



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Tri-Ex Tower Corporation

File: B-239628

Date: September 17, 1990

Alan M. Lestz, Esq., Witte, Lestz & Hogan, for the protester. Craig E. Hodge, Esq., and Alvin E. Prather, Esq., Department of the Army, for the agency. Richard P. Burkard, Esq., Andrew T. Pogany, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where agency's justification for proposed sole-source award under the authority of 10 U.S.C. § 2304(c)(1) (1988) is based primarily on urgent time constraints and safety concerns, and those concerns are only applicable to a portion of the work required, the sole-source award should be limited to that portion of the work.

DECISION

Tri-Ex Tower Corporation protests the Department of the Army's proposed sole-source award to Chu Associates, Inc. under request for proposals (RFP) No. DAAL02-90-R-9173 for the modification of 149 extendable towers (antenna masts). The masts were previously procured from Chu Associates under contract No. DAAL02-87-C-0092. That procurement was conducted on a "brand name or equal" basis for which Tri-Ex was the approved brand name product. The contractor here is required to rework 119 new masts currently in storage to incorporate safety modifications. The other 30 masts have been fielded and require restoration to an "as new" condition in addition to the rework. Tri-Ex challenges the Army's determination that only Chu Associates can complete the modifications within the agency's time constraints.

We sustain the protest.

The masts are Chu Associates' catalog items with mounting interfaces modified to the government's requirement. After supplying the masts, Chu Associates continued with its efforts to increase the safety, reliability, and ease of operation of its masts. In the meantime, based on usage in the field, the agency identified wear points in the mast that

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could eventually cause a catastrophic failure (cable breakage that would allow the mast to retract rapidly). The agency determined that certain improvements could be made to eliminate a potentially critical safety problem.

The contractual effort will require the contractor to completely disassemble the masts, add guards and outer shaft supports to all sheaves, modify the winch gearing, change the retract cable upper attachment method, change the retract cable guide, and add a locking feature to each section. The agency states that the rework of the masts will improve the wear resistance to the areas that contribute to cable stress or eliminate the possibility of the cable jumping the sheaves. The positive lock on each mast section will prevent the mast from retracting by more than one section in the event of cable breakage. The agency states that the contractor must disassemble the mast virtually to the component level, add new parts and sub-assemblies, and then reassemble the mast to ensure its basic strength, integrity, and performance. The solicitation's delivery schedule shows that the 119 new masts in storage will be reworked first, with delivery of 30 units within 3 months of award (15 within 2 months of award and 15 within 3 months of award). A quantity of 15 new units is required every month thereafter until the 9th month. The used masts will then be reworked and refurbished (10 and 11 months after award). It appears that the first 30 new masts reworked will be used to replace the 30 fielded masts.

On March 13, a justification and approval (J&A) for other than full and open competition for the entire modification and refurbishment effort was approved by the appropriate officials, including the competition advocate.^{1/} The J&A concluded that a sole-source award to Chu Associates was justified under 10 U.S.C. § 2304(c)(1) (1988), which authorizes use of other than competitive procedures when the items are needed and available from only one responsible source or a limited number of such sources and no other types of products will satisfy the agency's needs. The J&A states that the fielded masts present "a serious safety hazard to the operator or nearby personnel in that the mast is supporting a log periodic antenna with 16 vertically polarized elements that could impale anyone below in a free fall retraction." According to the J&A, since Chu Associates is the sole

^{1/} The J&A stated that the proposed sole-source contract would be for 157 masts, including 37 that are fielded. The April 10 solicitation indicates, however, that the contract would require modification of 149 masts, including 30 masts that are fielded. As stated, the 30 fielded masts are also to be refurbished.

manufacturer of this particular mast, only they are in a realistic position to make the necessary modifications.

