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DECISION



J. H. [unclear]
**THE CONTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-191078

DATE: May 17, 1978

MATTER OF: Kent Watkins & Associates, Inc.

DIGEST:

Sole source award, in form of modification to existing contract which doubles contract costs and performance period, is not legally justified where agency relies solely on incumbent's experience with project, agency's desire to avoid administrative inconvenience, and costs resulting from change of contractor, but does not establish that incumbent is uniquely qualified to provide required services. GAO therefore recommends that agency conduct competitive procurement and terminate existing contract should award to firm other than incumbent be advantageous to the Government.

Kent Watkins & Associates (KWA) protests through its counsel the issuance of Amendment No. 3 to contract No. H-4106, between Coopers and Lybrand (Coopers) and the Department of Housing and Urban Development (HUD), for technical consultant services in the monitoring and evaluation of HUD's Target Projects Program (TPP). KWA contends that by more than doubling the original contract both in terms of cost and period of performance, as well as providing an altered Statement of Work, the amendment constituted a cardinal change beyond the scope of the contract and that the agency requirement should have been the subject of a competitive procurement instead of what in effect constituted a sole source procurement which HUD has not justified with legal sufficiency. KWA requests that the contract be terminated for the convenience of the Government and competitively resolicited or, in the alternative, that KWA be awarded proposal preparation expenses for the proposal it prepared in expectation of the competitive procurement which HUD's Government Technical Representative (GTR) had allegedly promised KWA.

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The record indicates that Coopers, the only respondent to HUD's original request for proposals, was awarded contract H-4106 on November 1, 1976, for a one-year period, on a cost-plus-fixed-fee basis. On August 25, 1977, Amendment No. 1 was issued to reflect a change in the designated GTR. On October 28, 1977, Amendment No. 2 was issued to extend the contract by two months. Amendment No. 3, the source of contention, was executed to extend the contract period an additional 15 months, increased the contract price from \$148,556 to \$298,552, and added a revised statement of work.

HUD, paradoxically, denies that this constituted a cardinal change that should have been treated as a new procurement but concedes that its Office of Procurement and Contracts (OPC) "was aware that amendments of this nature should be awarded competitively to the fullest extent possible." Accordingly, HUD prepared a "Sole Source Justification" document dated December 22, 1977.

HUD denies knowledge that KWA had desired to respond to an RFP and had prepared a proposal in anticipation of the issuance of a solicitation. In this regard, HUD attributes its lack of scienter to the fact that the original GTR, whom KWA had purportedly advised of its intentions, was replaced on August 25, 1977. KWA, however, has furnished the sworn affidavit of its principal who states that he conveyed his intentions to both the original GTR and the subsequent GTR designated by Amendment No. 1.

A protest concerning a contract modification ordinarily is not for resolution under our bid protest function since it involves contract administration, a matter primarily within the authority of the contracting agency. However, this Office will review such a matter when it is alleged that the modification went beyond the scope of the contract and should have been the subject of a new procurement, since the execution of the modification could be viewed as an attempt to circumvent the competitive procurement statutes.

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Accordingly, we view this protest as appropriate for our consideration. Brandon Applied Systems, Inc., B-188738, December 21, 1977, 77-2 CPD 486.

HUD's TPP involves the funding of projects to reverse deterioration in public housing projects. The program includes HUD's monitoring of the participating Public Housing Agencies (PHAs) and evaluating their progress. The HUD contractor is responsible for processing and maintaining work plans developed by the PHAs and analyzing PHA performance, as well as for providing certain studies and reports. The program funding was spread over fiscal years 1974, 1975, and 1976, and the program is to be "operational" through fiscal year 1978.

It is not clear from the record whether HUD intended to have this type of contract coverage through fiscal year 1978 or whether its requirements for technical assistance were to be satisfied solely by the contract awarded to Coopers on November 1, 1976, which had a stated performance period of 12 months. Thus, we cannot determine whether HUD had annual on-going requirements (at least during the time the TPP was to be "operational") or whether these were one-time requirements that were to be satisfied during a one-year period of performance. The record indicates only that "Coopers was unable to complete the work specified in the original contract [as amended] within the 14 months for reasons beyond its control," those reasons being the delays and late starts of the PHAs. There is no explanation, however, as to why the performance time more than doubled or why the estimated costs went from \$148,556 to \$298,552 if much of the work was not performed during the original contract period.

Thus, while it may be that the modified contract calls for no more than what Coopers was to have done originally, it may also be the case that the modified contract incorporates new or additional, albeit similar, work which is an actual need of HUD for

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the time period following the initial contract period. In the former case, it is arguable that the mere extension of the contract would not be legally objectionable, while in the latter case the new year requirements normally would have to be competed.

