

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Camden Shipping Corporation

File: B-406171; B-406323

Date: February 27, 2012

Beverly Grissom for the protester.
Kristopher A. Fischer, Esq., Robert M. Elwell, Esq., and Kelly McKallagat, Esq.,
Department of the Navy, for the agency.
John L. Formica, Esq., and James A. Spangenberg, Esq., Office of the General
Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency reasonably awarded a bridge contract on a sole-source basis for the operation and maintenance of a vessel, where the agency reasonably determined that only the incumbent contractor/awardee could ensure the critically needed uninterrupted operation of the vessel, and the sole-source award did not result from a lack of advance procurement planning.
 2. Agency had a reasonable basis to cancel a solicitation for the operation and maintenance of a vessel that was set-aside for small businesses, and reissue the solicitation for the same services on an unrestricted basis, where the record supports the agency's determination that prices offered by the small businesses in response to the solicitation set aside for small businesses were unreasonable.
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DECISION

Camden Shipping Corporation protests the award, on a sole-source basis, of a bridge contract (N00033-12-C-2502 (C-2502)) to Seaward Services, Inc. by the Department of the Navy, Military Sealift Command (MSC), for the operation and maintenance of the ocean survey vessel (OSV) BOLD. Camden also contends that RFP No. N00033-12-R-2501 (RFP 12-2501), issued by MSC for the same services, should have been issued as a total small business set-aside.

We deny the protests.

BACKGROUND

The OSV BOLD is operated under the control of the Environmental Protection Agency (EPA), and “collects crucial coastal information in support of coastal and marine protection programs.” The OSV BOLD sails year-round along the coastlines of the United States and the Caribbean, and occasionally operates in foreign waters. In operating and maintaining the OSV BOLD, the contractor provides ship officers and crew, operational and technical support, as well as the equipment, tools, provisions and supplies necessary to operate, maintain, and repair the vessel. RFP No. N00033-10-R-2501 (RFP 10-2501) § C 1.1; RFP 12-2501 § C 1.1.

Seaward has operated and maintained the OSV BOLD since September 13, 2005. Until recently, Seaward operated and maintained the OSV BOLD under contract No. N00033-05-C-2500 (C-2500), awarded under a solicitation that had been issued as a total set-aside for small businesses. Seaward is currently performing these same services under the second of the two bridge contracts that were awarded since the expiration of C-2500.

The agency issued RFP 10-2501, on March 25, 2010, as a total set-aside for small businesses, to solicit proposals for the operation and maintenance of the OSV BOLD. The solicitation provided that award would be made to the offeror submitting the low-priced, technically acceptable proposal. The agency received proposals from four offerors, including Seaward and Camden, in response to the solicitation. The agency selected Seaward’s proposal for award, and provided the remaining offerors with the requisite pre-award notice on June 23, 2010.

Camden and another offeror, Ocean Services, LLC, timely protested Seaward’s size status to the contracting officer. These size status protests were promptly forwarded to the Small Business Administration (SBA). The record reflects that the SBA was unable to determine Seaward’s size status in 10 business days as required, and requested that the contracting officer grant “an indefinite extension to their evaluation of the case.” Agency Report (AR) (B-406171), Tab 20, MSC’s Memorandum to Dissolve Set-Aside, at 3. The contracting officer granted the extension, and withheld award to Seaward pending the SBA’s size status determination. Id.; see Federal Acquisition Regulation (FAR) § 19.302(h)(2).

In order to ensure the uninterrupted operation of the OSV BOLD, the contracting officer issued a modification to C-2500 to extend Seaward’s performance for 49 days through September 30, 2010. C-2500 Modification 54 at 2. This extension of Seaward’s contract was supported by a Justification and Approval (J&A) citing 10 U.S.C. § 2304(c) (unusual and compelling urgency). AR (B-406171), Tab 1, J&A (Aug. 10, 2010). The J&A specified that while it authorized an additional 6 months of contract performance, the performance was required to be exercised in parts. Id. at 3. Notice of this J&A was posted on the Federal Business Opportunities (FEDBIZOPPS) website on September 23, 2010.