On March 20, the agency published a notice in the Commerce Business Daily (CBD) stating that it was seeking a contractor to modify and refurbish masts produced by Chu Associates. A footnote referenced in the CBD notice indicated that the agency intended to negotiate with only one source but that other offerors had 45 days to identify their interest and capability to respond to the requirement. On April 4, Tri-Ex requested a copy of the solicitation describing the work effort required. On April 9, the contract specialist called a Tri-Ex representative and informed him that the agency intended to procure the items on a sole-source basis. The agency states that the Tri-Ex representative indicated that he had "no problem" with the sole-source nature of the procurement but requested a copy of the RFP for informational purposes. On April 27, after receiving the RFP, Tri-Ex notified the agency of its interest and requested the opportunity to inspect the masts. The agency denied the request and by letter dated May 1, Tri-Ex filed an agency-level protest. By letter dated May 8, the agency denied the protest. This protest was filed with our Office on May 9.

The agency argues that the protest is untimely because the firm knew of the proposed sole-source from the March 20 CBD notice and the intended sole-source award was confirmed in a conversation with the contract specialist on April 9, 1990. Generally, a protester is required to submit a timely expression of interest in fulfilling a potential sole-source requirement in response to a CBD notice as a prerequisite to filing a protest; if the agency rejects the protester and proceeds with its sole-source approach, the protester then must file its protest within 10 days after it knows or should have known of the rejection. Keco Indus., Inc., B-238301, May 21, 1990, 90-1 CPD ¶ 490. Here, Tri-Ex submitted a timely expression of interest on April 27.^{2/} It then submitted a timely protest to the agency after the agency rejected its request to inspect the masts. Tri-Ex's subsequent protest here is timely since it was filed within 10 days after formal notification of initial adverse agency action. 4 C.F.R. § 21.2(a)(3) (1990).

^{2/} We think that Tri-Ex's earlier conversation with the Contract specialist, prior to its receipt of the RFP, is irrelevant since the agency's CBD notice clearly offered other offerors 45 days in which to express interest and to persuade the agency to compete the requirement. In short, we think both the agency and potential offerors can change their minds during this period.

Tri-Ex asserts that the agency is seeking to prevent, rather than maximize competition. It disputes the agency's justification for a sole-source award to Chu Associates, maintaining that it is capable of performing the contract in the required time frame by inspecting the Chu Associates' mast and preparing design modifications. Tri-Ex argued initially that such a reverse engineering effort is possible based on a government drawing which depicts some aspects of the Chu Associates' mast and its review of a catalog sheet for the Chu Associates' antenna model which appears to be similar to a Tri-Ex model. In its final protest submission, Tri-Ex asserts that it now has technical data which will make the rework tasks easier. However, it concedes that engineering efforts are required for the redesign of special components such as sheaves, cable guides, winches, locks, and attachments.

While the overriding mandate of the Competition in Contracting Act of 1984 (CICA) is for "full and open competition" in government procurements obtained through the use of competitive procedures, 10 U.S.C. § 2304(a)(1)(A), CICA does permit noncompetitive acquisitions in specified circumstances, such as when the items needed are available from only one responsible source. 10 U.S.C. § 2304(c)(1). WSI Corp., B-220025, Dec. 4, 1985, 85-2 CPD ¶ 626. Where the agency has substantially complied with the procedural requirements of CICA, 10 U.S.C. § 2304(f), calling for written justification and higher level approval of the contemplated sole-source action and publication of the required CBD notice, we will not object to the sole-source award unless it is shown that there is no reasonable basis for the award. Elbit Computers, Ltd., B-239038, July 11, 1990, 90-2 CPD ¶ _____. In sum, except in those noncompetitive situations that arise from a lack of advance planning, a sole-source award is justified where the agency reasonably concludes that only one known source can meet the government's needs within the required time. Id.; Astron, B-236922.2, May 2, 1990, 90-1 CPD ¶ 441.

Here, the Army has complied with the procedural requirements of CICA at 10 U.S.C. § 2304(f), calling for written justification and higher level approval of the contemplated sole-source action and publication of the requisite CBD notice. The propriety of the agency's decision therefore rests on whether or not it was reasonable to conclude that only one source was available within the required time frame. We find that the agency had a reasonable basis to conclude that only Chu Associates could meet its requirements in the time frame given for modification of the first 30 stored masts that are needed to replace the 30 currently fielded masts. With respect to the modification of the remaining new masts, as well as the modification and refurbishment effort required

for the 30 currently fielded masts, the J&A does not provide a reasonable basis for excluding competition.

