Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: The Department of the Army--Request for Reconsideration

File: B-237742.2

Date: June 11, 1990

John M. Taffany, Esq., Bailey & Shaw, P.C., for the protester.
Joseph M. Zima, Esq., Department of the Army, for the agency.
Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

General Accounting Office will not consider new arguments raised by agency in request for reconsideration where those arguments are derived from information available during initial consideration of protest but not argued, or from information available but not submitted during initial protest, since parties that withhold or fail to submit all relevant evidence, information, or analyses for our initial consideration do so at their own peril.

DECISION

The Department of the Army requests reconsideration of our decision in Earth Property Servs., Inc., B-237742, Mar. 14, 1990, 90-1 CPD ¶ ___, in which we sustained Earth Property Services' (EPS) protest of the Army's sole-source award of a contract to J&J Maintenance, Inc., for maintenance of 4,843 housing units at Fort Bragg, North Carolina. The Army awarded the contract to J&J, the incumbent contractor, after determining that unusual and compelling urgency for the maintenance services existed and that J&J was the only source in a position to provide immediate continuing service. The Army argues that our decision is based on incorrect factual conclusions and on an erroneous application of the statutory requirement that agencies solicit as many offers as practicable when limiting full and open competition due to urgent and compelling circumstances.

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We affirm our decision.

On May 17, 1989, J&J was awarded contract No. DAKF40-89-D-0063, after submitting the lowest priced bid for housing maintenance services at Fort Bragg. Immediately after beginning performance on June 1, J&J began experiencing problems due to material discrepancies between the work estimates set forth in the solicitation, and the actual work required to be performed. Due to these difficulties, and faced with cash-flow problems related to withheld payments by the government, J&J essentially ceased performance of its contract on October 5. Shortly thereafter, J&J and the Army attempted to resolve these performance issues through negotiations. As a result of these negotiations, J&J agreed not to file a claim against the Army for the additional work not identified in the solicitation, and the contracting officer agreed to return monies withheld from J&J for failure to perform in accordance with the contract. In addition, in return for J&J's agreement not to file a claim, the contracting officer agreed to terminate J&J's fixed-price contract and award a cost-plus-award-fee contract to J&J effective November 1, 1989. This contract was to extend from November 1, 1989, through May 31, 1990, with one 6-month option.

In its protest, EPS claimed that the contract awarded to J&J on November 1 was a sole-source contract in violation of the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. §§ 2304 et seq. (1988). According to EPS, the Army improperly invoked the claim of urgency to limit competition, and improperly excluded EPS from the limited competition for the contract.

Our decision pointed out that agencies are permitted to use other than fully competitive 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). However, we noted that this authority does not automatically justify a sole-source award, as such authority is limited by the provisions at 10 U.S.C. § 2304(e), requiring agencies to request offers from as many potential sources as practicable under the circumstances. Consequently, sole-source awards are limited to instances where the agency reasonably believes that, due to the urgent circumstances, only one firm promptly and properly can perform the required work. Data Based Decisions, Inc., B-232663, B-232663.2, Jan. 26, 1989, 89-1 CPD ¶ 87.

Applying these principles, we held that the Army reasonably determined that urgent circumstances justified its decision to limit competition; however, we concluded that the Army improperly considered only J&J for award of the contract because the record did not support the Army's argument that only J&J was in a position to perform the requirement immediately. Specifically, the record showed that the Army recognized that other sources were available; that EPS advised the Army that it could begin performance on short notice if asked; and that EPS had performed the housing maintenance contract at Fort Bragg prior to award to J&J in May 1989. In addition, the record showed that the Army had promised J&J a sole-source contract in return for abandoning threatened litigation. The Army, on the other hand, never explained why EPS could not be considered for award and instead only generally questioned EPS' credibility and veracity. Thus, we sustained the protest, and recommended that the Army refrain from exercising the 6-month option in J&J's contract by either (1) conducting a fully competitive procurement based on a revised solicitation accurately reflecting the Army's needs; or (2) procuring the services on an interim basis if more time is needed to rewrite the solicitation.

In its reconsideration request, the Army first argues that we erred in concluding that the record did not suggest that the agency considered EPS to be nonresponsible. In support of this argument, the Army cites several documents in the record that it implies we overlooked or misunderstood in reaching this conclusion.1/

The Army did not argue that EPS was nonresponsible in its submissions in response to the original protest. The Army simply did not address squarely the protester's contention that it was prepared to perform on short notice the work J&J intended to abandon. Rather, the agency merely questioned whether EPS was generally credible.2/ In its request for

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1/ These documents include: portions of a draft U.S. Army Audit Agency report, the Contracting Officer's statement regarding the protest, a Determination and Finding document entitled "Authority to Enter Into a Cost Plus Award Fee Contract," and the Director of Contracting's Memorandum of Negotiation between the Army and J&J.

