

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

Decision

Matter of: Major Contracting Services, Inc.

File: B-401472

Date: September 14, 2009

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DIGEST

Agency improperly extended a contract on a sole-source basis where it did not establish that only the incumbent could provide the services and the agency could have avoided the urgency that ultimately led to the sole-source award through advance procurement planning.

DECISION

Major Contracting Services, Inc. (MCS) of Colorado Springs, Colorado, protests the Department of the Army's sole-source extension of contract No. W911S2-08-D-3000 to DAV Prime/Vantex Service Joint Venture (DAV Prime JV) of Larue, Texas, for portable chemical toilet services at Fort Drum, New York.

We sustain the protest.

On March 14, 2008, request for quotations (RFQ) No. W911S2-08-T-3009 was issued as a 100-percent set-aside for Service-Disabled Veteran-Owned Small Business Concerns (SDVOSBC) to acquire portable chemical toilet services at Fort Drum, New York. The procurement was conducted using simplified acquisition procedures under Federal Acquisition Regulation (FAR) Part 13.5.¹ The base year of the contract was for the period from June 1, 2008 to May 31, 2009 with four 1-year

¹ FAR subpart 13.5 authorizes the use of simplified procedures for the acquisition of commercial supplies and services in amounts greater than the simplified acquisition threshold but not exceeding \$5.5 million.

options.² Also included was FAR clause 52.217-8, Option to Extend Services (NOV 1999), which states:

The Government may require continued performance of any services within the limits and at the rates specified in the contract. These rates may be adjusted only as a result of revisions to prevailing labor rates provided by the Secretary of Labor. The option provision may be exercised more than once, but the total extension of performance hereunder shall not exceed 6 months. The Contracting Officer may exercise the option by written notice to the Contractor within . . . 30 days of contract expiration.

Agency Report (AR), Tab 3, DAV Prime JV Contract, at 13.

Three quotations were received in response to the RFQ, including quotations from MCS and DAV Prime JV, both of which represented that they were SDVOSBCs. On May 28, the agency made award to DAV Prime JV and performance began on June 1. On June 2, MCS was notified of the contract award in writing.

On June 5, MCS submitted a protest to the contracting officer alleging that DAV Prime JV was not an SDVOSBC and was thus ineligible for award. The agency forwarded MCS's protest to the SBA, which accepted it on June 19. The SBA notified MCS and the agency on June 26 that it had received the timely filed protest. Upon receiving the SBA's notice, the agency chose to allow DAV Prime JV to continue performance under the protested contract.

The SBA Director of Government Contracting sustained MCS's protest on July 15, finding that DAV Prime did not meet the eligibility requirements of an SDVOSBC, and therefore, the joint venture of DAV Prime and Vantex Service failed to qualify as an SDVOSBC. The SBA decision stated

DAV Prime and DAV/Vantex [the joint venture] were not eligible to bid on or perform the protested contract and are not eligible to bid on or perform any future SDVO contracts. . . . The DAV/Vantex joint venture therefore cannot be treated as an SDVO SBC for the purpose of Federal procurement opportunities. . . . The DAV/Vantex joint venture was thus ineligible to receive an award under the subject solicitation and, effective immediately, both DAV Prime and the DAV/Vantex joint venture are prohibited from submitting offers on future SDVO SBC procurements until such time as this determination is either overturned on appeal or relief is granted under 13 C.F.R. § 125.27(g).

² The four 1-year options were evaluated as part of the award decision.

MCS Protest, attach. 1, SBA Size Decision (July 15, 2008), at 1, 4, 5.

After receiving notice of the SBA's decision, MCS contacted the contracting officer to determine the status of the award, given the SBA's findings. The contracting officer informed MCS on July 21 that he would not make any decision until DAV Prime JV "forego(s) appeal or an appeal decision is made." Major Contracting Servs., Inc., B-400616, Nov. 20, 2008, 2008 CPD ¶ 214 at 2.

On July 25, DAV Prime JV appealed the decision of the SBA to the SBA Office of Hearings and Appeals (OHA). The OHA affirmed the SBA's decision and denied DAV Prime JV's appeal on August 15. MCS again contacted the contracting officer on September 8 to determine the status of award and was informed on September 15 that the contract was not and would not be terminated.

On September 19, MCS filed a protest with our Office seeking termination of DAV Prime JV's contract because the SBA had found, and the OHA had affirmed, that DAV Prime JV was not an eligible SDVOSBC.

