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Bednarz



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Laidlaw Environmental Services (GS), Inc.;
International Technology Corporation--Claim
for Costs

File: B-249452; B-250377.2

Date: November 23, 1992

William E. Hughes III, Esq., Whyte & Hirschboeck, for Laidlaw Environmental Services (GS), Inc; and Dorn C. McGrath III, Esq., Saul, Ewing, Remick & Saul for International Technology Corporation. Paul M. Fisher, Esq., and Cynthia Guill, Esq., Department of the Navy, for the agency. Christine F. Bednarz, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency improperly extended an interim services contract on a sole-source basis where it did not establish that only the incumbent contractor could provide the services within the required time frame and where it could have avoided the urgency that ultimately led to the sole-source award through advance procurement planning.
2. Awardee alleging protective order violation by a competitor is not entitled to the costs of filing and pursuing a protest seeking the competitor's exclusion from the competition on a follow-on contract or the material's release to the awardee, where the agency did not originally designate the material in question as protected, only designated the material as protected in response to the awardee's untimely insistence for protective order coverage, and then released the material from coverage in response to the awardee's protest.

DECISION

Laidlaw Environmental Services (GS), Inc. protests the sole-source extension of a contract for waste management services to International Technology Corporation (ITC), awarded under request for proposals (RFP) No. N62474-92-R-1010, issued by the Department of the Navy, Public Works Center, San Francisco. In addition, ITC claims costs for filing a protest against the release of alleged procurement sensitive

information to Laidlaw contained in the agency report filed in response to Laidlaw's protest.

We sustain Laidlaw's protest and deny ITC's claim for costs.

LAILAW'S PROTEST

The Navy issued the RFP on March 9, 1992, for the procurement of hazardous waste management services for various Department of Defense activities within the San Francisco Bay area, including collection, transportation, identification, packaging, and disposal services. On March 19, 1992, the Navy issued a written justification to limit the competition to four sources, including the protester and the awardee, pursuant to the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2304(c)(2) (1988).¹ The justification stated that the incumbent contract for waste management services, held by the protester, was to expire on March 31, 1992, and that the agency could not conduct a competition for the follow-on contract to be effective by that date because the proposed solicitation needed major technical revisions. Since it required continuity of these critical waste management services, the Navy decided to issue the RFP for interim services until it could compete the follow-on contract. The RFP specified a 3-month performance period, commencing on April 1 through June 30, 1992, and did not include any option periods or other provision to extend that contract.

Three offerors responded to the RFP, which included both firm, fixed-price line items and indefinite quantity line items, by the amended March 23, 1992, proposal receipt date. The Navy evaluated the offers consistent with the RFP's evaluation criteria, which provided for award to the low-priced, responsible offeror whose proposal conformed to the RFP. Based upon this criteria, the Navy selected ITC's low-priced offer for award in the amount of \$797,343.15; the protester's offer was next low in the amount of \$893,562.50.

On March 27, 1992, the Navy awarded the contract to ITC and also issued Modification P0001, which incorporated the clause at Federal Acquisition Regulation (FAR) § 52.217-8, authorizing the government to extend performance under the contract for a period not to exceed 6 months. ITC commenced performance 5 days after award on April 1, 1992.

¹This provision permits an agency to use non-competitive procedures when its needs are of such an unusual and compelling urgency that a competition would seriously injure the government's interests.

On June 19, 1992, Laidlaw wrote the Navy to express an interest in competing for its waste management requirements after the June 30 expiration of ITC's interim contract until the follow-on contract was awarded. Laidlaw's letter advised that it could submit a proposal with 2 days notice and could begin performance as of July 1, 1992, with the same staff which had served the Navy for a 3-year period ending in April 1992.

The Navy did not respond to this letter. Instead, on June 29, 1992, the day before the interim contract was to expire, it exercised the 6-month option to extend ITC's interim contract, from July 1, 1992, to December 31, 1992.² None of the other offerors were given an opportunity to compete for the option services. On July 16, 1992, Laidlaw protested that the Navy's extension of the interim contract amounted to an improper sole-source award in circumvention of CICA's competition requirements.³

On August 13, 1992, in response to Laidlaw's protest, the Navy issued a written justification and approval authorizing the sole-source extension of the interim contract on grounds that an unusual and compelling urgency existed for these services, pursuant to CICA, 10 U.S.C. § 2304(c)(2). According to the justification, it was necessary to extend the interim contract until the Navy could revise the technical specifications and compete the follow-on contract; otherwise, an interruption of these services would create environmental, health and safety hazards, and would expose the government to non-compliance fees of up to \$25,000 a day. In addition, the justification stated that only ITC possessed "the unique capability, technical knowledge, professional competence, established work procedures and equipment in place to assure continuity of services,"

²The Navy executed a written determination and finding justifying the exercise of the option, and ITC agreed to perform during the option period at its base period prices.

