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Decision

Matter of: WorldWide Language Resources, Inc.; SOS International Ltd.

File: B-296984; B-296984.2; B-296984.3; B-296984.4; B-296993; B-296993.2; B-296993.3; B-296993.4

Date: November 14, 2005

Richard D. Lieberman, Esq., McCarthy, Sweeney & Harkaway, PC, for WorldWide Language Resources, Inc.; Alison L. Doyle, Esq. and Jeniffer M. De Jesus, Esq., McKenna Long & Aldridge LLP, for SOS International Ltd., the protesters. Thomas P. Barletta, Esq., Paul R. Hurst, Esq., and Michael C. Drew, Esq., Steptoe & Johnson LLP, for Russian and Eastern European Partnership, Inc., d/b/a Operational Support Services, an intervenor.

Clarence D. Long, III, Esq., Paul D. Warring, Esq., and Edward N. Ramras, Esq., Department of the Air Force, for the agency.

Edward Goldstein, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protests challenging agency's award of sole-source contract for bilingual-bicultural advisors utilizing other than competitive procedures based on unusual and compelling urgency are sustained where the agency initially attempted to place the requirement under an environmental services contract, which, on its face, did not include within its scope the bilingual-bicultural advisor requirement. This obvious error constituted lack of advance planning, which compromised the agency's ability to obtain any meaningful competition and directly resulted in the sole-source award.
2. Justification and approval prepared in support of second sole-source award expanding the bilingual-bicultural advisor requirement was unreasonable where justification was premised on the conclusion that the awardee was the only responsible source, yet the capabilities of firms other than the awardee were not in fact considered.
3. Agency's request for dismissal of protests as untimely on the ground that announcement of contract award on the Department of Defense's official website, www.DefenseLink.mil, placed protesters on constructive notice of the award and thus required the protesters to file their protests within 10 days of the announcement

is denied since DefenseLink has not been designated by statute or regulation as the public medium for announcement of procurement actions.

DECISION

WorldWide Language Resources, Inc. and SOS International, Ltd. (SOSi) protest the Department of the Air Force's award of two sole-source contracts (Nos. FA7012-05-C-0003 and FA7012-05-C-0020) to Russian and Eastern European Partnership, Inc. (REEP) d/b/a Operational Support Services (OSS), for individuals performing services as bilingual-bicultural advisor/subject matter experts (BBA-SME) in Iraq. WorldWide and SOSi argue that: (1) the Air Force did not have the claimed unusual and compelling urgency justifying the noncompetitive awards to OSS; (2) to the extent there were urgent requirements, the urgency was the result of the Air Force's lack of advance planning; (3) the Air Force unreasonably concluded that OSS was the only firm capable of meeting the BBA-SME requirements; and (4) the Air Force failed to obtain competition to the maximum extent practicable as required by statute and regulation.

We sustain the protests.

Background

The protests concern two sole-source contracts, contract No. FA7012-05-C-0003 (with an estimated value of \$10.7 million) and No. FA7012-05-C-0020 (with an estimated value of \$35.5 million), awarded to OSS on December 3, 2004 and on July 29, 2005, respectively, both of which were to support the mission of the Multinational Forces-Iraq (MNF-I), particularly the Civil Affairs Command (CAC). The December contract required OSS to provide 50-75 bilingual-bicultural advisor-subject matter experts (BBA-SME), who were described as follows:

Western oriented individuals of Iraqi background who speak both English and Iraqi-dialect Arabic or Kurdish and who are committed to a democratic Iraq to act as advisors to Iraqi units of government and non-government organizations The advisory services required include, but are not limited to, advising government ministers, planning for and implementation of elections, drafting of constitutional documents, advising neighborhood, municipal and national councils and public services, training of security forces and details, translation and interpretation of conversations, documents and cultural matters in support of democratic objectives.¹

¹ The original requirement for "Western oriented individuals of Iraqi background" was changed, after contract award, to Iraqis with U.S. citizenship. See Contracting Officer's (CO) Statement of Facts at 3.

Contract No. FA7012-05-C-0003, Performance Based Work Statement at 2. The period of contract performance was 1 year, ending on December 2, 2005. The July contract effectively increased to 200 the total number of BBA-SMEs that OSS was required to provide through December 2005 and also extended the period of performance through July 2006 (OSS was required to provide an additional 150 BBA-SMEs from July through the end of OSS's December contract, which expired on December 2, and then provide a total of 200 BBA-SMEs through July 2006).