On September 17, the agency received SBA's determination finding Seaward to be other than a small business for purposes of this procurement. Shortly thereafter, the agency resumed its evaluation of the three remaining proposals, and extended Seaward's performance through modification of C-2500 for an additional 45 days through November 14, in order to have the time required to make another award decision. On October 1, the agency was notified that Seaward had appealed SBA's determination to SBA's Office of Hearing and Appeals. The agency, while awaiting a decision on Seaward's appeal, extended Seaward's performance under C-2500 for 90 days, that is, from November 15, 2010 through February 12, 2011. AR (B-406171), Tab 20, MSC's Memorandum to Dissolve Set-Aside, at 4.

The agency found that the three remaining proposals were significantly higher in price than Seaward's proposed price. Id. Because of this, the agency issued a market survey to gauge interest and potential pricing for the operation and maintenance of the OSV BOLD. AR (B-406171), Tab 5, Market Survey (Dec. 10, 2010). The market survey specified that if an RFP were issued, it would be issued on an unrestricted basis, and not as a set-aside for small businesses. Id. at 2. The agency received a number of responses to the market survey by the due date of December 20. On December 28, the agency received SBA's decision denying Seaward's appeal of the size status determination. AR (B-406171), Tab 20, MSC's Memorandum to Dissolve Set-Aside, at 4.

During this same time period (December 2010), the agency requested that the three remaining offerors (Camden, Ocean Services, and a third offeror) extend their proposals. Ocean Services, whose proposal's acceptance period expired December 18, submitted an extension of its proposal on December 20. The agency informed Ocean Services that because its proposal had expired, and its extension was considered late, its proposal would no longer be considered for award. Ocean Servs., LLC, B-404690, Apr. 6, 2011, 2011 CPD ¶ 73 at 2. Ocean Services protested the elimination of its proposal from the competition to our Office on December 30, 2010. The agency "suspended further action on the procurement pending a decision from the GAO" because of the uncertainty created by Ocean Services' protest to our Office. AR (B-406171) at 5.

On January 24, 2011, the agency executed a J&A for the award of a bridge contract to Seaward to ensure the continuous operation of the OSV BOLD for an additional 90-day period, that is, from February 13 to May 13. AR (B-406171), Tab 11, J&A (Jan. 24, 2011). This J&A, which cited 10 U.S.C. § 2304(c)(2) (unusual and compelling urgency), stated that Seaward was the only source that could provide the required services without interruption, and included a table and analysis supporting the agency's determination that the bridge contract's costs were "fair and reasonable." Id. Notice of this J&A, and a redacted version of the J&A, and were posted on FEDBIZOPPS on February 17, 2011. AR (B-406171), Tab 15, FEDBIZOPPS Notice (Feb. 17, 2011).

Our Office sustained Ocean Services' protest on April 6, and recommended, among other things, that Ocean Services be allowed to revive its expired proposal. Ocean Servs., LLC, supra, at 4. The agency followed our Office's recommendation, and on April 12, re-opened discussions with the remaining three small business offerors (Camden, Ocean Services, and a third offeror). AR (B-406171) at 6. During discussions, the agency advised each of these offerors that their proposed prices were significantly higher than the agency's independent government estimate (IGE), and cautioned the offerors that the agency could award a contract under RFP 10-2501 only if the price was "fair and reasonable." AR (B-406171), Tab 20, MSC's Memorandum to Dissolve Set-Aside, at 5.