³Laidlaw timely filed this protest within 10 days of receiving information from the contracting officer on July 6, 1992, that the Navy had exercised a 6-month option to extend the interim contract, an option of which Laidlaw did not or could not reasonably have had knowledge. 4 C.F.R. § 21.2(a)(2) (1992). Contrary to ITC's assertion, Laidlaw diligently pursued the information forming the basis of its protest, but its earlier inquiries into the Navy's acquisition plans, e.g., Laidlaw's June 19 letter expressing an interest in any follow-on procurement, received no response. See Mine Safety Appliance Co., 69 Comp. Gen. 562 (1990), 90-2 CPD ¶ 11.

estimating that a new contractor would consume up to 3 months to mobilize.

In the agency report on this protest, the Navy explained that it could not have anticipated the delay it experienced in competing the follow-on contract, because the need to revise the technical specifications arose during ITC's performance under the interim contract. According to the Navy, ITC's administration of the interim contract disclosed incomplete and unsatisfactory work under Laidlaw's predecessor contract, which the Navy needed to address in the specifications to the follow-on contract. Also, during the period of the interim contract, the Navy Public Works Center was charged with providing waste management services to additional San Francisco military installations, expanding the work requirements under both the interim and follow-on contracts. In consideration of these expanded requirements, the Navy doubted whether another contractor could mobilize within the 5-day time frame attained by ITC in performing the interim contract. Thus, the Navy asserts that only ITC could perform these urgent services within the required time frame.

A contract extension beyond the scope of a contract is only proper if separately justified as a noncompetitive procurement under CICA.⁴ Acumenics Research and Tech., Inc.-- Contract Extension, B-224702, Aug. 5, 1987, 87-2 CPD ¶ 128. CICA generally requires agencies to obtain full and open competition through the use of competitive procedures, although an agency may limit the number of sources from which it solicits proposals where its need for the property or services is of such an unusual and compelling urgency that the United States would be seriously injured if competitive procedures were employed. 10 U.S.C. §§ 2304(a)(1), (c)(2). CICA requires agencies to request offers from "as many potential sources as is practicable under the circumstances," 10 U.S.C. § 2304(e), but the agency may limit the procurement to the only firm it reasonably believes can properly perform the work in the available time, so long as the agency did not create the need for the sole-source award from a lack of advance planning. Resource Consultants, Inc., B-221860, Mar. 27, 1986, 86-1 CPD ¶ 296. We will object to the agency's decision to limit competition on grounds of urgency if the determination lacks a reasonable basis. Colbar, Inc., B-230754, June 13, 1988, 88-1 CPD ¶ 562.

⁴The Navy concedes that the 6-month option was outside the scope of the 3-month contract and effectively constituted a new procurement. We agree. See Sanchez Porter's Co., 69 Comp. Gen. 426 (1990), 90-1 CPD ¶ 433 (3-month extension to a 3-month interim contract must be justified under CICA).

In this case, although urgent circumstances arguably warranted the use of non-competitive procedures pending a competition for the follow-on contract, the Navy's decision to consider only ITC for the additional services was unreasonable. The Navy conducted a limited competition for the interim contract within a very accelerated time frame, issuing the solicitation on March 9, awarding the contract on March 27, and requiring performance 5 days later, on April 1, 1992. The Navy and awardee were able to meet this accelerated schedule satisfactorily.

The Navy states that its expanded work requirements precluded a similarly rapid mobilization by another contractor. However, the Navy has not described any of those additional work requirements. In fact, under the 6-month option, ITC agreed to the same scope of work and the same schedule as the original award. Laidlaw advised the Navy on June 19, 1992, that it could commence performance by the July 1 expiration of the interim contract, since it had performed the predecessor contract for these services for a 3-year period ending March 31, 1992. While the Navy now states that it has discovered "incomplete and unsatisfactory work under [Laidlaw's] predecessor contract," it has not described any of those alleged problems. Unless the Navy found Laidlaw nonresponsible and thus ineligible to compete under FAR § 9.103(b), Laidlaw was a potential source entitled to the opportunity to compete. Sanchez Porter's Co., supra.

