

DECISION

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

FILE: B-222465

DATE: July 7, 1986

MATTER OF: IMR Systems Corporation

DIGEST:

Although an agency is required to solicit as many sources as practicable when it uses other than competitive procedures based on the existence of an unusual and compelling urgency, an agency is justified in negotiating a contract with the only source it knows is capable of commencing performance immediately when the agency reasonably determines that the urgent nature of its requirement precludes the consideration of other sources.

IMR Systems Corporation protests the sole-source award by the Food and Drug Administration (FDA) of contract No. 223-86-1302 to the Maxima Corporation. The contract is for management of the document control room at FDA's Center for Drugs and Biologics (CDB) in Rockville, Maryland. IMR complains that it was improperly denied an opportunity to compete for the contract, even though it had advised the agency prior to award that it believed it was qualified to perform the services required. We deny the protest.

The agency reports that it had decided sometime prior to July 1985, to contract for the operation of the CDB document control room and to do so through a section 8(a) contract with the Small Business Administration (SBA).^{1/}

^{1/} Under Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1982), the Small Business Administration (SBA) enters into contracts with government agencies and arranges for the performance of such contracts by awarding subcontracts to socially and economically disadvantaged small business concerns. The SBA and the contracting agencies enjoy broad discretion in arriving at section 8(a) contracting arrangements. Inter Systems, Inc., B-220056.2, Jan. 23, 1986, 86-1 CPD ¶ 77.

The document control room processes a number of reports and other submissions incident to the FDA's drug review responsibilities. On July 31, 1985, the SBA authorized the FDA to negotiate with two firms, Maxima and Technassociates, Inc., both of which subsequently received a request for proposals. By letter dated August 22, however, Technassociates informed the FDA that it would not be submitting a proposal because, it said, the solicitation contained a number of uncertainties that made it undesirable to contract on a fixed-price basis. FDA then proceeded to negotiate only with Maxima.

At the conclusion of the negotiations, and after security clearances had been obtained and a preaward audit performed, FDA and Maxima agreed on February 28, 1986, to the terms of a contract, performance of which would commence on March 17. The agency forwarded the proposed contract to the SBA for approval. On March 5, however, the agency learned through its Small and Disadvantaged Business Utilization Specialist (SADBUS) that the SBA was reluctant to agree to the contract because it believed that the Standard Industrial Classification (SIC) the FDA had used (SIC 7379, with a limit on average annual receipts of \$12.5 million) was incorrect and that Maxima did not qualify as a small business under the proper SIC. The agency reports that it attempted to obtain a formal decision from the SBA on the matter, but was unsuccessful. With the proposed contract commencement date of March 17 approaching, the FDA wrote to the SBA on March 14 to request that the SBA either sign the contract or provide the basis for its refusal to do so. By letter dated March 19, the SBA informed the agency that it would not sign the contract, citing an incorrect SIC code and the FDA's failure to follow prescribed procedures as the reasons for this decision.

The agency reports that even before the SBA's refusal to sign the proposed 8(a) contract, it was experiencing difficulties in the document control room. The staffing level had dropped from six to two full-time employees, and a serious backlog in the processing of work had developed. When contractor operation of the control room did not commence on March 17 as anticipated, some former agency control room personnel were required temporarily to resume

control room work. After SBA refused to sign the proposed 8(a) contract, the agency determined that the lack of proper control room staffing was an urgent and compelling circumstance that justified a non-8(a), sole-source award to Maxima under 41 U.S.C. § 253(c)(2) (Supp. II 1984). A contract was signed on March 28; no other sources were solicited.

IMR does not contest the agency's determination that urgent and compelling circumstance justified its use of other than competitive procedures. Rather, the basis for the protest is that in failing to solicit an offer from IMR, the agency violated 41 U.S.C. § 253(e), which provides that whenever an agency uses other than competitive procedures under section 253(c)(2), it must request offers from as many potential sources as is practicable under the circumstances. IMR states that it had made known to the agency its interest concerning this procurement through numerous contacts, both oral and written, with the agency's SADRUS. IMR has submitted copies of its letters to the SADRUS, which assert that firm's ability to assume responsibility for control room operations with as little as 3 to 5 days notice.

