GORCZYCKI

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Stephens Engineering Company, Inc.

File: B-247601

Date: June 22, 1992

Charles E. Talisman, Esq., and Curtis V. Gomez, Esq., Patton, Boggs & Blow, for the protester.
Major Bobby G. Henry Jr., Department of the Army, for the agency.
Donald A. Morrison, Esq., and David R. Kohler, Esq., for the Small Business Administration.
Henry J. Gorczycki, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency has no obligation to continue acquiring computer repair services from a section 8(a) incumbent contractor after its service term under a delivery order is completed and may solicit offers for the services without restricting the competition.

DECISION

Stephens Engineering Company, Inc. protests the issuance of request for proposals (RFP) No. DAJA37-92-R-0011 by the United States Army, Europe (Army-Europe) for the repair of computer equipment on a per-call basis. Stephens argues that the agency should not have issued the RFP because it is already obtaining the service under a contract negotiated under section 8(a) of the Small Business Act, as amended, 15 U.S.C. § 637(a) (1988 and Supp. II 1990), with the Small Business Administration (SBA), to which Stephens is the subcontractor.

We deny the protest.

On May 4, 1990, the Army Information System Selection and Acquisition Agency (Army-ISSAA), Alexandria, Virginia, negotiated contract No. DAHC94-90-D-0002 for a fixed-price, indefinite delivery/indefinite quantity contract for on-call computer repair services. This contract, negotiated under the section 8(a) program, named SBA as the prime contractor

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and Stephens as the subcontractor. The contract did not provide for mandatory users, but gave various activities the option to order under the contract. Army activities located throughout the continental United States, Europe, and Asia could place orders with Stephens for services at fixed monthly rates. Stephens was required to maintain a minimum of one service center in each of these three geographic regions. The indefinite quantity contract only guaranteed Stephens a minimum of $75,000 in orders.

The contract was for the base period extending through September 1990, and provided for four option periods extending through March 1994; the first two options have been exercised. On September 20, 1991, Army-Europe issued delivery order No. G603 to Stephens under the Army-ISSAA contract for the repair of computer equipment from October 1, 1991, through September 30, 1992. The total price of this delivery order was $3,313,165.44. This delivery order contained no options or provision for extension of the service term.

Subsequent to issuing the delivery order, Army-Europe determined that, due to a low equipment failure rate, it could save more than $2 million by acquiring computer repair services on a fixed-price, per-call basis rather than on the on-call, fixed monthly rate basis under the Army-ISSAA contract with SBA/Stephens. Thus, Army-Europe, on January 2, 1992, issued this RFP, which contemplates award of a fixed-price, per-call requirements contract.

In its initial protest, Stephens alleged, among other things, that issuance of the RFP was improper because Army-Europe was planning to terminate the services procured under its delivery order without consulting with SBA, as allegedly required by applicable laws and regulations. Army-Europe denies any intent to terminate the delivery order. On February 20, Army-Europe issued an amendment to the RFP, which included a statement specifying that the award date would be September 1 and performance would begin October 1. Since the delivery order placed under the Army-ISSAA contract expires on September 30, the amendment confirms Army-Europe's position that it will not terminate the delivery order.

Stephens now asserts that Army-Europe's issuance of the RFP is akin to a termination of a section 8(a) program contract or to a decision not to exercise an option of such a contract. Stephens states that SBA regulations require that contract terminations be made in cooperation with SBA, see 13 C.F.R. § 124.319(b) (1992), and that decisions affecting

the exercise of an option be made in the best interest of the government considering the purposes of the section 8(a) program. See 13 C.F.R. § 124.318(b). Stephens argues that Army-Europe violated these regulations because it did not consult with SBA, nor did it consider the effects that issuing the RFP would have on the section 8(a) program contractor.

We do not agree that the Army's actions here are akin to a contract termination or a decision not to exercise an option such that the SBA regulations would apply. Termination of a contract involves a cutting short of contract performance, in whole or in part, prior to the end of the specified performance period or prior to the contractor's completion of the work called for by the contract. Option exercise refers to the government's decision to extend or not extend the performance period pursuant to a contract clause granting the government the right to make that decision. There is nothing akin to termination occurring here as the RFP, as amended, calls for performance to begin only after expiration of the period covered by the delivery order. Further, while a decision to conduct a competitive acquisition for the following year's services instead of issuing a new delivery order is similar to a decision not to exercise an available option in terms of the effect on the contractor, the SBA regulation, by its own terms, does not apply to decisions about ordering or not ordering under a non-mandatory indefinite quantity contract.[1]

Citing our decision in San Antonio Gen. Maint., Inc., B-240114, Oct. 24, 1990, 90-2 CPD ¶ 326, Stephens asserts that SBA must at least review Army-Europe's decision not to acquire repair services under the Army-ISSAA section 8(a) program contract after the current delivery order expires. San Antonio Gen. Maint., Inc. did not involve a determination whether to repeat a section 8(a) program procurement; rather, that decision interpreted 13 C.F.R. § 124.309(c)(2), which precludes a section 8(a) program acquisition that adversely impacts an incumbent small business contractor. Neither San Antonio Gen. Maint., Inc. nor 13 C.F.R. § 124.309(c)(2) requires SBA participation in Army-Europe's decision to contract for services using full and open competition after the expiration of a delivery order issued under the Army-ISSAA section 8(a) contract.