2/ The agency questioned EPS' credibility by quoting from a deposition transcript from several years ago on an unrelated matter where a representative of EPS admitted to telling a falsehood. It then indicated that it viewed the protester's offer to perform in the present case as incredible, and
(continued...)

reconsideration, the agency offers several reasons for this. It states that there was insufficient time to make a detailed responsibility determination and that the contracting officer "did not want to accuse EPS of improper conduct without all the facts." Although the contracting officer did not articulate nonresponsibility as the basis for excluding EPS, the Army states that "[l]ooking back, the decision not to include EPS was based on a reasonable belief that EPS could not either promptly or properly perform."

It is not our role to construct arguments for agencies or to make responsibility determinations with respect to prospective contractors. To the extent the Army's current argument that EPS was considered nonresponsible is based on information available during our initial consideration of the protest, that argument could have and should have been raised at that time. Department of the Navy--Request for Recon., B-228931.2, Apr. 7, 1988, 88-1 CPD ¶ 347; Newport News Shipbuilding and Dry Dock Co.--Request for Recon., B-221888.2, Oct. 15, 1986, 86-2 CPD ¶ 428. Failure to make such an argument in response to a protest undermines the goals of our bid protest forum--to produce fair and equitable decisions based on consideration of both parties' arguments on a fully developed record--and cannot justify reconsideration of our decision. Id. Here, we find unpersuasive the Army's contention that the information in the original record clearly establishes that the agency considered EPS nonresponsible, and thus justified the Army's exclusion of EPS from the limited competition.

As support for its argument that EPS was considered nonresponsible, the Army, for the first time, has provided to our Office, and to the protester, an Army Criminal Investigative Division (CID) report reviewing EPS' prior performance of the Fort Bragg family housing maintenance contract, and a memorandum detailing Fort Bragg's response to the findings in the draft Army Audit Agency report. The CID report was not mentioned in the Army's response to the initial protest, although the record included a negotiation memorandum authored by the Director of Contracting stating that J&J's claim "that the previous contractor had not performed the required seasonal maintenance on [heating and air conditioning units was] . . . supported to some extent by a CID investigation." This reference neither establishes

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2/(...continued)
suggested that the quoted deposition should indicate that the protester might not be truthful in its offer.

the existence of a written CID report nor the nonresponsibility of EPS. Further, parties that withhold or fail to submit all relevant evidence, information, or analyses for our initial consideration do so at their own peril. See Department of the Air Force--Reconsideration of Protest filed by Motorola, Inc., B-222181.2, Nov. 10, 1986, 86-2 CPD ¶ 542. These documents should have been produced by the Army during the initial protest; their production at this point will not result in a reconsideration of our decision. Id.

The Army next argues that our decision is legally incorrect to the extent it regards a potential contractor's responsibility as dispositive of whether the contractor properly has been excluded from a competition limited on the basis of urgency, since a contracting agency properly may exclude even responsible contractors where urgent circumstances so require. The Army has misread our decision. Our decision was based on the Army's failure to explain why it could not solicit EPS for award when EPS clearly possessed experience in performing this work and had advised the Army that it could perform on short notice if asked. Further, given the Army's refusal to consider EPS and its failure to justify that refusal, we also found significant the terms of the Army's settlement agreement with J&J, in which the Army promised J&J a sole-source contract as a quid pro quo for abandoning threatened litigation.3/ Thus, contrary to the Army's contention, our conclusion that EPS was improperly excluded from the competition was not based solely on a finding that EPS is a responsible contractor.

We have received a May 21 letter from the Army detailing the agency's response to the recommendation for corrective action in our initial decision sustaining EPS' protest. According to that letter, the Army has, as we requested, issued a solicitation for work to be performed after the initial year of the protested contract rather than exercise a 6-month option. The agency is now considering suspending or debarring EPS from participating in federal contracting pursuant to Federal Acquisition Regulation subpart 9.4., and

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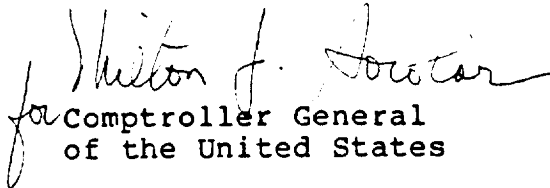
3/ In its reconsideration request, the Army argues that such agreements are permissible if the quid pro quo offered in settlement complies with all applicable statutes and regulations. We agree. See Techplan Corp., 68 Comp. Gen. 429 (1989), 89-1 CPD ¶ 452. Here, however, the Army's failure to justify EPS' exclusion on any other permissible basis rendered the sole-source contract improper. Thus, the settlement agreement proposed an action that did not comply with applicable statutes.

it believes that EPS will be found nonresponsible in the new competition. We consider such a determination to be independent of our decision in the EPS protest and it may be based upon the facts now available to the contracting officer. However, the agency's judgment about the protester's responsibility to perform the work under the new solicitation does not provide grounds for reconsideration of our prior decision.

Our decision is affirmed.



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