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DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-207389 DATE: June 15, 1982

MATTER OF: Department of the Interior--Request for an Advance Decision

DIGEST:

GAO finds that a grantee violated a grant condition requiring maximum free and open competition when the grantee, without adequate justification to support a sole-source award, added substantial, new, and separate work to an existing contract instead of conducting a competitive procurement.

The Department of the Interior, National Park Service, requests our views on whether it was proper for the city of Bristol, Connecticut, to issue a change order increasing the value of its contract with the Bristol Construction Company (BCC) by $228,075 (or 74 percent) for work not contemplated under BCC's original contract. The original BCC contract and the change order relate to an improvement project in Rockwell Park, Bristol, Connecticut. The project is substantially funded by a grant administered by Interior.

We find that the city's action was improper and violated a grant condition requiring maximum free and open competition.

Initial plans for the relevant phase of the Rockwell Park project included a lagoon path system, pond improvements and a river path system; however, since the city estimated that the cost for these improvements would be about $1.3 million and the city had a budget of only $610,000, the scope of work in the invitation for bids (IFB) was restricted to the lagoon path system and pond improvements. The city was concerned that even the IFB's restricted work scope would be over budget so the city requested

bids on mandatory alternates to delete exercise stations, reduce the size of plantings and eliminate lagoon lighting. To assure maximum flexibility, the IFB also called for unit prices for 28 items (for example, the price for each trash container complete, in place; and the price per cubic yard for gravel fill furnished). Each unit-item price was requested as the basis of the item being added or deducted. Because of higher than expected costs on a recent similar project and a current Government estimate of $640,000 for the instant procurement, the city expected to have to make deletions in the scope of work to hold the contract price within the budget.

Bid opening was April 22, 1980. BCC submitted the low bid in the amount of $307,621 and, with Interior's approval, the city made award to BCC. At that point, the city considered whether to conduct a new procurement for obtaining the remainder of the desired improvements or to add the work to BCC's contract. BCC agreed to price the additional work based on the unit prices for the 28 items priced in BCC's bid. The extra work included a new drainage system, the river path system with a pedestrian bridge, and two parking areas.

The city noted that BCC's prices were substantially lower than the other prices received and because BCC's equipment and personnel were already onsite, other potential contractors (some of which were contacted by the city) in all likelihood would not bid lower than BCC. On May 6, 1980, the city asked an architect to prepare cost estimates for additional work. The architect recommended modification of BCC's contract instead of a new procurement for these reasons: (1) BCC was doing a good job on the basic work; (2) two contractors onsite could have caused scheduling problems and other problems where path systems were being continued; (3) the optimum time for bidding during the spring season would have been past by the time a new IFB could have been prepared; and (4) inflation would probably have produced higher prices in a new competition. The city adopted the architect's recommendation and on July 3, 1980, a modification to BCC's contract was issued. There is no indication that Interior was asked to approve the contract modification. The additional work cost an additional $228,075. The work under the contract has been completed.

Interior questions whether the city's action in modifying BCC's contract, in lieu of conducting a procurement, violated the grant condition requiring maximum free and open competition in procurements.

The city argues that no grant condition was violated because the city had a contractual right under the Changes and Extra Work clause of BCC's contract to order the additional work, the city complied with all local requirements in issuing the change order, the pricing of the modification was based on bid-unit prices in an open and free competition, and the change order had been called to the attention of (unidentified) Federal authorities. The State of Connecticut, Department of Environmental Protection, reviewed the city's action and concurred with the city, noting that having two contractors working within the same work area on similar work would have been chaotic and unmanageable.

The record contains a letter dated July 11, 1980, from one of the unsuccessful bidders for the basic contract work, stating that the large addition to the BCC contract should have been opened to bidding by other contractors.

While we recognize that, in direct Federal procurements, contract modifications are primarily the responsibility of the contracting agency, we have cautioned that the contracting parties may not change the terms of a contract to interfere with or defeat the purposes of competitive procurement. See, e.g., E. R. Hitchcock & Associates, B-182650, March 5, 1975, 75-1 CPD 133. We are concerned that improper contract modifications tantamount to unjustified sole-source awards, in lieu of competitive procurements, will adversely impact upon the integrity of the competitive procurement process. See American Air Filter Co.--DLA Request for Reconsideration, 57 Comp. Gen. 567 (1978), 78-1 CPD 443. In this regard, we have stated that if a contract, as modified, is materially different from the contract for which competition was held, the subject of the modification (the new requirement) should have been competitively procured (unless a sole-source procurement was justified). American Air Filter Co., Inc., 57 Comp. Gen. 285 (1978), 78-1 CPD 136; see 50 Comp. Gen. 540 (1971).