The BBA-SME requirement had its genesis in a program established by the Office of the Secretary of Defense (OSD) in 2003, known as the Iraqi Reconstruction and Development Council (IRDC). The IRDC was composed of approximately 150 individuals of Iraqi heritage from the world-wide exile community who provided assistance to the Coalition Provisional Authority with stabilizing and maintaining a civil government in Iraq. Agency Report (AR), Tab 15, Declaration of Victor A.D. Rostow, Special Assistant to the Under Secretary of Defense for Policy, Sept. 12, 2005, at 2. Some members of the IRDC were selected for their professional experience (*i.e.*, lawyers, physicians, engineers, information technology specialists), while others were selected for family and/or social contacts with ethnic and tribal groups. The services provided by these individuals were obtained through a contract awarded to the firm Science Applications International Corporation (SAIC).² *Id.*

When the Coalition Provisional Authority dissolved in June 2004, the IRDC program also came to an end. In the timeframe between June and July, however, the Deputy Secretary of Defense “determined that the success of the United States war effort required the services of experts in reconstruction and governance in the period leading up to the establishment of a constitutional Iraqi government,” AR, Tab 15, *supra*, at 1, and sought a way to “support some 50-75 of [the IRDC] individuals who can operate independently throughout Iraq in support of MNF-I/CAC activities.” AR, Tab 16h, e-mail from Victor A.D. Rostow, Subject: Iraqi Contractor Help, Nov. 18, 2004. As a consequence, the Deputy Secretary of Defense tasked Mr. Victor Rostow, Special Assistant to the Under Secretary of Defense for Policy, who had organized and managed the IRDC program, with establishing a program to hire Iraqis of Western orientation who were capable of assisting the Civil Affairs Command. AR, Tab 15, *supra*, at 1.

² The SAIC contract for providing the 150 members of the IRDC was a sole-source award. The award and administration of this contract were the subject of reports by the Office of the Inspector General of the Department of Defense and GAO. See Contracts Awarded for the Coalition Provisional Authority by the Defense Contracting Command-Washington (D-2004-057, Mar. 18, 2004); Rebuilding Iraq: Fiscal Year 2003 Contract Award Procedures and Management Challenges (GAO-04-605, June 1, 2004).

In a hearing held by our Office concerning the issues in this case,³ Mr. Rostow explained that the program “was to be in place and functioning when the Iraqi elections occurred in January [2005].” Hearing Transcript (Tr.) at 135. While the immediate need was to address the elections, the program’s underlying purpose was to address the needs of the Iraqi community (e.g., their medical, energy, and agricultural needs) and thereby create “a nudge toward democracy.” Tr. at 136. According to Mr. Rostow, OSD wanted “to get the program started” and considered it to be “a demonstration grant” whereby OSD would fund the program for an initial period of 1 year and the military commands, i.e., Central Command or Southern Command, would then continue funding the program “because they’ve seen this as a function that works in the military.” Tr. at 138-39. According to OSD, the Civil Affairs Command mission is expected to increase as the war-fighters draw down; the Civil Affairs Command is suffering from staffing shortages; and the BBA-SME program is designed to augment this staffing shortage. AR, Tab 15, supra, at 5.

In mid-August 2004, Mr. Rostow began working on a statement of work for the program and contacted the Air Force with the requirement sometime between mid-August and mid-September. The Air Force’s Center for Environmental Excellence (AFCEE) initially took responsibility for the BBA-SME acquisition.⁴ Tr. at 133, 140. After speaking with Mr. Rostow and receiving the scope of work for the BBA-SME requirement, the AFCEE decided to compete the BBA-SME requirement among the multiple contract holders of AFCEE’s global engineering, integration, and technical assistance (GEITA) contract. The GEITA contract was to provide advisory and assistance services in support of AFCEE’s “continued excellence in the world environmental stewardship market,” including support for AFCEE’s programs involving environmental restoration, compliance, pollution prevention, conservation and planning, fuel facility engineering, base realignment and closure activities, and military family housing initiatives, to include privatization and outsourcing activities. See GEITA Contract, Statement of Work, at 3, 4-5.⁵

On October 27, 2004, AFCEE issued a solicitation for the BBA-SME requirement to the holders of the GEITA contract. AR, Tab 14, Declaration of Chief of Acquisition for the Air Force District of Washington, at 3. However, in early November, the BBA-

³ At the hearing, our Office heard testimony from the contracting officer, the commander of the Air Force’s 11th Contracting Squadron, and Mr. Rostow.

⁴ The record indicates that Mr. Rostow contacted the Air Force as a result of a conversation with the Chief of Staff for the Deputy Secretary of Defense. Tr. at 133, 143.

⁵ Our Office requested a copy of the GEITA contract and the Air Force provided a web address with a link to the requested information, <http://www.afcee.brooks.af.mil/pkv/GEITA/default.asp?CID=53&folder=GEITA>.

SME solicitation and the plan to place the BBA-SME requirement under the GEITA contract were canceled after the director of contracting for AFCEE, with the concurrence of the Office of the Secretary of the Air Force, determined that the BBE-SME requirement was not within the scope of the GEITA contract. In an e-mail message to the Air Force's Deputy Assistant Secretary for Contracting, he wrote:

Evidently Mr. Rostow called a Technical Division Chief at AFCEE directly on his cell phone and asked if they could do this. That started the ball in motion and no one (technical or contracting) really stopped for a sanity check on this until yesterday Bottom line -- Does not fit within AFCEE's charter, does not fit within scope of GEITA without really stretching way out there, there were some over zealous AFCEE personnel on both the technical and contracting sides that were leaning way forward in the saddle and trying to support a customer that called with a request for support based on AFCEE previous success in Iraq, AFCEE is not in the habit of saying no to anyone.