We find no evidence in the record to support the Navy's claim that only ITC was in a position to perform these services and that any other contractor, including Laidlaw, would face a significant mobilization period before it attained an effective level of performance. See Earth Prop. Servs., Inc., B-237742, Mar. 14, 1990, 90-1 CPD ¶ 273. In our view, the urgent circumstances leading to this sole-source contract extension resulted from the Navy's failure to adequately plan for the procurement in advance. On the same day it awarded the interim contract to ITC, the Navy amended the contract by authorizing up to a 6-month option to extend. Yet the Navy neither provided offerors with an opportunity to compete for the additional requirements at that time or during the 3-month interim contract.⁵ Based on the record, it is apparent that the Navy did not properly plan in advance for its requirements and this sole-source contract was unjustified. See K-Whit Tools, Inc., B-247081, Apr. 22, 1992, 92-1 CPD ¶ 382.

⁵Laidlaw states that it would have offered a lower price for 9 months of services (the interim contract plus the option) than for 3 months of services.

Laidlaw's protest is sustained.

ITC has substantially performed the interim contract, which expires on December 31, 1992, and the agency advises that the competition and award of the follow-on contract will be complete by that time. Given the imminent expiration of the interim contract and award of the follow-on contract, it is impracticable to recommend corrective action. However, the protester is entitled to the costs of filing and pursuing this protest, including attorneys' fees. 4 C.F.R. § 21.6(d)(1). The protester should submit its claim for costs directly to the agency. 4 C.F.R. § 21.6(e).

INTERNATIONAL TECHNOLOGY CORPORATION--CLAIM FOR COSTS

ITC requests that our Office declare it entitled to recover the reasonable costs of filing and pursuing a protest in which it alleged a violation of a protective order in connection with the Laidlaw protest, and sought the exclusion of Laidlaw from the competition for the follow-on contract. Specifically, ITC claims that Laidlaw's counsel provided the Laidlaw contracts administrator, who was not admitted to the protective order, with procurement sensitive information in a legal memorandum accompanying the agency report on Laidlaw's protest.

Our Office issued a protective order associated with Laidlaw's protest on July 27, 1992, pursuant to 4 C.F.R. § 21.3(d). Under the protective order, only persons admitted could have access to material designated as protected. Counsel for Laidlaw and ITC were admitted to the protective order.

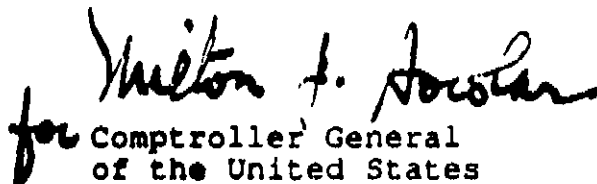
We received the agency report on Laidlaw's protest on August 14, 1992. The Navy did not designate the legal memorandum accompanying the report as protected. On September 2, 1992, counsel for ITC alerted our Office to the possibility that Laidlaw had violated the protective order by releasing procurement sensitive information contained in the agency legal memorandum to its contracts administrator, even though the Navy had not designated any portion of its memorandum as protected. Under the protective order, interested parties are required to designate additional documents they wish designated as protected within 2 days of receipt of the agency report.

The Navy reviewed its memorandum and determined that two statements were arguably protected: the anticipated award date for the follow-on contract and the Navy's request that our Office not recommend corrective action in the event Laidlaw's protest were sustained. Counsel for Laidlaw agreed to retrieve any released copies and to reissue them with appropriate redactions. ITC then requested permission

to release an unredacted copy of the memorandum to its client. When the Navy declined to agree, ITC protested to our Office on September 15, that Laidlaw should be excluded from competing for the follow-on contract because ITC had suffered a competitive disadvantage--it could not release an unredacted copy of the legal memorandum when Laidlaw had already released a copy to its client. On the next day, the Navy waived any objection to ITC's release of a complete copy of the legal memorandum to its client and we dismissed ITC's protest as academic.

ITC has now filed a claim for the costs of filing and pursuing its protest about release of the Navy's legal memorandum to its client. A protester may recover the reasonable costs of filing and pursuing a protest, including attorneys' fees, if the contracting agency unduly delays taking corrective action in response to a clearly meritorious protest. See Oklahoma Indian Corp.--Claim for Costs, 70 Comp. Gen. 558 (1991), 91-1 CPD ¶ 558. The Navy's removal of the legal memorandum from protective order coverage cannot reasonably be characterized as corrective action responsive to a clearly meritorious protest. The Navy originally released the memorandum as unprotected, and we think that ITC's counsel was free to release an unredacted copy to its client as Laidlaw's counsel had. Instead, ITC belatedly characterized Laidlaw's release of the memorandum as a protective order violation and succeeded in gaining the memorandum's designation as protected. ITC's subsequent and contradictory protest to release the memorandum from protective order coverage received no objections from the agency, which promptly (within 1 day) acceded to ITC's request. These circumstances provide no basis to declare ITC entitled to the recovery of protest costs.

The claim for costs is denied.


for Comptroller General
of the United States