DECISION — **THE COMPTROLLER GENERAL OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-218973.2 **DATE:** October 2, 1985

MATTER OF: Indian and Native American Employment and Training Coalition--Request by Department of Labor for Reconsideration

DIGEST:

1. An agency's request for reconsideration filed more than 1 month after the decision is issued is untimely.

2. Upon termination of a services contract for default the agency procured the services on a sole-source basis as a result of its determination that an unusual and compelling urgency for such services existed. Where the prior contract indicated no urgent need for such services and since the record does not indicate any changed circumstances, the agency's determination to limit the source of the procurement to a sole source was improper.

By letter received on May 24, 1985, the Department of Labor (DOL) requests reconsideration of our decision in Indian and Native American Employment and Training Coalition, B-216421, Apr. 16, 1985, 64 Comp. Gen. ____, 85-1 C.P.D. ¶ 432, and reports on its actions subsequent to issuance of that decision. The decision sustained a protest that a contract modification for technical assistance and training services on financial management and management information systems to Native American grantees was beyond the scope of the original contract for professional accounting and audit services between the agency and Rodriguez, Roach & Assoc., P.C. (Rodriguez, Roach), and we recommended to the Secretary of Labor that the contract modification be terminated for the convenience of the government and that a new solicitation be issued for the remaining work consisting of on-site technical assistance and training for the grantees.

In its request for reconsideration, DOL asserts that we did not fully understand the scope of the original solicitation. The request, however, is untimely and will not be considered. Our Bid Protest Regulations require that a request for reconsideration be filed within 10 working days

of when the basis for reconsideration is or should have been known, whichever is earlier. 4 C.F.R. § 21.12(b) (1985). While our regulations provide for our consideration of untimely protests where a significant issue is involved or good cause is shown, 4 C.F.R. § 21.2(c), there is no similar provision regarding untimely requests for reconsideration. See Simulators Limited, Inc.--Reconsideration, B-208418.2, Mar. 17, 1983, 83-1 C.P.D. ¶ 274. Furthermore, an agency's request for reconsideration is held to the same stringent filing standard as the request of any other party. Forest Service--Request for Reconsideration, B-208469.2, Mar. 14, 1983, 83-1 C.P.D. ¶ 247 and Dillon Supply Co.--Department of Energy--Request for Reconsideration, B-203937, Jan. 19, 1982, 82-1 C.P.D. ¶ 41. Accordingly, the Department of Labor's request for reconsideration, filed more than 1 month after the issuance of our April 16 decision, is clearly untimely. See Dillon Supply Co., et al., supra, 82-1 C.P.D. ¶ 41 at 2 and Novak Co., Inc.--Reconsideration, B-217023.2, Jan. 25, 1985, 85-1 C.P.D. ¶ 101.

DOL's letter further advises that the agency did not follow our recommendation. DOL states that while the Rodriguez, Roach contract was terminated (for default, because of the dissolution of the contractor), it did not compete the remaining work. Instead, by modification to an existing contract with Gilbert Vasquez and Company, it called for Vasquez to provide the remaining work. The agency indicates that Vasquez was to do this through the use of the original contractor's former employees as subcontractors. The agency advises that it justifies this sole-source acquisition under the authority of section 303(c)(2) of the Federal Property and Administrative Services Act of 1949, as added by the Competition in Contracting Act of 1984 (CICA), Pub. L. No. 98-369, title VII, 98 Stat. 1175, 1176 (1984) (to be codified at 41 U.S.C. § 253(c)(2)). That section provides that an executive agency may use procedures other than competitive where the agency's need for the property or services is of such an unusual and compelling urgency that the government would be seriously injured unless the executive agency is permitted to limit the number of sources from which it solicits bids or proposals. See also Federal Acquisition Regulation (FAR), § 6.302-2, 50 Fed. Reg. 1726, 1732 (1984), Federal Acquisition Circular 84-5, April 1, 1985 (to be codified at 48 C.F.R. § 6.302-2).

The task order that modified the Vasquez contract provides for the on-site technical assistance and training to be furnished by Vasquez to approximately 35 Native American grantees to be rendered in two phases. Phase I consists of on-site visits to a minimum of 14 grantee locations. After evaluation of a progress report submitted by the contractor on phase I, the agency would determine whether to authorize phase II--the remaining technical assistance and training. The task order provides that all work thereunder should be completed no later than August 25, 1985. We have been advised by the agency that Vasquez has completed performance of both phase I and phase II under the task order.

We cannot agree with DOL's action here.

As required by section 303(f)(1) of the Federal Property and Administrative Services Act of 1949, as added by CICA (to be codified at 41 U.S.C. § 253(f)(1)), a justification statement for the sole-source procurement was submitted to and approved by the appropriate agency official. The statement, in justifying the sole-source procurement from Vasquez on the basis that the need for the services is of an unusual and compellingly urgent nature, indicated that the training workshops (which had been conducted by Rodriguez, Roach) must be reinforced on a timely basis by the on-site technical assistance. The justification stated that to be effective such on-site technical assistance "must take place immediately" and that a lapse of several months or more between the training workshops and the on-site technical assistance would require that the entire technical assistance and training project be reinstated at great cost to the government. The justification also stated that the effectiveness of the training and technical assistance is dependent on the same parties providing both the workshops and the on-site technical assistance and that the knowledge and experience gained by the former Rodriguez, Roach staff who will be working with Vasquez cannot be replicated without considerable cost to the government. Finally, it was stated, the former Rodriguez, Roach staff members and the Indian participants have great mutual trust, confidence and working relationships which may not be capable of duplication and that such personnel acquired valuable knowledge and experience by developing and presenting the training workshops.