AR, Tab 16.ss., Nov. 10, 2004, e-mail, Subject: RE: GEITA Services for Bilingual-Bicultural Support to Iraq.

Unable to use the GEITA contract and with OSD expecting a contract in place by mid-November,⁶ the Air Force looked to other avenues to assist OSD with the BBA-SME acquisition and on November 10 the Air Force's Associate Deputy Assistant Secretary for Contracting contacted the Commander for the 11th Contracting Squadron, Bolling Air Force Base, Washington, to provide assistance with the procurement.

Experiencing what it perceived to be significant pressure from OSD to quickly satisfy the BBA-SME requirement,⁷ the 11th Contracting Squadron, the contracting activity, first considered the possibility of placing the BBA-SME requirement under an existing contract, specifically considering its two contractors for language instruction, one of which was OSS. However, after concluding that the BBA-SME requirement would not fit within the scope of the contracts it administered, the contracting activity decided to pursue a sole-source contract for the BBA-SME requirement "[b]ecause there was no way to competitively go out and get that effort done in a way that probably wouldn't result in a minimum four to six month slip of the schedule, maybe longer" Tr. at 27. When the contracting activity sought a

⁶ See, e.g., AR, Tab 16.b., e-mail from OSD to Office of the Secretary of the Air Force, Subject: Bilingual, Bicultural Support, Nov. 15, 2004 (stating "a mid-December contract award is simply not soon enough").

⁷ See, e.g., AR, Tab 16.e., e-mail, Subject: Bilingual, Bicultural Support, Nov. 16, 2004 (stating "OSD is putting a lot of pressure on the [Air Force] to get this done").

potential contractor for its expected sole-source award, it focused exclusively on OSS. After initial inquiries regarding OSS's capabilities and a November 18 meeting between OSS, OSD, and the Air Force, it was determined that the BBA-SME requirement should be awarded on a sole-source basis to OSS.

In early December, the Air Force executed a justification and approval (J&A) for other than full and open competition in support of the initial award to OSS. The December J&A, which cites 10 U.S.C. § 2304(c)(2) (2000) and Federal Acquisition Regulation (FAR) § 6.302-2 (unusual and compelling urgency) as the authority for the award to OSS, states that "OSS is the only known contractor who is in the position to provide deployed BBAs to Iraq in time to support the Iraqi national elections in January 2005." AR, Tab 1b.2, J&A, December 1, 2004, at ¶ 5. Describing OSS's "unique qualifications," the J&A noted that OSS is the largest provider of foreign language immersion training to the U.S. government; the firm's staff features former military specialists; OSS maintained a database of nearly [deleted] linguists, trainers, translators, and interpreters; and OSS had staff in Iraq. Id.

Under the heading "Market Survey," the J&A stated that "OSD could not locate an existing contract vehicle to support [the BBA-SME] requirement" and that because the AFCEE contracting option was cancelled, "there was not sufficient time to compete the requirement and meet the . . . 1 December 2004 deadline for contract award" Id. at ¶ 9. Moreover, the J&A highlighted the fact that OSS's cost of beginning operations in Iraq was reduced since OSS had [deleted] as well as the fact that OSS was [deleted]. Id. The J&A further provided that the requirement was expected to last for only 12 months and that a follow-on procurement was not anticipated, but that if similar requirements arose in the future, market research would be performed and the effort would be competed. Id. at ¶ 11. On December 3, 2004, the Air Force awarded contract No. FA7012-05-C-0003 to OSS.

In late January or early February 2005, after OSS had begun performance, the MNF-I identified a requirement for approximately 275 BBA-SMEs and conveyed this information to OSD. Tr. at 170-71. At the end of March, Mr. Rostow discussed the possibility of expanding the BBA-SME program with the Deputy Secretary of Defense based on positive feedback from Iraq regarding the program. Tr. at 170. According to Mr. Rostow, during the discussion of expansion, the Deputy Secretary of Defense requested "a paper that makes a recommendation, which I did probably about the middle of April." Tr. at 170. On May 2, 2005, the Deputy Secretary of Defense formally approved expansion of the BBA-SME program to 200 individuals and extension of the contract period through June 2006. See AR, Tab 1.d., Memorandum for Deputy Secretary of Defense, Subject: BBA-SME Project: Increasing Numbers and Money, Apr. 27, 2005.

