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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: Europe Displays, Inc.

File: B-297099

Date: December 5, 2005

Thomas C. Papson, Esq., and Jason N. Workmaster, Esq., McKenna Long & Aldridge, LLP, for the protester.

Joseph A. Pixley, Esq., Department of Transportation, for the agency.

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DIGEST

1. Agency unreasonably awarded a contract for the design and construction of an exhibition pavilion on a sole-source basis under simplified acquisition procedures to a firm that the agency believed the exhibit organizer required be used, where the agency's belief was erroneous and unreasonable.

2. A firm's statement of interest and technical capability to compete in response to an agency's published notice of intent to negotiate a contract on a sole-source basis is not a bid or proposal for which the GAO will recommend reimbursement of bid and proposal preparation costs where protest of sole-source award is sustained.

DECISION

Europe Displays, Inc. protests the sole-source award of a contract to Connexion under solicitation No. FTA-05-0256, issued by the Department of Transportation, Federal Transit Administration (FTA), for the design, construction, maintenance and dismantling of a pavilion at the Mobility and City Transport Exhibition in Rome, Italy.

We sustain the protest.

The Mobility and Transport Exhibition, which is organized by the UITP-International Association of Public Transport, is a bi-annual international exhibition for the public transportation industry. This year's exhibition was held on June 6-9, 2005 in Rome.

On April 18, FTA announced on the Federal Business Opportunities (FedBizOpps) Internet site its intent to negotiate with “Fransquin & Chaiban: Connexion Company” on a sole-source basis for the design and construction of a United States pavilion at the exhibition. The notice stated that the agency was acting under sole source authority pursuant to “41 U.S.C. § 253(c)(1), only one responsible source” for the services. Agency Report, Tab T, FedBizOpps Solicitation/Notice, at 1. The notice further announced that other potential sources wishing to demonstrate that they could meet the agency’s requirements could submit a written response with a technical capabilities statement “no later than 15 days after” the April 18 publication date. Id. at 2.

On May 2, 14 days after the publication date, Europe Displays timely submitted a written response with a technical capabilities statement. On May 9, the contracting officer informed Europe Displays by phone that the agency would not give the firm an opportunity to compete. The agency’s initial basis for excluding Europe Displays was that the agency believed that UITP (the exhibition organizer) required the use of Connexion for these services. Contracting Officer’s Statement at 1. However, following communications with Europe Displays and others, the contracting officer learned that the agency’s understanding of the requirement was incorrect, and that other firms could design and construct exhibition stands if custom designs were submitted to the exhibition architect at least 30 days prior to the start of the exhibition. Id.; Agency Report, Tab V, Exhibitor’s Handbook, at 14. The contracting officer then determined that, since the exhibition was to start in less than 30 days, it was too late to get approval for another firm’s design.¹ Contracting Officer’s Statement at 1-2.

The agency subsequently issued a justification and approval (J&A) for a sole-source award to Connexion based on the authority stated at Federal Acquisition Regulation (FAR) § 6.302-1(a)(2)(ii)(B) and 41 U.S.C. § 253(d)(1)(B) (2000), which authorizes the award of a follow-on contract for the continued development of a major system or highly specialized equipment when it is likely that award to a source other than the original source would result in unacceptable delays in fulfilling the agency’s requirements. Agency Report, Tab I, J&A, May 18, 2005, at 1. The J&A stated the following explanation as to why Connexion was the only responsible source available:

Given that Connexion is the only official exhibition management company for the show, they have the unique ability to coordinate the

¹ After the agency received Europe Displays’ response, the contracting officer requested a waiver of the 30-day deadline. UITP’s exhibition manager responded that this waiver could not be granted due to the size requirements of the agency’s pavilion. Agency Report, Tab M, E-mail Between Agency and UITP, May 12, 2005, at 1.

required efforts to design, build, and maintain the Pavilion in a timely manner and in compliance with the regulation of the UITP and the City Transport Exhibition. The UITP and the City Transport Exhibition recognize no other company. Connexion is the most economical and efficient solution to meet FTA's needs.

Id. at 2. On May 19, the agency made award to Connexion at a price of \$40,300.90. Agency Report, Tab G, Order for Supplies or Services.