The agency reports that even though its SADRUS may have known of the protester's interest in this procurement, the agency's contracts office did not. Moreover, says the agency, the urgent need for a contractor to operate the control room precluded consideration of other sources. In this connection, the contracting officer notes that considerable time was consumed in negotiating the proposed 8(a) contract with Maxima because of the need for security clearances and an audit of Maxima's proposed costs.

Under the Competition in Contracting Act of 1984, an agency is permitted to procure goods or services using other than competitive procedures when the agency's need is of such an unusual and compelling urgency that the government would be seriously injured if the agency cannot limit the number of sources solicited. 41 U.S.C. § 253(c)(2). In such circumstances, however, an agency must solicit as many potential sources as practicable. 41 U.S.C. § 253(e); TMS Building Maintenance, B-220588, Jan. 22, 1986, 65 Comp. Gen. ___, 86-1 CPD ¶ 68. In this connection, we

have said that an agency using the urgency exception may limit the competition to the only firm it reasonably believes can perform the work promptly and properly. Arthur Young & Co., R-221879, June 9, 1986, 86-1 CPD ¶ ____; Gentex Corp., R-221340, Feb. 25, 1986, 86-1 CPD ¶ 195. ____;

We find it unnecessary to resolve the issue of whether the contracting officer knew or should have known of IMR's interest in operating the document control room. Suffice it to say that the urgent need to provide for contractor operation of the control room simply made it impracticable to solicit any other sources.

The record indicates that at least until March 5, the agency was proceeding on the assumption that Maxima would be assuming responsibility for operation of the control room on or about March 17. When it learned that the SBA might be reluctant to sign the 8(a) contract, the FDA attempted to elicit the SBA's position on the matter but did not receive an official response from the SBA until March 27. By this time the control room was experiencing backlogs in its processing work and the agency determined that its need for a contractor was urgent if it was to avoid missing statutory processing deadlines. IMR does not question the propriety of this determination.

Faced with the urgent need to contract for control room services, the agency decided to enter into a sole-source contract with Maxima, the only source the agency knew was capable of commencing contract performance immediately. While there may have been other sources, including IMR, capable of performing the required work, the time involved in soliciting and evaluating other offers precluded the consideration of such other sources. In reaching this conclusion, the agency obviously relied on its recent, lengthy experience in negotiating the proposed 8(a) contract with Maxima, a process that included a cost audit and security clearances. Although expedited procedures could have been used once the agency formally was informed on March 27 of the SBA's decision not to sign the proposed 8(a) contract, the agency's conclusion that even expedited negotiations with another source would not have allowed for a contractor to begin performance immediately was reasonable under the circumstances. IMR's contention that

it could have commenced performance with as little as 3 to 5 days notice does not account for the time involved in selecting a qualified contractor, even using expedited procedures. In short, we find that the agency's solicitation of only one source was justified. See Authur Young & Co., R-221879, supra.

Moreover, the agency's sole-source contract with Maxima is for a period of only 6 months. At the end of the 6-month period, the agency should either contract for the required services under the 8(a) program or conduct a procurement using full and open competitive procedures, under which, of course, IMR would be entitled to compete. We note that Maxima's contract includes options allowing the agency to extend the period of performance up to two additional 12-month periods and a further additional period of 5.5 months. In our view, the urgent circumstances in this case justified the award of a short-term, sole-source contract, but did not justify the inclusion of options. A & C Building and Industrial Maintenance Corp., 64 Comp. Gen. 565, 85-1 CPD ¶ 626. Thus, the exercise of those provisions should not be considered. By letter of today, we are so advising the head of the agency.

Because we conclude that the agency did not act unreasonably in awarding a contract to Maxima without soliciting other sources, we deny the protest.

for Seymour E. Evans
Harry R. Van Cleve
General Counsel