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DECISION

THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-190723, B-190817 DATE: April 13, 1978

MATTER OF: Burton Myers Company

DIGEST:

1. Agency conclusion that CPA audit firms other than one which did audit of Comprehensive Employment and Training Act (CETA) subsponsors are incapable of competing because subsponsors' auditor has price advantage does not justify sole-source procurement for CETA prime sponsor audit services.

2. CPA audit services on CETA prime sponsors are not unique to extent that nonsubsponsor auditor could not perform. Record does not show audit services to be urgently needed by agency so that agency could not afford possible delay that might occur while nonsubsponsor CPA auditing firm does any required review and/or reauditing of subspon-sor auditor's work.

3. Agency did not justify protested sole-source procurements for audits of CETA prime sponsors on need for compatibility or interchangeability of prime sponsor audit report with already exist-ing subsponsor audit report. Record fails to show agency's CETA audit needs would be adversely affected if another auditor in audit of prime sponsor made reference or took exception to audit work of subsponsor auditor.

Burton Myers Company (Burton Myers) protests the award by the Department of Labor (DOL) of seven sole-source contracts for certified public accountant (CPA) audits of prime sponsor grantees under the Comprehensive Employment and Training Act (CETA), Public Law 93-203. DOL informs us that one audit contract has been awarded to J. D. Catten and Associates. Action on the award of three contracts to Medina, Munoz, Rosaly and Company (Medina); M. D. Oppenheim and Company (Oppenheim), and Kuehl and Cisne, Certified Public Accountants (Kuehl), has been suspended pending the resolution of this protest. DOL has canceled the three procurements

under which contracts were to have been awarded to Opalack and Company because of changes in the Department's fiscal year 1978 audit plans.

CETA Audit Publication No. 4 issued by DOL requires prime sponsor grantees to award audit contracts on CETA subsponsors on a competitive basis. Furthermore, under DOL guidelines, nonlocal CPA firms may compete for subsponsor audit contracts. In this regard, Oppenheim indicates that in the majority of subsponsor audit procurements it has witnessed, the awards have been made under very competitive conditions after proposals by 20 to 30 CPA firms. In Delaware County, Pennsylvania, Oppenheim states that it won its initial subgrant auditing award after competition with six or eight other CPA firms.

DOL believes that it is necessary to have the same CPA firm that audited the CETA subsponsors audit the CETA prime sponsor because this method eliminates duplication, permits the rendering of an overall opinion on the funds granted the prime sponsor, and results in significant savings of Federal funds. DOL further believes that it is imperative that the audits on the prime sponsors be compatible and interchangeable with the audits that have already been performed on the subsponsors. In this way an unqualified professional opinion can be rendered by a CPA firm.

DOL refers to the American Institute of Certified Public Accountants (AICPA) policy which states that when more than one public accounting firm is involved in an audit of a prime and the prime's subsponsors, the public accounting firm performing the audit of the prime cannot render an opinion on the funds expended without extensive review of the other firm's workpapers and/or extensive reauditing. In a letter to us dated February 6, 1978, Kuehl quotes Volume I of the AICPA's Professional Standards series, Auditing, Management Advisory Services, Tax Practices as of July 1, 1977, AU section 543, paragraph 543.10, as follows:

> "Whether or not the principal auditor decides to make reference (exception) to the examination of the other auditor, he should

make inquiries concerning the professional reputation and independence of the other auditor. He should also adopt appropriate measures to assure the coordination of his activities with those of the other auditor in order to achieve the proper review of matters affecting the consolidating or combining of accounts in the financial statements. These inquiries and other measures may include procedures such as the following:

"1. Make inquiries as to the professional reputation and standing of the other auditor to one or more of the following:

a. The AICPA

b. Other practitioners

c. Bankers and other credit grantors

d. Other appropriate sources

"2. Obtain a representation from the other auditor that he is independent under the requirements of the AICPA.

