

159927



**Comptroller General
of the United States**
Washington, D.C. 20548

Decision

Matter of: Valenzuela Engineering, Inc.
File: B-277979
Date: December 9, 1997

DECISION

Valenzuela protests the failure of the Department of the Air Force and the Army Corps of Engineers to comply with certain provisions of the Federal Acquisition Regulations (FAR) pertaining to small business issues in the acquisition of operation and maintenance (O&M) services at the Mike O'Callaghan Federal Hospital at Nellis Air Force Base, Nevada. The services were ordered under an indefinite delivery, indefinite quantity (IDIQ) contract of the Army Engineering and Support Center (CEHNC), Huntsville, Alabama, with Syska & Hennessy, Inc.

We dismiss the protest.

In March 1996, the Air Force entered into a contract for operations and maintenance services at the Nellis Air Force Base hospital through the Small Business Administration (SBA) under the section 8(a) program with Valenzuela for a base year with 4 option years.⁵ The Air Force initially contemplated certain engineering and construction tasks as part of Valenzuela's O&M contract, but deleted these requirements prior to the award assertedly for reasons unrelated to the capability of small businesses.

While Valenzuela was performing the base contract at Nellis Air Force Base, CEHNC developed an IDIQ procurement for O&M and incidental repair and replacement services at medical and nonmedical facilities under its Operation and Maintenance Engineering Enhancement (OMEE) program. According to the Army, OMEE provides for "the enhancement of new and existing complex facilities by developing maintenance concepts and O&M documentation and by identifying O&M training and maintenance management system requirements . . . [including] O&M contract support for Army and Air Force activities on a world-wide basis." Since

⁵Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1994), authorizes SBA to enter into contracts with government agencies and to arrange for performance through subcontracts with socially and economically disadvantaged small business concerns.

070561/159927

the OMEE primarily involved O&M services at medical facilities, the acquisition plan anticipated that such facilities would be the primary user of the services to be acquired under this procurement, but noted that there was good potential for the increased use of these services by non-medical government facilities.

Based on its experience under the OMEE program, which involved O&M services at "complex" facilities, CEHNC determined that the procurement was not suitable for a small business set-aside. CEHNC did not conduct a formal market survey or consult the SBA, but after discussing the matter with the agency's Small Business Utilization Specialist found that the agency's "experience of the market is that there is no small business which can provide the service."

On September 24, 1996, CEHNC issued request for proposals (RFP) No. DACA87-96-R-0046 under an IDIQ task order contract for a base year with 4 option years. The RFP's work statement identifies no specific facilities or locations at which these services are to be performed, but includes O&M and incidental repair and replacement services at "Government facilities such as but not limited to medical, non-medical, training, administrative, plants, labs and storage facilities . . . in the continental United States, Hawaii and Alaska."⁶ The RFP contemplated an award of no more than two contracts, and each awardee would receive "fair consideration" in the issuance of task orders. The task orders are to be issued on either a firm, fixed-price or a time and materials basis. For each task order, the contractor is required to develop a facility operation and maintenance concept plan, a facility operation and maintenance plan, and a commissioning plan prior to implementing the order.⁷

⁶The Nellis Air Force Base hospital was not specifically identified in the RFP and the Army had not considered the facility in preparing the procurement. In this regard, CEHNC states that "[i]t was unaware at the time of RFP issuance or award that the Air Force would be using the contract at Nellis Air Force Base; CEHNC did not formally learn of the Nellis requirement until May 9, 1997."

⁷According to the Army, this was a new process developed by CEHNC to more efficiently meet its operations and maintenance and engineering enhancement program needs. In the first step, the concept of operation is developed, in the second step a detailed facility operation and maintenance plan is developed, which takes the place of the traditional performance work statement, and the third step where performance of the O&M services in accordance with the plan takes place. The approach contemplated a partnership between the government and the contractor, that could result in cost savings and improved services.

CEHNC received three proposals in response to the RFP on April 3, 1997. Neither Valenzuela nor any other small business responded to the RFP. On May 5, CEHNC made awards to J&J Maintenance, Inc. and to Syska & Hennessy. Each contract has a ceiling amount of \$2,650,000 for the base year.

Following award of the Army contracts, the Air Force decided not to exercise the option under Valenzuela's 8(a) contract. Instead, it would satisfy its requirements for O&M services along with certain additional engineering and construction services under the OMEE program at Nellis Air Force Base through CEHNC's task order contract with Syska & Hennessy. There is no suggestion that Valenzuela had not been successfully performing the required O&M services at Nellis Air Force Base. The Air Force did not coordinate this decision with the SBA or consider whether the revised requirement was appropriate for a small business set-aside.