In view of this record--the unexplained lengthy performance date extension and significant change in cost; the possibility that the contract as modified now encompasses follow-on year requirements; and HUD's execution of a sole-source justification, which suggests that HUD impliedly regards the modification as tantamount to a sole-source procurement, we will consider the case as one involving a sole-source award.

Because of the requirement for maximum practical competition [see Federal Procurement Regulations 1-3.101 (1964 ed.)], agency decisions to procure sole source must be adequately justified and are subject to close scrutiny. Precision Dynamics Corporation, 54 Comp. Gen. 1114 (1975), 75-1 CPD 402.

HUD's sole source justification document indicates the following:

- 1) Coopers was the only firm to respond to HUD's solicitation for the initial contract; that it is adequately performing under its contract; that continuing with Coopers will obviate the need for staff orientation of a new contractor, as well as the loss of continuity in the performance of these tasks.

- 2) Coopers' experience in performing the current contract provides it with an understanding of the problems encountered in the implementation of HUD's program, with the consequence that it can assist HUD in the anticipation of such problems and to develop corrective measures to ensure the success of the program.

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3) Additional costs would be incurred in changing contractors due to contract overlapping (estimated at \$30,000), and the moving of files (estimated at several thousand dollars).

Although we have recognized that there are certain circumstances under which a sole source procurement is justified - such as where the Government's minimum needs could be satisfied only by items or services which are unique; where time is of the essence and only one known source can meet the Government's needs within the required time-frame; where data is unavailable for competitive procurement; where it is necessary that the desired item manufactured by one source be compatible and interchangeable with existing equipment (see Environmental Protection Agency sole source procurements, 54 Comp. Gen. 58 (1974), 74-2 CPD 59), we are unable to conclude that HUD has legally justified its action in this instance.

To the extent that HUD's OPC bases its justification on the fact that only Coopers responded to its competitive solicitation for the initial contract, the record indicates that KWA was interested in competing for the work encompassed by the third amendment and that KWA expressed its interest to the GTR. The fact that the GTR may not have communicated KWA's interest to OPC is not a legally sufficient reason to go sole-source since we have explicitly held that a "failure of communications" within the contracting agency as to the availability of competition, inducing the cognizant officials to mistakenly believe that only one firm is interested in the work, will not justify a sole source procurement. National Health Services, Inc., B-187399, January 7, 1977, 77-1 CPD 14.

Nor is Coopers' experience in performing under the current contract, which may enable it to better anticipate problems in the implementation of the program, a legally adequate justification since it

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is not asserted that Cooper is uniquely qualified and the fact that a particular concern may be able to perform the services with greater ease than any other concern does not justify a noncompetitive procurement to the exclusion of others. See Environmental Protection Agency sole source procurements, supra.

It appears that significant emphasis is placed by HUD upon various reasons which might be characterized as "administrative convenience", such as the ability to avoid staff orientation, moving and reorganizing files, contract overlapping, etc., and the delays that would ensue therefrom. However, we do not view administrative convenience or expediency as a valid reason for restricting competition. See 52 Comp. Gen. 987, 992-993 (1973); see also, Burton Myers Company, B-190723, B-190817, April 13, 1978, 78-1 CPD ___ ; cf. Department of Agriculture's Use of Master Agreement, 54 Comp. Gen. 606 (1975), 75-1 CPD 40.

Concerning HUD's allegation that changing contractors would involve additional costs, with the implication that it would appear economically advantageous to retain Coopers, a sole source award may not be justified on the basis of costs to be incurred as the result of a change in contractors. See Applied Devices Corporation, B-187902, May 24, 1977, 77-1 CPD 362. Rather, such costs may be taken into consideration as an evaluation factor to be applied to proposals received from firms other than an incumbent. See, e.g., 52 Comp. Gen. 905 (1973).

Accordingly, we recommend that HUD immediately conduct a competitive procurement contemplating a contract for the remainder of the services, such contract to commence at the earliest practical time from an administrative standpoint, and after such procurement process has been executed, terminate the existing contract for the convenience of the Government if award to a firm other than Coopers under the

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competitive procurement would be more advantageous to the Government, all factors considered. See Consolidated Elevator Company, Inc., 56 Comp. Gen. 434 (1977), 77-1 CPD 210.

Because this decision contains a recommendation for corrective action to be taken, it is being transmitted by letter of today to the congressional committees named in section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1970), which requires the submission of written statements by the agency to the House Committee on Government Operations, the Senate Committee on Governmental Affairs and the House and Senate Committees on Appropriations concerning action taken with respect to our recommendation.

R. P. Kester
Deputy Comptroller General
of the United States