



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Data Based Decisions, Inc.
File: B-232663; B-232663.2
Date: January 26, 1989

DIGEST

1. Protest is sustained where, while agency determined that urgency required limited competition, it failed to solicit offers from as many potential sources as were practicable under the circumstances and conducted the procurement in a manner which favored one subcontractor under a predecessor contract and placed the incumbent prime contractor and the other subcontractors, which were also known potential sources, at a competitive disadvantage.
2. The government is not required to exclude from competition a firm that may possess an advantage and capabilities due to prior experience as an incumbent subcontractor where the record does not establish that the subcontractor participated in the preparation of the solicitation, or otherwise gained a prohibited competitive advantage as a result of its incumbency.

DECISION

Data Based Decisions, Inc., protests the solicitation and the award of a contract to Integrated Systems Analysts, Inc. (ISA), under request for proposals (RFP) No. N00123-88-R-5755, issued by the Naval Regional Contracting Center, San Diego, for management of the Maintenance Resource Management System (M-System). Data Based asserts that the solicitation was drafted to favor ISA and, in effect, the award was improperly made on a sole-source basis. Data Based also contends that ISA should have been excluded from competition because of an organizational conflict of interest.

We sustain the protest because we find that the Navy's actions, in effect, resulted in a sole-source procurement rather than the limited competition that the Navy has justified.

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The solicitation was issued on September 14, 1988, pursuant to a request from the requiring activity, the Naval Surface Force, Pacific Fleet (Navsurfpac). The M-System oversees and plans maintenance of ships at Navy facilities to insure fleet readiness. The M-System collects maintenance reports sent by the ship's computer systems and transfers these requirements to an M-System site for inclusion in a master database, maintained by the contractor, enabling the Navy to review the status of ships and determine which of the needed maintenance items are to be performed when a ship is in port.

The contractor is responsible for keeping the system operational, for manning sites in San Diego, San Francisco, Yokosuka, Subic Bay and Pearl Harbor, and for configuration control of software and hardware. In addition, the contractor is responsible for software maintenance, site training of military and civilian personnel, and maintaining and updating the security of the system.

This 1-year contract was to replace a function being performed by Diversified Venture Management Corporation for the management of the Waterfront Maintenance Management System (W-System). Diversified was responsible for the W-System function, but the bulk of the work was performed by four subcontractors, including ISA and Data Based. As a subcontractor, ISA had performed the original installation of the W-system computer system, and site operations in San Diego, Long Beach and San Francisco. As a subcontractor, Data Based performed site operations at Yokosuka, Sasebo and Subic Bay. The Diversified contract was to expire on September 30, 1988, but included an option for another year which Navsurfpac had initially contemplated exercising. However, the Navy contends that in August 1988 Navsurfpac determined that the oversight function being performed by Diversified personnel would be handled in-house. The Navy also states that exercise of the option was unfeasible because, in August, Diversified lost its facility clearance to handle classified material within the W-System. Further, the Navy questioned Diversified's responsibility because of a criminal case pending against its president. Because of this combination of factors, the Navy determined that an urgency situation existed because of the September 30 contract expiration and because the fleet required contractual coverage.

Navsurfpac, believing only ISA technically capable of fulfilling the requirements as of October 1, intended to issue a 1-year sole-source contract to ISA, with a competitive procurement to follow, allowing time for other contractors to prepare proposals, obtain necessary

personnel, and allow for a phase-in period. Accordingly, the requirement was not synopsized in the Commerce Business Daily, and copies of the solicitation were sent to only ISA and Diversified. The Navy states that Diversified was sent a copy only because it was responsible for the existing contract, not because Navsurfpac believed it had any intrinsic capability to perform. Three of the subcontractors learned of the requirement and requested and were eventually provided with copies of the solicitation. When Data Based obtained a copy of the RFP on September 14, it protested to us that the September 20 due date did not allow sufficient time for it to adequately prepare a proposal, that the specifications were tailored to favor ISA, and that there were no evaluation factors. Two amendments were then issued, the last on September 21, which added evaluation factors and extended the due date to September 26. Data Based protested that this extension was still too short, and that the specifications were still tailored to favor ISA.

