Comptroller General
of the United States

Washington, D.C. 20548

156311

Decision

Matter of: Techno-Sciences, Inc.

File: B-257686; B-257686.2

Date: October 31, 1994

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Anoop N. Mehta for Science Systems and Applications, Inc., an interested party.
Lisa J. Obayashi, Esq., Department of Commerce, for the agency.
Christine F. Davis, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency improperly extended a contract on a sole-source basis where other responsible sources, such as the protester, would have been able to compete for the requirement had the agency engaged in adequate advance procurement planning to allow a phase-in period for a new contractor.

DECISION

Techno-Sciences, Inc. (TSI) protests the sole-source extension of Contract No. 50-DDNE-6-00221 to Science Systems and Applications, Inc. (SSAI) by the Department of Commerce, National Oceanic and Atmospheric Administration (NOAA). The contract is for the operation, maintenance, and technical support of the United States Mission Control Center (USMCC), Suitland, Maryland, which is the primary North American interface for an international, satellite-aided search and rescue system which includes more than 30 nations.

We sustain the protest.

In 1979, the United States, France, Canada, and the former Soviet Union developed the Search and Rescue Satellite-Aided Tracking (SARSAT) Program, which is a low-orbiting satellite system for locating distressed aircraft and ships. Basically, the system involves the use of multiple satellites in low, near-polar orbits listening for distress transmissions from a ship's or aircraft's emergency beacon. Instrumentation aboard the satellite detects distress transmissions in frequency bands of 121.5, 243, or 406 megahertz (MHz), and measures the apparent change in

frequency relative to the motion of the satellite, i.e., the Doppler Shift. This data is then transmitted to a ground station or a Local User Terminal (LUT), where it is used to calculate the location of the distressed ship or aircraft.

Once the LUT calculates the location of the distress signal, it transmits this information to a Mission Control Center (MCC). There are 13 MCCs currently in operation, and 3 of these are nodal MCCs, including the USMCC, which accepts data from all of the United States LUTs.[1] A nodal MCC processes, coordinates, and distributes search and rescue information depending upon the location of the distress signal. A nodal MCC either conveys the information directly to a Rescue Control Center (RCC) or routes the information to an appropriate regional MCC, which then forwards the information to the nearest RCC for search and rescue activities. The USMCC communicates with regional MCCs in Australia, Singapore, Japan, Hong Kong, and Canada.

Data communications between the USMCC and the various LUTs, RCCs, and regional MCCs are accomplished by the USMCC "online" computer system, using a Packet Switched Data Network (PSDN). The "online" system also displays and monitors the Doppler plots and other status information acquired by the LUTs, and processes the information to resolve any ambiguities concerning location. The USMCC also includes various "offline," primarily archival databases that operate on a different computer system than the "online" software.[2] A Local Area Network (LAN) provides the interface between the online and offline components, and allows for the exchange of information between the databases.

SSAI was awarded the present contract for 3 base years with 4 option years on September 10, 1986, after a small business set-aside competition. The contract contemplated a major software development effort associated with transferring the USMCC from Scott Air Force Base to NOAA's Suitland facility, and converting the system from a Hewlett Packard mainframe computer to an IBM mainframe computer. This transition, which entailed the development of new applications software

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[1]The other two nodal MCCs are in France and Russia.

[2]The "offline" components include a 406 MHz Beacon Registration Database, which assists in identifying distressed vessels or aircraft through their beacon registration; an Incident History Database, which collects and organizes incident data for NOAA's reporting purposes; and a Self-Test and Monitoring System, which downloads and analyzes the USMCC data for quality control and archiving purposes.

and database enhancements to run both the online and offline portions of the USMCC, was accomplished by SSAI in January 1990.

On July 25, 1991, NOAA requisitioned the development of new online software for the USMCC, using TSI as the software developer. NOAA had earlier awarded TSI a contract to provide a mobile LUT for use in Saudi Arabia, which the protester had designed to operate on a personal computer (PC) system rather than a mainframe computer. Recognizing the advantages of this technology, NOAA issued a change order to the protester's contract, which tasked TSI to convert the USMCC from a mainframe-based system to a PC-based system. The protester developed software for the operation of all USMCC online functions based upon requirements defined by itself and SSAI. During this effort, TSI notified the agency that it considered its software proprietary because the software was developed by TSI without the use of government funding. The conversion to a PC-based system, using the TSI-developed software, was accomplished by October 27, 1993. TSI has subsequently been responsible for maintaining the USMCC online software it developed;[3] SSAI maintains all other USMCC software and monitors and operates the USMCC on a continuous, 24-hour basis.

