



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Test Systems Associates, Inc.

File: B-244007.4; B-244007.5

Date: May 1, 1992

Albert J. Bauer for the protester,
Katherine S. Nucci, Esq., Dykema Gossett, for Access
Research Corporation, an interested party,
Joseph M. Goldstein, Esq., and Robert O. D'Ambrosio, Esq.,
Department of the Air Force, for the agency.
Aldo A. Benejam, Esq., and Christine S. Melody, Esq., Office
of the General Counsel, GAO, participated in the preparation
of the decision.

DIGEST

1. Under its Bid Protest Regulations, the General Accounting Office (GAO) will reverse a prior decision on reconsideration only where the requester shows that it contains errors of fact or law or that GAO failed to consider relevant information.

2. Protest challenging the noncompetitive award of a follow-on contract on the basis that awardee has an organizational conflict of interest that renders it ineligible for award is dismissed as untimely where the protest was not filed with General Accounting Office within 10 working days after the protester knew or should have known of its protest basis.

DECISION

Test Systems Associates, Inc. (TSAI) requests reconsideration of our decision in Dep't of the Air Force--Recon., B-244007.3, Mar. 17, 1992, 92-1 CPD ¶ ____, modifying our prior decision, Test Sys. Assocs., Inc., 71 Comp. Gen. 33 (1991), 91-2 CPD ¶ 367, in which we sustained TSAI's protest against the noncompetitive award of a follow-on contract to the incumbent, Access Research Corporation (ARC), under request for proposals (RFP) No. F41608-91-R-44874, issued by the Department of the Air Force for independent validation and verification (IV&V) of hardware and software for the

EF/F/FB-111 Avionics Intermediate Shop Replacement (AIS-R) System.¹ Since new information provided by the Air Force following our initial decision indicated that our recommendation was no longer practicable, we modified our decision by deleting the recommendation that the agency compete the requirement. TSAI now requests that we reconsider our conclusion that competing the requirement is impracticable. TSAI also protests the award, this time alleging that ARC has an organizational conflict of interest that renders the firm ineligible for award.

We deny the reconsideration request and dismiss the protest.

BACKGROUND

The Air Force published a notice of sole-source negotiations with ARC in the Commerce Business Daily (CBD) on April 5, 1991, and subsequently issued the RFP on May 30 as a sole-source solicitation contemplating a follow-on contract to ARC's then current IV&V contract. The RFP contemplated a time and materials contract for 1 base year and 1 option year. In its protest to our Office, TSAI challenged various provisions of the RFP as inadequate and unduly restrictive of competition, and as improperly limiting the competition to ARC.

We sustained TSAI's protest based upon our finding that the Air Force had provided no evidence substantiating its assertion that a competitive award to a source other than ARC would likely result in substantial duplication of costs to the government that are not expected to be recovered through competition. See 10 U.S.C. § 2304(d)(1)(B) (1988); Federal Acquisition Regulation (FAR) § 6.302-1(a)(2)(iii). Accordingly, we recommended that the Air Force draft a solicitation that allowed full and open competition for the required services, and that it satisfy its need for IV&V services through a competitive procurement.

The agency subsequently requested that we reconsider our decision on the basis that, among other things, changed circumstances related to the procurement rendered our recommendation impracticable.² Based on that new

¹The contract is to provide IV&V services for hardware, software, support equipment and data being acquired by the Air Force from Westinghouse Electric Corporation under contract No. F41608-83-C-0111.

²The Air Force stated that several program changes had affected the rate of delivery of data and equipment under the Westinghouse contract. As a result of those changes, the agency anticipated that Westinghouse's contract will be

information, we agreed with the agency that competing the requirement was no longer practicable. Specifically, we found that it would take approximately 6 months for a new IV&V contractor to become functionally familiar with the complexities of the AIS-R program. We thus concluded that since the Westinghouse contract supported by the IV&V contractor will be substantially complete within 9 months, drafting a competitive RFP, competing the requirement, as previously recommended, and bringing a new contractor into the program for that relatively brief period, would be impracticable. Accordingly, we modified our decision in Test Sys. Assocs., Inc., to delete the recommendation that the agency compete the requirement.

RECONSIDERATION REQUEST

In its reconsideration request, TSAI argues that we erred in concluding that competing the requirement would be impracticable. TSAI points to the original terms of the RFP for IV&V services, which contemplated the award of a contract for a base year with a 1-year option. According to TSAI, the RFP establishes the completion date for ARC's IV&V contract, including the option period, at around May 1993. TSAI does not dispute that the Westinghouse contract will be completed or substantially completed by December 1992, but argues that given the terms of the RFP, it doubts that ARC's IV&V contract will actually be completed by December 1992, implying that the agency thus has ample time to conduct a competitive procurement.

Under our Bid Protest Regulations we will reverse our prior decision upon reconsideration only where the requester shows that it contains either errors of fact or law or that we failed to consider information that was not available when the initial protest was filed. 4 C.F.R. § 21.12(a) (1992). TSAI has not met this standard here.