Data Based and ISA submitted the only proposals. The Navy determined that Data Based's proposal (priced at \$1,556,273.92) was technically unacceptable, and that ISA's proposal (priced at \$3,161,236) was technically acceptable. Award, based on initial proposals, was made to ISA on September 30, notwithstanding the pendency of this protest, on the basis of urgent and compelling circumstances which significantly affect the interest of the government, as permitted under the Competition in Contracting Act (CICA), 31 U.S.C. § 3553(c)(2)(A) (Supp. IV 1986).

In its report, the Navy suggests that only ISA was capable of performing on such short notice because only ISA understood: (1) the configuration control problems; (2) the training classes; (3) the data processing security, hardware and software maintenance requirements; and (4) the hardware configurations of the system. ISA had installed the W-System computers, which would be the M-System computers. In its evaluation of Data Based's proposal, the Navy noted that Data Based showed no understanding of data processing security, no capability to perform hardware maintenance other than a promise to subcontract maintenance work, and no evidence of how it would obtain capable personnel to perform configuration control, ongoing software maintenance or training.

The Justification and Approval for less than full and open competition, executed on October 31, a month after the award, states that due to the urgency of the requirement, neither a Commerce Business Daily synopsis nor full and open competition was feasible, but that: "competition will be

limited to 5 government-known sources with previous experience in the former [W-System] program, presently known as the [M-System] program." Thus, the Justification indicates that the Navy considered the prime contractor and the four subcontractors to be capable of competing.

Under CICA, an agency may use noncompetitive procedures to procure goods or services where the agency's needs are of such an unusual and compelling urgency that the government would be seriously injured if the agency is not permitted to limit the number of sources from which it solicits bids or proposals. 10 U.S.C. § 2304(c)(2) (Supp. IV 1986). However, this authority does not automatically justify a sole-source award. Rather, it is limited by the provisions at 10 U.S.C. § 2304(e), which require agencies to request offers from as many sources as are practicable under the circumstances. Consequently, a sole-source award is proper only where due to urgent circumstances the agency reasonably believes that only one firm promptly and properly can perform the required work. Freedom Marine, B-229809, Apr. 20, 1988, 88-1 CPD ¶ 389. A justification supporting this determination is required, which, under 10 U.S.C. § 2304(f)(2), may be executed after a contract is awarded, as was done here, if properly based on an unusual or compelling urgency. See Allied Signal, Inc., Garrett AiResearch, B-228591, Feb. 25, 1988, 88-1 CPD ¶ 193.

While the Justification in question authorizes limited competition among five offerors, the conduct of the procurement was consistent with the previously planned sole-source award. That a sole-source award was intended is evidenced by the August 19 request for security clearance for ISA, listing the contract number and a September 30 award date, and the September 13th preparation of a contract review board control sheet justifying a sole-source award to ISA. In addition, the procurement plan indicates the inapplicability of any technical evaluation, competitive range determination, or any other procedures normally associated with a competitive procurement and the original solicitation contained no evaluation criteria or listing of key personnel positions or requirements; these were added only after Data Based's protest was filed.

The Navy does not rebut Data Based's assertion that no effort was made to solicit any of the subcontractors other than ISA and, further, that when Data Based requested a copy of the solicitation it was discouraged from competing by Navsurfpac. Also, the Navy made no efforts to solicit the other four contractors which the Navy indicated in its Justification were potential sources and which, therefore,

should have been solicited. See Fairchild Weston Systems, Inc., B-225649, May 6, 1987, 87-1 CPD ¶ 479. Thus, it seems clear that the Navy did not even attempt to obtain the limited competition identified by the Justifications. Moreover, we think it clear from the record that even Data Based was not given a meaningful opportunity to participate in this procurement.

