Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Support Services International, Inc.

File: B-271559; B-271559.2

Date: July 16, 1996

Joel C. Mandelman, Esq., for the protester.
Mike Colvin, Department of Health and Human Services, for the agency.
Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Indian Health Service (IHS) did not violate the Buy Indian Act by failing to set aside a health care-related acquisition for Indian-owned companies since under the Buy Indian Act IHS has the discretion to set procurements aside for Indian-owned firms, but is not required to set aside any particular procurement.

2. Contracting agency has not adequately justified its decision not to solicit the incumbent and instead to award to another company on a sole source basis where the record fails to demonstrate a reasonable basis for the agency determination that the incumbent could not be expected to perform the services satisfactorily.

DECISION

Support Services International, Inc. (SSI), an Indian-owned company, protests the award of an interim contract to McKesson Drug Company under request for proposals (RFP) No. 785, issued by the Phoenix Area Indian Health Service (IHS), Department of Health and Human Services (HHS), for the purchase and delivery of drugs on the Federal Supply Schedule (FSS) to Indian health clinics located in Arizona, Nevada, and Utah. The protester complains that the award improperly was made on a sole source basis to a company that is not Indian-owned.

We sustain the protest.

BACKGROUND

In March 1995, the IHS awarded a contract consisting of base year plus two 1-year options contract to SSI under RFP No. 753, a Buy Indian Act set-aside for the distribution of drugs and pharmaceutical items on the FSS to IHS hospitals and clinics located in Arizona, Nevada, and Utah. At the conclusion of the base year,

the IHS decided not to exercise the option under SSI's contract since (as discussed more fully below) it was dissatisfied with SSI's performance during the base year and agency officials believed they could obtain the services at a substantially lower cost by negotiating an interagency agreement with the Department of Veterans Affairs (VA).[1] Since, as of the date that SSI's base year was due to expire (i.e., March 31, 1996), the IHS was still in the process of negotiating an agreement with the VA and anticipated that the arrangement would take an additional 90 days to implement in Arizona and an additional 180 days to implement in Nevada and Utah, the IHS awarded an interim contract for the services to McKesson, a pharmaceutical wholesaler which had been acting as a subcontractor to SSI under its contract and which was also the contractor servicing the VA's Arizona facilities.

On March 27, 1996, after learning that the option under its contract would not be exercised and that the agency instead intended to negotiate an agreement with the VA to have the services added to a contract that the VA had with McKesson, SSI protested to our Office. SSI argued that an award to McKesson, by means of an interagency agreement with the VA, would violate both the Buy Indian Act (since McKesson is not an Indian-owned firm) and the Competition in Contracting Act of 1984 (CICA) (since companies other than McKesson had not been permitted to compete for the award.)

By letter dated April 12, 1996, the agency notified our Office that it agreed with SSI that an award to McKesson, by means of an interagency agreement with the VA, would violate IHS's Buy Indian policy and that it intended to take corrective action by conducting a new procurement under the Buy Indian Act. The agency further informed us that it expected to issue the new solicitation within the next month and that SSI would be given an opportunity to compete.

On April 15, SSI learned of the interim award to McKesson, which the agency had decided to leave in place until the recompetition had been concluded. On April 19, the protester filed a supplemental protest with our Office objecting to the interim award.

ANALYSIS

SSI first argues that, as the satisfactorily performing incumbent, it should have been allowed to continue performing the services until the new competition was concluded. We are aware of no requirement, however, that a procuring agency with an urgent need for interim services extend an incumbent's contract rather than

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[1]VA had in place contracts for the delivery of pharmaceuticals to VA facilities in the states in question, which agency officials thought could be modified to include deliveries for the IHS clinics.

award a new contract. See Automation Management Consultants, Inc., B-243805, Aug. 29, 1991, 91-2 CPD ¶ 213.

