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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Department of the Air Force--Reconsideration

File: B-244007.3

Date: March 17, 1992

Albert J. Bauer for the protester,
Joseph M. Goldstein, Esq., Department of the Air Force, for
the agency.
Aldo A. Benejam, Esq., and Andrew T. Pogany, Esq., Office of
the General Counsel, GAO, participated in the preparation of
the decision.

DIGEST

1. The General Accounting Office will not consider new arguments raised by the agency in request for reconsideration where those arguments are derived from information available during initial consideration of protest but not argued, or from information available but not submitted during initial protest, since parties withhold or fail to submit relevant evidence, information, or analysis for our initial consideration at their own peril.
2. Contracting agency's argument, in request for reconsideration of prior decision sustaining a protest against the noncompetitive award of a follow-on contract, that the protester--a potential offeror under a competitive request for proposals--is not an interested party under the General Accounting Office's Bid Protest Regulations because the protester has an organizational conflict of interest that would render the protester ineligible for award under a competitive solicitation, is not supported by the record, where agency has not received and evaluated a proposal from the protester; has made no determination regarding the status or eligibility of the protester to receive award based upon information submitted in response to a competitive solicitation; and where the agency implies it has no information to substantiate its contention.
3. Prior decision sustaining protest against the proposed award of a sole-source, follow-on contract and recommending that agency satisfy its requirement through a competitive procurement is modified to delete the recommendation in light of new information provided by the agency showing that competing the procurement is not now practicable.

DECISION

The Department of the Air Force requests reconsideration of our decision in Test Sys. Assocs., Inc., B-244007.2, Oct. 24, 1991, 71 Comp. Gen. ____, 91-2 CPD ¶ 367, in which we sustained a protest of the proposed award of a follow-on contract under request for proposals (RFP) No. F41608-91-R-44874 on a sole-source basis to the incumbent, Access Research Corporation (ARC). The proposed contract is for independent validation and verification (IV&V) of hardware and software for the EF/F/FB-111 Avionics Intermediate Shop Replacement (AIS-R) System.¹ The agency argues that we erred in our prior decision and that the protester is not an interested party to maintain the protest because the firm has an organizational conflict of interest that would render it ineligible for award under a competitive solicitation.

We deny the request for reconsideration, but since new information submitted by the agency shows that our recommendation is not now practicable, we modify our prior decision to delete the recommendation.

The agency issued the RFP as a sole-source solicitation contemplating a follow-on contract to ARC's current IV&V contract which expired on September 30, 1991.² The RFP contemplated a time and materials contract for 1 base year and 1 option year. In its protest to our Office, Test Systems Associates, Inc. (TSAI) challenged various provisions of the RFP as inadequate and unduly restrictive of competition, and as improperly limiting the competition to ARC. TSAI alleged that as written, the solicitation precluded it from adequately preparing a proposal that fully responded to the RFP.

In its response to the protest, the agency justified the allegedly restrictive provisions in the RFP solely on the basis that the solicitation was reasonably and properly intended to result in a sole-source award to ARC. While the agency also stated that offers from other firms would be considered, based on our review of the record, we found that the challenged provisions reflected the agency's determination to procure the IV&V services from ARC on a

¹The proposed contract is to provide IV&V services for hardware, software, support equipment and data being acquired by the Air Force from Westinghouse Electric Corporation under contract No. F41608-83-C-0111.

²Since issuing the RFP, the agency has extended ARC's contract pending the outcome of these proceedings.

noncompetitive basis. We therefore based our decision on an analysis of the agency's sole-source approach.

Our decision explained that when an agency uses noncompetitive procedures, it must execute a written justification and approval (J&A), which must include sufficient facts and rationale to justify the use of the specific authority cited. See Federal Acquisition Regulation (FAR) § 6.303-2. The J&A must include a description of efforts made to ensure that offers are solicited from as many sources as practicable; a determination that the anticipated cost will be fair and reasonable; a description of any market survey conducted or a statement of the reasons a market survey was not conducted; and a statement of any actions the agency may take to remove any barriers to competition in the future. 10 U.S.C. § 2304(f)(3) (1988); see TMS Bldg. Maint., 65 Comp. Gen. 222 (1986), 86-1 CPD ¶ 58. We stated that since we generally will not object to a reasonably-justified sole-source award, Turbo Mechanical, Inc., B-231807, Sept. 29, 1988, 88-2 CPD ¶ 299, the propriety of the proposed decision to award the follow-on contract to ARC on a sole-source basis rested on whether it was reasonably based.

