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Comptroller General
of the United States

Washington, D.C. 20548

1141263

Decision

Matter of: Test Systems Associates, Inc.

File: B-244007.6

Date: March 29, 1993

Albert J. Bauer for the protester,
Joseph M. Goldstein, Esq., Robert O. D'Ambrosio, Esq., and
Mark E. Frazier, Esq., Department of the Air Force, for the
agency.
Aldo A. Benejam, Esq., and Christine S. Melody, Esq., Office
of the General Counsel, GAO, participated in the preparation
of the decision.

DIGEST

1. The General Accounting Office will consider protest by a potential offeror alleging that an agency's decision to exercise an option in an incumbent's contract, rather than conduct a new procurement, is unreasonable.
2. Agency properly exercised option to extend for 6 months the period of performance on a contract for independent validation and verification services, instead of issuing a competitive solicitation for the services, where the record shows that only the incumbent contractor could provide the services for that brief period without disruption.

DECISION

Test Systems Associates, Inc. (TSAI) protests the decision of the Department of the Air Force to exercise an option to extend the period of performance on a contract awarded to Access Research Corporation (ARC) under request for proposals (RFP) No. F41608-91-R-44874, issued by the Air Force on a sole-source basis 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

¹The contract at issue here 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.

TSAI essentially contends that the agency's decision to extend the period of performance of ARC's contract, instead of conducting a new procurement, is unreasonable.

We deny the protest.

BACKGROUND

The Air Force synopsisized a notice of sole-source negotiations with ARC in the Commerce Business Daily (CBD) on April 5, 1991,² and subsequently issued the RFP on May 30 as a sole-source solicitation contemplating a follow-on contract to ARC's then current IV&V contract. TSAI responded to the CBD announcement in a letter telefaxed to the agency on April 23. In its letter, TSAI stated that it was a potential supplier of the required services; that the firm had more than 5 years of experience related to the program; and that TSAI had provided IV&V services for the Department of Defense in connection with other programs. TSAI also suggested to the agency that it should satisfy the requirement through a competitive procurement and requested a copy of the solicitation. On April 23, the agency informed the protester that it would provide TSAI a copy of the RFP when it became available and that the firm would then be allowed to compete for the contract.³

Despite the agency's assurances, TSAI filed a protest in our Office on May 13, challenging any sole-source award to ARC. The agency subsequently issued the RFP on May 30, with an extended closing date of July 8. On June 17, the agency requested that we summarily dismiss TSAI's protest, stating that it had provided a copy of the RFP to TSAI, thereby giving the protester an opportunity to compete. We then dismissed TSAI's protest as academic.

²The synopsis stated that the solicitation would be issued to ARC on approximately April 23, and referenced note 22. This note stated that the government intended to solicit and negotiate with only one source but invited interested persons to identify their interests and capability so that the government could consider a competitive procurement for the required services.

³On that same day, the agency finalized a written justification and approval (J&A) for use of other than competitive procedures, as required by the Competition in Contracting Act of 1984, 10 U.S.C. § 2304(f) (1988 & Supp. III 1991). The J&A concluded that a sole-source award to ARC was justified under, 10 U.S.C. § 2304(c)(1), which authorizes the use of other than competitive procedures when the services required are available from only one responsible source or a limited number of responsible sources.

Following receipt of the RFP, TSAI filed an agency-level protest challenging the terms of the solicitation as ambiguous and unduly restricting the competition to ARC. After the Air Force denied that protest, TSAI filed a protest in our Office challenging various RFP provisions as inadequate and unduly restrictive of competition, and as improperly limiting the competition to ARC.