In justifying the contemplated sole-source award to Chu Associates, the Army's J&A stresses the fact that the potential for injury is high and "increasing with time." It asserts that since the government does not have a technical data package, a reverse engineering effort would be needed to develop the modifications. The J&A explains that Chu Associates has "already initiated design efforts to reduce the wear conditions and to prevent situations which could result in cable breakage." The J&A estimates that a competitor would need a minimum of 6 months to reverse engineer the mast for developing a technical data package and states that the agency has current fielding plans for replacing the masts in the field starting in June 1990.^{3/}

With respect to modifying replacements for the 30 masts in the field, we see no basis to object to the proposed sole-source award to Chu Associates under the authority of 10 U.S.C. § 2304(c)(1) as the only known available source capable of timely meeting the Army's delivery schedule. While Tri-Ex argues that it could compete for this urgent requirement based upon existing data, the protester has not submitted any evidence to support its assertion that it can meet the requirement in the short time frame established by the agency. Rather, the most detailed statement provided by the protester indicates that it must reverse engineer and redesign special components such as sheaves, cable guides, winches, locks, and attachments. Based on the solicitation's work statement, these appear to comprise almost the entire contract effort. We cannot conclude from the record before us that the agency was unreasonable in determining that Tri-Ex would not be able to satisfactorily reverse engineer the mast and meet the time frame established by the agency.

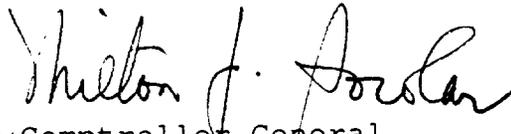
We sustain the protest with respect to the modification and refurbishment of masts which will not be fielded as replacements to the 30 currently fielded masts. Based on the proposed delivery schedule, this would consist of 89 new masts and the 30 currently fielded masts. Generally, an urgency justification (under 10 U.S.C. § 2304(c)(2)) does not support the procurement of more than a minimum quantity needed to satisfy the immediate urgent requirement and should not continue for more than a minimum time. See Honeycomb Co. of Am., B-227070, Aug. 31, 1987, 87-2 CPD ¶ 209. Here, the J&A, by its terms, advances justification only for the

^{3/} The agency has withheld award pending our decision. Consequently, the fielding plans, which were prepared in March, have been delayed.

modification of the new masts needed to replace the currently fielded masts based on urgency and safety considerations. It repeatedly mentions critical safety problems and compelling urgency evidenced by the failure of a fielded mast which requires replacement. The J&A does not advance or support a finding of urgency with respect to the modification and refurbishment of the currently fielded masts or the modification of the 89 new masts. In fact, the J&A is silent as to the agency's requirements for fielding any masts beyond the 30 needed to replace the currently fielded items. The J&A acknowledges that the reverse engineering effort to enable other offerors to compete could be completed in as few as 6 months. While the agency clearly believes that Tri-Ex would have to devote substantial financial resources to effectively compete in the future and that it is unlikely that it could perform the work at a lower price than Chu Associates, the protester should be given an opportunity to compete for requirements for which there is no demonstrated urgency.^{4/}

We recommend that, absent a new sole-source justification, the agency separate the modification effort required to replace the 30 fielded masts from the modification and refurbishment effort required for the remaining masts (30 currently fielded and 89 new masts) and that this latter requirement be procured competitively. Further, we find that Tri-Ex is entitled to the costs of pursuing this protest, including attorneys' fees. 4 C.F.R. § 21.6(d)(1).

The protest is sustained.

for 
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^{4/} The agency, in response to the protest, also argues that award to a firm other than the original manufacturer of the mast, Chu, would make it difficult to establish liability for any subsequent manufacturing defects. This reason for a sole-source award does not appear in the J&A and has not been approved by the appropriate agency officials.