In discussions with the contracting activity regarding the option of expanding the BBA-SME program, OSD initially sought an award date in June 2005, with the contract running through June 2006. Tr. at 195, 244. The contracting activity

explained that it would not be possible to meet a June 2005 award date if the requirement was subject to full and open competition because a competitive award would take a minimum of 6-8 months to coordinate and conduct the source selection. AR, Tab 12.b., e-mail, Subject: OSS-BBA Extension 4-22-05, Apr. 22, 2005. The contracting activity explained that the only option for an expedited contract was a sole-source award and indicated that OSD would be required to “conduct adequate market research to certify that only one source [in accordance with [FAR §] 6.302-1 can provide the required service without significant duplication of cost and loss of schedule.” Id.

On July 11, 2005, the Air Force approved a J&A for other than full and open competition in support of the award of a contract to OSS with a 1-year performance period, plus one 3-month option, for expansion of the BBA-SME program.⁸ While initial discussions between OSD and the Air Force concerned justifying a sole-source award to OSS under FAR § 6.302-1 (only one responsible source and no other supplies or services will satisfy agency requirements), the July J&A, like the prior one, cited 10 U.S.C. § 2304(c)(2) and FAR § 6.302-2 (unusual and compelling urgency) as the authority for the sole-source award to OSS. The J&A explained that the BBA-SME requirement was critical for the Civil Affairs Command and that without the BBA-SME program “numerous CAC missions cannot be performed.” AR, Tab 1.b.1, J&A, July 11, 2005, at ¶ 5. It stated that “OSS is the only contractor who is capable of meeting the government’s requirement in the unusual and compelling timeframe required.” Id. at ¶ 2. According to the J&A, the “critical need date” for the expanded BBA-SME requirement was July 1, 2005, and the national security interests of the government would be “seriously harmed” unless the agency was permitted to proceed with a sole-source award of the requirement. Id. at ¶¶ 4 and 5. The J&A further stated that OSS was

the only provider of subject matter experts with the requisite cultural competences and linguist skills. While there are a number of other providers of linguists (Titan Corp.) and linguists with security clearances, none of these providers have mined the Iraqi heritage community with a view to finding and deploying individuals with skills required by the MNF-I CAC. . . . They are the only provider having [deleted]. They are the only provider that can perform the contract without significant additional start-up costs and recruitment delays.

Id. at ¶ 5.

⁸ The original target date of June passed due to efforts to obtain further approvals and confirmation of funding for the requirement. Tr. at 244.

The J&A also indicated that the requirement was expected to last for only 15 months and that a follow-on contract was not expected. *Id.* at ¶ 11. On July 29, 2005, the Air Force awarded contract No. FA7012-05-C-0020 to OSS.

Analysis

As an initial matter the Air Force argues that the challenges relating to the December 2004 sole-source award to OSS should be dismissed as untimely.⁹ The agency maintains that the award was announced on December 6, 2004 on the official website for the Department of Defense, referred to as DefenseLink--<http://www.defenselink.mil/>--and that the protesters should have challenged the award within 10 days of this announcement, yet they waited more than 6 months to file their protests.¹⁰ In essence, the Air Force argues that the award announcement on DefenseLink placed the protesters on constructive notice of the sole-source award and that the timeliness of their protests should be measured from this date. We disagree.¹¹

Our Bid Protest Regulations contain strict rules for the timely submission of protests. These rules require that a protest based on other than alleged improprieties in a solicitation be filed no later than 10 calendar days after the

⁹ The Air Force also sought dismissal on the basis that the protesters are not interested parties because they are not capable of fulfilling the BBA-SME requirement. See Bid Protest Regulations, 4 C.F.R. § 21.0(a) (2005). The Air Force's contention that the protesters are not interested parties is premised on its review of the protesters' capabilities, as described on the General Services Administration website, after the protest was filed. In essence, the Air Force asserts that the protesters are primarily linguist contractors and that they have not previously provided the BBA-SME requirement, which differs from a linguist contract. This argument is unpersuasive, given that prior to its initial sole-source award, OSS was primarily a contractor for linguist services, and had never provided BBA-SMEs. Moreover, both protesters have expressly indicated their interest in the requirement, and set forth their capabilities, which appear consistent with a capability to perform the BBA-SME requirement.

¹⁰ Aside from providing general information about the Department of Defense and current news information, DefenseLink also announces at 5 p.m. each business day all Department of Defense contract awards valued at \$5 million or more. See <http://www.defenselink.mil/contracts/>.

¹¹ The protesters state that they learned of the December 2004 sole-source award only after they learned of the second sole-source award in July 2005. Notice of the July award was published on both FedBizOpps and the DefenseLink website.

protester knew or should have known its basis for protest, whichever is earlier.
4 C.F.R. § 21.2(a)(2).