We sustained TSAI's protest based upon our finding that the Air Force had provided no evidence substantiating its assertion that a competitive award to a source other than ARC would likely result in substantial duplication of costs to the government that were not expected to be recovered through competition. See 10 U.S.C. § 2304(d)(1)(B); Federal Acquisition Regulation (FAR) § 6.302-1(a)(2)(iii). Accordingly, we recommended that the Air Force draft a solicitation that allowed full and open competition for the required services, and that it satisfy its need for IV&V services through a competitive procurement. See Test Sys. Assocs., Inc., 71 Comp. Gen. 33 (1991), 91-2 CPD ¶ 367.⁴

The agency subsequently requested that we reconsider our decision on the basis that changed circumstances related to the procurement rendered our recommendation impracticable. In support of its request, the Air Force stated that several program changes had affected the rate of delivery of data and equipment under the Westinghouse contract, and that, as a result, ARC's contract would be substantially complete by December 1992. Since it would have taken approximately 6 months for a new IV&V contractor to become functionally familiar with the complexities of the AIS-R program, we concluded that competing the requirement, as previously recommended, and bringing a new contractor into the program for that relatively brief period, would have been impracticable. Accordingly, we modified our decision in Test Sys. Assocs., Inc., to delete the recommendation that the agency compete the requirement.⁵

⁴In addition to filing this protest, TSAI has requested that our Office determine the amount it is entitled to recover from the Air Force for the costs of filing and pursuing its protest. TSAI's claim will be addressed in a separate decision.

⁵TSAI subsequently requested reconsideration of our decision and also filed a protest challenging the award to ARC on an organizational conflict of interest basis. We denied the reconsideration request and dismissed the new protest basis as untimely. See Test Sys. Assocs., Inc., B-244007.4; B-244007.5, May 1, 1992, 92-1 CPD ¶ 408.

The Air Force initially awarded the IV&V contract to ARC for only a 9-month period, to coincide with the expected completion date of the Westinghouse contract. By letter dated November 4, 1992, however, Westinghouse informed the Air Force that it anticipated that data deliveries under its contract would not be completed until June 30, 1993. Since the contract awarded to ARC under the RFP would have expired in December 1992, the agency decided to extend ARC's IV&V contract through June 1993.⁶ TSAI challenges the agency's decision to extend ARC's contract, essentially arguing that the Air Force should issue a solicitation which will afford TSAI an opportunity to compete for the remainder of the contract.

DISCUSSION

Jurisdiction

As a preliminary matter, the Air Force argues that our Office lacks authority to review the merits of TSAI's protest, claiming that this dispute is beyond our bid protest jurisdiction. The Air Force asserts that the protest does not concern an existing solicitation or the award or proposed award of a new contract--matters which we generally review. Rather, the agency argues that since the challenged action involves the contracting officer's decision "to modify [ARC's] contract so as to activate" FAR § 52.217-8, TSAI's protest concerns a matter of contract administration which we do not review under our Bid Protest Regulations. The agency also maintains that TSAI's protest should be dismissed because it simply challenges the agency's general policies or procedures.

Generally, this Office will not review matters of contract administration, which are within the discretion of the contracting agency, and are for review by a cognizant board of contract appeals or a court of competent jurisdiction. See 4 C.F.R. § 21.3(m)(1) (1992); Specialty Plastics Prods., Inc., B-237545, Feb. 26, 1990, 90-1 CPD ¶ 228. With respect to exercising options, we will not consider allegations that an option should be exercised under an existing contract since that is a matter of contract administration beyond our bid protest function. See Walmac, Inc., B-244741, Oct. 22, 1991, 91-2 CPD ¶ 358, and cases cited therein. We will consider, however, protests alleging that an agency's determination to exercise an option in an existing contract,

⁶The agency states that ARC's contract contained the "Option to Extend Services" clause set forth at FAR § 52.217-8, which authorizes the government to extend contract performance for up to 6 months.

rather than conduct a new procurement, is unreasonable. See Washington Consulting and Mgmt. Assocs., Inc., B-243116.2, July 19, 1991, 91-2 CPD ¶ 76.

