

Pogary



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: McGregor FSC, Inc.
File: B-224000; B-224001; B-224002
Date: October 30, 1986

DIGEST

1. Agency contract for counseling services does not create illegal employer-employee relationship where the services will not be subject to direct government supervision and adequate direction is provided to the contractor through detailed written specifications contained in the solicitation's statement of work.
2. There is no basis for payment to protester of costs of filing and pursuing protests, including attorney's fees, where the protests are either academic or where the General Accounting Office has not found any procurement impropriety committed by the contracting agency.

DECISION

McGregor FSC, Inc. (McGregor) protests the issuance by the Department of the Navy, Fleet Contracting Center, Mayport, Florida, of request for quotations (RFQs) Nos. N68836-86-Q-0830 (for a Counseling Psychologist), N68836-86-Q-0832 (for an information and Referral Specialist) and N68836-86-Q-0834 (for a Marriage and Family Specialist) at the Navy's Family Service Center (FSC), Key West, Florida. McGregor contends that awards under the RFQs would result in prohibited personal services contracts and that the Navy is improperly converting certain functions previously performed by McGregor to in-house performance in contravention of OMB Circular No. A-76. McGregor did not submit a quotation although it was furnished with a copy of the solicitaitons.

We dismiss the protests under RFQs Nos. 0830 and 0834 and deny the protest under RFQ No. 0832.

The Navy failed to obtain any quotations in response to RFQs Nos. 0830 and 0834, and therefore canceled these RFQs. Except for requesting the reimbursement of the costs of

filing and pursuing its protest, including attorney's fees, which we discuss below, McGregor does not dispute the Navy's position that the firm's protests concerning the two canceled solicitations are academic and should be dismissed. See, e.g., Capital Electric Construction Company of Kansas, Inc., B-220964, Dec. 24, 1985, 85-2 CPD ¶ 714. Accordingly, we dismiss these protests and limit our discussion to the protest that remains under RFQ No. 0832.

That RFQ was issued on August 4, 1986, for the services of an information and referral specialist in accordance with a detailed statement of work contained in the RFQ. McGregor, the incumbent contractor, previously performed a broad range of professional, social, and counseling services at FSC, and had on its employee staff an information and referral specialist. The Navy, however, did not exercise the second option year in McGregor's contract.^{1/} While a new statement of work is currently being written for a future competitive solicitation for a broad range of social and counseling services, the Navy here issued the RFQ to provide interim coverage until December 31, 1986, for a small portion of the services previously performed by McGregor. The Navy is foregoing the services to be furnished under the canceled RFQs until a contract is awarded under the future competitive solicitation.

McGregor states that the counseling program which it established under its previous contract was of such magnitude that it could not operate without effective management and control. McGregor maintains that by contracting with a series of individuals (such as the information and referral specialist that this RFQ solicits), the Navy would displace McGregor's management and would have to provide its own "direction and management" of these individual contractors, thereby creating a prohibited personal services contract with them. In this regard, McGregor states that the individual contractors would work a 40-hour week and would have a performance evaluation by the Navy each week.

In response, the Navy says that while the contracting officer's representative will be required to monitor the individual's performance under the contract, he will have no authority to directly supervise or manage the individual.

^{1/} McGregor does not object to the Navy's failure to exercise the option and characterizes the Navy's failure to do so as a "non-issue" which should be "completely disregarded."

The individual contractor, rather, will be performing the work in accordance with the detailed specifications contained in the statement of work.

We find no basis to conclude that the Navy's procurement will establish an employer-employee relationship between the government and the individual contractor so as to create an unauthorized personal services type contract. In order for such a situation to occur, the contract must provide for detailed government direction or supervision of the contractor's employees. Logistical Support, Inc., B-197488, Nov. 24, 1980, 80-2 CPD ¶ 391. As noted, the Navy has provided the future individual contractor with detailed written specifications for performance of the work. Our review indicates that the contract contains no terms permitting the Navy to give direct supervision or management of the individual contractor. We do not think that monitoring through contractor performance evaluation meetings to review contractor performance on a periodic basis, creates a prohibited personal services contract between the government and the contractor. Accordingly, we deny this ground of protest.

Next, McGregor alleges that management and supervisory functions previously performed by McGregor will now be performed by the Navy, thereby converting this work to an in-house function in contravention of the procedures of OMB Circular No. A-76. The Navy states that these social and counseling services have always been contracted out from their inception and will continue to be contracted out. Since, as we have already found, the subject RFQ is to fill an interim need and does not constitute a prohibited personal services contract, and since the Navy states that the RFQ was not issued with the intent of making an in-house/contractor determination under Circular No. A-76, we have no basis to disagree with the Navy that no work has been or will be converted to in-house performance within the meaning of Circular No. A-76. We, therefore, also deny this ground of protest.

Finally, McGregor has requested reimbursement for the costs it incurred in pursuing these protests, including attorney's fees. Concerning the two canceled solicitations, payment of such costs are predicated upon a determination by our Office that a solicitation, proposed award, or award does not comply with a statute or regulation. See Sabreliner Corporation, B-221857, Apr. 29, 1986, 86-1 CPD 414. Here, our Office has not made such a determination since the Navy, on its own initiative, has canceled the solicitations. Thus, there is

no basis upon which we may declare McGregor entitled to the costs which are claimed. Sabreliner Corporation, B-221857, supra. Concerning the remaining solicitation, such costs are not recoverable where, as here, we have not found any procurement impropriety. Feinstein Construction, Inc., B-218317, June 6, 1985, 85-1 CPD ¶ 648.

The protests are dismissed and denied.

for *Raymond Efron*
Harry R. Van Cleve
General Counsel