The SBA's regulations address the effect of an SBA determination on an SDVOSBC status protest and explicitly differentiate between a determination's effect when issued before versus after award:

Effect of determination. SBA's determination is effective immediately and is final unless overturned by OHA on appeal. If SBA sustains the protest, and the contract has not yet been awarded, then the protested concern is ineligible for an SDVO SBC contract award. If a contract has already been awarded, and SBA sustains the protest, then the contracting officer cannot count the award as an award to an SDVO SBC and the concern cannot submit another offer as an SDVO SBC on a future SDVO SBC procurement unless it overcomes the reasons for the protest.

13 C.F.R. § 125.27(g) (2008). In its comments filed in response to MCS's protest, the SBA stated that its regulations "do not, under any circumstances, require a procuring activity to terminate or even suspend an award made to an entity that is subsequently determined to not be SDVO SBC eligible," although the Army "may certainly be subject to moral suasion" to do so. SBA Comments on MCS September 19, 2008 Protest at 3.

On November 20, we denied MCS's protest seeking termination of DAV Prime JV's contract because the SBA's regulation contains no requirement that a contract be terminated if an awardee is found to be other than an SDVOSBC after award was made, as was the case with DAV Prime JV. However, we noted that "given that DAV Prime JV is not an SDVOSBC and thus should not have been awarded the contract under this solicitation that was limited to SDVOSBCs, we think the agency should

consider whether it is appropriate to exercise the options under that firm's contract." Major Contracting Servs., Inc., supra, at 4 n.3.

Consistent with our decision, the agency chose to allow DAV Prime JV to continue performance under the contract for the base year. On February 10, 2009, the agency sent DAV Prime JV a preliminary notice of its intent to exercise the first option year under the contract. This letter noted that the "current period of the subject contract expires on May 31, 2009" and "the option period shall be June 1, 2009 through May 31, 2010."³ AR, Tab 5, DAV Prime JV Preliminary Notice of Option Exercise, at 1.

The Army reports that in early March 2009 the contracting officer and the director of contracting decided that the first option year would not be exercised because they learned that DAV Prime JV was not pursuing efforts to meet the eligibility requirements for an SDVOSBC joint venture. Contracting Officer's Statement at 1. Thus, the Army reports that the agency began planning for a follow-on contract for the portable chemical toilet services. AR at 2.

On March 25, MCS sent a letter to the Army inquiring about the status of the first option year under DAV Prime JV's contract. MCS's letter stated, in pertinent part, that the base year of DAV Prime JV's contract was nearing completion and requested that the contracting officer re-solicit the requirement instead of exercising the first option year. Further, MCS noted that "there remains sufficient interest in the requirement by Service-Disabled Veteran-Owned Small Businesses to once again set it [a new contract] aside for that Socio Economical Group." AR, Tab 6, Letter from MCS to Army (Mar. 25, 2009). The contracting officer replied to MCS's inquiry on May 4, and at that time, informed MCS that the directorate of contracting had decided not to exercise the first option year of DAV Prime JV's contract and would instead be resoliciting Fort Drum's requirement for portable chemical toilets. AR, Tab 7, Letter from Army to MCS (May 4, 2009).

On May 6, the agency rescinded its previously issued preliminary notice of intent to exercise the first option year in two notices sent to DAV Prime JV. The first notice stated, "This is a notice that the Government does not intend to renew subject contract." The second notice stated, "This is a preliminary notice of the Government's intention to extend subject contract under the authority of Federal Acquisition Regulation [FAR] clause number 52.217-8 [quoted above] . . . term of the extended period shall be June 1, 2009 through September 30, 2009." AR, Tab 9, Notices to DAV Prime (May 6, 2009).

³ The agency states, in its report on the protest, that the February notice was sent in error. AR at 6, n.2. However, the record shows that it was not until early May that the agency rescinded the notice, as explained below. Contracting Officer's Statement at 1.

Subsequently, on May 13, the contracting officer prepared a justification for the sole-source extension, which stated:

1. The Directorate of Contracting is working on a new award at this time but it will not be completed in time to continue services.

2. [In accordance with] FAR 17.207(c) the following determinations are made:

a. Due to the limited duration of the option period, the extent of services required, this option period's proximity to the base award period and the determinations made there under, it is determined that the extension of services is the most advantageous methods of fulfilling the Government's need.

b. The exercise of the option to extend services is in accordance with the terms of the option, the requirements of FAR 17.207 and Part 6.