Here, the Air Force misconstrues our Regulations and mischaracterizes its action. By its terms, the clause on which the Air Force relies--FAR § 52.217-8--involves an option to extend the period of performance in ARC's contract. Even if invoking that clause required the contracting officer to issue a modification to ARC's contract, as a matter of law, the agency has exercised an option to extend the period of performance of that contract. The Air Force's characterization of its action as a "contract modification" which is not for our review is therefore inaccurate. Further, rather than generally protesting agency policies or practices, as the agency argues, TSAI is challenging a specific procurement action--the agency's decision to extend ARC's contract rather than issue a competitive solicitation. The agency's reliance on our decisions in Saratoga Indus., Inc., B-247141, Apr. 27, 1992, 92-1 CPD ¶ 397 (involving a contract modification), and Cajar Def. Support Co.--Recon., B-240477.2, Sept. 14, 1990, 90-2 CPD ¶ 215 (regarding general protests of agency actions), to argue that we should not review the protest thus is misplaced. Since TSAI challenges as unreasonable the agency's decision to exercise an option in ARC's contract instead of competing the requirement, the protest is appropriate for our consideration. See Laidlaw Envtl. Servs. (GS), Inc.; Int'l Tech. Corp.--Claim for Costs, B-249452; B-250377.2, Nov. 23, 1992, 92-2 CPD ¶ 366.

Exercise of Option in ARC's Contract

The agency states that the December 1992 date upon which it based its reconsideration request--and based on which we acquiesced in allowing ARC to continue to perform the then-remaining portion of the contract--was merely a forecast of when ARC's contract was to be substantially complete, and was not meant as a firm completion date for that contract. The contracting officer states that the forecasted date was based upon the best and most reliable information available to the Air Force at that time, which consisted of Westinghouse's scheduled projections for data delivery. That schedule, a copy of which is in the record, is dated June 1991, and shows that final delivery of data by Westinghouse was to be completed by April 1993. The agency states that in order for Westinghouse to meet its April 1993 completion date, including corrections, approvals, and resubmissions, most of the data had to have been verified by the IV&V contractor by December 1992. Hence, the agency estimated that ARC's IV&V contract should have been "substantially complete" by that date.

The agency explains that due to unanticipated performance delays in Westinghouse's contract that were not the agency's fault, the need for IV&V services has now "slipped" to June 30, 1993. The contracting officer states that this delay was caused by events which are independent of the IV&V contract, and were not in any way created by the agency. Apparently recognizing the possibility of further unanticipated delivery delays, the agency states that this "shall be the last extension of IV&V services and all [tasks remaining after June 1993] shall be accomplished within the Air Force," regardless of any future delays affecting Westinghouse's contract.

In view of the agency's previous projection of December 1992 as the "substantial completion" date, the protester generally challenges the accuracy of the new June 1993 anticipated completion date; however, TSAI has provided no evidence showing the June 1993 date to be unreliable, and we have no basis to question the accuracy of the agency's statement in this regard. While the Air Force has apparently not developed its own time line projections indicating when either of the contracts involved here will be fully performed, it is clear that the agency based its decision on the best and most recent information available to it from Westinghouse.

With respect to the current extension, the agency has provided the November 4, 1992, letter from Westinghouse informing the Air Force of various target completion dates related to the AIS-R program. Under the heading "DATA," that letter states: "[a]ll CDRL deliveries to be complete by 30 June 1993, Air Force review time and subsequent changes which may be required could impact an absolute completion date." We cannot conclude that the agency's decision to extend the IV&V contract based on that information is unreasonable. The fact that the agency's earlier December 1992 anticipated completion date did not materialize, does not show that forecast was unreasonable at the time it was made, or that Westinghouse's more recent anticipated completion date is not reliable.

The record shows that the delays in the IV&V contract were not created by the agency, and that only the incumbent contractor could continue providing the services for the brief time remaining, without any disruptions to the program. Compare Laidlaw Env'tl. Servs. (GS), Inc.; Int'l Tech. Corp.--Claim for Costs, supra. In view of the agency's statement that there will be no further extensions to ARC's contract beyond June 1993, and given the need for continuity

of IV&V services, we find that the contracting officer reasonably exercised the option to extend the period of performance in ARC's contract for 6 months.

The protest is denied.



for James F. Hinchman
General Counsel