



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Sanchez Porter's Company
File: B-238106; B-238257
Date: April 27, 1990

Anthony L. Sanchez, for the protester.
Gary E. Wint, Esq., General Services Administration, for the agency.
Linda S. Lebowitz, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest is sustained where the agency, using noncompetitive procedures to award contract extension on a sole-source basis, fails to establish that the time constraints imposed by urgency prevented the agency from soliciting offers from other potential sources including the protester.
2. Where the protester effectively was permitted 2 hours to submit an offer due to the agency's unjustified failure to provide reasonable time to solicit offers, the protester was improperly deprived of an opportunity to compete.

DECISION

Sanchez Porter's Company, the incumbent contractor, protests that the General Services Administration (GSA) improperly awarded two interim contracts and a contract modification for janitorial and maintenance services at the United States Customs House, a federal office facility in Denver, Colorado. Sanchez generally alleges that GSA improperly excluded it from competing, and improperly justified the award of these contracts on the basis of urgency.

As discussed in detail below, we agree with GSA that urgency justified excluding Sanchez from the competition for the first interim contract due to dissatisfaction with the firm's recent performance. In the absence of exigent circumstances, however, agencies may not exclude a potential

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contractor because of unsatisfactory prior performance unless the firm is found to be nonresponsible under applicable regulations. Regarding the follow-on awards (a sole-source contract extension and a second interim contract), the record does not support the urgency determinations to exclude Sanchez. GSA had time available to solicit offers and did not find the firm to be nonresponsible. Therefore, we sustain Sanchez's protests against the interim contract modification and the second interim contract.

Pursuant to section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1988), the Small Business Administration (SBA) entered into a contract with GSA to provide custodial services at the Customs House and arranged for the performance of this contract by letting a subcontract to Sanchez, a socially and economically disadvantaged business. Sanchez provided these custodial services to GSA under contract No. GS-07P-87-HTC-0074 (-0074) for a basic term of 1 year, from July 1, 1988, to June 30, 1989. The contract provided for two 1-year options to be exercised at GSA's discretion. On April 7, 1989, GSA notified SBA that due to unsatisfactory performance by Sanchez, GSA did not intend to exercise an option to extend Sanchez's contract beyond the June 30 basic term expiration date. At GSA's request, SBA recommended E.C. Professional (ECP) as another qualified 8(a) contractor to provide the custodial services.

In April, GSA began negotiations with ECP under the 8(a) program for a 1-year contract with options. By the time Sanchez's contract expired on June 30, GSA and ECP had not reached an agreement under the 8(a) program because ECP had not yet submitted a price for the basic requirement that GSA considered reasonable. In order to prevent a lapse in the performance of services, which could jeopardize the health, safety, and welfare of those using the facility and possibly cause physical damage to the structure itself, GSA made an urgency determination and requested ECP (because ECP was expected to become the new 8(a) contractor in the immediate future) and Metropolitan Building Maintenance (because Metropolitan was providing custodial services at two facilities across the street from the Customs House facility) to submit prices for a 3-month interim contract. GSA did not request Sanchez, the incumbent 8(a) contractor, to submit prices for this interim contract due to its poor performance during the preceding 12 months. Because ECP offered the lowest prices, on July 3, GSA entered into a

3-month interim contract with ECP, contract No. GS-07P-89-JWC-0091 (-0091), for the period of July 3 through September 30.^{1/}

In August, negotiations between GSA and ECP under the 8(a) program were terminated because agreement could not be reached on price. On September 4, GSA withdrew the requirement from the 8(a) program after SBA failed to propose another qualified 8(a) contractor to provide the custodial services. In order to continue receiving custodial services at the Customs House, on September 28, 1 working day before ECP's initial interim contract expired, GSA issued a modification, No. PS01, to ECP's interim contract based on urgency. This modification extended ECP's contract term for another 3 months for the period of October 1 through December 31.

In October, pursuant to the Javits-Wagner-O'Day Act, 41 U.S.C. § 46-48(c) (1982), GSA began negotiations with the National Industries for the Severely Handicapped (NISH), a nonprofit agency. On November 28, GSA and NISH reached an agreement for NISH to provide the custodial services beginning March 1, 1990. Because NISH was not to begin performance until March 1, GSA again needed to procure short-term custodial services for the period of January 1 through February 28. On December 28, 1 working day before the extension of ECP's interim contract expired, GSA solicited offers from four firms, including Sanchez. The deadline for receipt of offers was 12:00 noon, local time, on December 29. Three of the firms received the solicitation package on December 28 (and submitted timely offers). Sanchez, because it had no telefacsimile machine, did not receive its solicitation package, sent by overnight mail, until 2 hours before the closing time on December 29. By a letter sent by commercial telefacsimile machine, Sanchez notified GSA just before the closing time that basically, due to a lack of time to prepare its price, it was not submitting an offer. Instead, Sanchez again requested that GSA exercise the option under its initial 8(a) contract. On December 29, GSA awarded contract No. GS-07P-90-JWC-0026 (-0026) to Metropolitan Building Maintenance, the lowest priced offeror.