The RFP called for a detailed presentation evidencing familiarity with the methods of managing a broad and complex technical program. Data Based had only 5 days (3 working days) to draft a proposal after the amended RFP was issued, and therefore was unable to prepare a comprehensive proposal which fully addressed the program requirements, or to obtain the required employee commitment letters. Instead, it submitted a slightly edited and rewritten version of the Diversified proposal which was the winning proposal the previous year. We believe the lack of an adequate solicitation and the late distribution of the RFP resulted in ISA being afforded more time and a better opportunity to prepare its proposal than was Data Based or any of the other known sources. Accordingly, while the Justification, approved a month after the award, demonstrates that limited competition (five offerors) was available, such a rationale does not reflect what actually occurred during the procurement, that only ISA was given the full opportunity to compete for the requirement.

While the pending expiration of the Diversified contract did create an urgency by the end of September, we find that this urgency was due primarily to the Navy's dilatory conduct. The Navy knew, at the latest, in August that it was not going to exercise Diversified's option. The current solicitation does not materially change the basic W-System contract functions other than to delete the previously performed computer installation and to change certain personnel requirements. Accordingly, the Navy could have issued the current RFP in a manner which would have permitted limited competition earlier than the September 14 issue date.

Moreover, we believe that the 1-year bridge contract is excessive. The Navy has provided no basis for this length of time, other than to note that it will take other competitors a substantial period of time to prepare their offers. However, there is no evidence that this is the case for offerors, such as Data Based, which are incumbent subcontractors and are familiar with the M-System requirements.

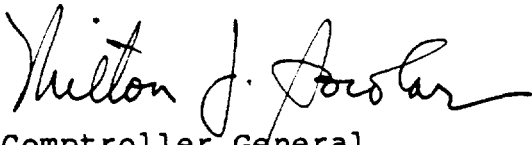
Regarding Data Based's argument that ISA should not have been permitted to compete, we find that the Navy was not required to exclude ISA from competing on the basis of an organizational conflict of interest. Subpart 9.5 of the Federal Acquisition Regulation, which governs conflicts of interest, generally requires contracting officials to avoid, neutralize or mitigate potential significant conflicts of interest so as to prevent unfair competitive advantage or conflicting roles that impair a contractor's objectivity. While Data Based asserts that ISA employees, in performing their responsibilities under ISA's W-System subcontract, were in a position to affect or influence the drafting of the solicitation, and to obtain confidential procurement information, there is no evidence to support this allegation. Further, the Navy has investigated the responsibilities of the ISA employees in question and has determined that they were not in a position to gain access to confidential information related to the procurement. In addition, the Navy employees in question were all questioned by the contracting officer and specifically stated that there were no unauthorized disclosures made to ISA personnel. Accordingly, we find no basis to conclude that ISA should be excluded on the basis of conflict of interest.

Data Based also alleges that the solicitation personnel requirements were tailored to reflect the qualifications of ISA personnel, and therefore are overly restrictive. In this respect, the Navy has presented explanations and justifications which provide prima facie support for the specifications in question, and these justifications have not been rebutted by Data Based, which has the burden of showing that the specifications are unreasonable. Targets Financial Corp., B-228131, Nov. 23, 1987, 87-2 CPD ¶ 506. In this regard, we note that specifications are not necessarily improper merely because a potential offeror cannot meet the requirements. Id. However, in view of the other matters raised in this protest, we believe that when the Navy implements our resolicitation recommendations below, it should review the personnel requirements to insure that they accurately reflect the procuring activity's minimum needs.

We sustain the protest.

We recommend that the Navy review the personnel qualifications under the solicitation and issue a new solicitation permitting all of the known potential sources a reasonable time in which to prepare offers and participate in the competition. If, as a result of this action, a contractor other than ISA is selected for award, then we recommend the

termination for convenience of ISA's contract. Data Based is also entitled to the costs of filing and pursuing its protest, including attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1988).


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