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**Comptroller General
of the United States**

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

Decision

Matter of: Strong Environmental, Inc.

File: B-311005

Date: March 10, 2008

Richard Verch for the protester.

Emily Vartanian, Esq., Library of Congress, for the agency.

Eric M. Ransom, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the decision.

DIGEST

Use by Library of Congress of cooperative agreement instead of contract for disposal and recycling of cassette tape players is denied where the applicable regulations do not require use of a contract for the requirement.

DECISION

Strong Environmental, Inc. protests the decision of the Library of Congress to provide for the disposal and recycling of “talking book” cassette tape players through a Memorandum of Understanding (MOU) between itself and Federal Prison Industries, Inc. (UNICOR), rather than through a previously conducted competitive solicitation for the same requirement. Strong contends that the Library has improperly used the UNICOR MOU for the requirement and should have awarded a contract to Strong under the solicitation.

We deny the protest.

On January 31, 2007, the Library issued solicitation No. NLS20070070 for services to dispose of “talking book” cassette tape players for the Library’s National Library Service for the Blind and Physically Handicapped (NLS) program. The solicitation was intended as a continuation of the Library’s previous practice of disposing of NLS equipment through contracts arranged by NLS, rather than through the Library’s

Integrated Support Services unit.¹ Strong and another firm, North Georgia Telecom (NGT), responded to the solicitation by the closing date.

On April 23, the Library and UNICOR concluded an MOU under which UNICOR would dispose of, recycle, and/or refurbish or reuse electronic equipment not needed by the Library, at no cost to the Library. The MOU was negotiated under Library of Congress Regulation (LCR) 2120, "Cooperative Agreements Without Transfer of Funds," and was signed on the Library's behalf by the director of the Library's Integrated Support Services unit, not by a contracting officer in the Library's Office of Contracts and Grants Management.

On August 3, the Library's Office of Contracts and Grants Management awarded a contract under solicitation No. NLS20070070 to NGT for \$594,250, for 1 base year plus 4 option years. Strong received notification of the award on August 6 and subsequently requested a debriefing on August 14. Strong received the debriefing on August 23, and filed an agency-level protest on August 29, alleging that NGT was ineligible for the award because NGT did not possess certain required certifications from the Environmental Protection Agency until 6 days after the solicitation's closing date.

In November, the Library determined that the NLS "talking book" cassette tape players fell within the scope of the UNICOR MOU and could be disposed of by UNICOR at no cost to the government. The Library immediately met with UNICOR to discuss combining the NLS "talking book" players with other Library machines being sent to UNICOR for disposal. After this meeting with UNICOR, the Library decided that it would terminate the contract with NGT for the convenience of the government effective January 31, 2008, and that UNICOR would begin accepting NLS "talking book" players on February 1. On December 5, 2007, the Library terminated NGT's contract, effective January 31, 2008. On December 13, the Library notified Strong that it had elected to terminate the contract with NGT and use the UNICOR MOU to provide the required disposal and recycling services at no cost to the government. Strong then filed this protest with our Office on December 21.²

¹ The Integrated Support Services unit is the office within the Library tasked with centralizing the Library's support service needs, such as shipping and inventory control, and has traditionally handled disposal of most of the Library's excess non-collections personal property.

² The Library's termination of the NGT contract rendered Strong's agency-level protest of the award to NGT academic for purposes of any subsequent protest on this ground to our Office. We only consider protests against specific procurement actions and will not render to a protester what would be, in effect, an advisory decision. Dyna-Air Eng'g Corp., B-278037, Nov. 7, 1997, 97-2 CPD ¶ 132.

On January 15, 2008, the Library and UNICOR agreed to an amendment to the UNICOR MOU to provide for the disposal of the NLS “talking book” players.

Strong contends that the Library’s UNICOR MOU was improperly executed and cannot be used for the disposal of the NLS “talking book” players in lieu of a procurement contract. Strong argues that the Library failed to execute a required determination and findings (D&F) prior to entering into the UNICOR MOU, and that the Library should not be allowed to use the MOU to essentially make a “sole-source award” to UNICOR. Strong misunderstands the applicable procurement regulations.