In support of its contention that the protesters were on constructive notice by virtue of the DefenseLink posting, the Air Force points to our decisions holding that publication in the Commerce Business Daily (CBD) or on the FedBizOpps website (which has replaced the CBD) placed protesters on constructive notice of an agency's contract actions. For example, we have recognized that publication in the CBD of an agency's intent to enter into a sole-source contract constitutes constructive notice of that proposed contract action. See Fraser-Volpe Corp., B-240499 *et al.*, Nov. 14, 1990, 90-2 CPD ¶ 397 at 3; S.T. Research Corp., B-232751, Oct. 11, 1988, 88-2 CPD ¶ 342 at 1. Similarly, we have held that publication on the FedBizOpps website places prospective contractors on constructive notice of contract awards, such that protests of the awards must be filed within 10 days of publication. CBMC, Inc., B-295586, Jan. 6, 2005, 2005 CPD ¶ 2 at 2.

These cases, however, are inapposite. The doctrine of constructive notice creates a presumption of notice in law that cannot be rebutted. See, e.g., Townsend v. Little and Others, 109 U.S. 504, 511 (1883) ("constructive notice is defined to be in its nature no more than evidence of notice, the presumption of which is so violent that the court will not even allow of its being controverted"). By definition the doctrine imputes knowledge to a party without regard to the party's actual knowledge of the matter at issue. Given the severity of such a rule, our decisions holding protesters to constructive notice of information published in the CBD and now on FedBizOpps have been premised on the fact that first the CBD and now FedBizOpps have been expressly designated by statute and regulation as the official public medium for providing notice of contracting actions by federal agencies. See Herndon & Thompson, B-240748, Oct. 24, 1990, 90-2 CPD ¶ 327 at 3 (protesters are charged with constructive notice of contents of procurement synopsis published in the CBD since it is the official public medium for identifying proposed contract actions); see also 15 U.S.C. § 637(e)(2)(A) (2000); 41 U.S.C. § 416(a)(7) (2000); FAR § 2.101 (designating FedBizOpps as the governmentwide point of entry (GPE), "the single point where Government business opportunities greater than \$25,000, including synopses of proposed contract actions, solicitations, and associated information, can be accessed electronically by the public").

In this case, the Air Force did not publish its intent to enter into a sole-source contract with OSS,¹² nor did it provide notice of the award on FedBizOpps; rather,

¹² As a general matter, an agency is required to synopsise, through the GPE, proposed contracting actions, to include a solicitation for a sole-source award. See FAR § 5.201. An agency, however, is not required to publish notice of a proposed sole-source award where it has decided to limit competition under 10 U.S.C. § 2304(c)(2) (unusual and compelling urgency), and determined that the government would be

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the Air Force announced the December award solely on DefenseLink. While the agency maintains that DefenseLink is “as widely known as FedBizOpps and as eagerly perused,” AR, Tab 2.a., Agency’s Request for Dismissal at 2, DefenseLink has not been designated by statute or regulation as an official public medium for providing notice of contracting actions. As a consequence, and in view of the sometimes harsh consequences of application of the doctrine, we do not treat posting on DefenseLink as giving rise to constructive notice.

Moreover, we note that the agency was required to provide notice of the award on FedBizOpps, but failed to do so. Pursuant to FAR § 5.301(a), agencies are required to synopsize, through FedBizOpps, contract awards exceeding \$25,000 that are either: (1) covered by the World Trade Organization Government Procurement Agreement or a Free Trade Agreement; or (2) “likely to result in the award of any subcontracts.” FAR § 5.301(a). It is the second prong that applied to the December 2004 award, and thus required the Air Force to provide notice of the award through FedBizOpps.¹³

When the Air Force and OSD met with OSS on November 18 to discuss OSS’s capabilities, OSS attended the meeting with the “team” that it intended to use in performance of the BBA-SME requirement. Agency’s Response to GAO Questions for the Record at 2. Thus, not only was it “likely” that the award to OSS would result in the award of subcontracts, the award of subcontracts was anticipated by the Air Force with certainty. While the Air Force argues that it did not anticipate that OSS would use any subcontractors other than those with which it had already teamed, this argument is of no consequence, since under the regulation an agency is to consider whether an award is likely to result in “any” subcontracts. Since OSS clearly planned to utilize subcontractors upon award of the BBA-SME requirement, the Air Force should have synopsized the award on the GPE.¹⁴ Having failed to

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seriously injured if it complied with the specified notification time periods. See FAR § 5.202 Because the December 2004 sole-source award was made pursuant to 10 U.S.C. § 2304(c)(2), the Air Force did not provide notice of the intended sole-source award through the GPE, FedBizOpps.

¹³ Under FAR § 25.401(b), “services purchased in support of military services overseas” are excluded from coverage of the World Trade Organization Government Procurement Agreement and Free Trade Agreements. The BBA-SME services in support of the Civil Affairs Command in Iraq clearly fall within this exclusion, so this prong does not apply.