We have traditionally subjected sole-source procurements to close scrutiny. See ROLM Corp. and Fisk Telephone Systems, Inc., B-202031, Aug. 26, 1981, 81-2 C.P.D. ¶ 180. With the enactment of CICA, Congress has made it plain that sole-source awards are to be made only when "truly necessary" and only when properly justified. See H.R. Rep. No. 861, 98th Cong., 2d Sess. 1425-7 (1984) (conference report). We think that standard is not met in this case.

Section 303(c)(2) of the Federal Property and Administrative Services Act of 1949, as added by CICA, is the authority upon which the agency relies for its justification of its sole-source acquisition. This section provides that an agency may use other than competitive procedures where the agency's need for the property or services is of such an unusual and compelling urgency that the government would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits bids or proposals. However, section 303(c)(2) does not provide that a sole-source procurement is appropriate in every instance where a limitation of procurement sources is justified on account of the urgency of the agency's needs.

On the contrary, the cited provision requires agencies to obtain competition from as many sources as practicable, see FAR, § 6.302-2(c)(2), Federal Acquisition Circular 84-5, April 1, 1985 (to be codified at 48 C.F.R. § 6.302-2(c)(2)); see also H.R. Rep. No. 861, 98th Cong., 2d Sess. 1425 (1984) (conference report), although agencies are not precluded from awarding a contract on a sole-source basis under section 303(c)(2) when conditions dictate that only one source is available. H.R. Rep. No. 861, supra, at 1425. We note that even where a sole-source procurement is not justified an agency may proceed expeditiously with a procurement carried out under authority of section 303(c)(2) since notice of procurements under such provision are not required to be published in the Commerce Business Daily. See subsection 18(c)(2) of the Office of Federal Procurement Policy Act and subsection 8(g)(2) of the Small Business Act as added by sections 303 and 404, respectively, of the Small Business and Federal Procurement Competition Enhancement Act of 1984, Pub. L. 98-577, Oct. 30, 1984, 98 Stat. 3066, 3077, and 3083, and the FAR, § 5.202(a)(2), 50 Fed. Reg. 1726, 1728 (1984), Federal Acquisition Circular 84-5, April 1, 1985 (to be codified at 48 C.F.R. § 5.202(a)(2)).

We think it is instructive to compare the terms of the Vasquez contract with that formerly held by Rodriguez, Roach. The training workshops and on-site technical assistance and training requirements initially were added to the Rodriguez, Roach contract by modification No. 3 to task order No. 101 effective in September 1984. That modification provided that up to four workshops would be conducted with the first workshop completed not later than January 31, 1985, and the last workshop completed by September 30, 1985. As set forth in our April 16 decision, the agency had advised us that the four training workshops had been completed by Rodriguez, Roach. Modification No. 3 to the task order provided that the on-site technical assistance and training should be completed not later than December 31, 1985. There is nothing whatsoever in the language of modification No. 3 which would indicate that it was crucial or even highly desirable that the training workshops be promptly followed-up by on-site technical assistance and training. In fact, under the terms of the contract modification, all of the workshops could be conducted early in 1985, as in fact did occur, and the on-site assistance could be provided late in the year--the only requirement being that the on-site services be completed by the end of the calendar year.

Thus, under the terms of the contract modification, the prior contractor could have waited several months or more between the completion of the training workshops and the inception of the on-site assistance. Furthermore, there is nothing in modification No. 3 which provided that the training workshops were to be completed prior to a grantee's receiving on-site technical assistance and training, nor did the modification require each grantee who attended a training workshop to receive the on-site technical assistance and training. In the absence of evidence of any changed circumstances since the issuance of modification No. 3 which would now require that the on-site technical assistance and training be provided on an urgent basis to the grantees who had attended the training workshops, we believe that DOL has not shown that the on-site assistance and training is of such a compelling nature as to justify procurement of such services under other than competitive procedures.

Even if DOL had demonstrated that the procurement in question was of a sufficiently unusual and compelling urgency as to justify limiting the sources of procurement, we still could not agree that the circumstances attendant to

this procurement dictated that only one source was available for award. We are not persuaded by the agency's argument that the same individuals who conducted the training workshops must also provide the on-site assistance due to the working relationships they developed incident to the workshops and the knowledge and experience they gained from developing and presenting the workshops. DOL has not provided any evidence which would show that the required services are so unusual that only the former Rodriquez, Roach staff members could adequately provide such services, or, if that is so, why only Vasquez could utilize their services as subcontractors.

In view of the above, we do not believe that the agency's sole-source procurement from Vasquez of the on-site technical assistance and training services was proper. However, because the services under the contract modification have already been performed corrective action with respect to this procurement would not be appropriate. We are, however, bringing this matter to the attention of the Secretary of Labor.

Milton J. Socolar

for Comptroller General
of the United States