As a general rule, procurements must be conducted using competitive procedures. 41 U.S.C. § 253(a) (Supp. IV 1986). An agency may use other than competitive procedures where

^{1/} This interim contract was not under the 8(a) program as the contract was directly between GSA and ECP, rather than between SBA and GSA with a subcontract to ECP.

the agency's needs are of such an unusual and compelling urgency that the government would be seriously injured if the agency did not limit the number of sources from which bids or proposals are solicited. 41 U.S.C. § 253(c)(2). When using other than competitive procedures based on unusual and compelling urgency, the agency is required to request offers from as many potential sources as is practicable under the circumstances. 41 U.S.C. § 253(e). We will object to the agency's determination to limit competition based on unusual and compelling urgency where we find that the agency's decision lacks a reasonable basis. Colbar, Inc., B-230754, June 13, 1988, 88-1 CPD ¶ 562.

Interim Contract -0091

With respect to the award of the interim contract (-0091) to ECP for custodial services for the period of July through September, Sanchez alleges that as the incumbent 8(a) contractor, GSA improperly excluded it from the competition based on an urgency determination.^{2/} Under 41 U.S.C. § 253(c)(2), an agency, in urgent circumstances, may limit the competition to firms with satisfactory work experience which it believes can promptly and properly perform the services. See Industrial Refrigeration Serv. Corp., B-220091, Jan. 22, 1986, 86-1 CPD ¶ 67. The agency is not required to solicit the incumbent if, in the agency's judgment, there is doubt based on the incumbent's prior record of performance that the firm can perform the

^{2/} Sanchez challenges the decision of GSA not to extend the term of its 8(a) contract by exercising an option under this contract, which Sanchez alleges could have saved the government more than \$40,000 during the period from July to December when ECP was providing the services under the interim contract and modification which extended the interim contract. The contracting agency's decision not to exercise an option is a matter of contract administration. There is no obligation for the contracting agency to justify a decision not to exercise an option on the basis of a cost comparison. The regulations only provide that the agency cannot exercise an option without first determining that it is the most advantageous method of fulfilling the agency's needs, price and other factors considered. Federal Acquisition Regulation (FAR) § 17.207(c)(3) (FAC 84-49). Those who bid or offer on contracts containing option provisions assume the risk that the agency might not exercise the option. Western States Management Servs., Inc., B-233576, Dec. 8, 1988, 88-2 CPD ¶ 575; Arlington Public Schools, B-228518, Jan. 11, 1988, 88-1 CPD ¶ 16.

services. Id. This is true whether or not the agency has formally found the incumbent to be nonresponsible under FAR § 9.103(b) (FAC 84-18). Atlanta Investigations, B-227980; B-227981, July 30, 1987, 87-2 CPD ¶ 121.

GSA reasonably limited competition for the interim contract in April 1989 because of its urgent need to obtain a contractor for the services. GSA knew that it would not be exercising an option to extend Sanchez's 8(a) contract. GSA, however, planned to maintain this requirement under the 8(a) program, and requested SBA to recommend another qualified 8(a) contractor to provide the necessary custodial services. Upon SBA's recommendation in April, GSA commenced negotiations with ECP under the 8(a) program with the apparent belief that by the end of June, GSA and ECP would have reached an agreement under the 8(a) program for ECP to begin providing custodial services. By the end of June, when Sanchez's 8(a) contract expired, GSA and ECP had not reached an agreement under the 8(a) program. At this point, GSA reasonably determined that the operation of the government offices at the Customs House would be jeopardized (specifically the health, safety, and welfare of those using the facility and the possibility of physical damage to the structure itself) if janitorial and maintenance services were not performed. For this reason, we find GSA properly determined that exigent circumstances existed justifying other than competitive procedures to procure the custodial services. 41 U.S.C. § 253(c)(2), supra.

We cannot object to GSA's decision not to solicit an offer from Sanchez. GSA determined that Sanchez's performance during the previous 12-month period was unsatisfactory, as reflected by a number of contract administration problems and monthly payment deductions (which the record reveals were particularly high during the last quarter of Sanchez's performance under its 8(a) contract). Based on Sanchez's prior record of performance under its 8(a) contract, GSA states it had no reason to believe that Sanchez could provide interim custodial services which would be any better than the services it provided under its 8(a) contract. GSA limited the competition to ECP, with which it expected to shortly complete negotiations for an 8(a) contract, and Metropolitan, the contractor providing custodial services in two nearby buildings. Both of these firms were prepared to immediately begin performance upon award of the interim contract. Under these circumstances, we think GSA's decision to limit the competition to two firms which could promptly and properly perform the work was not objectionable. Industrial Refrigeration Serv. Corp., B-220091, supra.