¹⁴ Unlike the December award, Air Force did synopsize the July sole-source award to OSS through FedBizOpps. In explaining the different treatment, the Air Force stated that “[t]he Contracting Officer who handled the second contract award felt that

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comply with the applicable notice provisions, the Air Force cannot now complain that the protesters should have filed their protests in a more timely manner.¹⁵

We next consider the protesters' arguments that the December 2004 and July 2005 sole-source awards to OSS were improper. The protesters argue that to the extent the awards to OSS were justified based on urgency, the urgent circumstances were the result of the Air Force's lack of advance planning. They argue that the J&As prepared in connection with the awards are not adequately justified and that the Air Force failed to request offers from as many potential sources as practicable.¹⁶

The Competition in Contracting Act (CICA) requires agencies to conduct their procurements using "full and open competition." 10 U.S.C. § 2304(a)(1)(A). CICA, however, permits noncompetitive acquisitions in specified circumstances, such as when the agency's need for the services is of unusual and compelling urgency. 10 U.S.C. § 2304(c)(2). Specifically, the exception provides as follows:

The head of an agency may use procedures other than competitive procedures only when . . . (2) the agency's need for the property or services is of such an unusual and compelling urgency that the United States would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits bids or proposals.

Id.; see also FAR § 6.302-2(a)(2).

This exception only allows an agency to "limit the number of sources"; an agency may not simply ignore the potential for competition. The mandate for agencies to effect some modicum of competition is reiterated in 10 U.S.C. § 2304(e), which provides that when an agency utilizes other than competitive procedures based on unusual and compelling urgency, the agency "shall request offers from as many potential sources as is practicable under the circumstance." See also FAR § 6.302-

(...continued)

publication in FedBizOpps was required" Agency's Response to GAO Questions for the Record at 3.

¹⁵ To the extent the Air Force argues that by filing their protests more than 6 months after the award to OSS the protesters failed to diligently pursue their grounds for protest, we fail to see how they could have been aware of any basis for protest to pursue given that the agency did not synopsize the intended sole-source award to OSS, and also failed, as required, to synopsize the award on the GPE.

¹⁶ WorldWide also argues that the Air Force did not analyze OSS's prices for reasonableness and failed to obtain reasonable pricing under the contracts. The record, however, does not support the protester's contentions in this regard.

2(c)(2). In addition, CICA provides that under no circumstances may noncompetitive procedures be used due to a lack of advance planning by contracting officials or concerns related to the amount of funds available to the agency. 10 U.S.C. § 2304(f)(5); see also FAR § 6.301(c).

With regard to the requirement for advance planning, our Office has recognized that such planning need not be entirely error-free or successful. See, e.g., HEROS, Inc., B-292043, June 9, 2003, 2003 CPD ¶ 111 at 6; New Breed Leasing Corp., B-274201, B-274202, Nov. 26, 1996, 96-2 CPD ¶ 202 at 6; Sprint Communications Co., L.P., B-262003.2, Jan. 25, 1996, 96-1 CPD ¶ 24 at 9. As with all actions taken by an agency, however, the advance planning required under 10 U.S.C. § 2304, must be reasonable. In enacting CICA, Congress explained: “Effective competition is predicated on advance procurement planning and an understanding of the marketplace.” S. Rep. No. 50, 98th Cong., 2d Sess. 18 (1984), reprinted in 1984 U.S.C.C.A.N. 2191. The Senate Report also quoted with approval the following testimony regarding the need for advance planning:

Opportunities for obtaining or improving competition have often been lost because of untimely, faulty, or the total lack of advance procurement planning. Noncompetitive procurement or inadequate competition also has resulted many times from the failure to develop specifications By requiring effective competition, Congress will serve notice on the agencies that they will need to do more than the minimum to comply with the statute.

Id. at 19, reprinted in 1984 U.S.C.C.A.N. 2192.

Based on this legal framework we sustain the protesters’ challenges to each of the two sole-source awards to OSS for BBA-SME services, albeit on separate and distinct grounds.

December 2004 Sole-Source Award

Based on the factual context presented with regard to the December 2004 award to OSS, it is evident that the agency’s efforts—as described and explained by the agency itself—were so fundamentally flawed as to indicate an unreasonable level of advance planning, which directly resulted in the sole-source award to OSS. In responding to the protesters’ challenges to the December sole-source award, the Air Force suggests that its actions and the justification underpinning the sole-source determination should be evaluated based on the circumstances faced by the contracting activity in November 2004 when it received the requirement and took steps to expeditiously procure the required BBE-SME services. For example, the Air Force highlights the fact that when the J&A was prepared in support of the award to OSS, the government was faced with the dilemma of needing BBA-SME services in place to support the January 2005 elections in Iraq—then only 2 months away—and it did not

have a contractor to provide the services. AR, Tab 13, Supplemental Legal Memorandum at 15; AR, Tab 1.b.2, J&A ¶ 3.

We recognize the abbreviated contracting schedule faced by the contracting activity in its efforts to obtain a contract vehicle for the BBA-SME requirement—a schedule driven by expectations and mandates from higher echelons within the Department of Defense. The record, however, clearly reflects the fact that this narrow procurement window was the direct result of unreasonable actions and acquisition planning by the Air Force and the Department of Defense, to the extent these entities engaged in any acquisition planning at all.