The Library, as a legislative branch agency, is not subject to the Federal Acquisition Regulation (FAR), see 41 U.S.C. § 253(a)(1)(A) (2000); Carol Solomon & Assocs., B-271713, July 19, 1996, 96-2 CPD ¶ 28 at 1 n.1, but conducts its acquisitions in accordance with the LCR. The Library’s general procurement regulation, LCR 2110, “Procurement – Supplies and Services,” states that it is the policy of the Library to follow the FAR in procurements of goods and services under LCR 2110 and that all deviations from the FAR under LCR 2110 must be documented by a D&F prepared in accordance with the FAR. However, LCR 2110 also states that “procurements conducted under other LCRs are not subject to the FAR unless specifically made subject thereto by the express terms of the regulation.” LCR 2120, “Cooperative Agreements without Transfer of Funds,” is one such “other LCR;” nothing in LCR 2120 makes the FAR applicable to actions taken under the provision. Therefore, the FAR is not applicable to Library agreements made pursuant to LCR 2120, and no D&F is necessary to allow such an agreement, provided that the agreement in fact falls within the definition of “cooperative agreement” in LCR 2120.

Section 4 of LCR 2120 defines a “cooperative agreement” as a “legal instrument reflecting a relationship between the Library of Congress and a . . . commercial organization, international organization, Federal, State, local or foreign government, individual, or other party, to establish a joint digitization or education project or other activity . . . that is consistent with the Library’s mission and intended for the parties’ mutual benefit.” In comparison, section 4 of LCR 2110 defines a “procurement contract” as a “legally binding instrument that obligates a seller to furnish goods and/or services to the Library for the Library’s direct benefit or use, and obligates the Library to pay for those goods and/or services.”

Here, the agreement between the Library and UNICOR provides that the Library may provide certain electronic equipment to UNICOR in lieu of abandonment and destruction and that UNICOR agrees to use the electronic equipment in meeting its mission of providing opportunities for job training and skills development. By the January 15, 2007 amendment to the MOU, UNICOR agreed to provide for the disposal of the NLS “talking book” players at no cost to the Library.

Based on review of the MOU between the Library and UNICOR, we conclude that the MOU is a “cooperative agreement” subject to the provisions of LCR 2120, and not a “procurement contract” subject to the provisions of LCR 2110. Specifically, the fact

that the MOU acknowledges the mutual benefit to the parties and the fact that the MOU does not obligate the Library to pay for the services provided by UNICOR indicate that LCR 2120 controls.³

We generally will not review a protest of the award, or solicitation for the award, of cooperative agreements because they do not involve the award of a “contract.” See Sprint Communications Co., L.P., B-256586, B-256586.2, May 9, 1994, 94-1 CPD ¶ 300 at 3. However, we will consider a protest alleging that the agency is improperly using a cooperative agreement in lieu of a procurement contract.⁴ Energy Conversion Devices, Inc., B-260514, June 16, 1995, 95-2 CPD ¶ 121 at 2. In this case, we find nothing in LCR 2110 and 2120 to prohibit the use of a cooperative agreement or to mandate the use of a procurement contract in any particular situation in which an agreement fitting the definition of a “cooperative agreement” is available to fulfill a requirement. We therefore see no basis to conclude that the Library was required to use a procurement contract, or that it was improper for the Library to use the UNICOR MOU for the requirement here.

To the extent that Strong is an interested party to argue that the NGT contract should have been rescinded as improperly awarded rather than terminated for convenience, this issue concerns a matter of contract administration over which we do not exercise jurisdiction. See 31 U.S.C. § 3552 (2000); Bid Protest Regulations, 4 C.F.R. § 21.5(a) (2007). Further, Strong’s contention that it should be awarded the work remaining under the NGT contract is academic given the Library’s decision--which we have found no reason to question--to use the UNICOR MOU for that work.

The protest is denied.

Gary L. Kepplinger
General Counsel

³ Given our conclusion that the UNICOR MOU is a cooperative agreement under LCR 2120, the requirement for a D&F referenced under LCR 2110 where a deviation from the FAR is contemplated does not apply here.

⁴ Our analysis in these cases is guided by the provisions of the Federal Grant and Cooperative Agreement Act, 31 U.S.C. §§ 6301-08 (2000). For example, the Act in pertinent part states that an executive agency shall use a procurement contract where “the principle purpose of the instrument is to acquire (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government.” 31 U.S.C. § 6303. The Act, however, applies only to executive agencies, not the Library. See *id.* Our analysis in this case is therefore guided instead by reference to the LCR, as the applicable authority for the Library’s acquisitions.