In determining to procure the services on a sole-source basis, the Air Force relied on 10 U.S.C. § 2304(d)(1)(B), which permits the procurement of follow-on goods or services on a noncompetitive basis from the original source where the agency determines that it is likely that: 1) award to other than the incumbent would result in substantial duplication of costs to the government that is not expected to be recovered through competition; or 2) where a competitive award would result in unacceptable delays in fulfilling the agency's needs.³ Relying on these provisions, the agency argued that awarding the contract to other than ARC would result in substantial duplication of costs to the government, which could not be recovered through competition, and that awarding the contract to another firm would delay its requirement for timely IV&V services.

The agency's J&A stated that the "Program Management Office estimates that duplication of costs would exceed \$6,302,000." The J&A further stated that the estimate was based upon "previous years expenditures to ARC." In addition to the \$6.3 million figure, the agency added that the

³FAR § 6.302-1(a)(2)(iii), which implements 10 U.S.C. § 2304(d)(1)(B), contains virtually identical terms.

costs of maintaining a duplicate data base by a new IV&V contractor was estimated at \$100,000 per year.⁴

We sustained the protest based upon a finding that the Air Force had provided no evidence substantiating its assertions that a competitive award to a source other than ARC would likely result in substantial duplication of costs to the government that are not expected to be recovered through competition. Specifically, we found no support for the agency's generalized statement in its J&A that duplication of costs would exceed \$6.3 million if award were made to other than ARC. We also found no support for the agency's assertion that award to any other source would result in unacceptable delays in fulfilling its requirement.

On reconsideration, the Air Force states that it was not aware that the adequacy of the J&A was at issue in the protest, and implies that the agency did not have an opportunity to address the adequacy of the J&A.

Notice to Air Force of protest issue

In our view, the Air Force had ample notice that TSAI was challenging the agency's decision to issue a sole-source solicitation, and that TSAI's protest placed the propriety of the J&A directly at issue. The agency's response to TSAI's protest was based primarily on its determination that the solicitation was properly intended to result in a sole-source award to ARC. In a supplemental submission dated June 24, 1991, TSAI directly challenged, paragraph-by-paragraph, the agency's "substantial duplication of costs" and "unacceptable delays" arguments--upon which the J&A relied. In that letter, TSAI also analyzed the basis for the \$6.3 million figure, and alleged that it was "obviously fabricated" with no rational basis. TSAI also expressly took exception to the agency's "unacceptable delays" argument, and explained how the \$6.3 million figure was inconsistent with the 6-month learning curve the agency estimated would be required to bring a new contractor up to speed.

⁴In a supplemental submission to our Office, the contracting officer stated that:

"\$100K per year duplication costs were estimated as only the salary costs per year for two programmers and two data entry personnel to transcribe the raw information provided by a new IV&V contractor into the existing ARC data base and minimal computer rental time . . . the \$100K figure is a minimum . . . actual costs would be considerably more."

In light of the protester's detailed allegations, we specifically made several requests to the agency that the \$6.3 million estimate in its J&A be justified. Despite these requests, the agency continued to reiterate the \$6.3 million figure, stating simply that it represents all payments for services made to ARC under the firm's IV&V contracts during the past 7 years.⁵ Except for its brief conclusory statement, the agency provided no substantive analysis, made no attempt to explain its rationale, and provided no documentation supporting its \$6.3 million estimate. Given the level of detail and specificity of TSAI's submissions, and our specific requests for additional documentation supporting the J&A, we disagree with the agency's assertion that it did not have an opportunity to adequately respond to the protest.

Request for supplemental information

In its reconsideration request, the contracting officer states that "the GAO never formally requested, in writing, a total accounting of the additional costs associated with award to a new IV&V contractor." The agency now submits a document entitled "Contracting Officer's Statement of Facts and Findings," dated November 5, 1991, prepared in response to our decision, which consists of more than seven pages of new information, analysis and arguments, in support of the agency's decision to issue the noncompetitive RFP to ARC.

The Competition in Contracting Act of 1984 and our Bid Protest Regulations require agencies to submit a complete report, including all relevant documents, on the protested procurement. 31 U.S.C. § 3553(b) (1988); 4 C.F.R. § 21.3(c) (1991). By notice dated June 21, 1991, we reminded the agency of that statutory requirement for a report, which is to include "the contracting officer's statement setting forth findings, actions, recommendations and any additional evidence, or information deemed necessary in determining the validity of the protest." 4 C.F.R. § 21.3(c). Upon review of the report submitted in response to the protest and in light of the protester's specific challenges to the J&A, we found that the agency had not provided any evidence in support of its "substantial duplication of costs" argument and orally asked the agency to supplement the record if it had such evidence. The Air Force did not provide the requested information.