The three offerors submitted revised proposals by the May 6 due date. Id. at 6. The agency found that two of the proposals had errors in their proposed pricing, and that discussions should be reopened. Id. The agency also issued a 79-day extension to Seaward's bridge contract, which was set to expire on May 13. This extension, which provided for performance from May 14 to July 13, was supported by a J&A citing 10 U.S.C. § 2304(c)(2) (unusual and compelling urgency), with the J&A stating that Seaward was the only source that could provide the required services without interruption. The J&A, which authorized the initial 79-day extension, allowed for a total performance period of 180 days. AR (B-406171), Tab 17, J&A (Apr. 27, 2011). Notice of this J&A was posted on FEDBIZOPPS on May 11. AR (B-406171), Tab 19, FEDBIZOPPS Notice (May 11, 2011).

On May 18, discussions with the three remaining small business offerors were reopened, and revised proposals were requested and received. Errors were found once again with regard to one offeror's proposal, and on June 2, discussions were again reopened. AR (B-406171), Tab 20, MSC's Memorandum to Dissolve Set-Aside, at 6. Revised proposals were requested, received, and evaluated, and the cognizant contracting officer ultimately concluded that an award could not be made under the RFP 10-2501 because the prices proposed by the three remaining small business offerors, including Camden, were not fair and reasonable. Id. The contracting officer thus recommended that the small business set-aside be dissolved. Id. at 17-18. On August 17, MSC's Director of Contracts and Small Business Specialist, and SBA's Procurement Center Representative, concurred. AR (B-406171), Tab 21, Small Business Coordination Record.

On August 18, the agency issued an amendment canceling RFP 10-2501. RFP 10-2501 amend. 13, Cancellation Notice and Withdrawal of Small Business Set-Aside. The record further reflects that on August 18, the contracting officer contacted each offeror by telephone, including Camden, and informed them that the solicitation was cancelled, that the small business set-aside was cancelled because the agency was unable to determine that the prices offered were fair and reasonable, and that the agency intended to issue another solicitation that would not be set aside for small businesses. Agency Request for Dismissal

(Nov. 23, 2011), attach. 1, Contracting Officer's Statement, at 1. No protest of the cancellation of RFP 10-2501 was filed at that time.

The agency subsequently approved the remaining extension of Seaward's performance under the bridge contract, which provided for Seaward's continued performance to November 9. The agency also determined, based on unusual and compelling urgency, that the award of a second bridge contract to Seaward was necessary to ensure the continuous operation of the OSV BOLD from November 10 until a contract under a solicitation providing for the award of a contract for the operation and maintenance of the OSV BOLD on an unrestricted basis could be awarded. AR (B-406171), Tab 23, J&A (Oct. 21, 2011). The agency noted in this regard that it would take 6 to 12 months from the planning stages to the award of a contract on an unrestricted basis, followed by a 45 day period to complete "ship turnover" to the successful contractor, if other than Seaward. Id. at 1.

The agency thus awarded a second bridge contract to Seaward on November 4, and notice of the J&A supporting this action, and a redacted version of the J&A, were posted on FEDBIZOPPS on November 11, 2011. AR (B-406171) at 8; Tab 25, FEDBIZOPPS Notice (Nov. 25, 2011). On November 21, Camden protested the award of the second bridge contract to our Office.

On December 9, MSC issued RFP 12-2501 on an unrestricted basis. Proposals were due on January 9, 2012. On January 9, Camden filed a protest that this RFP should be set aside for small businesses.

DISCUSSION

Sole-Source Bridge Contract

Camden argues that the award of the second bridge contract to Seaward was improper.¹ Protest (B-406171) at 1, 9. Camden asserts here that it is capable of

¹ Camden also appeared to argue that the cancellation of RFP 10-2501 was improper. Protest (B-406171) at 1, 9. In this regard, Camden argued that its proposed price in response to RFP 10-2501 was fair and reasonable, and that the agency's determination to the contrary was unreasonable. Id. at 7. Camden concluded that the agency had thus "effectively and improperly removed the solicitation and any subsequent award for the OSV BOLD from the Small Business Program," and that the agency should "reissue the [s]olicitation as total small business set-aside." Id. at 6, 9. However, in response to an agency request that our Office dismiss this aspect of Camden's protest as untimely, given that Camden's protest was filed more than 10 days after Camden knew of the agency's cancellation of RFP 10-2501 and the withdrawal of the small business set-aside, Camden stated that it was not challenging the cancellation, but rather, had
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performing the bridge contract, and that the agency “exaggerates” the time required to transition to a new “ship manager,” such as Camden. Protester’s Comments (B-406171) at 2, 18. Camden further argues that the urgency of the requirement that resulted in the sole-source award of the bridge contract to Seaward was the result of a lack of advance procurement planning.