Specifically, 2-3 months¹⁷ were lost as a result of the initial plan to place the BBA-SME requirement under the GEITA contract—even though the requirement was clearly outside the scope of the GEITA contract. As noted above, the GEITA contract was for advisory and assistance services in support of AFCEE’s “continued excellence in the world environmental stewardship market,” including support for AFCEE’s programs involving environmental restoration, compliance, pollution prevention, conservation and planning, fuel facility engineering, base realignment and closure activities, and military family housing initiatives, to include privatization and outsourcing activities. AR, Tab 17, GEITA Contract, Statement of Work, at 3, 4-5. The BBA-SME requirement, however, was for Western-oriented individuals of Iraqi background, who were committed to a democratic Iraq, and who would provide services in Iraq such as advising government ministers, planning for and implementing elections, drafting constitutional documents, advising neighborhood, municipal, and national councils, and training security forces and details. The plan to use the GEITA contract was unreasonable on its face, given how widely it diverged from the BBA-SME requirement. In fact, as indicated above, a senior member within the Air Force, responsible for acquisition, characterized the plan as requiring a “sanity check” and indicated that it was the result of individuals “leaning way forward in the saddle” in an effort to support a customer because they were “not in the habit of saying no to anyone.” AR, Tab 16.ss., E-mail, Subject: RE: GEITA Services for Bilingual-Bicultural Support to Iraq, Nov. 10, 2004. It was this gross error that directly resulted in the Air Force’s determination to pursue a sole-source award for the BBA-SME requirement. After the Air Force cancelled the GEITA plan, it initiated discussions with OSD regarding the option of making a sole-source award based on urgency. See AR, Tab 16.kk., E-mail, Subject: Iraqi Contracting Debacle,

¹⁷ As noted above, in mid-August 2004, Mr. Rostow began working on a statement of work for the BBA-SME requirement. Mr. Rostow testified that between the end of August and the beginning of September, he provided AFCEE with a copy of the actual statement of work. Tr. at 140. It was not until approximately 2-3 months later, on November 10, the Air Force’s Associate Deputy Assistant Secretary for Contracting contacted the Commander for the 11th Contracting Squadron for assistance with the procurement.

Nov. 12, 2004 (stating “[the Air Force] has assured me that [it] should have a contracting solution by COB today or Monday . . . specifically mentioned ‘sole-sourcing’ and ‘urgent and compelling’ as options on any new contract”).

July 2005 Sole-Source Award

Turning to the July 2005 sole-source award to OSS for expansion of the BBA-SME requirement, we find that the agency’s J&A in support of the sole-source award to OSS was flawed because it was premised on the unsupported conclusion that OSS was the only contractor capable of meeting the BBA-SME requirement in a timely and cost-effective manner. We therefore sustain the protesters’ challenge to this second sole-source award as well.¹⁸

The July 2005 J&A, which nominally cited “unusual and compelling urgency” as the justification for the sole-source award to OSS, was in fact prepared based on the exception to full and open competition set forth in 10 U.S.C. § 2304(c)(1), which applies when the agency concludes that required services are only available from one responsible source. Specifically, the contracting officer testified with regard to the July J&A as follows: “I wrote this J&A, believing that I was going to use one responsible source. . . . I think the situation in Iraq is urgent, but it was written for [‘only] one responsible source’.” Tr. at 277. Moreover, the reasoning set forth in the J&A is consistent with the “only one responsible source” exception. The J&A expressly asserts that OSS is “the only provider [deleted]. They are the only provider that can perform the contract without significant additional start-up costs and recruitment delays.” AR, Tab 1.b.1., J&A at ¶ 5.

The record further reflects that the contracting officer sought support from OSD in preparing the J&A for “only one responsible source,” pursuant to 10 U.S.C. § 2304(c)(1) and FAR § 6.302-1, and expressly informed OSD that it would be required to conduct market research certifying that OSS was the only responsible source capable of providing the BBA-SME requirement without significant duplication of cost and loss of schedule. AR, Tab 12.b., E-mail, Subject: OSS-BBA Extension 4-22-05, Apr. 22, 2005. In support of this contention the contracting officer maintained that OSD conducted market research, considered the capabilities of other firms, and certified that OSS was the only capable source. For example, the contracting officer testified:

Q. Did OSD provide market research certifying only one source can provide the required service?

¹⁸ In reaching our decision, we need not address the question of whether the July 2005 sole-source award, an expansion of OSS’s December 2004 award, was rendered inherently unlawful as a consequence of the defects in the December 2004 sole-source award.

A. Yes, they did.

Q. Who provided that market research?

A. Victor Rostow.

Q. Do you know what he did in terms of his market research?

A. . . . I know he had looked at existing contracts, he looked at the uniqueness of this requirement – because at this point in time it had never occurred to me to do two follow-on unusual and compelling [urgency] J&As. It's hard just to justify. So we were looking at who was the one vendor who would be able to fulfill this requirement without having a gap in the deploying of vetted trained security-cleared BBA subject matter experts in country. . . .

