



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Encore Management, Inc.

File: B-278903.2

Date: February 12, 1999

J. Patrick McMahon, Esq., McMahon, David & Brody, for the protester.
Wilsie Y. Minor, Esq., Corporation for National and Community Service, for the agency.

Henry J. Gorczycki, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of this decision.

DIGEST

Agency has reasonable basis to cancel solicitation for clerical and administrative support services where agency's actual requirement is for personal services which the agency intends to satisfy with civil service personnel.

DECISION

Encore Management Inc. protests the cancellation of request for proposals (RFP) No. 97-PB-05, issued by the Corporation for National and Community Service (CNCS) for clerical and administrative support services.

We deny the protest.

The RFP, issued on June 3, 1997 as a competitive section 8(a) set-aside, contemplated the award of a time-and-materials contract for 1 year with 4 option years to provide support services at all or most of the agency's offices.¹ RFP at 1, 5, 9, amend. 2, at 2; Agency Report at 5.

The agency awarded a contract to Lionel Henderson Corporation on December 15. Agency Report at 2. Encore protested the award on December 23. On January 22, 1998, the agency proposed to take corrective action in response to the protest, which rendered the protest allegations academic. *Id.* at 2-3. The agency's corrective action included reopening negotiations, conducting additional

¹The positions required under the RFP are secretary I, II, III and IV, general clerk III, legal assistant, accounting clerk III, switchboard operator/receptionist, key entry operator II, and project manager. RFP amend. 2, § B.2, at 2-5. The statement of work described the duties for all of these positions except project manager. RFP § C.2, at 9-13. The RFP did not identify the duties of the project manager. Agency Report at 9.

discussions, and making a new source selection decision based on revised proposals. Id. at 3. Our Office subsequently dismissed the protest.²

While the agency was proceeding with this corrective action, the agency's Office of the Inspector General (OIG) initiated an audit of the agency's procurement and contract administration processes. Agency Report at 3, Tab 20. On August 7, the OIG issued report No. 98-24, which determined that the agency was administering the incumbent contract for clerical and administrative services, and other contracts, as personal services contracts in violation of Federal Acquisition Regulation (FAR) § 37.104 (June 1997), and recommended that the agency either cease using personal services contracts or obtain authority to issue such contracts. Agency Report at 4, Tab 23 at 19-24.

CNCS's chief operating officer subsequently determined that the agency would hire government employees to perform the work covered by the RFP, which was being performed under the incumbent clerical and administrative services contract. Agency Report, Contracting Officer's Statement at 6, Tab 24. The incumbent contract with Encore was extended to allow sufficient time to hire government employees for all necessary positions. Contracting Officer's Statement at 6. As a result, the RFP was canceled and offerors were so notified by letter of October 23. RFP amend. 3; Agency Report at 4, Tabs 26, 27. This protest followed.

Encore alleges that, although the incumbent contract may have been administered as a personal services contract, nothing in the terms of that contract or the canceled RFP requires its administration as a personal services contract, and thus there is no reasonable basis to cancel the RFP. Protest at 3-4; Comments at 4-7.

²Alternative to the present protest, Encore requests reimbursement of its protest costs on the initial protest because of the agency's corrective action. Comments at 7. Our Bid Protest Regulations, 4 C.F.R. § 21.8(e) (1998), provide that where an agency takes corrective action in response to a protest, we may recommend that the agency pay protest costs, including attorneys' fees; however, we will make such a recommendation only where the agency unduly delays taking corrective action in the face of a clearly meritorious protest. Jack Faucett Assocs.--Recon., Protest, and Costs, B-278961.2, B-278961.3, Apr. 17, 1998, 98-1 CPD ¶ 116 at 3. Because our Regulations are designed to encourage agencies to take prompt corrective action where appropriate, as a general rule, if an agency takes corrective action by the due date of its protest report, we will regard such action as prompt and decline to consider a request to recommend reimbursement of protest costs. Id. Here, CNCS notified our Office prior to the report due date for the initial protest of the corrective action to be taken. (CNCS implemented and nearly completed that corrective action before the basis for cancellation became apparent. Agency Report at 13-14.) Accordingly, we decline to recommend reimbursement of protest costs here.