We have also stated, in 5 Comp. Gen. 508 (1926), that an existing contract may not be expanded to include additional work of any considerable magnitude, unless it clearly appears that the additional work was not contemplated at the time of the original contract and was an inseparable part of the original work, making performance by any other contractor virtually impossible. For example, in 41 Comp. Gen. 484 (1962), we found that a contract modification was essentially an unjustified sole-source procurement. There, we were not persuaded that the agency's explanation that the contractor was already onsite, knew the existing conditions and offered the greatest assurance of satisfying the agency's needs justified the modification.

Our decision in Kent Watkins & Associates, Inc., B-191078, May 17, 1978, 78-1 CPD 377, is a close analogy to the instant matter. There, the contracting agency, by contract modification, increased the contract price from $148,556 to $298,552, extended the contract period an additional 15 months, and added a revised statement of work (possibly encompassing follow-on requirements). We considered the matter as involving a sole-source award and we found that the sole-source procurement was not justified based solely on the incumbent's experience with the project, the agency's desire to avoid administrative inconvenience, and possible costs resulting from a change of contractors.

Regarding the city's right to modify the contract under the Changes and Extra Work clause of BCC's contract, we note that the clause empowered the city (1) to unilaterally alter the line, grade, plan, form, position, dimension or material of or for the work contemplated in a manner not inconsistent with the general layout or project and (2) to order any extra work deemed necessary in connection with the specified work. In our view, the clause permits extra or changed work only in connection with work contemplated or specified in the contract. Here, the work contemplated or specified consisted of the lagoon path system and pond improvements with three possible alternates, deleting certain small items of that effort. The bid pricing for the basic work and three alternates was a lump-sum not a unit-price basis. It seems clear to us that the river path system, parking lots, etc., were not items of contemplated or specified work that could be changed or added under the Changes and Extra Work clause. In sum, we find that the city

did not intend (and the IFB and contract did not provide) and the bidders were not notified that the river path system, parking lots, etc., could be added to the original work; thus, the purposes of competitive bidding were defeated by the improper BCC contract modification incorporating the new work.

Regarding the city's reasons for selecting BCC, the facts that BCC was doing a good job on the basic work and that a new competition might result in a price higher than BCC was willing to accept do not provide a valid basis for noncompetitively selecting BCC. Further, the record does not show why the fact that the optimum time for spring bidding might pass while a new IFB was prepared would significantly and adversely impact the city's situation. In addition, the city's explanation that two contractors working in the park may cause scheduling and path continuation problems does not support the State's view that two contractors would create an unmanageable situation. In our view, the city and State have not adequately shown why only one contractor at a time could work in the park or why the project could not be completed by BCC finishing the work under its contract before the contractor selected under a second IFB began the new work. Finally, the city's belief that no other firm could underbid BCC's proposed price based on BCC's bid-unit prices is not a proper basis to procure noncompetitively. Price competition in a formal procurement is the only real means to determine what the work should cost. See Informatics, Inc., 56 Comp. Gen. 402 (1977), 77-1 CPD 190, aff'd, 56 Comp. Gen. 663 (1977), 77-1 CPD 383; 5 Comp. Gen. 508, supra.

Moreover, under the terms of the grant conditions, noncompetitive procurement is permissible when (1) the item is available from one source only, (2) there is urgency, (3) the grantor has approved the sole-source award, or (4) after solicitation of a number of sources, competition is determined to be inadequate. Here, the record indicates that many sources could have performed the work, there was no urgency, the grantor did not approve the sole-source award, and at least one firm other than BCC was interested in bidding on the work.

Thus, the city's noncompetitive award to BCC (in the form of a contract modification) was improper because the city's action violated grant conditions requiring maximum free and open competition in procurements.

In view of our conclusion, we recommend consideration be given to corrective action with respect to this matter and to whether any revisions in regulations and grant conditions are indicated.

for Milton J. Socolar
Comptroller General
of the United States