The Competition in Contracting Act (CICA), 10 U.S.C. § 2304(c)(2) (2009), permits an agency to use other than competitive procedures in acquiring goods or services where the agency’s requirement is of such an unusual and compelling urgency that the government would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits proposals. Although CICA requires that agencies solicit offers from as many potential sources as is practicable when using the unusual and compelling urgency exception to limit competition, 10 U.S.C. § 2304(e), an agency nonetheless may limit a procurement to the only firm it reasonably believes can properly perform the work in the time available. McGregor Mfg. Corp., B-285341, Aug. 18, 2000, 2000 CPD ¶ 151 at 6.

When using noncompetitive procedures pursuant to 10 U.S.C. § 2304(c)(2), such as here, agencies are required to execute a written J&A with sufficient facts and rationale to support the use of the cited authority. See 10 U.S.C. § 2304(f)(1)(A), (B); FAR §§ 6.302-1(d)(1), 6.302-2(c), 6.303, 6.304. Our review of an agency’s decision to conduct a noncompetitive procurement focuses on the adequacy of the rationale and conclusions set forth in the J&A; where the J&A sets forth a reasonable justification for the agency’s actions, we will not object to the award. Research Analysis & Maint., Inc., B-296206, B-296206.2, July 12, 2005, 2005 CPD ¶ 182 at 4; Global Solutions Network, Inc., B-290107, June 11, 2002, 2002 CPD ¶ 98 at 6.

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referenced the cancellation “merely to demonstrate the string of events that the MSC used to make the improper sole source non-competitive award” of the second bridge contract to Seaward. Protester’s Response to Agency’s Request for Dismissal (Nov. 30, 2011) at 1-2.

In light of Camden’s response, we consider this aspect of Camden’s protest withdrawn or, in the alternative, untimely. With regard to timeliness, Camden’s initial protest of the cancellation is untimely under our Bid Protest Regulations, because it was filed more than 10 calendar days after the protester knew, or should have known, the basis for its protest. 4 C.F.R. § 21.2(a)(2) (2011). That is, the record shows that Camden, which did not file its protest until November 1, 2011, was aware on August 18, of the cancellation of RFP 10-2501, the dissolution of the small business set-aside, and the agency’s intent to solicit the required OSV BOLD services on an unrestricted basis.

The J&A for this bridge contract explains that the “inability to operate the EPA vessel would prevent the agency from meeting the mission critical needs that the OSV BOLD provides,” including “two statutory mandates” stemming from the “Clean Water Act” and “The Marine Protection, Research, and Sanctuaries Act.” AR (B-406171), Tab 23, J&A (Oct. 21, 2011), at 2. The J&A adds here that the OSV BOLD supports “numerous other initiatives and agency priorities.” Id.

The J&A further explains that after the cancellation of RFP 10-2501, “there was not enough time to conduct a competition for a new contract, allow for transit time for the ship, conduct ship turnover requirements (which take a minimum of 45 days, with potentially more time needed), and allow for the new contractor to compile their crew.” Id. The J&A continues by noting that “[e]ven sole sourcing a contract to another vendor would mean an interruption of services, based on ship turnover and acquisition time.” Id. The J&A concludes that under the circumstances here, Seaward, the incumbent contractor, “is the only source that can provide the required services without interruption,” and notes that the agency is currently in the “acquisition planning stage” for a new RFP to be issued on an unrestricted basis. Id. at 2-3.