* * * * *

d. The Government has a bonafide need for continuing the services, which will be fulfilled by extending services for four months and will preclude a disruption of services.

AR, Tab 10, Contracting Officer's Justification for Contract Extension (May 13, 2009). On May 14, the contracting officer issued contract modification No. P00001 to extend DAV Prime JV's contract for 4 months--from June 1 to September 30. AR, Tab 11, modification No. P00001 to DAV Prime JV's Contract.

On May 6, the Army also posted a presolicitation notice for the follow-on procurement, RFQ No. W911S2-09-T-3028--a 100-percent small business set-aside, rather than a set-aside for SDVOSBCs. The anticipated issue date of the RFQ was May 27. On July 16, the RFQ for the follow-on procurement was posted on the Federal Business Opportunities website with quotations due on August 6.

MCS protests the Army's 4-month sole-source extension of DAV Prime JV's contract, in essence arguing that the Army should have instead issued a solicitation which would have afforded MCS the opportunity to compete.

The Army argues that our Office lacks authority to review the merits of MCS's protest because this dispute is assertedly a matter of contract administration outside our Office's jurisdiction. It is true that generally our Office will not review matters of contract administration, which are within the discretion of the agency and are for review by a cognizant board of contract appeals or the Court of Federal Claims. Bid Protest Regulations, 4 C.F.R. § 21.5(a) (2009). However, while we generally will not

consider allegations that an option should be exercised under an existing contract because they are matters of contract administration, we will consider protests alleging that an agency's determination to exercise an option in an existing contract, rather than conduct a new procurement, is unreasonable or violates law or regulation. Test Sys. Assocs., Inc., B-244007.6, Mar. 29, 1993, 93-1 CPD ¶ 274 at 4-5. Because that is the allegation here, the MCS protest is appropriate for our consideration.

Here, the agency extended DAV Prime JV's contract for 4 months beyond the base year end date of May 31 by exercising an option in the existing contract--FAR clause 52.217-8, Option to Extend Services. FAR § 17.207(f) requires that a contracting officer, before exercising an option, make a written determination that the exercise of the option is in accordance with the terms of the option and the requirements of FAR § 17.207 and FAR Part 6. FAR § 17.207(f) further states that to meet the requirements of FAR Part 6, regarding full and open competition, the option must have been evaluated as part of the initial competition and be exercisable at an amount specified in or reasonably determinable from the terms of the basic contract.

The option to extend the contract here under FAR clause 52.217-8 was not evaluated as part of the initial competition, so that the exercise of this option amounts to a contract extension beyond the scope of the contract, and therefore effectively constitutes a new procurement. Laidlaw Env'tl. Servs. (GS), Inc.; International Tech. Corp.--Claim for Costs, B-249452, B-250377.2, Nov. 23, 1992, 92-2 CPD ¶ 366 at 4; see Techno-Scis., Inc., B-257686, B-257686.2, Oct. 31, 1994, 94-2 CPD ¶ 164 at 8 n.3. Thus, the agency could not have met the FAR Part 6 standards for full and open competition by simply exercising the option under FAR clause 52.217-8. FAR § 17.207(f); see Antmarin Inc.; Georgios P. Tzanakos; Domar S.r.l., B-296317, July 26, 2005, 2005 CPD ¶ 149 at 8 n. 8. In such circumstances, the agency must justify the use of noncompetitive procurement procedures in accordance with FAR Subpart 6.3 before exercising the unevaluated option. Laidlaw Env'tl. Servs. (GS), Inc.; International Tech. Corp.--Claim for Costs, supra.

An agency may use noncompetitive procurement procedures to procure goods or services where its needs are of such an unusual and compelling urgency that the government would be seriously injured if the agency is not permitted to limit the number of sources from which it solicits proposals. 10 U.S.C. § 2304(c)(2) (2006); FAR § 6.302-2; see Techno-Scis., Inc., supra, at 8. When citing an unusual and compelling urgency, the agency is required to request offers from as many potential sources as is practicable under the circumstances. 10 U.S.C. § 2304(e). An agency using the urgency exception may restrict competition to the firms it reasonably believes can perform the work in the available time so long as the agency did not create the need for the sole-source award from a lack of advanced planning. 10 U.S.C. § 2304(f)(5)(A). We will object to the agency's decision to limit competition on grounds of urgency if the determination lacks a reasonable basis. Laidlaw Env'tl. Servs. (GS), Inc.; International Tech. Corp.--Claim for Costs, supra at 4.