"3. Ascertain through communications with the other auditor:

a. That he is aware that the financial statements of the component which he is to examine are to be included in the financial statements on which the principal auditor will report and that the other auditor's report thereon will be relied upon (and, where applicable, referred to) by the principal auditor.

b. That he is familiar with the accounting principles generally accepted in the United States and with the Generally Accepted Auditing Standards promulgated by the AICPA and has conducted his examination and reported in accordance therewith.

c. That he has knowledge of the relevant financial reporting requirements for statements and schedules to be filed with regulatory agencies (Department of Labor).

d. That a review will be made of matters affecting elimination of intercompany (interagency) transactions and accounts and, if appropriate in the circumstances, the uniformity of accounting practices among the components included in the financial statements."

If the principal auditor decides not to make either reference or exception in his report to the work performed by another auditor, Kuehl states that paragraph AU 543.12 of the above-cited publication provides that the following must be done:

"When the principal auditor decides not to make reference to the examination of the other auditor, in addition to satisfying himself as to the manners described in Paragraph .10, he should also consider whether to perform one or more of the following procedures:

a. Visit the other auditor and discuss the audit procedures followed and results thereof.

b. Review the audit programs of the other auditor. In some cases, it may be appropriate to issue instructions to the other auditor as to the scope of his audit work.

c. Review the working papers of the other auditor, including his evaluation in internal control and his conclusions as to other significant aspects of the engagement."

In view of the foregoing, Kuehl is of the opinion that in order for an unqualified opinion to be rendered in an audit of a prime it must be "compatible" with the audits of the subsponsor contract. Kuehl, consequently, contends an audit by it of the prime sponsor would

insure a determination of CETA compliance without any qualification or without substantial additional auditing work.

Oppenheim also contends that there would be significant additional costs if a different firm auditing the prime sponsor must do extensive review and testing of the papers of the CPA firm that audited the subsponsors. Along the same vein, Medina argues that the use of different auditors would result in higher administrative costs for the CETA program, thus reducing the direct benefits to the participants since there would be a reduction in funds available for the program.

Listing the justifications for noncompetitive procurements outlined in our decision in Precision Dynamics Corporation, 54 Comp. Gen. 1114, 1115 (1975), 75-1 CPD 402, and referencing cases cited therein, Burton Myers argues that the only bases for sole-source awards are:

(1) where the item or services are unique;

(2) where time is of the essence and only one known source can meet the Government's needs within the required timeframe;

(3) where data is unavailable for a competitive procurement; and

(4) where it is necessary that a desired item manufactured by one source be compatible and interchangeable with existing equipment.

Burton Myers goes on to argue that DOL has not justified these protested sole-source procurements under any of the above-listed bases. Burton Myers, therefore, concludes that CPA services are not unique; that time is not of the essence in any of these protested procurements; that data for competitive procurement is available; and that interchangeability is never a consideration where the procurement of services is involved. In Burton Myers' opinion, DOL has made its sole-source audit procurements of CETA prime sponsors merely for "administrative convenience." Citing our decision in Department of Agriculture's Use of Master Agreement, 54 Comp. Gen. 606 (1975), 75-1 CPD 40, Burton Myers points out the general

rule that restriction on competition may not be imposed solely for administrative convenience.

DOL responds to the administrative convenience argument by stating that in light of the fact that subsponsor procurements are highly competitive, a wide variety of CPA firms is involved in audits of CETA subsponsor grants. Consequently, DOL's administrative workload will be increased rather than decreased because of the corresponding increase in the number of CPA firms that will be involved in the future in audits of CETA prime sponsors if the Department's sole-source procurement procedures are upheld by us.

Sole-source awards are subject to close scrutiny by our Office. Christie Electric Corporation, B-188622, December 8, 1977, 77-2 CPD 441. The record reveals that the DOL decision to obtain on a sole-source basis CETA prime sponsor audits is largely based on economics, that is, it appears to be cheaper for the Government to buy these CPA audit services on a sole-source basis than to obtain them after open competition. The protester urges that the proper method for determining which CPA firm is best suited to fulfill DOL's needs considering both price and technical factors is competition. Furthermore, Burton Myers alleges that DOL has in the past received competition for "similar" audit requirements.