SSAI's contract, including options, was due to expire on September 30, 1993. In anticipation of this event, NOAA published a notice in the Commerce Business Daily (CBD) on April 27, 1992, announcing its intention to issue a competitive, small business set-aside solicitation for the operation of the USMCC and the maintenance of non-proprietary software on the system. The agency anticipated issuing a solicitation by August 6, 1992, and awarding the follow-on contract by July 1, 1993. The early award date allowed for a phase-in period to familiarize the new contractor with all aspects of the USMCC's maintenance and operation under SSAI's supervision.

On April 22, 1993, the contracting officer determined that her office was seriously behind schedule in meeting its acquisition milestones, having only produced a draft statement of work to date, and that "there is no way that this procurement can be in place . . . when the current contract is due to expire." The contracting officer advised her technical representative that "[i]t is imperative that

[3]TSI will continue to be responsible for the maintenance of its proprietary online software, pursuant to the award of a sole-source contract on May 9, 1994, for 1 base year with 4 option years.

we hold a meeting, at your earliest convenience, to discuss what are your plans to continue the existing service."

The agency elected to extend SSAI's contract for an additional 9 months (i.e., to June 30, 1994) and, on July 16, 1993, executed a justification and approval (J&A) supporting the sole-source extension of SSAI's contract at an estimated cost of $1 million.[4] The J&A concluded that the sole-source extension was justified under 41 U.S.C. § 253(c)(1) (1988), which allows the use of noncompetitive procedures when the supplies or services needed by the agency are available from only one responsible source. In the J&A, the agency noted that the USMCC was about to undergo three major technological changes, these being, the imminent transition to the protester's PC-based platform; the upgrading of LUT technology; and the forthcoming transition to a new international telecommunications contractor at the expiration of the incumbent contract in December 1993.[5] In the agency's estimation, only SSAI possessed the knowledge and experience to oversee the technological changes that the USMCC was undergoing, including the monitoring and testing of TSI's PC-based software.[6] In the J&A, the agency acknowledged that a new contractor could perform these functions after a phase-in period, but did not consider it practical to solicit a new contractor for such a short interim contract.

By August 25, 1993, NOAA had developed a draft acquisition plan for the follow-on procurement, which was expected to be a small business set-aside because "[o]ther qualified small businesses are known to exist." The draft acquisition plan forecast that a solicitation would be issued by October 15, 1993, and award made by June 1, 1994, allowing a 1-month phase-in period for a new contractor.

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[4]NOAA had previously announced the proposed sole-source extension of SSAI's contract in a June 3 CBD notice. The CBD notice invited interested vendors who believed they could immediately assume the contract responsibilities to submit an affirmative response to this effect. No responses were received.

[5]The international telecommunications contractor provides the PSDN connection, which allows the USMCC to communicate with foreign MCCs.

[6]Regarding the forthcoming implementation of the protester's PC-based software, the J&A noted that, "[a]s with all new systems, problems are to be expected during the first year and changes will be required in order to have this system performing without interruption."

By October 27, 1993, NOAA still had not finalized the draft acquisition plan, which caused the Commerce Department's Office of Procurement Management to remark that its "review process back in the latter part of August explored the already tight schedule for this acquisition, and commented that the [acquisition] plan would need to be received within a week or two at the most." In response, the contracting officer explained that her legal advisor had held the acquisition plan for almost a month and that "hopefully it will get to you soon."