Stephens also asserts that Army-Europe's issuance of the RFP violates Federal Acquisition Regulation (FAR) § 19.501(g). Stephens contends that FAR § 19.501(g) requires an agency

[1]In its report on the protest, SBA confirms the nonapplicability of those regulations to the present situation.

that has conducted a procurement under the section 8(a) program to continue to conduct future procurements under that program. FAR § 19.501(g), by its own terms, only applies to small business set-asides. An award under the section 8(a) program is not an award under a small business set-aside. See Logistical Support, Inc., B-232303.2, Sept. 13, 1988, 88-2 CPD ¶ 241; compare FAR Subpart 19.5 with FAR Subpart 19.8. Therefore, FAR § 19.501(g) has no application to Stephens as the section 8(a) incumbent contractor.[2]

Stephens next contends that Army-Europe has violated the Federal Information Resources Management Regulation (FIRMR), which generally requires the sharing and reuse of existing federal information processing (FIP) resources. Stephens asserts that the servicing center, which the Army-ISSAA contract required Stephens to establish in Europe, is an existing FIP resource that Army-Europe should share, and that Army-Europe's acquisition of repair services without using the Army-ISSAA contract will result in duplication of the services supplied by Stephens's center.

The FIRMR requires an agency seeking to acquire FIP resources to consider alternatives to satisfying its requirements, such as using existing FIP resources on a shared basis, and to determine the approach that will be most advantageous to the government. FIRMR §§ 201-17.001(d)(1), 201-20.203-1. Here, even assuming the service center established by Stephens under the terms of the Army-ISSAA contract is an existing FIP resource, see FIRMR § 201-4.001, we find the agency reasonably considered the possibility of using this resource before issuing the RFP. In this regard, prior to issuing the RFP, Army-Europe compared its fixed monthly cost of repair services under the Army-ISSAA contract with the cost it would incur by procuring repair services on a per-call basis. Army-Europe concluded that procuring on a per-call basis would save the agency more than $2 million a year. Therefore, even assuming that Army-Europe's issuance of a contract under the RFP would result, as Stephens asserts, in duplicating the service center established under the Army-ISSAA contract, Army-Europe's acquisition does not violate the FIRMR because it reasonably found the RFP represents a more advantageous alternative.

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[2]The regulation governing repetitive section 8(a) program acquisitions is found at FAR § 19.804-4; it imposes no obligation upon the procuring agency to repeat an acquisition under the section 8(a) program.

Finally, Stephens asserts that restrictive RFP terms demonstrate that Army-Europe acted in bad faith to exclude Stephens from competing under the RFP or to favor other prospective contractors over Stephens. For instance, Stephens asserts that Army-Europe did not include a provision implementing Article 73 of the North Atlantic Treaty Organization (NATO) Status of Forces Agreement (SOFA) in the RFP, and that Stephens could not be competitive with other prospective contractors as a result.

The SOFA establishes the rights and obligations of military forces of NATO nations (and their civilian components) which might be stationed in the territory of other member nations. Article 73 of the SOFA allows the United States to provide logistical support[3] for certain contractor personnel (technical experts) serving United States forces in the Federal Republic of Germany, thus allowing it to provide such personnel the same logistic support as that provided members of the civilian component of United States forces. See generally Theater Aviation Maint. Servs., B-233539, Mar. 22, 1989, 89-1 CPD ¶ 294. The provision of logistical support for technical experts apparently serves to aid the United States in supplying its military forces in Germany with necessary United States citizen civilian personnel, and does not appear to be intended to facilitate the competitive process of federal procurements. Id. Here, Army-Europe has no requirement for United States citizen personnel in this procurement as the work can be performed by foreign nationals; thus, it did not provide for contractor personnel logistical support. This does not provide a basis to infer that the agency acted to exclude a prospective contractor from the competition or to favor one contractor over another; it means only that vendors that choose to compete must decide whether to use foreign nationals for contract performance or bear the extra expense of using United States citizens.

[3]Logistical support includes such benefits as quarters, recreation facilities, communications, banking, laundry, vehicle registration, petroleum and oil products, base exchange, medical and dental services on a reimbursable basis and access to Department of Defense schools on a tuition paying basis.

From our review, there is no evidence of bad faith, as alleged by Stephens, in Army-Europe's decision to issue and structure the RFP as it did.[4] Thus, we find no merit to this last allegation.

The protest is denied.

Robert P. Murphy
for James F. Hinchman
General Counsel

[4]There is no evidence to support Stephens's assertion that various Army contacts with its subcontractors constituted bad faith dealings; such contacts may constitute appropriate procurement planning.