We agree with Burton Myers. Essentially, DOL is contending that the CETA subsponsor auditing firms have an apparent superior economic advantage which cannot be rivaled. We rejected this basis for sole-source procurement in Olivetti Corporation of America, B-187369, February 28, 1977, 77-1 CPD 146, in which we stated:

> "Whatever the contracting officer's conclusion as to potential price competition, however, it may not be grounds for sole-source award of a contract. 41 Comp. Gen. 484, 490 (1962). The contracting officer may not speculate as to potential bidders' willingness to compete in the face of a particular firm's apparent competitive advantage. That willingness may only be tested in the crucible of competition. See, 16 Comp. Gen. 395, 397 (1937).

> Even where the contracting officer perceives little or no willingness in the market to supply competitive offers or bids, the administrative costs of preparing and issuing a solicitation are outweighed by the potential costs of losing bidders' confidence in the competitive system."

In Olivetti Corporation of America, supra, the Civil Service Commission concluded that because one company held a distinct price advantage in the procurement of typewriters, no other companies would offer competitive prices. Similarly, DOL has concluded that because the CPA firm which audits the CETA subsponsors has a significant price advantage in the procurement for auditing the prime sponsor, no CPA firm other than the CPA subsponsor auditor is capable of offering competitive prices. Although DOL's conclusion is expressed in terms of ability to to compete rather than willingness to compete, the effect is the same.

There are, however, other sole-source justifications that have been advanced here. Oppenheim believes that the services of the CPA firm auditing the prime sponsor would be "unique" since there is no other CPA firm which could perform the prime sponsor audit utilizing the auditing system and audit work already performed in the subsponsor audit. Oppenheim also contends that time is of the essence in these protested procurements because in auditing time is "always of an essence."

We have in the past held that a sole-source award for technical services to an incumbent contractor is justified where a new contractor, in order to perform the services adequately, would need to learn the technical history previously available only to the incumbent and the agency cannot afford the delay and risk involved in training a new contractor. See Systems Engineering Associates Corporation, B-189260, October 3, 1977, 77-2 CPD 255. Here, on the other hand, DOL has raised no argument or fact whatever that would establish either any urgency in the procurement of these prime sponsor audit

contracts or any claim that the services are unique to the extent that a nonsubsponsor auditor could not perform. We are unable to accept the general assertion of Oppenheim that time is always of the essence in auditing to support a sole-source procurement.

The only noneconomic justification for sole-source award that DOL makes involves the need for audits of prime sponsors to be compatible and interchangeable with the audits that have been performed on the subsponsors. Compatibility and interchangeability are required so that the CPA firm auditing a prime sponsor can render an "unqualified" audit opinion. AICPA policy is such that unless the principal auditor reviews the audit program and the working papers of the other auditor, the principal auditor must make some type of reference or exception to the work performed by the other auditor. Furthermore, Kuehl points out that there would quite likely be an exception taken by the nonsubsponsor auditing firm in order to limit its exposure to professional liability.

On the basis of the record before us, we believe that DOL has not supported its contention that prime sponsor audit reports must be compatible and interchangeable with existing subsponsor audit reports. Even assuming that a nonsubsponsor auditor will make either a reference or take an exception in the prime sponsor audit report to the work performed by another auditor on the subsponsors, DOL fails to demonstrate that such reference or exception will result in a failure to meet DOL's CETA audit needs.

In view of the above, we conclude that the noncompetitive procurements protested by Burton Myers were not justified. We are therefore recommending that those solicitations where award has not yet been made be canceled and resolicited on a competitive basis under proper evaluation and award factors. We have no information regarding the status of the contract awarded J.D. Catten and Associates. Therefore, in view of our conclusion, we recommend that DOL give consideration to terminating the contract for the convenience of the Government and that DOL also procure this audit service competitively.

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As this decision contains a recommendation for corrective action to be taken, it is being transmitted by letter of today to the congressional committees named in section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1970), which requires the submission of written statements by the agency to the House Committee on Government Operations, the Senate Committee on Governmental Affairs and the House and Senate Committees on Appropriations concerning the action taken with respect to our recommendation.

R. F. Keller

Deputy Comptroller General
of the United States