In a negotiated procurement, such as this, the contracting officer has broad discretion in deciding whether to cancel a solicitation; the contracting officer need only have a reasonable basis to do so, as opposed to the cogent and compelling reason required for the cancellation of a solicitation after sealed bids have been opened. G.K.S. Inc., B-235208, Aug. 9, 1989, 89-2 CPD ¶ 117 at 3. An agency may properly cancel a solicitation no matter when the information precipitating the cancellation first surfaces or should have been known, even if the solicitation is not canceled until after offers have been submitted and evaluated. Jack Faucett Assocs., supra. Cancellation of a solicitation is proper where award under the solicitation would not serve the government's actual needs. Constructive Solutions, Inc., B-278227, Jan. 9, 1998, 98-1 CPD ¶ 9 at 2; Waste Management Env'tl. Servs., Inc., B-252553, July 12, 1993, 93-2 CPD ¶ 14 at 4-5. It is the responsibility of the contracting activity to determine its requirements, and our Office will defer to the activity's judgment in that regard. Peterson-Nunez Joint Venture, B-258788, Feb. 13, 1995, 95-1 CPD ¶ 73 at 4. Here, the agency has a reasonable basis to cancel the RFP because its actual needs require personal services which must be satisfied by hiring civil service employees.

A personal services contract is one that, by its express terms or as administered, makes the contractor personnel appear, in effect, government employees. FAR §§ 37.101, 37.104(a). The government is normally required to obtain its employees by direct hire under competitive appointment or other procedures required by the civil service laws. FAR § 37.104(a). Obtaining personal services by contract, rather than by direct hire, circumvents those laws unless Congress has specifically authorized acquisition of the services by contract. Id. Agencies may not award personal services contracts unless specifically authorized by statute to do so. FAR § 37.104(b).

Whether a solicitation would result in a personal services contract must be judged in the light of its particular circumstances, with the key question being whether the government will exercise relatively continuous supervision and control over the contractor personnel performing the contract. FAR § 31.104(c)(2); Information Ventures, Inc., B-241641, Feb. 14, 1991, 91-1 CPD ¶ 173 at 4. The following descriptive elements guide the assessment of whether a proposed contract is personal in nature:

- (1) Performance on site;
- (2) Principal tools and equipment furnished by the government;
- (3) Services are applied directly to the integral effort of agencies or an organizational subpart in furtherance of assigned function or mission;
- (4) Comparable services, meeting comparable needs, are performed in the same or similar agencies using civil service personnel;
- (5) The need for the type of service provided can reasonably be expected to last beyond 1 year;

- (6) The inherent nature of the service, or the manner in which it is provided, reasonably requires directly or indirectly, government direction or supervision of contractor employees in order to--
- (i) Adequately protect the Government's interest;
 - (ii) Retain control of the function involved; or
 - (iii) Retain full personal responsibility for the function supported in a duly authorized Federal officer or employee.

FAR § 37.104(d).

CNCS's analysis of the services actually provided under the incumbent contract indicates that they constituted personal services. Although the incumbent contract started off small and included temporary, short-term positions for a limited portion of the agency, CNCS's requirements quickly grew into requirements for permanent clerical and administrative positions throughout the agency. Contracting Officer's Statement at 6-7. The contractor's personnel in these positions worked at the agency's offices alongside CNCS employees performing the same or similar work and using CNCS's supplies and equipment. Agency Report at 6-9. CNCS managers supervised contractor personnel by directing, reviewing and approving their work. Id. CNCS managers interviewed and selected contractor personnel for assignment to positions, and routinely requested pay increases and promotions for contractor personnel. Contracting Officer's Statement at 7. The agency states that its managers now expect and require this level of supervision and control over contractor personnel in order to perform the functions of CNCS. Id. Moreover, the agency no longer needs temporary personnel for short-term positions; rather, the only purpose of this contract is to satisfy the agency's needs for full-time, permanent staff. Id. at 7-8. The record thus shows that CNCS requires continuous supervision and control over the personnel performing the work requirements under the RFP, and that contractor personnel have been, and would continue to be, in effect, government employees. This is a requirement for personal services. See FAR §§ 37.101, 37.104.

The protester has not directly challenged the reasonableness of the agency's stated requirement for personal services, but alleges that a contract awarded under this RFP could be administered so as not to be a personal services contract. However, Encore provides no support to show that such administration would satisfy the agency's actual requirements for permanent clerical and administrative personnel to be directly supervised and controlled by CNCS employees. Since the agency's actual needs require personal services, CNCS properly decided that it must satisfy its needs through employment of civil service personnel.³ Therefore, the contract

³In fact, CNCS has already begun, and substantially completed, the hiring process for these employees. Agency Report at 12, Contracting Officer's Statement at 6.

contemplated by the RFP, if it did not provide personal services, would not satisfy the agency's requirements, and the cancellation of the RFP is reasonable.

The protest is denied.

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