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Decision

Matter of: CWIS, LLC

File: B-416530

Date: September 14, 2018

Rene B. Ugarte, Esq., and Andrew Newell, Esq., Whitcomb, Selinsky, McAuliffe PC, for the protester.

Les Sternberg, for P.K. Management Group, Inc., the intervenor.

Audrey Roh, Esq., and Julie K. Cannatti, Esq., Department of Housing and Urban Development, for the agency.

Paul N. Wengert, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency improperly awarded a sole-source contract to provide property management services is denied where the record shows that the agency's justification that unusual and compelling urgency required obtaining services from the contractor that was able to begin full performance at the end of the previous contract, without a transition period, was reasonable.

DECISION

CWIS, LCC, of Colorado Springs, Colorado, protests the issuance of a sole-source purchase order to P.K. Management Group, Inc. (PKMG), of Doral, Florida, under sole-source justification No. JOFOC1818, issued by the Department of Housing and Urban Affairs (HUD), for a 12-month contract to provide field service management (FSM) services¹ for properties in Illinois (identified by the agency as area 3A). CWIS argues that HUD lacked a valid basis to award a sole-source contract on the basis of unusual and compelling urgency, and that the urgent circumstances were invalidated by the agency's lack of reasonable planning.

¹ HUD explains that the services primarily involve inspecting properties, securing them, performing cosmetic repairs and enhancements, remedying health and safety issues, and generally ensuring that each property is ready to show to prospective purchasers. Agency Report (AR) at 2.

We deny the protest.

BACKGROUND

The procurement at issue is HUD's action to obtain a successor FSM contractor for HUD area 3A. Before this procurement, the FSM requirement for area 3A had been awarded to another contractor.² The contract resulted from a competition for multiple contracts (for multiple HUD areas) that were awarded in mid-2017 as small business set-asides under solicitation No. DU204SB-17-R-0002. AR at 2 n.1. HUD deemed Contractor A's performance unsatisfactory and, after several lesser measures were unsuccessful the contracting officer informed Contractor A on April 23, 2018, that the agency would not exercise the option to extend the term of the contract beyond the base period; instead, the contract would end at the conclusion of the base period, on May 31. As a result, the agency needed a replacement contractor to be in place on June 1 to begin full performance without a transition. HUD determined that a contractor would therefore need to have credentialed staff and offices in place, and "experience" providing these services for HUD specifically in Contract Area 3A." AR at 4.

HUD also determined that it would not be feasible to complete a competitive procurement for the replacement contract by May 31 because the agency's experience showed that a full and open competition for FSM services had typically taken at least 10 months to complete. HUD determined that only PKMG could meet the agency's requirement to transition to full performance on June 1. Accordingly, between May 31 and June 18, HUD prepared and approved a justification and approval (J&A) for other than full and open competition based on unusual and compelling urgency to justify the award of a sole-source contract to PKMG. AR Tab 12, FBO.gov Sole-Source Notice, at 2-3.

The sole-source justification explains that HUD required FSM services to market, preserve, and protect approximately 500 HUD-owned properties in Illinois that would otherwise be at risk of adverse occupancy and damage by vandals and thieves while vacant, that would then become a blight on their communities. Id., exh. 1, Class J&A Approval, at 2.³ The justification went on to explain that the option to extend Contractor A's contract could not be exercised due to that firm's performance problems, and that allowing the services to lapse would cause serious injury to the government both from damage to un-serviced properties and from holding properties longer before they could be sold. Id. The justification then stated that the agency had identified one source that had the ability to provide the services starting June 1 "without a significant

² While the identity of that contractor is public, in this decision, we refer to the firm as Contractor A, and we express no view on Contractor A's performance or on the agency's actions regarding the administration of that contract.

³ Although the J&A expressly references being a class approval, it is addressed only to this procurement, not to a class of procurements.

ramp-up period or additional costs.” Id. The justification explained that PKMG had an office, vetted and credentialed staff, and resources to begin performance of all responsibilities on June 1, and noted that PKMG had been the contractor for area 3A before the contract award to Contractor A. Id. at 3.

HUD issued the order⁴ at issue in this protest to PKMG on June 1 as a 1-year requirements contract for \$15.9 million. On June 18, HUD posted notice of the award, including a copy of the sole-source justification, on fbo.gov. CWIS filed this protest within 10 days of that posting.

PROTEST

HUD requested that the protest be dismissed, arguing that CWIS’s protest failed to provide a sufficient factual and legal basis to challenge the sole-source award. In particular, HUD noted that the protest listed the wrong contract number, attached an irrelevant exhibit (a sole-source justification for areas 4S and 6S, rather than area 3A), and incorrectly labeled the services at issue as cleaning services, rather than property management or FSM services. Dismissal Request at 2 & 3 n.2. In response, CWIS argued that its protest was sufficient despite those mistakes.⁵

In our view, reviewing the protest as a whole made reasonably apparent that CWIS raised a challenge to the sole-source contract award to PKMG for area 3A (including correctly identifying both PKMG as the awardee and correctly specifying the sole-source justification for area 3A). Accordingly, we did not dismiss the protest. See Electronic Bid Protest Filing & Dissemination System Docket # 10 (denying dismissal).

With respect to the challenges to the adequacy of HUD’s justification for awarding the contract without competition, CWIS argues that the sole-source justification is defective. In particular, CWIS argues that the circumstances do not constitute unusual and compelling urgency; that the urgency is invalidated by the agency’s failure to plan; that the 12-month term of the order is longer than justifiable; and that even if the circumstances supported a valid justification for limiting competition, HUD nevertheless should have solicited a competing proposal from CWIS given its ongoing performance as an incumbent FSM contractor in multiple other HUD service areas. Protest at 2-3. We address each of CWIS’s arguments in turn, and conclude that HUD had a valid basis for issuing the order on a sole-source basis for a 12-month term.

