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**Comptroller General
of the United States**

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

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Decision

Matter of: OSC Solutions, Inc.

File: B-401498

Date: September 14, 2009

Robert H. Koehler, Esq., and Elizabeth Gill, Esq., Patton Boggs LLP, for the protester.
Kacie A. Haberly, Esq., General Services Administration, for the agency.
Peter D. Verchinski, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the cancellation of a request for quotations (RFQ) and issuance of orders on a sole-source basis to a non-profit agency under the authority of the Javits-Wagner-O'Day Act is sustained where the acquired items are not on the procurement list maintained by the Committee for Purchase From People Who Are Blind or Severely Disabled, so that the sole-source procurement was improper and therefore the cancellation of the RFQ was not reasonable.

DECISION

OSC Solutions, Inc. of West Palm Beach, Florida, protests the General Services Administration's (GSA) cancellation of a request for quotations (RFQ) and subsequent sole-source award of a blanket purchase agreement to the Industries of the Blind, Greensboro, North Carolina (IBNC), for tarps.

We sustain the protest.

The Federal Emergency Management Agency (FEMA), Department of Homeland Security, identified an urgent requirement for 162,799 "self help" tarps to restock four of FEMA's distribution centers for the 2009 hurricane season. On May 18, 2009, FEMA requested that GSA purchase the tarps in accordance with certain "FEMA Tarp Specifications," which identified such requirements as material, thickness, ultraviolet resistance, and packaging (each tarp was to be packaged with 2 lengths of 100-foot parachute cord). Legal Memorandum at 2; Agency Report (AR), Tab 10, FEMA Tarp Specifications.

GSA's contracting officer asked IBNC and the Lighthouse for the Blind, Fort Worth, Texas (two "Ability One" vendors) whether they could satisfy the agency's

requirements in accordance with the Javits-Wagner-O'Day (JWOD) Act.¹ IBNC informed GSA that it had 30,000 tarps in stock and that

these are exactly the same tarps we supplied to FEMA recently. They do meet these exact specs. We will get you delivery information in the morning. Do you need more than 30,000 if we could get them in a couple weeks?

AR, Tab 19, IBNC Email to GSA, May 19, 2009. GSA responded that it would not require more than the 30,000 tarps from IBNC because the agency's "intent was to acquire all the tarps that the Industries [of] the Blind and Lighthouse for the Blind had available for immediate shipment that met the FEMA specification and to acquire the remaining quantity from the Federal Supply Schedule [FSS]."² Contracting Officer's Statement at 5. The Lighthouse for the Blind did not have tarps that met the specifications. Agency Dismissal Request at 2.

On May 19, GSA emailed the RFQ to five FSS vendors, including Premier and Companies, Inc., asking those firms for a quotation for 162,799 tarps under their FSS contracts.³ AR, Tab 13. The RFQ identified the FEMA self-help tarp specifications and delivery instructions. Although no required delivery date was specified, the vendors were informed that quotations would be evaluated for "the ability of the

¹ The JWOD Act provides authority for noncompetitive acquisitions for specified supplies or services. See Federal Acquisition Regulation (FAR) § 6.302-5(b)(2). The Act establishes the Committee for Purchase from People Who Are Blind or Severely Disabled (the Committee), and grants it exclusive authority to establish and maintain a procurement list of supplies and services provided by qualified nonprofit agencies for the blind or disabled. 41 U.S.C. §§ 46(a), 47(a) (2000); see FAR Subpart 8.7. Once a commodity or service has been added to the procurement list, contracting agencies are required to procure that commodity or service directly from a qualified agency for the blind or severely handicapped if it is available within the time period required. 41 U.S.C. § 48; FAR § 8.704; JAFIT Enters., Inc., B-266326, B-266327, Feb. 5, 1996, 96-1 CPD ¶ 39 at 2.

² The contracting officer states that he was running a "dual procurement," which he has "done several times while supporting disaster. Typically, the quantity of self-[help] tarps required by FEMA is so great that no single source is able to meet the expedited delivery requirement or quantity. Therefore, seeking to fill the requirement by going [to] several sources is the normal operating procedure." Contracting Officer's Statement at 14.