Based on our review of the record, we find no basis to question the sole-source award to Seaward. We first note that there is no basis on which to question the agency’s position that there is a critical and immediate need for the OSV BOLD to continue operations uninterrupted. Nor do we find the agency’s view that only Seaward, who is currently operating and maintaining the OSV BOLD, would be able to ensure the uninterrupted operation of the OSV BOLD. In this regard, we have no basis on which to question the agency’s explanation regarding what is required to transition the services to a new contractor, such as transiting the ship to port, compiling crew, and turning over the operations and maintenance services to the new contractor. Although the protester asserts that through its participation in the competition under RFP 10-2501 it is “positioned and able to assume the operations and maintenance management of the OSV [BOLD], essentially on a 30 day notice,” we cannot find the agency’s view to the contrary to be unreasonable.² Protester’s Comments (B-406171) at 16.

Nor do we agree with Camden that the urgency of the requirement that resulted in the sole-source award of the second bridge contract to Seaward was the result of a lack of advance procurement planning. As described above and as pointed out by the agency, the record evidences that the agency has consistently tried to use the

² We note that the protester’s statement that it could proceed on 30-days notice does not account for the time prior to such a notice required to conduct a competition, nor does it account for the time required to actually transition services, even assuming that the OSV BOLD would be immediately available at the end of that 30 days for such a transition.

competitive process to award a contract for the services required here. In this regard, we find no merit in the protester's assertion that the delays attributable to the successful size status challenges to Seaward (the incumbent contractor and awardee under RFP 10-2501), were the result of a lack of advance planning. Nor do we find merit in the protester's view that a lack of advance planning resulted in the delay associated with Ocean Service's successful protest to our Office. Finally, we cannot find that the delays associated with the successive rounds of discussions in order to allow the small business offerors opportunities to correct errors in their proposed pricing, or to propose pricing that the agency could determine fair and reasonable and permit an award under RFP 10-2501, to be the result of a lack of advance planning. In any case, while we find that the record here evidences few or no errors attributable to the agency in the conduct of this acquisition, we note that our Office has long recognized that the requirement for advance planning does not mean that such planning be completely error-free, but, as with all actions taken by an agency, the advance planning required must be reasonable. RBC Bearings Inc., B-401661, B-401661.2, Oct. 27, 2009, 2009 CPD ¶ 207 at 6.

MSC's Determination Not to Set Aside RFP 12-2501 for Small Businesses

Camden protests the terms of RFP 12-2501, arguing that the solicitation should have been set aside for small businesses. The protester specifically argues here that its proposed price under RFP 10-2501 was fair and reasonable and representative of a fair market price as charged by a small business. The protester asserts that the agency's determination to the contrary was not reasonably based, because it failed to consider that Camden's pricing was based upon its use of unionized labor.

An acquisition expected to exceed \$150,000, such as the one here, must be set aside for small business contractors where there is a reasonable expectation that offers will be obtained from at least two responsible small business concerns and the award will be made at a fair market price. FAR § 19.502-2(b); Ruchman and Assocs., Inc., B-275974, Apr. 25, 1997, 97-1 CPD ¶ 155 at 1-2. The determination of whether to set aside a particular procurement involves a business decision within the broad discretion of the contracting officer, and we will not sustain a protest challenging the determination absent a showing that the determination was unreasonable. American Artisan Prods., Inc., B-292380, July 30, 2003, 2003 CPD ¶ 132 at 5.

As set forth previously, this is not a situation where the agency is determining whether a new requirement, or a requirement that had been previously solicited on an unrestricted basis, should be set aside for small businesses. Rather, this protest involves the propriety of the withdrawal of a small business set-aside, where the agency, with the concurrence of SBA, concluded as the result of a rather lengthy procurement process, that it was unable to award a contract to any of the small business offerors because their proposed prices could not be found fair and

reasonable, and the subsequent issuance of essentially the same solicitation on an unrestricted basis. As such, and consistent with the positions of the protester and agency, the resolution of this protest does not involve the question of whether the agency could expect to receive two or more offers from small businesses in response to the solicitation, but rather, whether the prices offered by those small businesses were or would be fair and reasonable.

