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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Saltwater Inc.--Reconsideration and Costs

File: B-294121.3; B-294121.4

Date: February 8, 2005

Joseph Sullivan, Esq., Mundt MacGregor, for the protester.
William T. Grimm, Esq., Davis Grimm Payne & Marra, for NWO, Inc., an intervenor.
Terry Hart Lee, Esq., Department of Commerce, for the agency.
Christina Sklarew, Esq., and Jerold D. Cohen, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

1. Where agency's implementation of the corrective action proposal that led GAO to dismiss a protest as academic is such that the issue in controversy in fact has not been rendered academic, GAO will consider the protest's merits in response to reconsideration request.
 2. Protest that contract award was based on terms different than those on which competitive offers were received is sustained where the contract's term exceeds the term provided for in the underlying solicitation.
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DECISION

Saltwater Inc. asks that we reconsider our August 25, 2004 dismissal of its protest of the award of a sole-source contract to NWO, Inc. by the Department of Commerce, National Oceanic and Atmospheric Administration (NOAA), for fisheries observer services. Saltwater argues that the corrective action that Commerce had proposed in response to the protest, which led to our dismissal decision, in fact provided no meaningful remedy. Saltwater also complains that Commerce's implementation of that corrective action has resulted in the continuation of an unjustified sole-source contract with NWO. Finally, Saltwater requests that it be reimbursed its costs of pursuing this and its prior protest.

We agree with Saltwater that, in light of Commerce's actions since we dismissed the firm's protest, its challenge to the propriety of the award to NWO is not academic. Moreover, having reviewed the issue's merits, we sustain Saltwater's protest in part.

We also recommend that Saltwater be reimbursed the costs of pursuing this and its prior protest.

BACKGROUND

In January 2003, NOAA issued request for proposals (RFP) No. AB1330-03-RP-0024, seeking fisheries observer services in connection with NOAA's National Marine Fisheries Service (NMFS) Pacific Islands Region Observer Program (PIROP), under a fixed-rate contract, for a base year and one option year. Saltwater and NWO both submitted proposals, and Saltwater was awarded the contract, the first year of which expired on June 30, 2004 and which had a 1-year option ending on June 30, 2005. Following a protest filed by NWO, the agency held discussions and twice permitted the offerors to submit final proposal revisions (FPR). In its second request for FPRs, Commerce advised Saltwater that if the agency again selected Saltwater, its contract would be modified to include certain overtime pay requirements.

In December 2003, Saltwater was again selected for award and was given, for execution, a modification to its earlier-awarded contract. Saltwater declined to execute the modification, on the basis that it did not accurately reflect the terms of Saltwater's FPR. In January 2004, NOAA informed Saltwater that it intended to terminate the firm's contract and make award to NWO. Saltwater protested this decision to our Office, and we denied the protest in our decision, Saltwater Inc., B-293335.3, April 26, 2004, 2004 CPD ¶ 106.

Following our decision, rather than terminate Saltwater's contract for convenience the contracting officer decided to wait for the base period of the contract to expire, on June 30, 2004. The agency awarded a contract for the requirement to NWO on June 18, to commence performance on July 1. This contract award was for a base period of July 1, 2004 through December 31, 2004, with an option for an additional year extending to December 31, 2005 (which has been exercised). This contract also included provisions implementing the overtime pay requirements.

Saltwater protested that the award to NWO was improper, and the attorney from our Office handling the protest conducted an alternative dispute resolution (ADR) conference call with the parties in an attempt to resolve the matter. During that discussion, the GAO attorney advised the parties that he anticipated that our Office would sustain the protest, on the basis that the award was made on a sole-source basis without justification. The GAO attorney indicated that the protest would be rendered academic if the agency (1) prepared and executed a Justification and Approval (J&A) adequate to support the award to NWO, or (2) recompeted the acquisition. Commerce then advised our Office by telephone, and confirmed in writing, that the agency would recompete the services as part of a restructuring of fishery observer services nationwide, and that it envisioned that it would require at least 15 months to develop the solicitation. In addition, Commerce would, "as expeditiously as possible, make a determination as to the necessity for a sole-source

contract and thereafter prepare and execute an appropriate J&A for the contract file.” Remedy Letter of Aug. 23, 2004.

We dismissed the protest by our decision of August 25. We stated that we viewed the protest to be academic “because Commerce has advised our Office that it would, ‘as expeditiously as possible,’ determine whether a sole source contract was necessary and, if it determined that it was, would then prepare an appropriate J&A for such action.” We noted, in addition, that Commerce would undertake a new acquisition as part of the nationwide restructuring of these services.

RECONSIDERATION REQUEST

In requesting reconsideration, Saltwater maintains that we should not have dismissed the protest because Commerce’s proposed corrective action did not, in fact, render the protest academic, especially given the way the corrective action has been implemented.¹ We agree.

Our understanding from Commerce’s letter proposing corrective action was that the agency would decide whether a sole-source contract was needed and, if so, prepare an adequate J&A. In opposing Saltwater’s reconsideration request, Commerce indicates that it has not issued a J&A to support the award to NWO because it has concluded that the award to NWO was based on the 2003 competition and therefore no J&A is needed. Commerce asserts that, in its view, all it agreed to do in terms of corrective action to render Saltwater’s protest academic was to promise to include the PIROP effort as part of the broader restructuring of the nationwide fishery observer program, for which a solicitation would be developed in the future. We agree with Saltwater that the action Commerce has taken did not render Saltwater’s challenge academic, and we therefore reverse our dismissal and will consider the protest’s merits.

PROTEST

Saltwater protests that the award to NWO was improper because it was made on a basis other than the proposal that NWO had submitted in response to the 2003 solicitation. We agree.

As noted above, the competitive award to Saltwater was based upon a 1-year contract extending through June 30, 2004 with a 1-year option to June 30, 2005.

¹ Saltwater has also alleged that improper *ex parte* discussions occurred between the GAO attorney and Commerce, following the ADR conference call, that contributed to our decision to dismiss the protest. We have reviewed this allegation and find it without merit, as the exchanges at issue concerned only procedural matters.

However, the award to NWO was for a 6-month contract period from July 1, 2004 to December 31, 2004, with an option to extend the contract 1 year, *i.e.*, to December 31, 2005, which Commerce has exercised. Because the period of performance under NWO's contract extends beyond June 30, 2005, it is inconsistent with the basis for the competition and therefore improper. See Tennessee Valley Serv. Co., B-188771, Dec. 8, 1977, 77-2 CPD ¶ 442. That is, the extension of NWO's contract beyond June 30, 2005 constitutes an improper sole-source, since it was not supported by a J&A.

Since the contract with NWO now is in its option year, we recommend that Commerce meet its needs after June 30 competitively (through limited competition if full and open competition is not feasible) and terminate NWO's contract as of that date if NWO is not the successful offeror. We further recommend that the agency reimburse Saltwater for the costs of filing and pursuing its protests, including reasonable attorneys' fees. Saltwater's certified claim for costs, detailing the time spent and cost incurred, must be submitted to the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1) (2004).

In view of the above conclusion and recommendation, we see no practical reason for our Office to address Saltwater's other objections to NWO's award.²

The protest is sustained.

Anthony H. Gamboa
General Counsel

² The objections center around the fact that in awarding the contract to NWO, Commerce did not include an overtime provision that had been included in the solicitation and which Saltwater had believed conflicted with the modification—essentially the reason why Saltwater refused to execute the modification at issue in our April 26 decision.