⁴ HUD labels the contracting action here as a “[r]equirements [t]ask [o]rder.” AR Tab 11, Order No. 86544A18D00005 to PKMG, at 5.

⁵ CWIS also argued that it submitted corrections a short time later. Nevertheless, our review concludes that the initial filing was sufficient despite the errors. HUD’s argument regarding CWIS’s submission of the corrected protest after our Office’s 5:30 p.m. filing deadline therefore does not provide a basis to dismiss the protest as untimely.

With respect to the sole-source justification, CWIS argues that HUD should have begun to plan for competition to replace Contractor A when its performance was unsatisfactory, rather than when the agency decided to allow the contract to expire at the end of the base period. Protester's Comments at 1. Failing to do so, CWIS argues, was unreasonable and undercuts HUD's claim of urgency. Id. CWIS also maintains that HUD's definition of its requirements for a replacement contractor exceeded the agency's minimum needs and unreasonably limited consideration only to PKMG. Id. at 2. Finally, CWIS argues that the 1-year term of the contract with PKMG exceeds the time needed for HUD to hold a competition for the requirement. Id. at 3.

HUD argues that the sole-source award to PKMG was the only means to meet the agency's requirements, and that CWIS has not shown that it could have submitted an acceptable proposal to take over performance of the FSM services.⁶ AR at 7. HUD also explains that because previous competitive procurements for FSM services have taken 10 to 12 months to complete, the agency reasonably determined that a 1-year sole-source contract was the minimum term necessary for the agency to pursue a competition for FSM services in area 3A. Id. at 10-11. HUD also disputes CWIS's claim that the urgency here was caused by a lack of planning. The agency argues that it properly focused on obtaining acceptable performance from Contractor A, that exercising an option to extend Contractor A's contract would be similarly unlikely to produce acceptable performance, and that HUD took reasonably prompt steps to obtain a replacement contractor after determining that lesser steps had not worked. Id. at 13.

As a general rule, contracts must be awarded through the use of full and open competition. 41 U.S.C. § 3301. Our review of an agency's decision to conduct a sole-source procurement focuses on the adequacy of the rationale and conclusions set forth in the written justification. When that document sets forth a reasonable justification for the agency's actions, we will not object to the award. McKesson Automation Sys., Inc., B-290969.2, B-290969.3, Jan. 14, 2003, 2003 CPD ¶ 24 at 4. When using other than full and open competitive procedures based on unusual and compelling urgency, the agency is required to request offers from as many potential sources as is practicable under the circumstances. Federal Acquisition Regulation § 6.302-2(c)(2). The agency has the authority to limit the procurement to the only firm the agency reasonably believes can properly perform the work in the available time. Colbar, Inc., B-230754, June 13, 1988, 88-1 CPD ¶ 562 at 2. This Office will object to the agency's determination to limit competition based on unusual and compelling urgency where the agency's decision lacks a reasonable basis, however. Id.

⁶ HUD notes that in a 2012 capability statement, CWIS identified multiple areas in which it had the capability to provide FSM services, but that Illinois/area 3A was not among them. AR Tab 1, CWIS Capability Statement (Feb. 24, 2012), at 5. Furthermore, HUD notes, CWIS did not submit a proposal for area 3A in response to competitive procurements in 2012 and 2017. AR Tab 2, Abstract of Bids for 2012 Area 3A Contract Award to PKMG, at 1; AR Tab 7, Abstract of Bids for 2017 Area 3A Contract Award to Contractor A, at 1.

Our review of the record here supports the reasonableness of HUD's actions. First, although CWIS questions the urgency of HUD's requirement to provide FSM services given the imminent end of Contractor A's contract, the circumstances support HUD's judgment. In particular, the lack of FSM services would result in serious injury to the agency's property resulting from increased damage to properties by theft and vandalism, and incidents of adverse occupancy. Those incidents would in turn slow the marketing of properties, decrease their values, increase cost and time for repairs, and adversely affect the surrounding neighborhoods and communities. In our view, HUD reasonably concluded that those effects were sufficiently likely and serious to justify the award of a sole-source contract on an unusual and compelling urgent basis to a firm that could take over FSM service responsibilities on June 1.

Next, although CWIS argues that HUD should at least have held a limited competition, in which CWIS asserts that it would have submitted a competitive offer, the record provides no basis to question HUD's judgment that only PKMG could meet the agency's requirements beginning June 1. CWIS has not shown that it could have met HUD's requirements to begin full performance on June 1, and instead only theorizes that PKMG might not have met the agency's requirements. In contrast to the agency's explanation of the harms that would result from not having FSM services, CWIS has not provided a factual basis to show that HUD's requirements exceeded its minimum needs.

Finally, CWIS contends that HUD should have begun planning for competition earlier, and that the term of PKMG's contract should have been less than 1 year. We disagree. The record shows that HUD reasonably decided to direct its efforts to obtaining acceptable performance from Contractor A as the contractor selected through competition. HUD's effort to administer that contract to obtain acceptable performance was reasonable, and does not reflect a lack of adequate planning under these circumstances. Additionally, the agency's experience in awarding contracts for FSM services supports its determination that it would be likely to take 10 to 12 months for the agency to complete a competitive procurement and have the replacement contractor in place. Awarding a 1-year contract to PKMG was thus a reasonable means to facilitate competition at the earliest feasible opportunity.

Taken as a whole, CWIS has not shown a sufficient basis in the record and circumstances here for our Office to sustain its challenges to HUD's actions.

The protest is denied.

Thomas H. Armstrong
General Counsel