Ayer
242240

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

# Decision

**Matter of:** Holmes & Narver Services, Inc.

**File:** B-242240

**Date:** April 15, 1991

William A. Roberts III, Esq., and Lee Curtis, Esq., Howrey & Simon, for the protester.
Paul M. Fisher, Esq., and Vicki O'Keefe, Esq., Department of the Navy, for the agency.
Roger H. Ayer, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

**DIGEST**

1. Protest that offeror had insufficient time to prepare revised proposal because of its late receipt of amendments is denied where the protester had the last-issued amendment 5 working days prior to the closing date; 5 days appears to be a reasonable time period to address the particular changes made by the amendments; adequate competition was achieved through the receipt of eight proposals; and there is no showing that the agency deliberately attempted to exclude protester.

2. Agency's failure to equalize competition to compensate for some potential offerors' legal acquisition of incumbent contractor's contract information is not objectionable where the information's availability was not the result of improper or unfair action and pertinent information possessed by the agency was not necessary for offerors to compete intelligently and on a relatively equal basis.

3. Incumbent contractor's offer to sell access to its employees and its contract information to potential offerors who agree to buy inventory and equipment at pre-agreed prices if they win the contract is not a prohibited contingent fee arrangement within the meaning of 10 U.S.C. § 2306(b) (1988) because the services were not "to solicit or obtain the contract" since they did not involve any dealings with government officials.

**DECISION**

Holmes & Narver Services, Inc. protests the actions of the Navy Facilities Engineering Command in failing to extend the closing date for receipt of proposals under request for proposals (RFP) No. N62467-90-R-0560 for the base maintenance services at the Marine Corps Recruiting Depot, Parris Island, South Carolina, and in failing to provide information pertaining to the incumbent contract.1/

We deny the protest.

On October 1, 1990, the RFP was issued with a closing date of December 4. Eight amendments were subsequently issued, but the closing date was not extended. On November 9, 1990, the Navy issued amendment No. 5. On November 13, Holmes & Narver, in an effort to expedite the amendment's receipt, offered to pay for overnight delivery of amendment No. 5, which the contracting officer refused. In the alternative, Holmes & Narver sought local distribution of the amendments out of the Navy's Parris Island administrative contracting office, even though the amendments originated in the Navy's procuring contracting office in Charleston, approximately an hour's drive away from Parris Island. Holmes & Narver received amendment No. 5 on November 19.

On November 20, Holmes & Narver requested a 4-week extension of the closing date, urging that amendment No. 5 necessitated major proposal revisions that could not be accomplished in the limited time remaining before the December 4 closing date. The Navy advised Holmes & Narver that an extension would not be forthcoming. On November 26, Holmes & Narver received the balance of the amendments issued under the solicitation (amendment Nos. 6, 7, and 8). On December 3, Holmes & Narver repeated its request for an extension, which the Navy again denied. On December 4, Holmes & Narver--prior to the 2:00 p.m. closing deadline--protested to our Office the Navy's refusal to accede to Holmes & Narver's request for an extension.

The record indicates that the agency was reluctant to delay the closing date because the incumbent contractor, Earth Property Services, Inc. (EPS), had been suspended and the Navy

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1/ The Navy reports that Holmes & Narver is a major subcontractor to the incumbent, and that its responsibilities include management of the Parris Island power-plant; sewage treatment/wastewater facility; swimming pools; and sewage lift station.

was unwilling to extend its contract.2/ Holmes & Narver did not submit a proposal in response to the RFP.

Holmes & Narver contends that the Navy improperly failed to extend the closing date in violation of Federal Acquisition Regulation (FAR) § 15.410(b), which requires the contracting officer to consider whether the time before closing is sufficient to permit prospective offerors to consider the changes effected by the amendment. Holmes & Narver claims that the Navy's refusal to extend the closing date to respond to the amendments was unreasonable in light of Holmes & Narver's November 19 and November 26 receipt of the amendments--10 and 5 working days, respectively, before the December 4 closing date.

The Navy reports that it decided that the offerors had enough time to adequately prepare their proposals after receipt of amendment Nos. 5 through 8 because the amendments were basically clarifications of existing work requirements and administrative changes, which added relatively little work. Consideration was also given to the extensive interest in this solicitation (e.g., more than 40 contractors attended the pre-proposal meeting) and the large number of proposals anticipated, as well as the constraints of the government's procurement schedule due to the Navy's reluctance to extend EPS' contract. The Navy asserts that Holmes & Narver should have picked the amendments up in Charleston if it wanted faster access to them.