³ GSA states that the quantity of tarps should have been identified as 132,799 tarps. Contracting Officer's Statement at 4.

vendor to meet requirement with the best delivery schedule, technical, and price.”
Id. Quotations were requested by the next day.

GSA received quotations from Premier and IBNC. Premier stated that it could provide 162,799 tarps at a price of [deleted] per tarp with delivery to the various locations “on or around” [deleted].⁴ AR, Tab 17, Premier Email Quotation, May 19, 2009, at 4. IBNC informed GSA that it could provide 30,000 tarps at a price of [deleted] but would need approximately 2 ½ weeks to obtain the parachute cord and could begin shipping the week after receiving the parachute cord. IBNC also stated that it could provide an additional 100,000 tarps “very soon” but did not provide a price for the additional tarps. AR, Tab 20, IBNC Quotation, May 20, 2009.

In order to obtain more competition, the contracting officer asked OSC Solutions, another FSS vendor, for a quotation for the tarps. OSC Solutions stated that it could provide the tarps at a price of [deleted] per tarp, with delivery to begin [deleted] weeks after receipt of order, at a delivery rate of no fewer than [deleted] tarps per week for [deleted] weeks. AR, Tab 5, OSC Solutions Quotation, May 20, 2009.

GSA decided to issue an order for the tarps to Premier. After being notified of this decision, OSC Solutions questioned Premier’s ability to provide a tarp in compliance with the Trade Agreement Act (TAA).⁵ AR, Tab 1, OSC Solutions Email to GSA, May 22, 2009. GSA attempted to confirm whether Premier’s tarp was TAA-compliant, but could not.⁶ On May 29, GSA contacted IBNC to determine whether it could provide all of the 162,799 tarps, and IBNC indicated that it could provide all of the tarps by the end of June. Contracting Officer’s Statement at 10; Legal Memorandum at 3. That same day, GSA cancelled the RFQ.

⁴ Premier subsequently informed GSA that its delivery would be [deleted] days after receipt of an order. AR, Tab 17, Premier Email to GSA, May 21, 2009, at 8.

⁵ The TAA, as implemented by the FAR, generally requires that supplies and services in excess of specified dollar thresholds be acquired from the United States or designated countries. 19 U.S.C. § 2512(a)(1)(A); FAR § 25.403(c). FSS Schedule 51V, “Hardware Superstore,” under which GSA sought quotations for the tarps, incorporates FAR § 52.225-5, “Trade Agreements,” requiring that supplies under this schedule be TAA-compliant.

⁶ On June 1, GSA removed Premier’s tarp from the firm’s FSS contract because “TAA compliance could not be validated.” AR, Tab 2, Modification of Premier FSS Contract, June 1, 2009. Subsequently, Premier proposed a 20x25 Blue Poly Tarp from South Korea, which is listed as a designated country. FAR § 25.003. GSA added that tarp to Premier’s FSS contract. Id., Modification of Premier FSS Contract, June 4, 2009.

On June 2, the agency executed a justification and approval (J&A) for other than full and open competition to establish a blanket purchase agreement with IBNC, citing the JWOD Act as the basis for its sole-source purchase of the tarps. AR, Tab 8, J&A. The next day, the agency issued four purchase orders (one for each of the four distribution centers) to IBNC for a total of 162,799 tarps. AR, Tab 9, Purchase Orders issued to IBNC. Shortly thereafter, OSC Solutions protested to our Office.⁷

OSC Solutions argues that GSA could not issue the blanket purchase agreement and orders to IBNC under the authority of the JWOD Act, because the tarps are not on the JWOD procurement list. Given that the agency could not purchase the tarps from IBNC under the authority of the JWOD Act, OSC Solutions argues that the agency did not have a reasonable basis to cancel the RFQ, where OSC Solutions had submitted a responsive quotation.

A contracting agency needs a reasonable basis to support a decision to cancel an RFQ. Deva & Assoc. PC, B-309972.3, Apr. 29, 2008, 2008 CPD ¶ 89 at 3. We have recognized that a solicitation may be cancelled where, during the course of the procurement, the item or services involved are discovered to be on, or have been added to, the JWOD procurement list. See Best Foam Fabricators, Inc., B-259905.3, June 16, 1995, 95-1 CPD ¶ 275 at 2; Microform Inc., B-246253, Nov. 13, 1991, 91-2 CPD ¶ 460, aff'd on recon., B-246253.2, Mar. 31, 1992, 92-1 CPD ¶ 338.

