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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Dr. Loyd J. Kiernan

File: B-250300

Date: December 30, 1992

Dr. Loyd J. Kiernan for the protester.
L. James Gardner, Esq., Department of the Navy, for the agency.
Katherine I. Riback, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

In reprocurement for dental services contract after termination for default, where the contracting agency needed the services without delay, the contracting officer reasonably negotiated with two high ranked original offerors who were situated in the local area, on the basis of offers they submitted under the original solicitation; since one of these two offerors declined to renew his offer on the same basis as required under the initial solicitation, the agency properly made award to the other offeror.

DECISION

Dr. Loyd J. Kiernan protests the award of the reprocurement of a contract which was terminated for default for dental services for the Naval Dental Center, Orlando, Florida, under request for proposals (RFP) No. N68836-92-R-0016. Dr. Kiernan essentially argues that as the initial offeror next-in-line for award, he should have been awarded a sole-source reprocurement contract. Additionally, Dr. Kiernan argues that his offer on the reprocurement was improperly rejected for proposing to subcontract the required services.

We deny the protest.

The initial solicitation was issued on December 30, 1991, as a total small business set-aside and requested offerors to submit firm, fixed prices for the services of two full-time dentists. The solicitation provided that none of the required services shall be subcontracted "without the prior written consent of the Contracting Officer," and required offerors to provide with their proposals, letters of intent to perform from each individual dentist proposed. Award was

to be made to the offeror whose proposal represented the best value to the government with the technical proposal receiving greater emphasis than price.

Thirteen proposals were received by the closing date. On April 28, 1992, contracts were awarded to Dr. James J. Kelly and Dr. Louis A. Glorioso, with performance to begin October 1. In response to a Freedom of Information Act (FOIA) request, Dr. Kiernan received a copy of the abstract of offers and a cover letter dated May 14 stating that Dr. Kiernan was the fourth ranked offeror. Additionally, Dr. Kiernan claims that he was informed by an individual (whom he cannot now identify) that should the higher ranked offerors drop out for any reason he would be awarded the contract.[1]

In August, both awardees informed the contracting officer that they were unable to meet the October 1 start date, and requested to be allowed to subcontract. Both awardees were informed that subcontracting was not acceptable under this solicitation. The contract awarded to Dr. Glorioso was terminated for convenience and the requirement was then resolicited. Dr. Kiernan was mailed a copy of that solicitation but did not submit an offer. Dr. Kelly's contract was terminated for default.

Because the agency needed to have the dental services commence by October 1, following the termination for default the agency sought to reprocure the work by negotiating with Dr. Kiernan and Dr. Snell, two of the original offerors, on the basis of offers they submitted under the original solicitation. Both offerors had been evaluated as highly qualified and were located in the Orlando area; thus, the agency believed that they could begin performance by the start date. When Dr. Kiernan was contacted by the contracting officer, he requested that he be allowed to work part-time and subcontract the remainder of the work. The contracting officer informed Dr. Kiernan that this was a reprocurement against a defaulted contract and that the services had to be procured using the same statement of work. The contracting officer explained that the original procurement required a full-time dentist and did not contemplate offers on a part-time or subcontracting basis

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[1]The agency states that no agency official involved in this procurement made this statement to Dr. Kiernan. Even assuming that Dr. Kiernan's was so advised by an agency official, generally, the government is not bound by the incorrect informal advice given by government contracting employees to bidders and offerors during the contracting process. Air Inc., 69 Comp. Gen. 504 (1990), 90-1 CPD ¶ 533.

and that therefore his offer was not acceptable. Dr. Kiernan claims that he was informed by the contracting officer that he would be allowed to subcontract if he obtained the approval of the Commanding Officer at the Naval Dental Clinic, Orlando. Dr. Kiernan then met with the Commanding Officer and, according to Dr. Kiernan, obtained his approval to subcontract out some of the work.[2]

Dr. Snell agreed to the terms on which he had competed under the original procurement, and was awarded the repurchase contract, whereupon Dr. Kiernan filed this protest.