Q. Do you know what other contractors he looked to in his market survey?

A. I do know that he looked at some other contractors

Tr. at 237-40.

Contrary to this testimony of the contracting officer, Mr. Rostow testified that he had not considered the capabilities of other contractors and he did not know whether the Air Force had considered other contractors. Tr. at 178-79. In addition, regarding the question of whether he had provided the contracting officer with market research in support of the J&A, Mr. Rostow testified:

Q. You did not provide [the contracting officer] with market research in support of the J&A ultimately?

A. I did not go out and look at other contractors. I feel comfortable saying that this is the contractor, that this contractor can provide the services and I don't believe there are other contractors who can do it without loss of time and money. But I can't - - I didn't go out and look for other contractors.

Tr. at 185.

We conclude from this inconsistency that, contrary to the understanding of the contracting officer, firms other than OSS and their capabilities were simply not meaningfully considered. This was a critical error given that the J&A was premised on the notion that the capabilities of other firms had in fact been considered, and, as a consequence, we believe that the J&A's conclusions supporting the sole-source decision in this regard were unreasonable.

Moreover, the actions associated with the J&A were inconsistent with the requirements of the “unusual and compelling urgency” justification ultimately relied upon by the agency as the basis for the sole-source award to OSS. When relying on the urgency justification, as noted above, an agency is required to obtain competition to the maximum extent practicable. However, as a consequence of the agency’s focus on the capabilities of OSS to the exclusion of all others, the agency failed to take any steps to obtain any competition for the expanded BBA-SME requirement.¹⁹ For example, in testimony before our Office regarding the consideration of other contractors, the Air Force indicated that due to the short time frame to fulfill the requirement, transition issues, and because OSS was “performing admirably,” the Air Force determined that OSS “was uniquely qualified to be the source on this follow-on.” Tr. at 65. The record shows that the expanded BBA-SME requirement was formally approved by the Under Secretary of Defense on May 2, 2005 and OSS’s sole-source contract was ultimately awarded in late July—but during that entire period no effort was apparently made to identify other firms, consider their capabilities or provide for any degree of competition, even on a limited basis.²⁰ In addition, while it may be the case that OSS’s customers in Iraq were pleased with OSS’s performance, their satisfaction did not provide a basis for disregarding the requirement to seek competition to the maximum extent practicable. See TeQcom, Inc., B-224664, Dec. 22, 1986, 86-2 CPD ¶ 700 at 5 (agency’s satisfaction with performance of incumbent contractor did not justify the use of non-competitive procedures). As a consequence, we sustain the protesters’ challenge to the second sole-source award to OSS.

¹⁹ As argued by the Air Force, we have held that an agency has the authority under the urgency exception to full and open competition to limit the procurement to the only firm it reasonably believes can properly perform the work in the available time. See, e.g., Total Industry & Packaging Corp., B-295434, Feb. 22, 2005, 2005 CPD ¶ 38 at 2; McGregor Mfg. Corp., B-285341, Aug. 18, 2000, 2000 CPD ¶ 151 at 6. In these cases, unlike the case at hand, however, we have upheld the agency’s decision to limit the procurement to a single source only where the decision was made after considering the capabilities of other firms and the agency reasonably decided to exclude them from the competition based on their capabilities.

²⁰ In fact, the period during which additional sources could have been considered was apparently even longer, thus further undermining the argument that extreme urgency precluded considering other firms. The MNF-I had identified a requirement for approximately 275 BBA-SMEs in January 2005, and it was only the formal approval for expansion by OSD which occurred on May 2, so that the agency had at least 4 months between identification of the requirement and the date by which a contract had to be in place. Moreover, we note that while OSD was initially aiming to have an award by June 1, this date was obviously not met and OSD characterized the J&A’s “critical need date” of July 1 as “arbitrary.” Tr. at 178.

Recommendation

In crafting our recommendation in this case, we are sensitive to the pressing needs associated with the military's mission in Iraq. In view of the fact that OSS's initial sole-source contract is now substantially complete, and recognizing the agency's asserted need for the services at issue, we do not recommend termination of this contract.²¹ With regard to the second sole-source award, however, we recommend that the agency promptly obtain competition for the requirement, or prepare a properly documented and supported J&A in support of the expanded BBA-SME requirement, and, if necessary, promptly obtain competition to the maximum extent practicable. If, as a result of any recompetition, an offeror other than OSS is in line for award, we recommend that the agency terminate OSS's contract. We also recommend that the agency reimburse the protesters' reasonable costs of filing and pursuing the protests, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). The protesters should submit their certified claim for costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days after the receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protests are sustained.

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General Counsel

²¹ Citing FAR § 33.104(c), the agency notified our office of its decision to continue with contract performance notwithstanding the protests challenging the awards to OSS based on the finding that "performance is in the best interests of the United States and that urgent and compelling circumstances" would not permit waiting for a decision from our Office. AR, Tab 11, Continuation of Contract Performance.