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

Decision

Matter of: DOD Contracts, Inc.

File: B-250603.2

Date: March 3, 1993

Daniel A. Bellman, Esq., Porter, Wright, Morris & Arthur, for the protester.
Ronald M. Pettit, Esq., Defense Logistics Agency, for the agency.
M. Penny Ahearn, Esq., David Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency's award of a non-competitive sole-source contract based on urgency, in lieu of exercising option under protester's contract, was unobjectionable where agency reasonably determined that the protester's poor financial condition rendered the firm unable to perform satisfactorily; referral to the Small Business Administration for a certificate of competency review was not required under these circumstances.

DECISION

DOD Contracts, Inc. (DCI), a small business, protests the the Defense Logistics Agency's (DLA) sole-source award of a contract to Licking-Knox Goodwill Industries, Inc. (Goodwill), under request for proposals (RFP) No. DLA710-93-C-0001, for janitorial and custodial services at the Defense Construction Supply Center (DCSC), Columbus, Ohio. DCI argues that DLA's justification of the noncompetitive award to Goodwill was improper, and that exclusion of the firm from award consideration should have been referred to the Small Business Administration (SBA) for a certificate of competency (COC) review.

We deny the protest.

DLA awarded contract No. DLA710-88-C-0075 to DCI in 1988; the contract included a base year and 4 option years, with the final option year, if exercised, commencing on October 1, 1992. Beginning in February 1992, DLA became aware that DCI was experiencing financial difficulties, including: (1) the stopping of trash pick-up and disposal

services by DCI's subcontractor on the incumbent contract due to nonpayment of the amounts owed the subcontractor by DCI; (2) the return of employees' pay checks for insufficient funds on two other government contracts held by DCI; and (3) a levy by the Internal Revenue Service on the contract proceeds arising under the incumbent contract based on $432,944 in back taxes and penalties owed by DCI.

Based on this information, DLA began considering alternatives to obtaining the services under its contract with DCI. In the meantime, DLA experienced further difficulties with DCI, including monetary judgments against DCI obtained by third party creditors with respect to the incumbent contract and DCI's having insufficient funds to pay workers' compensation insurance under another government contract. By July 1992, however, alternatives to exercise of the option appeared unfeasible because of insufficient time, and DLA therefore decided to exercise the final option year under DCI's incumbent contract if DCI could be determined financially responsible.[1] In this regard, a DLA survey of DCI's financial condition resulted in a recommendation to exercise the final option year if a personal guarantee offered by DCI's president proved satisfactory.

On August 28, prior to making a final decision on exercising the option, the contracting officer learned that DCI's president was the subject of an investigation by the United States Attorney's Office and that an indictment was being sought based on alleged misconduct in relation to the offer of personal assets to guarantee the performance of government contracts, including inflating the value of personal assets and using the same collateral to guarantee more than one contract. Based on this information, the contracting officer requested additional data from DCI's president in order to assure sufficient unencumbered personal assets to guarantee performance of the remaining option. After reviewing the additional information submitted by DCI, the contracting officer determined that DCI's president had insufficient unencumbered assets to provide an adequate personal guarantee. Specifically, DLA considered the fact that DCI's balance sheet showed that DCI's liabilities ($1,472,993) exceeded its total assets

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[1]These alternatives included obtaining the services through the National Industries for the Severely Handicapped (NISH), pursuant to the Javits-Wagner-O'Day Act, 41 U.S.C. § 46-48(c) (1988 and Supp. III 1991). DLA learned, however, that insufficient time existed for DCSC to be placed on the NISH procurement list before the end of the then-current contract period.

($507,000) by $965,993, thus making the firm insolvent. The personal guarantee offered by DCI's president was not supported by sufficient unencumbered assets to overcome DCI's negative net worth of $965,993.

On September 14, 1992, the contracting officer concluded that DCI was financially nonresponsible, and that it was not in the best interest of the government to exercise the option, even though the custodial and trash disposal services are deemed essential to the operation of DCSC. On September 16 the contracting officer determined, pursuant to 10 U.S.C. § 2304(c)(2) (1988) and Federal Acquisition Regulation (FAR) § 6.302-2(a)(2), that unusual and compelling urgency existed which required the use of other than full and open competition in order to procure the required services. Shortly thereafter, on September 18, DLA made award to Goodwill, the only known source familiar with and capable of performing the requirement.[2]

DCI argues that DLA improperly precluded it from competing for the award based on urgency, and that since the agency's decision to make a sole-source award to Goodwill instead of extending DCI's contract was based on responsibility considerations, the matter should have been referred to the SBA for a COC review.

Under 10 U.S.C. § 2304(c)(2), an agency may use noncompetitive procedures to procure goods or services where the agency's needs are of such unusual and compelling urgency that the government would be seriously injured if the agency were not permitted to limit the number of sources from which it solicits bids or proposals. An agency using the urgency exception may limit competition to firms with satisfactory work experience which it reasonably believes can promptly and properly perform the work. See also FAR § 6.302-2(a)(2); Jay Dee Militarywear, Inc., B-243437, July 31, 1991, 91-2 CPD ¶ 105. In these circumstances, the agency is not required to solicit the incumbent if, in the agency's reasonable judgement, there is doubt based on the incumbent's prior record that the firm can perform the services. Sanchez Porter's Co., 69 Comp. Gen. 426 (1990), 90-1 CPD ¶ 433.

We find that DLA reasonably made a sole-source award to Goodwill instead of exercising DCI's option, because of

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[2]During the exploration of alternatives to exercising the incumbent's option, Goodwill became familiar with the requirement and reviewed the specifications, inspected the job site, obtained estimates from suppliers and subcontractors, and developed a proposal to be reviewed by the committee.

DCI's financial problems and the urgent need to obtain a contractor for the services. Once DLA became aware of DCI's financial difficulties, the agency proceeded reasonably by attempting to obtain the additional information and assurances necessary to establish that DCI would have the financial capacity to perform the option. The record indicates that not until approximately 2 weeks prior to the expiration of the current option period under DCI's incumbent contract did the agency finally conclude that, based on the latest information concerning DCI's financial condition, it could not exercise the final option. Given DCI's continuing financial difficulties--including the apparent inability to consistently pay subcontractors, workers compensation taxes and federal income taxes, and its insolvency--the inability of its president to guarantee the availability of the financial resources needed to continue performance, and the impending indictment of DCI's president for misconduct related to federal contracts, DLA reasonably concluded that DCI could not satisfactorily perform an additional contract period. Under these circumstances, proceeding with a sole-source award to Goodwill was unobjectionable. Sanchez Porter's Co., supra. [3]

Where an agency reasonably decides to satisfy an urgent requirement by limiting competition to firms it believes can perform satisfactorily, and thereby excludes firms it believes cannot so perform, the determination to exclude a certain firm need not be referred to the SBA. Jay Dee Militarywear, Inc., supra; Industrial Refrigeration Service Corp., B-220091, Jan. 22, 1986, 86-1 CPD ¶ 67. It follows that DLA's award of a contract to Goodwill on an urgency basis rather than exercise DCI's option did not have to be referred to the SBA for a COC review.

The protest is denied.

for James F. Hinchman
General Counsel

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[3]DCI argues that the agency should have considered whether to exercise the option on a 1-month interim basis; it believes it would have been found financially responsible had the agency done so. Even if DCI is correct that it would have been found responsible, there simply was no requirement that the agency make such an interim award to DCI in lieu of proceeding with an award for the entire contract period to Goodwill. Moreover, the contract contained an option only for a 1-year period; there was no 1-month option that could be exercised.