SSI next argues that by failing to set the acquisition aside for Indian-owned firms, the IHS violated the Buy Indian Act. Contrary to the protester's contention, the Buy Indian Act does not require that all contracts awarded to provide goods and services to Indian tribes be awarded preferentially to Indian-owned contractors. Rather, the Act states simply that "[s]o far as may be practicable Indian labor shall be employed, and purchases of the products . . . of Indian industry may be made in open market in the discretion of the Secretary of the Interior." 25 U.S.C. § 47 (1994). The federal courts and our Office have construed this language as conferring upon the Secretary of the Interior--and, with regard to the maintenance and operation of hospitals and health facilities for Indians, the IHS[2]--broad discretionary authority to negotiate exclusively with Indian contractors; neither the courts nor our Office have construed the Act as requiring that every eligible procurement be set aside for Indian-owned companies, however. See Lakota Contractors Ass'n. v. U.S. Dept. of Health and Human Servs., 882 F.2d 320 (8th Cir. 1989); Indian Resources Int'l, Inc., B-256671, July 18, 1994, 94-2 CPD ¶ 29. Moreover, to the extent that the award to McKesson violated IHS's own internal Buy Indian policy, which provides for the award of health care-related contracts to non-Indian firms only if no eligible Indian firms are available, we do not regard an agency's internal policy as establishing legal rights and responsibilities such as to make actions contrary to the stated policy illegal and subject to objection by this Office. Indian Resources Int'l, Inc., supra.

Turning to the issue of whether the IHS violated CICA by awarding the interim contract to McKesson on a sole source basis, 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 justification and approval (J&A) with sufficient facts and rationale to support the use of the specific authority. 41 U.S.C. § 253(f)(1)(A) and (B). Our review of the agency's decision to conduct a sole source procurement focuses on the adequacy of

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[2]The functions of the Secretary of the Interior for the maintenance and operation of hospital and health facilities for Indians were transferred to the Secretary of HHS, who delegated HHS' authority under the Buy Indian Act exclusively to the IHS. Department of Health and Human Servs.--Request for Advance Decision, B-232364, Oct. 5, 1988, 88-2 CPD ¶ 325.

the rationale and conclusions set forth in the J&A. Techno-Sciences, Inc., B-257686; B-257686.2, Oct. 31, 1994, 94-2 CPD ¶ 164.

Here, the agency justified the sole source award to McKesson on the ground that McKesson was the only company that could begin to furnish services immediately upon expiration of SSI's contract and thus assure that services did not lapse. In this regard, the contracting officer noted that McKesson, as a subcontractor to SSI, had been responsible for the delivery of medications under SSI's contract and thus already had in place ordering and delivery systems and payment mechanisms. Other wholesalers, in contrast, would require 90 to 120 days to implement their systems, according to the agency. The contracting officer further noted that he did not regard SSI, the incumbent, as a viable source since its performance during the base year had been unsatisfactory.

We do not think that the agency has adequately justified its decision to exclude SSI from the competition. While an agency may, in urgent circumstances, limit the competition to firms with satisfactory work experience which it believes can promptly and properly perform the services, DOD Contracts, Inc., B-250603.2, Mar. 3, 1993, 93-1 CPD ¶ 195, and is not required to solicit the incumbent if it reasonably doubts, based on the incumbent's prior record, that the firm can perform the services, Sanchez Porter's Co., 69 Comp. Gen. 426 (1990), 90-1 CPD ¶ 433, the agency's assessment of the incumbent's prior performance and capability to perform must be reasonable. Here, we think that the IHS's assessment of SSI's prior performance and capability to perform was not reasonable.

The record shows that the IHS's dissatisfaction with SSI's performance during the base year stemmed from SSI's inability, during the initial months of performance, to obtain drugs from a few manufacturers at the FSS prices, which generally are lower than market. As the prime pharmaceutical vendor for the IHS clinic pharmacies, SSI was eligible to purchase drugs for the clinics at FSS prices, but a few manufacturers were unaware of SSI's authority to do so. Thus, the manufacturers in question were furnishing the drugs requested and billing SSI's subcontractor, McKesson, at the FSS prices, but were then billing McKesson for the difference between the FSS price and the market price. McKesson, in turn, was billing the pharmacies for the difference between the two prices.

