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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: REEP, Inc.

File: B-290665

Date: September 17, 2002

Gilbert J. Ginsberg, Esq., for the protester.

Lt. Col. Daniel K. Poling, Department of the Army, for the agency.

Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest against agency's issuance of delivery orders under Federal Supply Schedule (FSS) is sustained, where agency issued orders to firm that was only vendor on one schedule within the FSS, identical services were available at lower price from protester and other vendors on another schedule within the FSS, and agency had knowledge that the services were available under the second schedule; since agency must review information reasonably available before awarding FSS delivery orders, it could not make award without reviewing vendors' prices on second schedule.

DECISION

REEP, Inc. protests the Department of the Army's issuance of delivery order Nos. DAKF23-02-F-5215 and DAKF23-02-F-5315 to Worldwide Language Resources, Inc. under that firm's Federal Supply Schedule (FSS) contract in connection with its acquisition of language training services for the 5th Special Forces Group (SFG). The protester maintains that the agency improperly issued these delivery orders on a sole-source basis to Worldwide, even though REEP could have provided the same services under its FSS contract at a lower price.

We sustain the protest.

The 5th SFG has an ongoing requirement for language training services and has been meeting its need through the award of delivery orders under the FSS. Worldwide had been performing these services under a prior 1-year delivery order awarded in March 2001 and due to expire on March 15, 2002. On March 4, 2002, the agency issued request for quotations (RFQ) No. DAKF-23-02-Q-0040 (RFQ 0040) in an effort to meet its requirement for language training services. REEP filed a protest in our

Office in which it asserted that the RFQ's terms were unduly restrictive and that Worldwide had a conflict of interest that should preclude the firm from competing to provide language training services. In response to that protest, the agency advised our Office that it intended to cancel the RFQ, redraft the solicitation and evaluate REEP's conflict of interest allegation with a view to avoiding, neutralizing or mitigating any possible conflict on the part of Worldwide. Based on this proposed corrective action, we dismissed REEP's protest (B-290155, April 29, 2002). On May 24, the agency issued a new solicitation (RFQ No. DAKF23-02-Q-0059) for its language training services requirement. REEP has filed a protest in our Office challenging the terms of that RFQ, which we intend to address in a separate decision.

In order to meet its ongoing requirement for language training services during this same period, the agency issued two FSS delivery orders to Worldwide, the first on March 15 and the second on June 3. These delivery orders were executed without issuance of solicitations or receipt of competitive quotations. The delivery orders were awarded against Worldwide's contract under FSS No. 69; Worldwide is the only vendor with a language training contract under that schedule. In contrast, REEP, Worldwide and numerous other vendors hold language training contracts under FSS No. 738-II.

REEP maintains that it was improper for the agency to award the delivery orders to Worldwide without also considering vendors' prices under FSS No. 738-II. REEP states, and the agency does not dispute, that its prices under its FSS contract are lower than Worldwide's.

We agree with REEP. Agencies are not required to conduct competitive acquisitions when making purchases under the FSS; by statutory definition, the award of a delivery order under the FSS satisfies the requirement for full and open competition—so long as award is made to the vendor providing the best value to the government at “the lowest overall cost.” 10 U.S.C. § 2302(2)(c) (2000); Federal Acquisition Regulation (FAR) § 8.404(a). Provided that agencies satisfy this statutory condition, they are not required to seek further competition, synopsise the requirement or make a separate determination of fair and reasonable pricing before awarding an FSS delivery order. FAR § 8.404. To ensure that it is meeting the statutory obligation to obtain the best value at the lowest overall cost to the government when placing orders under the FSS, an agency is required to consider reasonably available information, typically by reviewing the prices of at least three schedule vendors. FAR § 8.404(b)(2); Commercial Drapery Contractors, Inc., B-271222, B-271222.2, June 27, 1996, 96-1 CPD ¶ 290 at 3.

Here, the agency's only explanation for its actions is that it placed the delivery orders with Worldwide because it was the only vendor with a contract under FSS No. 69. However, the record shows that the agency had actual knowledge of numerous other

vendors that offered the same language training services under FSS No. 738-II.¹ The agency has not asserted that there is anything unique about the training offered by Worldwide under its FSS contract—for example, that it includes features not available from other vendors—that would provide a basis for paying a price premium for the services. Accordingly, we find that the agency failed to meet its obligation to consider reasonably available information, namely, the prices offered by other vendors under FSS No. 738-II, before placing its delivery orders with Worldwide. Had it done so, it would apparently have discovered that the same requirement could be met at a lower overall cost to the government. Under these circumstances, we sustain REEP's protest.

Since the agency continued (and has completed) performance under the delivery orders awarded to Worldwide, corrective action is not practicable. Accordingly, we recommend that REEP be reimbursed the costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2002). REEP's certified claim, detailing the time spent and the costs incurred, should be submitted to the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Anthony H. Gamboa
General Counsel

¹ The agency issued RFQ 0040 on March 4 to vendors holding contracts under FSS No. 738-II; this was prior to issuance of the first delivery order to Worldwide on March 15.