GAO

Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Diversified Technology & Services of Virginia, Inc.

File: B-282497

Date: July 19, 1999

Virginia Smith and E. D. David for the protester.
Marion T. Cordova, Esq., Agricultural Research Service, for the agency.
Christina Sklarew, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that sole-source extension of contract is an improper result of poor planning on the agency's part is denied where the record shows that the agency engaged in extensive planning (once it determined that a change in contract type would better serve the government's interests), properly justified its use of sole-source authority, and reasonably limited the sole-source extension to a 3-month period, with additional 1-month options.

DECISION

Diversified Technology & Services of Virginia, Inc. protests the Department of Agriculture, Agricultural Research Service's sole-source extension of contract No. 53-3K06-8-8 for operations and maintenance support services for its Southern Regional Research Center in New Orleans, Louisiana. Diversified alleges that the extension is improper because it is due to a lack of planning on the agency's part.

We deny the protest.

In September 1997, Diversified was selected for award under request for proposals (RFP) No. 01-3K06-97 for these same services. Three offerors protested improprieties in the evaluation and source selection process, and a hearing was held in our Office in November. During the course of that hearing, the agency recognized that the evaluation had been improper, and proposed to reevaluate proposals and make a new source selection based on that reevaluation. As a result, Diversified's contract was terminated for the convenience of the government.

In January 1998, responsibility for the procurement was transferred to a different branch of the Agricultural Research Service and assigned to a different contracting officer. The new contracting officer reviewed the procurement and determined that the contract type should be changed from cost-reimbursement to fixed-price, and that a reevaluation of the initially submitted proposals would no longer be practical. Agency Report, Tab C, Jan. 1998 Initial Proposal Review Assessment, at 1.[1] The contracting officer expected that new proposals could be requested without changing the performance work statement (PWS), thus limiting the time and effort required for a complete rewrite. Id. The agency sent a revised solicitation package to the original competitive range offerors on March 5. Protest, Tab 6. Although the PWS was unchanged, the revised RFP generated 119 questions from prospective offerors, seeking clarification of the PWS in light of the higher level of risk that a contractor would bear under a fixed-price contract. Agency Request for Dismissal at 5. After reviewing the questions, the contracting officer determined that the PWS should be rewritten, in order to respond to the questions and to reflect the agency's approach to performance-based service contracting. Id. The agency notified offerors that the PWS was being substantially revised, established a deadline for the submission of any additional questions, and stated that a consolidated amendment would be issued to reflect the revisions. Protest, Tab 7, Letter from Contracting Officer to Offerors (Mar. 12, 1998).

Agency personnel in Washington and New Orleans coordinated efforts to edit and redraft the new PWS. When it became apparent that their workload was preventing them from finishing the redraft as quickly as was necessary, they decided in August 1998 to hire a contractor to write a second PWS draft. Agency Request for Dismissal at 6. In November, the contractor delivered its final PWS draft, which the agency then reviewed and finalized for release. On March 5, 1999, the agency published in the Commerce Business Daily a notice of its intent to negotiate on a sole-source basis an extension to its contract with J.A. Jones Management Services. Protest, Tab 9. On March 15, the agency issued a proposed schedule for the procurement, projecting milestones such as the release of the amended RFP on April 16, 1999, closing date for receipt of proposals on May 14, and (after negotiations and the submission of best and final offers) award in September.[2] Protest, Tab 15, Letter from Contracting Officer to Offerors at 2 (Mar. 15, 1999). On March 22, the agency's competition advocate signed a justification and approval (J&A) for other than full and open competition to support the proposed contract extension.

Diversified filed a protest with the agency on March 10, contending that the sole-source extension was improper and that an award should simply be made on the basis of a reevaluation of existing 1997 best and final offers. Protest, Tab 10,

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[1]The contracting officer advised offerors of these decisions by letter of February 5, 1998. Protest, Tab 5.

[2]On April 16, the Department of Agriculture released its revised RFP and established a May 20 closing date for receipt of proposals.