As noted above, the contemporaneous justification for the exercise of this option contained no specific justification for the sole-source extension in accordance with FAR § 6.303 and simply stated that the exercise of the option complied with FAR § 17.207 and FAR Part 6. The agency in its report on the protest explained:

FAR 52.217-8 is typically used for continuity of services when solicitation “slip” occurs. A solicitation “slip” or delay in a follow-on procurement can occur for various reasons, and in this instance, the need for the four-month extension was due to the following reasons: First, following the decision not to renew the DAV Prime/Vantex contract, the market research for the new procurement took longer than anticipated. This was mainly due to the rather broad NAICS Code, 562991 -- Septic Tank and Related Services, which applied to many categories of contractors (e.g., general plumbing contractors) beyond those specifically providing chemical toilet services. . . . In addition, since the DAV Prime/Vantex contract was not going to be renewed, the services provided under the base year of the contract were scheduled to end on May 31, 2009; however, the summer months are heavy training months at Fort Drum during which time there is a high-volume need for portable chemical toilets and continuity of such services during the summer period is essential. The limited contract extension will allow for continuity of services and avoid the potential disruption that would accompany a changeover of contractors during the summer months.

Contracting Officer’s Statement at 2.

We agree with the agency that the circumstances presented met the requirements for an exception to full and open competition due to an unusual and compelling urgency, when, at the end of DAV Prime JV’s contract, it did not have a follow-on contract in place for services during the summer months--when the portable chemical toilet services would be most used. However, the record here evidences that the urgency resulted from the Army’s failure to adequately plan for this procurement in advance and that DAV Prime JV was not the only firm interested and capable of performing these services.

The Army knew in August 2008 of the OHA’s decision that DAV Prime JV was not an SDVOSBC. Both the SBA and our Office’s decision in November 2008 suggested that the Army should consider whether to exercise an option, since DAV Prime JV had been found not to be an eligible SDVOSBC. In early March 2009, approximately 5 months later, the agency finally determined that it would not exercise the first option year because DAV Prime JV was not pursuing efforts to meet the eligibility requirements for an SDVOSBC joint venture.

The agency points to the delay in issuing a new solicitation--due to a rather broad NAICS Code for septic tank and related services--as the reason for the delay in procuring follow-on services and the cause of the urgency. However, as the market survey took longer than expected, it is apparent that the agency should reasonably have been aware that the follow-on contract would not be in place by May 31, the date DAV Prime JV's contract expired, and that the agency was required to plan how it would obtain these services until the follow-on contract would be in place.

If there was not time for full and open competition for the interim services until the follow-on contract was executed, in accordance with FAR Subpart 6.3, the agency should have conducted a limited competition among qualified sources who the agency found would be interested in performing the services. While the final results of the market survey, which ultimately led to the agency's decision to issue the follow-on procurement as a small business set-aside, took longer than the Army anticipated, the survey identified potential qualified sources that would be interested in providing these services and could have been included in a limited competition. Further, because the Fort Drum requirement for portable chemical restroom services was "a recurring requirement that has been procured by contract for at least the last 10 years," see MCS's Sept. 19, 2008 Protest, Agency Acquisition Strategy, at 1, the Army was presumably already familiar with the potential sources who could provide these interim services. Indeed, MCS, a qualified firm, had already indicated its interest and capability of providing these services. Thus, the record evidences that DAV Prime JV was not the only firm capable of performing these services.

Based on this record, the agency's has not provided a reasonable basis for the sole-source extension. It is apparent that the Army did not properly plan in advance for its requirement to extend this contract; we do not think that the agency could sit idly by in the face of the circumstances here and not take action to obtain more competition for its requirements. VSE Corp.; Johnson Controls World Servs., Inc., B-290452.3, et al., May 23, 2005, 2005 CPD ¶ 103 at 9.

MCS's protest is sustained.

We have been advised that DAV Prime JV has substantially performed the 4-month contract extension, which expires September 30, 2009, and that the agency intends for the competition and award of the follow-on contract to be completed by that time. Given the imminent expiration of the contract extension and award of the follow-on contract, it is impracticable to recommend corrective action. However, we recommend that the protester be reimbursed the costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). The protester should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days after receipt of this decision. Id. at § 21.8(f)(1).

The protest is sustained.

Daniel I. Gordon
Acting General Counsel