NOAA was unable to meet its proposed acquisition schedule, despite the preparation of a draft solicitation by November 1993. On June 13, 1994, the agency issued a J&A for a second sole-source extension of SSAI's contract, this one for 12 months (i.e., to June 30, 1995) at an estimated cost of $1.25 million.[7] In this J&A, which again cited 41 U.S.C. § 253(c)(1), NOAA determined that SSAI possessed an "intimate and comprehensive knowledge of the USMCC requirements," which "[n]o other contractor could reasonably be expected to acquire . . . in a timely manner." The incumbent's existing knowledge of the USMCC was considered necessary "to effect a timely and non-disruptive transition" to two new USMCC features. With respect to the first feature--the implementation of the protester's PC-based platform in October 1993--the agency explained that, "[a]s with all new systems, problems were to be expected during the first year and, indeed, they have occurred." According to the J&A, only SSAI could promptly identify problems in the new PC-based software and recommend appropriate solutions, owing to its current in-depth knowledge of the USMCC system. For the same reason, the J&A indicated that no other contractor could be entrusted to effect the transition to a new international telecommunications network when the incumbent telecommunications contract expired.[8]

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[7]The Commerce Department's Office of Procurement Management questioned the contracting officer about what prompted the need for a second sole-source extension and why a full year was needed beyond June 1994 to award the competitive follow-on contract. The contracting officer was also asked to provide an acquisition schedule for the follow-on procurement. The contracting officer responded that she did not consider the acquisition schedule to be excessive.

[8]As indicated above, the agency used this same rationale to justify SSAI's first sole-source extension, but the transition to a new international telecommunications contractor apparently did not take place during the first sole-source period, as had been represented in the prior J&A.

On June 8, 1994, NOAA published a CBD notice announcing the proposed second sole-source extension of SSAI's contract. The CBD notice invited interested vendors to submit an affirmative statement detailing their qualifications "to immediately assume the [contract] duties without disruption to the current operations."

TSI responded on June 14. In its qualification statement, TSI claimed that it was fully familiar with all facets of the USMCC and was prepared to assume the required duties without disruption. In particular, TSI stated that it was currently qualified to monitor the USMCC online functions because it had developed the PC-based online software and was solely responsible for its maintenance. The protester also claimed current operational knowledge of the USMCC offline functions and interfaces because TSI had designed, built, and installed four regional MCCs; had trained the operators for these MCCs; and was in daily contact with these MCCs to provide ongoing technical support. According to TSI, these regional MCCs functionally approximated the USMCC and utilized the same international telecommunications media, either in use or contemplated to be in use at the USMCC.

On June 15, NOAA rejected the protester's qualifications statement because it did not demonstrate that TSI could "immediately assume the duties of the incumbent." NOAA determined that TSI's experience was narrow in relationship to the USMCC functional requirements.[9] Without "USMCC functional knowledge," TSI was not considered presently qualified to identify the remaining problems in its proprietary software[10] or to effect the transition to a new

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[9]NOAA elaborated the reasoning underpinning this conclusion in its agency report on the protest. First, NOAA stated that TSI does not have experience in the continuous maintenance and operation of an MCC, even the regional MCCs that it designed and installed. NOAA also stated that these regional MCCs are substantially less complex than the USMCC, which processes, coordinates, and distributes data to the regional MCCs themselves; receives data from a greater number of LUTs; serves a greater number of MCCs; and contains more extensive offline databases. Because of the enhanced data processing and telecommunications requirements of the USMCC, the agency did not view the protester's regional MCC experience as a substitute for USMCC experience.

[10]The agency acknowledged that the number of serious problems in the PC-based software had declined over the last 2 months, but stated that the expertise of the

(continued...)

international telecommunications contractor. The agency concluded that,

> "[n]o other contractor, including TSI, could reasonably be expected to immediately assume these responsibilities without disruption to the daily operation of the USMCC. Indeed, a transition period of two months is planned in the recompeted contract."

On June 22, TSI protested the proposed extension of SSAI's contract to our Office.[11] On June 30, the agency executed another J&A supporting the second sole-source extension of SSAI's contract, which recounted the agency's failed settlement discussions with TSI and the resulting "unusual and compelling urgency" necessitating the sole-source extension. See 41 U.S.C. § 253(c)(2). In this J&A, the agency stated that it had offered TSI an opportunity to compete in a limited competition for a 10-month interim contract in lieu of extending SSAI's contract for the 12 months needed to award a fully competitive follow-on contract.[12] TSI made a counteroffer not acceptable to the agency, which allegedly necessitated the sole-source award to SSAI to avoid a lapse in these urgently needed services.

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[10](...continued)
incumbent would be needed "for the next few months" to evaluate any remaining problems that might arise.