Letter from Diversified to Contracts Branch, Agricultural Research Service (Mar. 10, 1999). The agency denied Diversified's protest by letter of March 31, offering explanations for the various delays that had occurred in the procurement process and concluding that since the operations and maintenance services are required on an ongoing basis, the incumbent contractor is the only feasible source until a new contract can be awarded on the basis of the revised RFP. Protest, Tab 1, Letter from Contracting Officer to Diversified (Mar. 31, 1999). This protest followed.

Diversified protests that the extension is improper because it was caused by a failure on the agency's part to engage in advance planning, arguing that the agency should have realized when it decided to change the contract type that this change "could not be made in an expeditious manner." Protest at 6.

While the overriding mandate of the Competition in Contracting Act of 1984 (CICA) is for "full and open competition" in government procurements obtained through the use of competitive procedures, 41 U.S.C.A. § 253(a)(1)(A) (West Supp. 1999), CICA does permit noncompetitive acquisitions in specified circumstances, such as when the services needed are available from only one responsible source or when the agency's need for the services is of such an unusual and compelling urgency that the agency would be seriously injured unless permitted to limit the number of sources solicited. 41 U.S.C. §§ 253(c)(1), (c)(2) (1994). When an agency uses noncompetitive procedures under 41 U.S.C. § 253(c)(1) or (c)(2), it is required to execute a written J&A with sufficient facts and rationale to support the use of the specific authority. See 41 U.S.C. § 253(f)(1)(A) and (B); Federal Acquisition Regulation (FAR) §§ 6.302-1(d), 6.302-2(c), 6.303, 6.304. Our review of the agency's decision to conduct a sole-source procurement focuses on the adequacy of the rationale and conclusions set forth in the J&A. When the J&A sets forth a reasonable justification for the agency's actions, we will not object to the award. Marconi Dynamics, Inc., B-252318, June 21, 1993, 93-1 CPD ¶ 475 at 5; Dayton-Granger, Inc., B-245450, Jan. 8, 1992, 92-1 CPD ¶ 37 at 4. However, noncompetitive procedures may not properly be used where the agency created the urgent need through a lack of advance planning. 41 U.S.C. § 253(f)(5)(A); see Laidlaw Envtl. Servs. (GS), Inc.; International Tech. Corp.--Claim for Costs, B-249452, B-250377.2, Nov. 23, 1992, 92-2 CPD ¶ 366 at 4.

Here, the J&A recites the procurement's history, as described above, and states that proposals are currently being resolicited, with September 30 as the anticipated award date. The J&A states that, in the interim, the research center cannot accomplish its mission without these services. Noting that the incumbent has provided the services for the past 5 years, the J&A concludes that Jones's experience and knowledge will permit the firm to continue to support the research center efficiently and at the lowest cost to the government. The J&A lists four bases for its conclusion that Jones is uniquely qualified to provide the services through an extension to its current contract, which may be paraphrased as follows:

1. No other offeror could immediately perform all of the services provided by Jones without incurring substantial cost and causing unacceptable delay.
2. Any other contractor would incur excessive projected duplicated cost and schedule risk to provide the services.
3. While it would be technically possible for other companies to provide the required services, this could only be achieved by expending considerable resources and time; the incumbent contractor already has the organization in place to provide these services without any transition.
4. These services are needed on an ongoing basis to support the research center; any delay would result in critical mission impairment in research.

Justification for Other Than Full and Open Competition for Operation and Maintenance Support at 3.

In essence, the J&A acknowledges that other firms could eventually provide the services, but that none could immediately perform all of the services provided by the incumbent without incurring substantial costs and causing unacceptable delay. The record shows that the agency has been unable to complete the planning required to conduct a competition for these services despite its substantial ongoing efforts to do so.