On May 19, Europe Displays filed an agency-level protest of the sole-source award to Connexion. On June 3, the agency determined that it was in the best interests of the agency to continue performance by Connexion while the agency considered Europe Displays' protest. Agency Report, Tab E, Authorization to Proceed with Contract Performance. On August 16, Europe Displays received the agency's decision denying its protest. This protest followed. The protested contract has been fully performed. Agency Report at 4 n.3.

Europe Displays alleges that the authority cited in the agency's J&A does not support an award to Connexion because the award is not a follow-on award under a continuing project. It also alleges that the agency had no reasonable basis to determine that Connexion was the only firm permitted to design and construct stands at the UITP exposition, and that the agency did not conduct this procurement in a manner that permitted other responsible firms to compete.

The agency does not dispute that Europe Displays is qualified and capable of performing the solicitation requirements. The agency also does not dispute that the sole-source authority cited in the J&A does not apply here. Rather, the agency states that regardless of what was stated in the J&A, the procurement was conducted under simplified acquisition procedures, and thus the laws and regulations applicable to simplified acquisitions as set forth at FAR Part 13 apply. We agree with these agency positions.

Under the Federal Acquisition Streamlining Act of 1994 (FASA), simplified acquisitions--used to purchase supplies and services, including construction, research and development, and commercial items, the aggregate amount of which does not exceed certain dollar thresholds (FAR §§ 2.101, 13.000, 13.003(a))--are excepted from the general requirement that agencies obtain full and open competition through the use of competitive procedures when conducting procurements. See 41 U.S.C. §§ 253(a)(1)(A), (g)(1), and (g)(4) (2000). Part 13 of the FAR establishes procedures for simplified acquisitions, which are designed to promote efficiency and economy in contracting, and to avoid unnecessary burdens for agencies and contractors. To facilitate these objectives, FASA only requires that agencies obtain competition to the maximum extent practicable. 41 U.S.C. § 427(c); FAR § 13.104; Information Ventures, Inc., B-293541, Apr. 9, 2004, 2004 CPD ¶ 81 at 3. Under the maximum-extent-practicable standard, an agency "may solicit from one source if the contracting officer determines that the circumstances of the contract

action deem only one source is reasonably available (e.g., urgency, exclusive licensing agreements, or industrial mobilization).” FAR § 13.106-1(b)(1). We review protests of sole-source determinations made in these procurements for reasonableness. Information Ventures, Inc., supra.

The agency has not demonstrated that it had a reasonable basis to make a sole-source award here. Essentially, the agency states that it acted in “good faith” based on the best information available at the time. This is not a legitimate defense to this protest. Our review is based on whether the agency’s sole-source decision was reasonable based on the information reasonably available to the agency at the time of the sole-source decision, not whether the agency acted in good faith. See Ultraviolet Purification Sys. Inc., B-226941, Sept. 10, 1987, 87-2 CPD ¶ 229 at 3-4.

The agency has not clearly identified the basis for its belief that UTIP required Connexion to be used for this work, but has provided the UITP Exhibitor’s Handbook, which sets forth the parameters for the exhibitors. The handbook addresses “shell scheme stands” and “custom-designed stands” for use at the exhibit. A shell scheme stand is a standard, furnished module occupying 12 square meters for use by exhibitors that do not want to provide their own stands. Agency Report, Tab V, UITP Exhibitor’s Handbook, § 5.5. The FTA’s requirements here are for a larger, custom-designed pavilion with 150 square meters of usable space. Agency Report, Tab T, FedBizOpps Solicitation/Notice, at 2. The handbook stated the following requirements for custom-designed stands:

Those companies that opt to have custom-designed stands must send the project drawings . . . to the exhibition architect Fransquin & Chaiban for approval. . . . The project must be submitted 30 days before the beginning of the exhibition at the latest. . . . Exhibitors are obliged to perform the assembly of their stands . . .