[11]Subsequent to the filing of TSI's protest, NOAA exercised its authority under the Competition in Contracting Act of 1984, 31 U.S.C. § 3553(c)(2), (d)(2) (1988), to proceed with award and performance of the contract in the face of the protest. CICA authorizes such action where "the head of the procuring activity responsible for award of a contract" makes a written determination that urgent and compelling circumstances will not permit waiting for our decision and discloses that determination to our Office. NOAA's Director of the Office of Administration signed the written determination in this case. While TSI protests that this individual is not "the head of the procuring activity," and that the determination overriding the stay of performance is therefore legally defective, the agency has submitted a Commerce Department Administrative Order demonstrating that NOAA's Director of the Office of Administration is the head of that procuring activity.

[12]NOAA contemplated that it would award the interim contract in 2 months and that it would provide a 2-month phase-in period for TSI, if the firm were awarded the contract, after which TSI would be fully responsible for all contract duties.

While the overriding mandate of the Competition in Contracting Act of 1984 (CICA) is for "full and open competition" in government procurements obtained through the use of competitive procedures, 41 U.S.C. § 253(a)(1)(A), CICA does permit noncompetitive acquisitions in specified circumstances, such as when the services needed are available from only one responsible source or when the agency's need for the services is of such an unusual and compelling urgency that the agency would be seriously injured unless permitted to limit the number of sources solicited. 41 U.S.C. § 253(c)(1), (c)(2). When an agency uses noncompetitive procedures under 41 U.S.C. § 253(c)(1) or (c)(2), it is required to execute a written J&A with sufficient facts and rationale to support the use of the specific authority.[13] See 41 U.S.C. § 253(f)(1)(A) and (B); Federal Acquisition Regulation (FAR) §§ 6.302-1(d), 6.302-2(c), 6.303; 6.304. Our review of the agency's decision to conduct a sole-source procurement focuses on the adequacy of the rationale and conclusions set forth in the J&A. When the J&A sets forth a reasonable justification for the agency's actions, we will not object to the award. Marconi Dynamics, Inc., B-252318, June 21, 1993, 93-1 CPD ¶ 475; Dayton-Granger, Inc., B-245450, Jan. 8, 1992, 92-1 CPD ¶ 37. However, under no circumstances may noncompetitive procedures be used owing to a lack of advance planning. 41 U.S.C. § 253(f)(5)(A); see Laidlaw Envtl. Servs. (GS), Inc.; International Technology Corp.--Claim for Costs, supra.

Prior to the filing of this protest, the agency executed a J&A based upon 41 U.S.C. § 253(c)(1), which found that only the incumbent contractor could support the USMCC; stabilize the protester's PC-based platform; and accommodate a new international telecommunications network without disruption. NOAA determined that no other contractor could acquire comparable knowledge and expertise to support the USMCC and oversee these changes within the time required by the agency--that is, immediately. This finding was affirmed after NOAA received and reviewed TSI's qualifications statement, which did not demonstrate to the agency that the protester was immediately qualified to operate and maintain the USMCC without a phase-in period.

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[13]Where, as here, a contract extension is beyond the scope of the contract period, as extended by options, it effectively constitutes a new procurement and must be justified as a noncompetitive procurement under CICA. See Laidlaw Envtl. Servs. (GS), Inc.; International Technology Corp.--Claim for Costs, B-249452; B-250377.2, Nov. 23, 1992, 92-2 CPD ¶ 366.

The agency's position that TSI would require a phase-in period before taking over the USMCC's maintenance and operation, in that TSI has never been the maintenance and operations contractor for an MCC, not even for any of the regional MCCs that it designed and built, cannot reasonably be questioned.[14] Nonetheless, it is undisputed that TSI would have been qualified to support the USMCC during this sole-source period, if allowed a 2-month phase-in period; indeed, NOAA's second J&A based upon 41 U.S.C. § 253(c)(2) reflects that it considered TSI qualified to compete for this requirement.[15] In other words, had the agency adequately planned for this second extension of the original 7-year contract to allow for a relatively short phase-in period, otherwise qualified sources, such as the protester, would have been able to compete for this requirement. See Rampart Servs., Inc., 65 Comp. Gen. 164 (1985), 85-2 CPD ¶ 721 (agencies are required to account for reasonable phase-in periods to achieve adequate advance procurement planning).