Dr. Kiernan essentially argues that he should have been awarded a sole-source reprocurement contract because he was the next ranked offeror. Additionally, Dr. Kiernan argues that his offer on the reprocurement complied with the solicitation requirements, which Dr. Kiernan contends permit subcontracting.

While there are circumstances in which an agency properly may elect to award a reprocurement contract to the next offeror under the original solicitation, DCX, Inc., B-232692, Jan. 23, 1989, 89-1 CPD ¶ 55, there is no legal requirement that the agency do so. Federal Acquisition Regulation (FAR) § 49.402-6 authorizes contracting officers, in accordance with the default clause (FAR § 52.249-8), to use any terms and acquisition method deemed appropriate for the repurchase, provided that the repurchase is made at as reasonable a price as practicable, and competition to the maximum extent practicable is obtained. Canaveral Maritime, Inc., B-238356.2, July 17, 1990, 90-2 CPD ¶ 41.

Here, the agency's decision to seek limited competition between two of the firms that submitted offers in the original procurement was reasonable. The agency determined that it obtained competition to the maximum extent practicable by soliciting these two sources, because of the limited time frame imposed by the required commencement date. Dr. Kiernan's proposal was eliminated from consideration because he changed his initial offer to perform the services himself (which was the basis on which his proposal had been evaluated), and proposed instead to subcontract a portion of the work. The solicitation did not allow subcontracting without explicit permission from the contracting officer.

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[2]The Navy reports that the Commanding Officer advised Dr. Kiernan that only the contracting officer had authority to approve subcontracting, but that he, the Commanding Officer, would be amenable to such approval by the contracting officer.

Dr. Kiernan's view that he was absolutely entitled to a sole-source award on the basis of different terms than he originally offered is simply without legal basis. We generally view satisfying reprocurement needs through competition, rather than a sole-source award, as appropriate in view of the goals of the FAR of maximizing competition and repurchasing at the lowest practicable price. See TSCO Inc., 65 Comp. Gen. 347 (1986), 86-1 CPD ¶ 198.

Dr. Kiernan also argues that his offer on the reprocurement satisfied the solicitation requirements because Dr. Kiernan contends that the solicitation allowed subcontracting. The solicitation states that subcontracting is permitted only with the written permission of the contracting officer. The agency position is that this provision is included in the solicitation only to accommodate circumstances arising during contract performance. While Dr. Kiernan asserts that he was informed that the Commanding Officer had the authority to approve the use subcontracting during the competition, and Dr. Kiernan then relied on this information, bidders rely on oral advice at their own risk if the oral advice conflicts with the written terms of the solicitation. Mid South Indus., Inc., B-216281, Feb. 11, 1985, 85-1 CPD ¶ 175. Here, the solicitation sets forth a process which does not provide for the Commanding Officer to grant the approval in question.

Further, Dr. Kiernan argues that he always intended to subcontract out part of the dental services contract and that the contracting officer was aware of this intent. However, this alleged intent to subcontract was not indicated in his original offer, which contains no reference to subcontracting. The solicitation required that offerors provide a letter of intent from each individual dentist proposed, and Dr. Kiernan's offer included only one letter of intent for himself. Since the agency evaluated Dr. Kiernan's offer on the basis of Dr. Kiernan's qualifications, and did not permit subcontracting without explicit written permission, we believe that the agency reasonably determined that Dr. Kiernan's offer based on subcontracted services as unacceptable.

Dr. Kiernan also argues that subcontracting is routinely practiced at the Naval Dental [illegible], Orlando; however, this is not relevant to the award in this case since each procurement is a separate transaction and agency action under one procurement does not affect the propriety of the

agency's action under a different procurement. Westbrook Indus., Inc., B-245019.2, Jan. 7, 1992, 71 Comp. Gen. ___, 92-1 CPD ¶ 30.

The protest is denied.

Robert P. Murphy
for James F. Hinchman
General Counsel