Agency Report, Tab V, UITP Exhibitor’s Handbook, § 5.6. Thus, the Handbook clearly contemplates that Fransquin & Chaiban (with which Connexion is associated) is not responsible for designing and/or building custom-designed stands, but will review project drawings for custom-designed stands submitted to it for approval, and that the exhibitor (not the exhibition architect) is responsible for stand assembly. While the agency states that it understood “Fransquin & Chaiban: Connexion” to have a dual role as both the exhibition architect to review stand designs, and as the official stand constructor, to design and build exhibit stands, Agency Report at 6; Contraction Officer’s Statement at 1, the Handbook specifically identified SDI srl of Rome, Italy (not Fransquin & Chaiban or Connexion) as the

official stand constructor for the exhibit.² Agency Report, Tab V, UITP Exhibitor's Handbook, § 10.5.

The agency states that, once it became aware that UITP did not restrict the design and construction of exhibit stands to Connexion, the 30-day deadline for submitting project drawings to the exhibition architect had passed, and thus the agency did not have sufficient time to conduct a competition for this procurement. Agency Report at 7. This provides no basis for the sole-source award. In this regard, the record shows that if the agency had reasonably read the UITP Exhibitor's Handbook (or asked UITP), instead of assuming a sole-source award to Connexion was required, it would have had sufficient time to obtain competition to the maximum extent practicable, which would have allowed Europe Displays to compete for the custom-designed exhibition stand.³ In this regard, we note that the agency knew of its requirements and began discussing plans for its custom-designed stand with Connexion in 2004, and had the time to obtain competition for the stand. Agency Report, Tab S, E-mail from Connexion to FTA, Dec. 13, 2004. Thus, the agency's actions in awarding a sole-source contract under simplified acquisition procedures without providing Europe Displays with a reasonable opportunity to compete was not reasonable, and we sustain the protest on this basis. See Information Ventures, Inc., supra; Ultraviolet Purification Sys. Inc., supra, at 2-4.

We do not recommend that the sole-source contract be disturbed inasmuch as it has been fully performed and the exhibition at which the agency needed the pavilion has long since closed. We do recommend that the agency reimburse the protester its costs of pursuing this protest, including reasonable attorney's fees. 4 C.F.R. § 21.8(d) (2005). The protester should submit its certified claim for costs, detailing the time expended and the costs incurred, directly to the contracting agency within 60 days of receipt of this decision. 4 C.F.R. § 21.6(f)(1).

The protester requests that our Office also recommend reimbursement of its bid/proposal preparation costs, which in this case Europe Displays claims are its costs of responding to the FedBizOpps announcement of the proposed sole-source award. Where, as here, our Office determines that a solicitation, proposed award or award does not comply with statute or regulation, we may recommend that the

² The UITP Exhibitor's Handbook clearly contemplates that exhibitors may use firms other than SDI to construct custom-designed stands. Agency Report, Tab V, UITP Exhibitor's Handbook, §§ 2.5, 3.4, 5.1, 6.1.

³ The agency alleges that, although Europe Displays submitted a timely response to the solicitation/notice, the agency could have allowed the firm to compete if Europe Displays had not delayed in responding to the solicitation/notice. Agency Report at 8-9. We see no basis for this attempt to shift the blame for the agency's unreasonable action to a firm that submitted a timely response.

agency reimburse the protester's bid or proposal preparation costs. Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3554(c)(1)(B); 4 C.F.R. § 21.8(d). However, the protester's response to the solicitation/notice here was a statement demonstrating its interest in and qualifications for providing the type of design and construction services required by the agency. Agency Report, Tab R, Europe Displays' Response. Thus, the response was nothing more than a request to be considered a capable source for the agency's requirement and does not constitute a proposal for which we could recommend reimbursement of preparation costs.⁴ See Rotair Indus., Inc., B-224332.2, B-225049, Mar. 3, 1987, 87-1 CPD ¶ 238 at 6 (source approval requests are not bids or proposals).

The protest is sustained.

Anthony H. Gamboa
General Counsel

⁴ The protester also requests that our Office recommend when the agency should issue similar solicitations for future exhibition requirements, and that future competitions should be set aside for small business concerns. We note that under CICA and our Bid Protest Regulations, 4 C.F.R. § 21.1, our Office's jurisdiction is limited to considering protests involving solicitations already issued by federal agencies and awards made or proposed under those solicitations. We also note that any decision on a protest of a future solicitation would be based on the specific circumstances surrounding that solicitation, and thus, current assumptions about the facts and circumstances of possible future solicitations would be speculative and prone to error. We therefore decline the protester's request for additional recommendations.