The agency argues in its report in response to the protest that it did diligently plan for a follow-on procurement, but that unforseen difficulties prevented it from preparing the specifications in time. NOAA basically attributes these unforseen difficulties to the protester. Namely, the agency states that it was engaged in a protracted dispute with the protester, who believed its proprietary software rights extended to certain enhancements it developed under an April 10, 1992, contract modification.[16] NOAA states that it could not define the requirements for the USMCC follow-on contract until it clarified the government's rights in the TSI-developed portion of the system, which it was unable to do until May 9, 1994, when the parties settled their dispute. In addition to the ownership dispute, the agency states that numerous problems emerged in TSI's online

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[14]We also note that these regional MCCs are unquestionably more limited in scope than the USMCC.

[15]As noted above, the second J&A stated that NOAA had offered TSI an opportunity to compete for a 10-month interim contract, but that TSI did not accept this offer. TSI states that it did not reject the agency's offer and filed its protest because it believed the offer was no longer pending.

[16]NOAA states that it did not dispute TSI's proprietary interest in the initial software package the firm developed without government funding, but only contested TSI's interest in the software enhancements, for which the protester received $223,000 pursuant to the April contract modification.

software following its implementation in October 1993, and that NOAA could not develop specifications for the follow-on procurement until "system stability was achieved," which allegedly did not occur until June 1994.

At the outset, we note that the explanations now invoked by NOAA to justify the sole-source award were absent from both J&As executed in this matter and were first raised in the agency report on this protest. We have no evidence that the problems now identified by the agency were considered at the time it justified SSAI's sole-source award, and we do not believe that these problems prevented the use of competitive procedures in this case. See Earth Property Servs., Inc., B-237742, Mar. 14, 1990, 90-1 CPD ¶ 273.

For example, we see no reason that NOAA needed to determine ownership of the TSI software enhancements before issuing a competitive solicitation. NOAA simply could have specified--as it did in various draft documents--that the general support contractor would be responsible for the maintenance of non-proprietary software on the system. Even assuming the ownership was relevant to this issue, we would question why NOAA was so slow to respond to TSI's assertion of ownership. Specifically, while the record reflects that the agency knew TSI considered its software proprietary as of April 20, 1992, shortly after NOAA tasked TSI to develop the software enhancements, by its own account, the agency did not attempt to determine ownership of the TSI software enhancements until January 1994.

We also find that any problems in TSI's software should not have prevented the agency from developing the specifications for a follow-on procurement. As the protester has observed, the agency could have specified that the general support contractor would be required to monitor TSI's software, without identifying precisely what problems would be uncovered during the monitoring.[17] This is especially true because any problems in TSI's proprietary software would be corrected by TSI, not the general support contractor. Furthermore, the protester observes that NOAA expected problems to arise during the USMCC's transition to wholly new online software; in fact, NOAA used this expectation to justify the first sole-source extension of SSAI's contract. Thus, the protester credibly argues that NOAA should have been prepared to draft specifications while the PC-based system was stabilizing, instead of waiting until after "system stability was achieved." NOAA has not responded to these arguments.

[17]Indeed, this appears to be precisely what the agency envisions, based upon the draft solicitation it developed in November 1993.

Our review of the record reveals that NOAA made little progress in its two attempts to plan for a competition of this follow-on requirement. There is little planning documentation in evidence after NOAA's preparation of a draft solicitation in November 1993--itself belatedly prepared. The difficulties alleged by NOAA do not explain the persistent delays that have characterized this procurement process. Instead, the record shows that, had NOAA engaged in advance procurement planning, it could have resolved the difficulties of which it now complains in time to conduct a competitive procurement. In sum, we find no justification supporting the sole-source award to SSAI, other than NOAA's lack of advance planning, and we therefore sustain the protest. See Arrow Gear Co., 68 Comp. Gen. 612 (1989), 89-2 CPD ¶ 135; K-Whit Tools, Inc., B-247081, Apr. 22, 1992, 92-1 CPD ¶ 382.

We are unable to recommend that the interim contract be disturbed, inasmuch as the agency found that urgent and compelling reasons mandated its continued performance notwithstanding this protest, and only a short period of performance under the interim contract remains before performance under the competitive procurement for these services is scheduled to commence. TSI is entitled to recover its costs of filing and pursuing this protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1994). The protester should submit its certified claim for such costs, detailing the time expended and costs incurred, directly to the agency within 60 days after receipt of this decision. 4 C.F.R. § 21.6(f)(1).

The protest is sustained.

for Comptroller General
of the United States