Schatz

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Neil R. Gross & Company, Inc.

File: B-237434

Date: February 23, 1990

Ronald S. Perlman Jr., Esq., Porter, Wright, Morris & Arthur, for the protester.
Thomas K. Delaney, Office of Procurement Services, Department of Labor, for the agency.
Sylvia Schatz, Esq., David Ashen, Esq. and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Modification of existing contract to add court reporting services for an interim period pending completion of competitive procurement for new contract constitutes an improper sole-source award where new services are not within the scope of the contract as originally awarded, limited competition was not justified, and procuring agency was aware that the incumbent contractor was interested in competing.

DECISION

Neil R. Gross & Company, Inc., protests that the Department of Labor (DOL) improperly awarded a contract for court reporting services on a sole-source basis to the Heritage Court Reporting Company. Gross contends that the agency made an improper sole-source award by modifying Heritage's existing DOL contract (No. J-9-M-7-0058), for transcribing hearings and pretrial conferences conducted by DOL administrative law judges, to include court reporting services for the Occupational Safety and Health Administration (OSHA), which previously were provided by Gross, without soliciting an offer from Gross for the services.

We sustain the protest.

Gross, one of three incumbent DOL contractors for court reporting services, had previously furnished the specific

services being procured for OSHA. In anticipation of the expiration of Gross's contract on September 30, 1989, DOL decided to secure further court reporting services for OSHA through the use of small purchase procedures; accordingly, on August 14, DOL issued a request for quotations (RFQ) for the services. However, after reviewing the specification following a protest of its terms, DOL determined that it did not reflect the agency's actual needs and, as a result, canceled the RFQ on September 18.

On September 26, 4 days prior to the expiration of its existing contract, Gross advised the contracting officer by telephone that it was interested in competing for and performing any future DOL or OSHA court reporting services contracts. On September 27, however, DOL modified its existing contract for court reporting services with Heritage, not due to expire until July 1990, without soliciting an offer from Gross. DOL reports that it modified the contract with Heritage to acquire the services on an interim basis, until a contract could be awarded on a competitive basis for fiscal year 1990. (In this regard, on October 11 DOL synopsized in the Commerce Business Daily the proposed issuance of a solicitation for court reporting services for fiscal year 1990; Gross' bid in response to the solicitation was determined to be low, but award of a contract has not yet been made, pending a review of Gross' responsibility.)

Gross contends that inclusion of the interim OSHA services under Heritage's contract without soliciting Gross' offer amounted to an improper sole-source award because the agency was aware that Gross was available to compete for and perform an interim contract for the services. DOL responds that Heritage's prior existing contract with the agency was properly modified to provide for acquisition of the additional services because the interim services fell within the overall scope of Heritage's contract.

As a general rule, our Office will not consider protests against contract modifications, as they involve matters of contract administration that are the responsibility of the contracting agency. 4 C.F.R. § 21.3(m)(1) (1989). We will, however, consider a protest that a modification is beyond the scope of the original contract, and that the subject of the modification thus should be competitively procured absent a valid sole-source justification. See Avtron Mfg., Inc., 67 Comp. Gen. 404 (1988), 88-1 CPD ¶ 458.

In weighing the propriety of a modification, we look to whether there is a material difference between the modified contract and the prime contract that was originally

competed. Indian and Native American Employment and Training Coalition, 64 Comp. Gen. 460 (1985), 85-1 CPD ¶ 432. In determining the materiality of a modification, we consider factors such as the extent of any changes in the type of work, performance period and costs between the contract as awarded and as modified. See American Air Filter Co., Inc., 57 Comp. Gen. 285 (1978), 78-1 CPD ¶ 136, aff'd on reconsideration, B-188408, June 19, 1978, 78-1 CPD ¶ 443. We also consider whether the solicitation for the original contract adequately advised offerors of the potential for the type of changes during the course of the contract that in fact occurred, CAD Language Sys., Inc., B-233709, Apr. 3, 1989, 89-1 CPD ¶ 342, or whether the modification is of a nature which potential offerors would reasonably have anticipated under the changes clause. American Air Filter Co., Inc., 57 Comp Gen. 285, supra.