There is no per se requirement that the closing date in a negotiated procurement be extended following a solicitation amendment. MISSO Servs. Corp., 64 Comp. Gen. 4 (1984), 84-2 CPD ¶ 383. The decision as to the appropriate preparation time for the submission of offers lies within the discretion of the contracting officer. L&E Serv. Co., B-231841.2, Oct. 27, 1988, 88-2 CPD ¶ 397. We limit our review of such determinations to the questions of whether the refusal to extend the closing date adversely impacted competition and whether there was a deliberate attempt to exclude an offeror. MISSO Servs. Corp., 64 Comp. Gen. 4, supra.

The Navy issued the last amendment on November 20 and Holmes & Narver admits receiving it on November 26, 5 working days prior to the closing date. Our review of amendment Nos. 5 through 8 reveals no significant additional requirements that 5 working days of diligent effort by a qualified offeror could not address, particularly if it were an experienced on-site contractor such as Holmes & Narver.

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2/ Since EPS was suspended, it was ineligible to compete for this award.

Moreover, late receipt of an amendment provides no basis for disturbing a procurement where the agency obtains adequate competition and reasonable prices since offerors generally bear the risk of late receipt. See REL, B-228155, Jan. 13, 1988, 88-1 CPD ¶ 25. Here, the agency received eight proposals and there is no evidence that the Navy deliberately attempted to exclude Holmes & Narver from the competition.

Holmes & Narver also protests that the offerors were not competing on an equal basis because EPS, the incumbent contractor, was offering access to EPS' employees and to a variety of competitively useful information to those firms that would agree to purchase EPS' inventory at cost and its equipment at fair market value if successful at winning the contract. Holmes & Narver turned down the offer and then reported the matter to the Navy when it learned that two firms had likely purchased the offered information.3/ The protester contends that, under the circumstances, the Navy had a duty to make the same information, insofar as it is in the agency's possession, available to all offerors.

Generally, an agency must assure that it provides enough information through the solicitation or otherwise to allow offerors to compete intelligently and on relatively equal terms. See John J. Moss, B-201753, Mar. 31, 1981, 81-1 CPD ¶ 242. The government, however, is not required to compensate for the competitive advantage inherent in an incumbent contractor (for example, by seeking from the incumbent information not in the government's files) unless the advantage resulted from improper preferential treatment or unfair action. University Research Corp., B-228895, Dec. 29, 1987, 87-2 CPD ¶ 636. On the other hand, if material information may have been unfairly or improperly made available to a particular offeror, the agency is required to equalize the competition by providing other potential offerors

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3/ The protester reports that the offer was made to it, and that it later received information in the form of a copy of a November 13 memorandum from the incumbent's project manager to all incumbent contractor supervisors advising that the incumbent's president had "given employees permission (release from confidentiality) to discuss [the incumbent's] present contract operations" with two specifically named firms. The protester understood this to mean two other potential offerors had accepted the same deal that the incumbent offered to the protester.

access, even if this requires reopening the competition or canceling the procurement and resoliciting. 49 Comp. Gen. 251 (1969); Holmes and Narver Servs., Inc./ Morrison-Knudson Servs., Inc., a joint venture; Pan Am World Servs., Inc., B-235906; B-235906.2, Oct. 26, 1989, 89-2 CPD ¶ 379.

The incumbent's November 14 offer to sell the information disclosed the general categories of information offered. For example, it offered personnel information; certain listing/documentation of material and equipment; incumbent financial records pertaining to total job costs; and copies of unnamed operational and technical plans, procedures, and manuals. The protester requested this information to the extent that it is in the possession of the government.

The record does not indicate, however, what specific information offered by EPS the agency could have distributed to the competitors. While it would have been appropriate for the agency to search its files and make available to potential offerors all nonproprietary information pertaining to this procurement,4/ it appears that much of the offered information that may be in the Navy's possession is proprietary to EPS, covered by the Privacy Act, 5 U.S.C. § 552a (1988), or otherwise not for distribution by the government. In any case, nothing in the record persuades us that the information that Navy may have in its possession but has not made available is necessary to allow offerors to compete intelligently or on relatively equal terms.

We think it obvious that the value of information being offered, as well as the protester's and other offerors' desire to possess it, derives solely from it being the incumbent's information and reflective of the properly recognized "incumbent's advantage." As indicated above, the Navy is not required to compensate for this advantage, whether it resides in the incumbent or in any other firm that has been given access by the incumbent to its information, unless those in possession of the information came by it as a result of improper preferential treatment or unfair action.