A determination of price reasonableness for a small business set-aside is within the discretion of the contracting agency, and we will not disturb such a determination unless it is unreasonable. A. Hirsh, Inc., B-271829, July 26, 1996, 96-2 CPD ¶ 55 at 2. In making such a determination, the agency may consider such factors as the government estimate, the procurement history for the solicited services, the current market climate, and the “courtesy bid” of an otherwise ineligible large business offeror. Id.; Nutech Laundry & Textiles, Inc., B-291739, Feb. 10, 2003, 2003 CPD ¶ 34 at 4; see FAR §§ 19.202-6, 15.404-1(b).

We have recognized that, in view of the congressional policy favoring small businesses, contracts may be awarded under small business set-aside procedures to small business firms at premium prices, so long as those prices are not unreasonable.³ Hardcore DuPont Composites, L.L.C., B-278371, Jan. 20, 1998, 98-1 CPD ¶ 28 at 3. The determination of whether a small business price premium is unreasonable depends on the circumstances of each case, Olsen Envtl. Servs., Inc., B-241475, Feb. 6, 1991, 91-1 CPD ¶ 126 at 2-3, and we have found cancellations proper where the protester’s price exceeded the government estimate by as little as 7.2 percent. See Building Maint. Specialists, Inc., B-186441, Sept. 10, 1976, 76-2 CPD ¶ 233 at 4.

The record here provides a reasonable basis for the agency’s decision to cancel RFP 10-2501, a small business set-aside, and issue RFP 12-2501, which is essentially the same solicitation, on an unrestricted basis. As previously noted, prior to canceling RFP 10-2501 and withdrawing the set-aside, the agency first found, and the record confirms, that the three small business offerors’ prices were significantly higher than the IGE and the price proposed by Seaward. The agency next conducted a market survey to gain more information on which to base a determination of price reasonableness.⁴ The record further reflects that after

³ We note that we have equated the concept of price reasonableness with “fair market price” in the context of a small business set-aside. See American Imaging Servs., B-238969, B-238971, July 19, 1990, 90-2 CPD ¶ 51 at 2.

⁴ Our discussion of the amount by which the protester’s and other small business offerors’ prices exceeded Seaward’s price or the IGE in connection with RFP 10-2501 is necessarily general because a protective order was not issued in connection with this protest and the agency is currently conducting a competition for
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confirming through the market survey that the prices offered by the small businesses were unreasonably high, the contracting officer engaged in multiple rounds of discussions in an attempt to get the small business offerors to lower their prices to a point that they could be determined fair and reasonable. It was only after this lengthy and relatively involved process that MSC, with the concurrence of SBA, ultimately determined that an award could not be made to any of the small business offerors under RFP 10-2501 because their prices were not fair and reasonable. Although the protester clearly disagrees with the agency's determination, that disagreement does not provide a basis on which to find the agency's determination unreasonable.⁵

Because we find reasonable the agency's actions in canceling RFP 10-2501, inasmuch as none of the small businesses submitted fair and reasonable prices and in the absence of any evidence that small businesses would submit fair and prices in response to RFP 12-2501, there is no basis to find unreasonable MSC's determination not to set aside RFP 12-2501 for small businesses.

The protests are denied.

Lynn H. Gibson
General Counsel

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these services under RFP 12-2501. We have reviewed the numbers in camera, and the amount by which the small business offerors' proposed prices exceeded the IGE, Seaward's proposed price, and certain of the results of the market survey is significant and well within the bounds that provide a reasonable basis for MSC's actions here.

⁵ With regard to the protester's argument about the effect of unionized labor on its and Seaward's prices, we note that the protester has failed to point to any provision in the solicitation requiring the use of unionized labor, and that absent such a provision, there is no basis on which to find the agency's price determination here unreasonable because it did not consider the impact that the use of unionized labor may have on price.