Despite the original RFP terms, it appears that ARC was not awarded a contract for a base period and an option year. Rather, the Air Force states, it awarded the IV&V contract to ARC for only a 9-month period of performance, to coincide with the anticipated completion of the Westinghouse contract. Although TSAI speculates that the contract will continue for a longer period, there simply is no support in the record for this position. Thus, as we stated in our

substantially completed by December 1992. The agency further stated that as of October 30, 1991, Westinghouse and its principal subcontractor had experienced massive layoffs, directly affecting the AIS-R program, arguing that in light of these personnel changes, it is important to maintain continuity with ARC's experienced IV&V personnel.

prior decision modifying our original recommendation, since it would take approximately 6 months for a new IV&V contractor to become familiar with the AIS-R program, competing the requirement would clearly be impracticable.

TSAI'S PROTEST OF AWARD

TSAI also protests the award to ARC, this time alleging that ARC has an organizational conflict of interest that renders the firm ineligible for award. According to TSAI, the Air Force provided a notice of sole-source negotiations with ARC in the CBD on July 11, 1990, for expert and consultant services under a separate RFP, which resulted in a non-competitive award to ARC soon thereafter.³ TSAI states that under that contract, ARC is required to assist the Air Force to investigate and support the agency's position regarding claims submitted by Westinghouse against the Air Force under Westinghouse's contract. TSAI essentially argues that ARC will not be able to provide objective, impartial IV&V services to the Air Force while simultaneously supporting the agency's position relative to Westinghouse's claims. See FAR § 9.501.

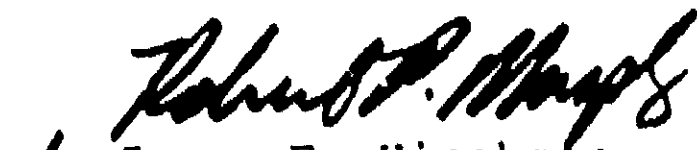
The Air Force and ARC request that we dismiss TSAI's protest as untimely filed. In support of their requests, these parties assert that TSAI was on actual notice of the sole-source negotiations with ARC regarding the expert and consultant services contract from the July 11, 1990, CBD announcement, and that TSAI was aware of the resulting contract. The agency and ARC thus argue that any objections TSAI may have to the award of the IV&V services contract to ARC on conflict of interest grounds had to have been filed within 10 working days from April 5, 1991, when TSAI learned of the proposed sole-source negotiations with ARC for the IV&V services contract from the CBD announcement. See 4 C.F.R. § 21.2(a)(2). The agency and the interested party argue that since TSAI did not raise the conflict of interest issue in its original protest, and did not file the instant protest with our Office until March 30, 1992, its protest is untimely. TSAI concedes that it did not raise the conflict of interest issue in its original protest, but argues that "the public interest in preventing conflicts of interests" in government procurements justifies our considering its protest at this time.

³Although TSAI states that it identified to the Air Force other sources that could then perform the expert and consultant services, our records indicate that TSAI did not challenge the subsequent noncompetitive award of that contract to ARC to our Office.

Our Bid Protest Regulations contain strict rules requiring timely submission of protests. Under these rules, protests not based upon alleged improprieties in a solicitation must be filed no later than 10 working days after the protester knew, or should have known, of the basis for protest, whichever is earlier, 4 C.F.R. § 21.2(a)(2). Our timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. Air Inc.--Recon., B-238220.2, Jan. 29, 1990, 90-1 CPD ¶ 129. We may, in a given case, invoke the significant issue exception to our timeliness rules when, in our judgment, the circumstances of the case are such that our consideration of the protest would be in the interest of the procurement system. See Golden North Van Lines 69 Comp. Gen. 610 (1990), 90-2 CPD ¶ 44. In order to prevent the timeliness requirements from becoming meaningless, we will strictly construe and seldom use the significant issue exception, limiting it to protests that raise issues of widespread interest to the procurement community, see, e.g., Golden North Van Lines, Inc., supra, and which have not been considered on the merits in a previous decision. DynCorp, 70 Comp. Gen. 38 (1990), 90-2 CPD ¶ 310.

Here, given that TSAI was on notice that ARC had been performing the expert and consultant services contract since mid-1990, TSAI's protest of the award to ARC of the IV&V services contract on conflict of interest grounds, filed on March 30, 1992, nearly 12 months after TSAI learned of the proposed award of that contract, is clearly untimely. Further, we do not think that considering an untimely protest against an alleged improper award of a follow-on contract on the basis that the awardee has an organizational conflict of interest presents an issue of such widespread interest as to justify invoking the exception to our timeliness rule. We have numerous decisions addressing challenges to the award of contracts on organizational conflict of interest grounds. See, e.g., D.K. Shifflet & Assocs., Ltd., B-234251, May 2, 1989, 89-1 CPD ¶ 419; ESCO, Inc., 66 Comp. Gen. 404 (1987), 87-1 CPD ¶ 450; Designers and Planners, Inc. et al., B-221385 et al., May 15, 1986, 86-1 CPD ¶ 463. While we recognize the importance of the matter to the protester, we do not regard TSAI's protest as raising a significant issue under our Regulations.

The reconsideration request is denied and the protest is dismissed.


for James F. Hinchman
General Counsel