IHS held SSI accountable for failing to obtain all requested drugs at the FSS prices, and viewed SSI's inability to resolve the pricing problems as evidence of the protester's unwillingness and inability to perform its contractual responsibilities. However, our review of the contract and the record reveals that the agency's blame was misplaced. The contract clearly required the contracting officer to notify the

drug companies of SSI's status prior to the date it commenced performance[3]--yet the record shows that the contracting officer did not do so until early October 1995 (i.e., 6 months after performance had begun.) In our view, the record shows that the difficulty that SSI encountered in obtaining certain drugs at FSS prices was in large part attributable to the IHS's failure to notify the various drug manufacturers at the time of award that SSI would be acting as IHS's pharmaceutical vendor for the clinics. To the extent that, once informed of SSI's status, a few manufacturers still refused to furnish the drugs at FSS prices because their companies, as a matter of general policy, refused to provide FSS pricing under prime vendor contracts, we fail to see how SSI, as a contractor, could have compelled them to do so.

We also fail to see that SSI's status as other than a drug wholesaler impaired its ability to perform, as the agency implies. The contracting specialist in fact concedes that any hesitancy that manufacturers may have had about dealing with SSI due to their lack of familiarity with the company "did not turn out to be a problem" since the companies were willing to deal with SSI's subcontractor, McKesson, which had responsibility for placing orders with, and receiving payment from, the drug companies.

Further, regardless of who was at fault for SSI's initial difficulties in obtaining FSS prices from certain manufacturers, the record shows that the pricing problems had largely been resolved by early 1996, as evidenced by the decreasing number of "re-bills" being received by IHS clinic pharmacists. It thus appears that not only was SSI not responsible for the difficulties that IHS encountered in obtaining FSS pricing for drugs for its pharmacies, but further that most of the problems had been resolved prior to expiration of SSI's contract for the base year.

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[3]Section B-1 of the contract provided as follows:

> "Contractor shall provide all drugs/pharmaceutical items (comprising approximately 12,000 items) for twenty-two Phoenix Area Indian Health Service, Service Unit Hospital and clinic facilities located in Arizona, Nevada, and Utah, [for] which the Prime Vendor has been authorized by the manufacturer as a distributor:
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> A. Under the Federal Supply Schedule; and
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> B. Under other Government supply contracts. It will be the responsibility of the IHS Contracting Officer to contact contractors for authorization for the Prime Vendor to distribute products and utilize contract pricing. Once authorization is received, IHS will provide the successful Prime Vendor with participating contractors and pricing information." (Emphasis added.)

IHS has not established that SSI is incapable of performing the interim services. The J&A cites unsatisfactory performance and difficulties with the current contractor, which, as we discussed above, does not support such a conclusion. Neither the J&A nor the rest of the record set forth any other rationale to demonstrate that SSI cannot perform. We find no reasonable basis for IHS's determination that SSI should be excluded from the competition. Accordingly, we sustain the protest.

Since the agency now projects that the new solicitation will not be issued until July 1996, and that award will not be made until September, we recommend that it solicit proposals from both SSI and McKesson for performance of the services during the remaining interim period, and, if it determines that SSI's proposal is more advantageous than McKesson's, that it terminate the interim contract awarded to McKesson and make award to SSI. We also recommend that the agency pay the protester the costs of filing and pursuing its protest.[4] See Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (1996). In accordance with section 21.8(f)(1) of our Regulations, SSI's certified claim for such costs, detailing the time expended and the costs incurred, must be submitted directly to the agency within 90 days after receipt of the decision.

The protest is sustained.

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[4]Our recommendation regarding the payment of costs extends to the supplemental protest only. We do not recommend that the protester be reimbursed for the costs of pursuing its initial protest since the agency took prompt corrective action in response to that protest. In this regard, we will recommend that an agency that has taken corrective action pay a protester its protest costs only where the agency delays unduly in taking the corrective action in the face of a clearly meritorious protest. CSL Birmingham Assocs.; IRS Partners-Birmingham--Entitlement to Costs, B-251931.4; B-251931.5, Aug. 29, 1994, 94-2 CPD ¶ 82.