Interim Contract Modification PS01

Sanchez challenges GSA's urgency determination as a basis for using other than competitive procedures in issuing a modification to the interim contract, thereby extending the period of ECP's performance for another 3 months from October to December. We conclude that this modification was improper.

The record indicates that, in August, negotiations between GSA and ECP for an 8(a) contract ended, and on September 4, when SBA failed to recommend another 8(a) contractor, GSA withdrew the requirement from the 8(a) program. Although too late to issue a fully competitive solicitation, GSA knew at this time that it had approximately 1 month before ECP's interim contract expired to solicit at least some sources for the follow-on contract for custodial services.^{3/} On September 28 (1 working day before ECP's interim contract expired), in order to continue receiving the necessary janitorial and maintenance services after September 30, GSA, on the basis of urgency, issued a modification to ECP's interim contract, extending it for another 3 months from October to December. We find that GSA's explanation for the extension--that its leasing branch was understaffed--is not a reasonable basis for the extension without soliciting any other sources. The record shows that approximately 1 month prior to the extension, GSA was aware it would have a continued need for these services. While GSA's use of the urgency exception to full and open competition to solicit these services appears justified, we see no reason in the record for not requesting offers from as many potential sources as was practicable given the time available to solicit offers. See 41 U.S.C. § 253(e); AT&T Information Serv. Inc., 66 Comp. Gen. 58 (1986), 86-2 CPD ¶ 447. Unless GSA found Sanchez nonresponsible and thus ineligible for award under FAR § 9.103(b), the firm was a potential source entitled to the opportunity to compete. See, e.g., Saxon Corp., B-237629, Feb. 26, 1990, 90-1 CPD ¶ 230. We thus sustain this ground of protest.

^{3/} An argument can be made that GSA knew in April, when it informed SBA that it did not intend to extend Sanchez's 8(a) contract by exercising an option and, in any event, no later than June, when Sanchez's 8(a) contract expired, that it would need to issue a solicitation for long-term custodial services. We believe that GSA, in good faith, intended to keep this requirement under the 8(a) program by negotiating another 8(a) contract, and, for this reason, believe GSA was justified in not conducting a competitive procurement at these particular times.

Interim Contract -0026

Sanchez also challenges GSA's award of the last short-term interim contract (-0026) to Metropolitan for 2 months from January to February until NISH would begin to provide custodial services in March. Sanchez basically argues that it had insufficient time to prepare its offer and that the award violated statutory requirements for full and open competition.^{4/}

With respect to the award to Metropolitan, we find that GSA's award was improper. The record indicates that GSA knew in October that it needed to have a contractor in place to provide custodial services beginning in January. In October, GSA began negotiations with NISH and on November 28, GSA reached an agreement with NISH to provide custodial services beginning March 1. Therefore, on November 28, GSA knew it still had 1 month before the extension of ECP's interim contract expired to award a short-term interim contract to a firm to provide custodial services for the months of January and February. However, GSA waited until December 28 (1 working day before the extension to ECP's interim contract expired) to solicit offers from four firms, including Sanchez.

On December 29, GSA awarded a contract to Metropolitan, the lowest priced offeror, so that custodial services would continue in January and February (again, apparently based on urgency). However, the record reveals no reason, other than staffing problems, for why GSA waited until 1 working day before the extension of ECP's interim contract expired to solicit offers. While GSA appears to have had a legitimate urgency basis precluding full and open competition, the law, as stated previously, requires that the agency request offers from as many potential sources as is practicable under the circumstances. GSA's unexplained, and we think

^{4/} GSA argues that this protest is untimely because it concerns improprieties apparent in the solicitation which should have been filed prior to the closing date under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1989). However, we think the letter of December 29, 1989, from Sanchez filed prior to the closing time with GSA which complains of the insufficient time allotted to prepare an offer and requests a "fair advantage to obtain this contract" was intended as a protest. Although Sanchez states that the letter should be considered as its "formal bid," the letter contains no offer and GSA did not consider this letter as containing an offer.

unjustified, decision to wait until the day before ECP's extension was to expire to solicit offers deprived Sanchez, a firm GSA apparently now believed could perform the contract, of a reasonable opportunity to compete. The record shows that Sanchez did not receive its solicitation package until 2 hours before the deadline for receipt of offers. As a result of GSA's late issuance of the solicitation, Sanchez did not have reasonable time to submit an offer. We therefore sustain this ground of protest.

Because the latter two interim contracts have already been performed, termination of these contracts and resolicitation of these requirements is not an appropriate remedy. Accordingly, we find that Sanchez is entitled to recover its protest costs. Bid Protest Regulations, 4 C.F.R. § 21.6(d)(1).

A handwritten signature in cursive script that reads "Milton J. Fowler".

Acting Comptroller General
of the United States