⁵In response to our requests, the agency submitted a document entitled "memo to file" dated September 25, 1991, and signed by the contract negotiator. This brief document provided no analysis, simply stating that "[t]he \$6.3M figure referenced in the J&A and the Contracting Officer's D&F was based on the approximate total expenditures to ARC."

The information that the agency now provides in its reconsideration request, along with documentation supporting the J&A, could have and should have been provided in response to the initial protest, or in response to our Office's requests for further information and justification of the agency's estimates. Parties that withhold or fail to submit all relevant evidence, information, or analyses for our initial consideration do so at their own peril. Griffin-Space Servs. Co.--Recon., 64 Comp. Gen. 64 (1984), 84-2 CPD ¶ 528. The Air Force's belated submissions on reconsideration, prepared in response to our decision, will not now result in reconsideration of our prior decision. The Dep't of the Army--Recon., B-237742.2, June 11, 1990, 90-1 CPD ¶ 546. Moreover, contrary to the Air Force's \$6.3 million estimate advanced during the initial protest, the contracting officer now estimates that award to a new IV&V contractor, other than ARC, would result in duplication of \$600,000 for the basic year of the contract. Even in its reconsideration request, the agency has failed to provide any evidence that such costs--a drastic reduction from the agency's earlier \$6.3 million estimate--might not be recovered through competition or that they should even be viewed as substantial here.

Conflict of interest allegation

The agency also argues that we should have dismissed the protest because TSAI is not an interested party to maintain the protest. According to the agency, TSAI has an organizational conflict of interest that would render it ineligible for award under a competitive solicitation. In support of this argument the agency states that TSAI once was a subcontractor on the F-111 AIS-R project to the prime contractor (Westinghouse), and would not have been considered eligible for award for an earlier contract for IV&V services awarded in 1987.

Subpart 9.5 of the FAR prescribes general rules and procedures for identifying organizational conflicts of interest, and FAR § 9.508 provides examples to assist contracting officers in applying these rules to individual contracting situations. Under FAR § 9.501(d) an "organizational conflict of interest" means that:

"because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the Government, or the person's objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage."

The agency does not explain, and there is no evidence in the record showing, how TSAI is unable to render impartial advice to the government or how TSAI would have an unfair advantage under a competitive procurement as a result of its alleged relationship with Westinghouse. The agency has not issued a competitive solicitation under which TSAI and other offerors could submit proposals, and has not had an opportunity to evaluate the firm's eligibility. The record suggests that the agency has no information upon which to base its conclusion that TSAI has a conflict of interest. In this connection, the agency simply states that since it was not privy to TSAI's subcontracts with Westinghouse, "it would be impossible . . . to determine if open actions exist on any of TSAI's equipment or data," which would presumably show that the firm is ineligible for award.

Given the absence of information about TSAI's past relationship with Westinghouse, the agency's assertion that TSAI would be ineligible for award is not supported by the record. TSAI states, and the agency concedes, that it currently has no contractual obligations to Westinghouse pertaining to the AIS-R program; and the agency has taken no action regarding the status or eligibility of TSAI to receive award based upon information submitted under a competitive solicitation, making the agency's conflict of interest argument, at best, premature. See, e.g., Price Bros. Co., B-235473, June 9, 1989, 89-1 CPD ¶ 549. The fact that TSAI was once a subcontractor to the prime and might have been ineligible for award of a similar IV&V services contract 5 years ago does not establish ineligibility for performing the current procurement or similar future procurements.

Changed circumstances

In its request, the agency states that since issuing the noncompetitive RFP, several program changes have affected the rate of delivery of data and equipment under the Westinghouse contract. As a result of those changes, the agency forecasts that Westinghouse's contract will be substantially completed by December 1992. The agency further states that as of October 30, 1991, Westinghouse and its principal subcontractor experienced massive layoffs, directly affecting the AIS-R program. The agency states that in light of these personnel changes, it is important to maintain continuity with ARC's experienced IV&V personnel.

Based on the new information, we find that competing the requirement is not now practicable. The record shows that it would take approximately 6 months for a new IV&V contractor to become functionally familiar with the complexities of the AIS-R program. Given that the Westinghouse contract supported by the IV&V contractor will be

substantially complete within 9 months, drafting a competitive RFP, and competing the requirement, as previously recommended, and bringing a new contractor into the program for that relatively brief period, is now impracticable. Accordingly, we modify our decision in Test Sys. Assocs., Inc., B-244007.2, Oct. 24, 1991, 71 Comp. Gen. ___, 91-2 CPD ¶ 367, to delete the recommendation that the agency should compete the requirement.

Milton J. Aorler

Acting Comptroller General
of the United States