In light of the significant difference in the character of the services, the prior procurement of the services under separate contracts, and the apparent substantial increase in costs under the Heritage contract, we find that the modification of the Heritage contract is beyond the scope of the firm's existing contract. First, notwithstanding DOL's unsupported assertion to the contrary, it appears that the OSHA services added by modification were significantly different in many respects from the services under Heritage's original contract. According to Gross, the freedom of participants at OSHA advisory committee meetings to interject comments at any time during the proceeding and the technical character of the discussions renders transcribing the hearings significantly more difficult than transcribing the more formal, less technical workmen's compensation hearings covered under Heritage's existing contract. Gross further advises that satisfying the OSHA requirement has traditionally involved a 3-day delivery requirement, and may even involve a 1-day delivery requirement. Gross explains that the faster delivery required for OSHA (compared to the 20-day delivery specified under Heritage's existing contract), significantly increases the difficulty and, therefore, the cost of performance. Again, aside from a broad, unsupported statement that the OSHA services are within the scope of Heritage's original contract, DOL has not refuted Gross' detailed characterization of the OSHA services.

In addition to the differences in the character of the services, we consider it significant that DOL has procured the OSHA services under separate contracts, awarded on the basis of different statements of work than are included under Heritage's contract covering workmen's compensation hearings; it appears that the agency itself has viewed the

services as separable and essentially different in nature. We have recognized that in determining whether potential offerors reasonably would have anticipated such a contract modification at the time of the original competition, consideration should be given to the history of the present and past related procurements. American Air Filter Co., Inc., 57 Comp. Gen. 285, supra.

Furthermore, while DOL has not provided information as to the value of the added services (e.g., based on ordering under prior contracts), it appears that the addition of the OSHA services to Heritage's contract may result in a substantial increase in costs under that contract. In this regard, the modification DOL issued to add the services also provides for an increase of up to $500,000 in the contract price. (This increase apparently applies to both the services already included in Heritage's contract and the OSHA services.)

We conclude that the OSHA reporting services in question were not within the scope of Heritage's existing reporting services contract, and that DOL was required to procure those services in accordance with the competition requirements of the Competition in Contracting Act (CICA), 41 U.S.C. § 253(c) (Supp. IV 1986).

Under CICA, an agency may use other than competitive procedures where there is only one responsible source that can satisfy the government's needs, 41 U.S.C. § 253(c)(1), or where its needs are of such an unusual and compelling urgency that the government would be seriously injured if the agency did not limit the number of sources from which bids or proposals are solicited. 41 U.S.C. § 253(c)(2). DOL does not argue, and there is nothing in the record indicating, that these circumstances were present in this case.

Moreover, even where an agency is justified in limiting competition, it is required to request offers from as many potential sources as is practicable under the circumstances. 41 U.S.C. § 253(e). We have previously recognized that where a responsible source is known to the agency and has expressed interest in the procurement, the agency must undertake reasonable efforts to permit the source to compete. See California Properties, Inc., B-232323, Dec. 12, 1988, 88-2 CPD ¶ 581. Here, Gross advised the contracting officer that it was willing to compete for and perform any future court reporting services contracts for DOL and OSHA. Since Gross was the incumbent contractor for court reporting services for OSHA, it clearly was a source capable of performing the same or similar services under an

interim contract and therefore should have been solicited. Id.

Although we therefore sustain the protest, corrective action is not practicable since the fiscal year 1990 contract now has been competed and an award (to Gross, pending a responsibility determination) is imminent; the interim contract will end upon the new award, so allowing Gross to participate in a recompetition is not feasible. By separate letter of today, however, we are advising the Secretary of our decision. We also find Gross entitled to recover its costs of filing and pursuing this protest. See 4 C.F.R. § 21.6(e).

The protest is sustained.

Milton J. Socolar

Acting Comptroller General
of the United States