On May 9, the Air Force requested CEHNC to administer O&M services at the Nellis Air Force Base hospital under its task order contract. Pursuant to the Economy Act, 31 U.S.C. § 1535 (1994), the Air Force requested the services under a Military Interdepartmental Purchase Request dated May 28, which authorized the transfer of Air Force funds in the amount of \$40,000 for this purpose. On June 19, CEHNC issued delivery order No. 0002 at a price of \$38,385 under its IDIQ contract with Syska & Hennessy to provide a facility operation and maintenance plan for O&M services at the Nellis Air Force Base hospital. On September 12, CEHNC entered into a bilateral modification to the delivery order with Syska & Hennessy, implementing the plan for the O&M services for 1 year (October 1, 1997 to September 30, 1998) at a cost of \$1,711,153. The record shows that the bulk of the work will be subcontracted to Johnson Controls, Inc., another large business.

Meanwhile, the Air Force, in a letter dated May 30, notified Valenzuela that the Air Force did not intend to exercise the option under its contract effective October 1. During June, Valenzuela met with the SBA procurement center representative and Air Force officials regarding the decision not to exercise its contract option and how the O&M services would be performed. According to Valenzuela, the SBA advised that it was unaware of the May 30 notice, and the Air Force indicated that the matter would be reviewed and that the June delivery order to Syska & Hennessy was only for "scoping and planning". The SBA also sent a letter to the Air Force dated June 6 to inquire why the Air Force was removing its O&M requirement at Nellis Air Force Base from the 8(a) program. While awaiting a response, Valenzuela communicated with various Air Force, Army, and SBA officials contending that its contract option should have been exercised and that these services should not be removed from the small business program.

On August 12, the Air Force Small Disadvantaged Utilization Specialist sent a letter to Valenzuela advising that the Air Force believed that acquiring the services under CEHNC's contract would be more beneficial than continuing performance with Valenzuela, and that Valenzuela should contact the Army for subcontracting

opportunities at the Nellis Air Force Base facility. The Air Force also sent a letter to the SBA dated August 29, stating that the Air Force's 8(a) O&M contract with Valenzuela did not provide the services needed to meet its requirements. The Air Force notified Valenzuela on August 28 to begin transition to the new contractor on September 1. After the SBA furnished the letter it received from the Air Force to Valenzuela on September 4, this protest followed on September 8.

Valenzuela contends that the Air Force and the Army's actions resulted in the improper withdrawal of the Nellis Air Force Base hospital O&M work from the 8(a) and small business programs in violation of various FAR provisions. Among other things, Valenzuela argues that under the FAR the Air Force was required to notify the SBA prior to determining to fulfill its requirement under a task order contract and to review the acquisition to determine whether or not it could be set aside for small business concerns. Valenzuela asserts that it has successfully performed the O&M services and it has performed engineering, design, construction, and O&M services under a variety of contracts with the government throughout California, Arizona, and Nevada.

The Air Force, Army, and Syska & Hennessy argue that the protest should be dismissed as untimely because Valenzuela should have known of its basis of protest in June following the Air Force's May 30 notification to Valenzuela that it would not exercise the contract option and the Army's June 19 issuance of the delivery order to Syska & Hennessy. Valenzuela responds that when it inquired about the matter it was told that the initial delivery order to Syska & Hennessy was merely for planning and that the agencies were still reviewing the matter to determine whether they would proceed with acquiring the work from CEHNC under the Economy Act. Valenzuela states that until it received a copy of the August 29 letter to the SBA and was advised to begin transition for a new contractor it had no basis for protest.

Under our Bid Protest Regulations, a protest not based upon alleged improprieties in a solicitation must be filed no later than 10 calendar days after the protester knew or should have known of the basis for protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2) (1997). The agencies argue that the Air Force had conveyed its intent to follow a course of action that was adverse to the protester's interest on May 30 and June 19, which required the protest to be filed within 10 days afterwards. See, e.g., Kimmins Thermal Corp.-Recon., B-238646.4, Jan. 31, 1991, 91-1 CPD ¶ 106 at 2.

While the record contains some basis to find that Valenzuela believed during June and July that the matter was still under consideration, as discussed above, the Air Force clearly stated to Valenzuela that it intended to proceed with acquiring the services at Nellis Air Force Base from Syska & Hennessy in an August 12 letter.⁸ Thus, we find that the protest filed on September 8, almost a month later, was untimely.

The protester argues that even if the protest is untimely, we should consider the issues raised as significant to the procurement system and entertain the protest pursuant to 4 C.F.R. § 21.2(c), which provides discretion for our Office to waive timeliness requirements in certain cases. We decline to do so.⁹ We note that had the protest been considered under 4 C.F.R. § 21.2(c) and been sustained, we would not have recommended any remedial action in view of the advanced state of contract performance and the untimeliness of the protest. See Golden North Van Lines, Inc., 69 Comp. Gen 610, 615, 90-2 CPD ¶ 44 at 7.

The protest is dismissed.

Comptroller General
of the United States

⁸In the absence of evidence to the contrary, we assume that mail is received within 1 calendar week from the date that it was sent. Apex Micrographics, Inc., B-235811, Aug. 31, 1989, 89-2 CPD ¶ 205 at 3. The protester therefore would be charged with receipt of this letter on August 19 and its September 8 protest is untimely because it was filed more than 10 days later. Id.

⁹We do have concerns related to the actions challenged in this case, and are writing the Secretary of the Army and the Secretary of the Air Force to bring our concerns to their attention.