air Force Base.

ABS states that it never claimed to be an authorized Konica dealer, but rather that it could perform this contract because it can purchase parts directly from Konica. ABS contends that the National Guard decided to award the contract to TCM, the previous contractor, only because of its satisfaction with that firm's prior performance, without considering the lower price which ABS quoted.

The agency asserts that it was justified in using the non-mandatory FSS to obtain its service needs because the agency doubted whether ABS could provide quality service, due to ABS' prior contract performance and because it was not an authorized Konica dealer. In support of its position, the agency has provided our Office with a letter, from the Deputy Assistant Secretary of Defense for Procurement, which states that optional FSS sources are "preferred sources of supplies and services," and that "[t]here is no statutory or regulatory need to synopsise requirements, seek further competition, determine price reasonableness, or comply with small business-small purchase-set-aside requirements when schedules are used." Acquisition Letter 88-40.

The decision whether to place an order with a non-mandatory FSS contractor, or to proceed with a solicitation, is a business judgment for the contracting officer, which our Office will not question absent a clear showing of abuse of discretion. In this regard, an abuse of discretion may exist where the agency purchased from an FSS contractor even though the agency knows it can procure the item at a lower overall cost. AMRAY Inc., B-210490, Feb. 7, 1983, 83-1 CPD ¶ 135. By regulation, agencies are encouraged to use the non-mandatory FSS as a primary source of supply, except where the agency has "actual knowledge" that it can procure the item by solicitation at a price more advantageous to the government, after taking into consideration the burden and cost of a new procurement. Federal Property Management Regulations (FPMR) § 26.401-5(b), 41 C.F.R. § 101-26.401-5(b) (1988).

Here, the receipt of ABS' unsolicited proposal provided the contracting officer with actual knowledge that an apparent \$222 price advantage was available from a non-FSS source. While the contracting officer cited the protester's prior poor performance as a justification for not awarding the contract to ABS, this consideration pertains to the firm's responsibility. Because ABS is a small business, any nonresponsibility determination must be referred to the

Small Business Administration for consideration under its certificate of competency (COC) procedures. Data Express, B-234685, July 11, 1989, 89-2 CPD ¶ 28. Similarly, the question of ABS' access to Konica parts is a matter pertaining to responsibility, and we note in this regard that ABS has demonstrated that it has in the past procured parts directly from Konica. Accordingly, the contracting officer's determination that it was in the government's best interest to award to TCM was not based on appropriate considerations. The decision relies on the above-cited Acquisition Letter 88-40, which is incorrect to the extent it suggests that knowledge of a more advantageous price need not be considered in determining to place a non-mandatory FSS purchase order. In fact, as provided by FPMR § 26.401-5(b), cited above, an agency should not use the FSS where it has "actual knowledge" of the availability of a more advantageous price, after taking into consideration the burden and cost of a new procurement.

Here, however, the apparent price advantage available is only \$222, and in its agency report the National Guard has indicated that it has determined that this potential savings is outweighed by the cost and burden of conducting a new procurement. ABS has not argued that the cost and burden of a procurement is less than the \$222 apparent savings. In view of the relatively small potential price advantage, we find that the agency did not abuse its discretion in determining to use the FSS for the services in question. See Precise Copier Servs., B-232660, Jan. 10, 1989, 89-1 CPD ¶ 25.

The protest is denied.



for James F. Hinchman
General Counsel