In our view, the J&A provides an adequate rationale and conclusions to support the 3-month contract extension with six 1-month options at issue. Although Diversified argues that the agency has been moving too slowly and that its current situation was caused by a lack of advance planning, the record demonstrates that the delays have, in fact, been caused in part by the agency's efforts to plan for the long term rather than to opt for a short-term "fix." The agency's determination that a fixed-price contract would better serve its needs and be more cost-effective in the long run led to its conclusion that it could not simply reevaluate existing best and final offers; and although the contracting officer had hoped to avoid revising the PWS, questions from competitive range offerors led the agency to conclude that it could not simply retain its original PWS. While the revision project has not moved quickly, we do not agree with Diversified's premise that any delays render the agency's use of a limited sole-source extension impermissible here. CICA clearly requires advance procurement planning--and does not recognize the lack of such planning as a valid justification for a sole-source procurement--but CICA does not require that such planning be entirely successful or error-free. Sprint Communications Co., L.P., B-262003.2, Jan. 25, 1996, 96-1 CPD ¶ 24 at 9. Here, rather than demonstrating the lack of advance planning, as the protester suggests, the record establishes that the agency has been very actively engaged in planning efforts.

Diversified argues in its comments on the agency report that the issue is whether the agency engaged in advance planning prior to the release of the initial solicitation in February 1997, and suggests that the planning that occurred after that date is irrelevant here. Protester's Comments at 1-2. We disagree. Nothing in the record suggests a lack of advance planning before the February 1997 release of the solicitation. Instead, Diversified's real complaint is with the shift from a cost-reimbursement to a fixed-price contract, which Diversified concedes would necessarily take considerable time. The agency has, however, provided a reasonable explanation of why the new contracting officer decided that a fixed-price contract was more appropriate, in light of the recurring nature of the services being procured and the agency's intervening experience with a similar contract in another part of the country. Contracting Officer's Statement at 2. While Diversified plainly disagrees with that decision, once it was made (in early 1998), the protester appears to agree that the transition would take considerable time (in the protester's words, "could not be made in an expeditious manner"). We thus conclude that the lack of advance planning did not cause the delay.

While Diversified argues that our decision in New Breed Leasing Corp., B-274201, B-274202, Nov. 26, 1996, 96-2 CPD ¶ 202, is dispositive, we disagree. In that decision, we concluded that an agency had failed to engage in advance planning when it failed to recognize and correct obvious flaws in prior solicitations and contracts, leading contracting officials to cancel a solicitation 8 months after the submission of initial proposals and to extend admittedly flawed contracts for an entire year. In contrast, here the agency has taken the initiative, recognizing after a protest brought to light certain evaluation improprieties that a different type of contract would be more cost effective and less administratively burdensome for the government. In addition, the proposed extensions are limited to a 3-month period, with options to extend for 1 month at a time.[3]

With regard to Diversified's disagreement with the agency's determination to change contract types, we note that the decision as to the appropriate pricing format was within the discretion of the agency, and we believe that the agency's exercise of that discretion here was reasonable. For example, while the protester appears to disagree with the agency's reference to the government's interest in shifting risk to the contractor in the context of recurring requirements, Protester's Comments at 2-3, the FAR supports the agency's approach. See FAR § 16.104(d).

Finally, the protester seeks a decision from our Office recommending that the agency award the contract on the basis of the 1997 best and final offers. We cannot

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[3]In this context, we note that the remedy recommended in New Breed was that the "agency make expeditious efforts to finalize competitive procurements for these requirements and terminate [the extended] contracts upon award of those contracts." New Breed Leasing Corp., supra, at 8. Here, since the extensions are limited to shorter periods and the agency is engaged in the process of finalizing its procurement process, that same result will actually obtain.

make such a recommendation here, both because we have found that the agency did not violate a procurement statute or regulation (and we therefore have no reason to recommend relief at all) and because the particular relief sought by Diversified is unreasonable. Once the agency reasonably decided that a cost-reimbursement contract did not meet its needs, there is no plausible basis to recommend that the agency select from among a range of 2-year-old proposals based on that pricing format. In any event, since the agency notified Diversified of its determination that it could not award a contract based on the existing best and final offers by letter of February 5, 1998, the propriety of that decision cannot now be timely challenged. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (1999).

The protest is denied.

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of the United States