Holmes & Narver contends that its two competitors' possession and use of the incumbent's information results from improper and unfair action because the information came into the competitors' hands as a result of a contingent fee arrangement prohibited by 10 U.S.C. § 2306(b) (1988), which Holmes & Narver brought to the Navy's attention prior to the closing date. The incumbent's offer, as presented to Holmes & Narver, was to provide nonexclusive access to both the incumbent's

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4/ Many agencies set up reading rooms if they have voluminous information that may be relevant to the agency's requirements.

employees and contract information in the incumbent's possession, provided "[i]n event of the award of the Parris Island contract to [Holmes & Narver]," Holmes & Narver would compensate the incumbent by purchasing the incumbent's inventory at cost and its equipment at fair market value.5/ Holmes & Narver views this as involving a prohibited contingent fee arrangement and states that it therefore declined the offer.

The statutory prohibition reads:

> "Each contract awarded under this chapter after using procedures other than sealed-bid procedures shall contain a warranty, determined to be suitable by the head of the agency, that the contractor has employed or retained no person or selling agency to solicit or obtain the contract under an understanding or agreement for a commission, percentage, brokerage, or contingent fee, except a bona fide employee or established commercial or selling agency maintained by him to obtain business." (Emphasis added.) 10 U.S.C. § 2306(b).

EPS' offer of access to competitively useful information in exchange for an agreement to purchase EPS' inventory and equipment at pre-set prices upon receiving the contract could be regarded as a contingent fee arrangement.6/ We need not resolve whether the purchase of EPS' inventory and equipment would involve the payment of a contingent fee, since we find that it would not be prohibited in any event because the "fee" (if the proposed purchase of the inventory is a fee) was not to be paid for EPS "to solicit or obtain" the contract.

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5/ Holmes & Narver explains that a former contractor's inventory ordinarily is sold below cost. Consequently, an awardee bound to purchase the inventory at cost will probably pay more for the inventory than it is worth--the excess being EPS' contingent fee for providing winning information.

6/ This is not clearly a contingent fee as contemplated by the statute. We have found little useful precedent on this matter. For example, the court, in Weitzel v. Brown-Neil Corp., 251 F.2d 661 (4th Cir. 1958), implies that a legitimate subcontract in exchange for providing sales agent services is not prohibited.

FAR § 3.405(a) states that "[t]he fact that a fee is for information does not exclude it from the definition of contingent fee."7/ Thus, merely providing a prospective contractor with "information" may fall within the ambit of the meaning of "to solicit or obtain" a contract. However, the regulation does not define what is meant by "information"; there is no evidence that the regulation was intended to cover providing any information from whatever source pertaining to the preparation of a proposal. For example, the regulation would not reasonably encompass a potential vendor providing information regarding its product to an offeror on the condition that it receive a subcontract if the offeror is successful.

Court decisions also provide little guidance. They usually involve selling agents who contact government officials to advance opportunities for a contract award, a situation clearly encompassed by the restriction (unless it falls within the statutory exceptions). See, e.g., Mitchell v. Flintkote Co., 185 F.2d 1008 (2d Cir.), cert. denied, 341 U.S. 931 (1951), and J.D. Streett & Co. v. United States, 256 F.2d 557 (8th Cir. 1958). One court has addressed the distinction between services rendered "to obtain" a contract and other services. Browne v. R&R Eng'g Co., 264 F.2d 219 (3d Cir. 1959). In Browne, the court held that contingent fee services in connection with a proposed contract that did not involve "any dealing . . . with those responsible for any aspect of the letting of public contracts"8/ were not prohibited. In the absence of more specific statutory or regulatory guidance about what "to solicit or obtain" a contract entails, we will follow the distinction in Browne.

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7/ An earlier version of the regulation read:

> "Contingent fees paid for 'information' leading to obtaining a Government contract or contracts are included in the prohibition and, accordingly, are in breach of the covenant unless the agent qualifies under the exception as a bona fide employee or a bona fide established commercial or selling agency maintained by the contractor for the purpose of securing business." Federal Procurement Regulations § 1-1.504-6.

8/ In Browne, the court found the contingent fee for proposal preparation services was not prohibited.

Here, the incumbent only provided information in its possession that it would have used if it could have competed itself. There is no evidence that EPS offered services that involved any contact or dealing with the government on this procurement. Therefore, under the Browne standard we find no violation of the contingent fee prohibition. That being so, we conclude that the potential offerors did not acquire the incumbent's information--and perhaps some of its advantage--as a result of improper preferential treatment or unfair action. Consequently, these offerors' use of the information imposed no duty on the Navy to provide similar information to other potential offerors.

The protest is denied.

Ronald Berger

for James F. Hinchman
General Counsel