Here, we find that GSA had no reasonable basis to cancel the RFQ, because the tarps obtained from IBNC under the authority of the JWOD Act are not on the procurement list.⁸ Accordingly, GSA's noncompetitive purchase of the tarps was not authorized by the JWOD Act. See JAFIT Enters., Inc., supra, at 2. Given that the noncompetitive purchase of the tarps from IBNC under the JWOD Act was the agency's only documented basis for cancellation of the RFQ, we find that GSA did not have a reasonable basis to cancel the RFQ.

GSA nevertheless argues that OSC Solutions was not prejudiced by the agency's cancellation of the RFQ. Specifically, GSA contends that it could have issued an

⁷ Prior to submitting its report, GSA requested that we summarily dismiss the protest on the basis that the OSC Solutions was not an interested party and was not prejudiced by the agency's actions for reasons that the agency later renewed in its report and which we address in our decision below. We did not find summary dismissal of the protest to be appropriate.

⁸ GSA does not contend that the tarps acquired from IBNC are on the procurement list; in fact, GSA acknowledged in its request for dismissal that "IBNC [was] in the process of requesting that the Committee place the specific tarps on the Procurement List." See Agency Dismissal Request, June 24, 2009, at 5. As of the date of our decision, the tarps were not identified on the procurement list.

order under the RFQ to IBNC⁹ or to Premier and further argues that it would not have issued an order to OSC Solutions under the RFQ because the firm's quoted delivery schedule was too long. Our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions, that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc., v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996).

We find a reasonable possibility that OSC Solutions was prejudiced by GSA's cancellation of the RFQ and improper issuance of orders to IBNC under the JWOD Act. GSA's arguments do not establish that there was no reasonable possibility that OSC Solutions would not have had a substantial chance of receiving an order under the RFQ. OSC Solutions raised colorable arguments disputing whether Premier or IBNC offer TAA-compliant tarps that would satisfy the RFQ requirements. We did not address these arguments, given the agency's cancellation of the RFQ.¹⁰ With respect to the agency's arguments that the delivery schedule quoted by OSC Solutions was too long, the contemporaneous record does not show that the agency considered OSC Solutions's quotation to be unacceptable, either due to the quoted delivery schedule or for any other reason.

We sustain the protest. While we would normally recommend that the agency cancel the orders to IBNC and consider issuing an order or orders under the RFQ, GSA has advised us that it terminated for convenience the orders issued to IBNC, after having received 68,406 tarps, and conducted a limited competition for the remaining 93,393 tarps, under which GSA received a quotation from OSC Solutions. Given that there is no longer a requirement for the tarps and that OSC Solutions was given an opportunity to compete for a portion of the tarps, we recommend that OSC Solutions be reimbursed a pro-rated amount of the firm's costs of quotation preparation, see Hydro Research Sci., Inc.—Costs, B-228501.3, June 19, 1989, 89-1 CPD ¶ 572 at 5-6, and reimbursed its costs of filing and pursuing the protest, including reasonable

⁹ As noted above, GSA received a quotation from IBNC under the RFQ. FAR § 8.713 permits agencies to "acquire supplies and services not included on the Procurement List from an AbilityOne participating nonprofit agency that is the low responsive, responsible offeror under a solicitation issued by other authorized acquisition methods." We do not address whether IBNC, which does not hold an FSS contract, could compete for an order under a competition conducted among FSS schedule holders.

¹⁰ As noted above, GSA removed the tarps from Premier's FSS contract, as a result of the protest. Although tarps were later added to Premier's FSS contract, the record does not show that these tarps are identical to the tarps Premier quoted, and does not show the price that would be associated with the newly-added tarps.

attorneys' fees. 4 C.F.R. § 21.8(d)(1), (2) (2009). OSC Solutions should submit its certified claim for costs, detailing the time expended and costs incurred, directly to GSA within 60 days after the receipt of this decision.

Daniel I. Gordon
Acting General Counsel