



G A O

Accountability * Integrity * Reliability

United States General Accounting Office
Washington, DC 20548

Comptroller General
of the United States

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: One Source Mechanical Services, Inc.; Kane Construction

File: B-293692; B-293802

Date: June 1, 2004

Johnathan M. Bailey, Esq., Bailey & Bailey, for the protesters.

Joseph A. Gonzales, Esq., and Larry E. Beall, Esq., United States Army Corps of Engineers; and Kenneth Dodds, Esq., Small Business Administration, for the agencies.

Paul N. Wengert, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that the agency failed to provide maximum practicable preference to making multiple awards under solicitations for services, as required by the Federal Acquisition Regulation, is sustained where contracting officer's conclusion that multiple-award approach could not be used is not supported by the record.

DECISION

One Source Mechanical Services, Inc. (OSMS), a small business, protests the terms of request for proposals (RFP) No. W91278-04-R-0007, issued by the United States Army Corps of Engineers, for the award of a single indefinite-delivery, indefinite-quantity (ID/IQ) contract for the operation, maintenance, repair, and minor construction of Army Medical Command (MEDCOM) facilities in the United States (the O&M RFP). OSMS protests the Corps's decision not to set aside part or all of the procurement for small businesses, and objects to the Corps's decision not to permit multiple awards under the solicitation.

Kane Construction, a small business, protests the terms of solicitation No. W91278-04-R-0012, issued by the United States Army Corps of Engineers, for the award of a single ID/IQ contract for the renovation, repair, and minor construction at

various MEDCOM facilities in the United States (the Renovation RFP). Kane protests the Corps's decision not to permit multiple awards under this RFP as well.¹

We sustain the protests.

These protests involve two solicitations of a planned set of 13 ID/IQ "toolbox" contracts to provide assessment, construction, renovation, repair, and maintenance services to support MEDCOM. Agency Report (AR) for O&M RFP, Tab H, Revised Acquisition Plan, at 3. The acquisition plan contemplated that the 13-contract "toolbox" would consist of three contracts for architect-engineer services, three contracts for renovation, repair, and minor construction, three contracts for construction repair and maintenance services (5-year contracts, awarded separately at 2-year intervals), two contracts for asbestos abatement and removal services, one contract for facility assessment studies, and one contract for preventative maintenance and inspections. Id.

The O&M RFP was issued on December 17, 2003. The Corps anticipated making a single contract award to the "best value" offeror selected through full and open competition. As revised by amendment No. 3, the RFP provided that initial proposals were due on February 26, 2004. On February 20, the Corps postponed the due date for receipt of initial proposals pending a decision from our Office on OSMS's timely protest.

The Renovation RFP was issued on February 10, 2004. The Corps anticipated making a single contract award to the best value offeror selected through full and open competition. As revised by amendment No. 1, the RFP provided that initial proposals were due on March 11. On March 9, the Corps postponed the due date for receipt of initial proposals pending a decision from our Office on Kane's timely protest.

From the time of acquisition planning through the issuance of the two solicitations at issue in these protests, the Corps's intent has been to make a single award under each solicitation. After issuance of the O&M RFP, a potential offeror (not one of the protesters) complained to the Corps that multiple awards were required for that solicitation, as well as for any subsequent solicitations. AR for O&M RFP, Tab J, Letter from Potential Offeror to Contracting Officer, at 3 (Dec. 29, 2003). Responding to that company's argument, the contracting officer executed a document, entitled "Determination and Findings Decision to Use Single Award Task Order Approach," which was dated January 22, 2004 for the O&M RFP. AR for O&M RFP, Tab I, Determination & Findings. The contracting officer executed an

¹ Although Kane also initially protested the agency's failure to set aside the Renovation RFP for small businesses, it withdrew this ground of protest after receipt of the agency report. Kane's Comments on Renovation RFP at 7.

identically-entitled (and substantially similar) document for the Renovation RFP on the same date. AR for Renovation RFP, Tab J, Determination & Findings.

The Federal Acquisition Streamlining Act of 1994 requires that the implementing regulations--here, the Federal Acquisition Regulation (FAR)--express a preference for awarding multiple task or delivery order contracts for the same or similar services or property, and establish criteria for determining whether multiple contracts would not be in the best interest of the government. 10 U.S.C. § 2304a(d) (2000). Accordingly, the FAR provides that during acquisition planning, the contracting officer must, to the maximum extent practicable, give preference to making multiple awards of indefinite-quantity contracts under a single solicitation for the same or similar supplies or services to two or more sources. FAR § 16.504(c). However, the FAR provision identifies a number of circumstances where, if applicable, the contracting officer cannot use the multiple-award approach. The contracting officer is required to document his decision. Id. Specifically, the FAR provides as follows:

(c) Multiple award preference --

(1) Planning the acquisition.

(i) Except for indefinite-quantity contracts for advisory and assistance services as provided in paragraph (c)(2) of this section, the contracting officer must, to the maximum extent practicable, give preference to making multiple awards of indefinite-quantity contracts under a single solicitation for the same or similar supplies or services to two or more sources.

(ii)(A) The contracting officer must determine whether multiple awards are appropriate as part of acquisition planning. The contracting officer must avoid situations in which awardees specialize exclusively in one or a few areas within the statement of work, thus creating the likelihood that orders in those areas will be awarded on a sole-source basis; however, each awardee need not be capable of performing every requirement as well as any other awardee under the contracts. The contracting officer should consider the following when determining the number of contracts to be awarded:

- (1) The scope and complexity of the contract requirement.
- (2) The expected duration and frequency of task or delivery orders.
- (3) The mix of resources a contractor must have to perform expected task or delivery order requirements.
- (4) The ability to maintain competition among the awardees throughout the contracts' period of performance.

(B) The contracting officer must not use the multiple award approach if-

- (1) Only one contractor is capable of providing performance at the level of quality required because the supplies or services are unique or highly specialized;

(2) Based on the contracting officer's knowledge of the market, more favorable terms and conditions, including pricing, will be provided if a single award is made;

(3) The expected cost of administration of multiple contracts outweighs the expected benefits of making multiple awards;

(4) The projected task orders are so integrally related that only a single contractor can reasonably perform the work;

(5) The total estimated value of the contract is less than the simplified acquisition threshold; or

(6) Multiple awards would not be in the best interests of the Government.

(C) The contracting officer must document the decision whether or not to use multiple awards in the acquisition plan or contract file. The contracting officer may determine that a class of acquisitions is not appropriate for multiple awards (see subpart 1.7).

FAR § 16.504(c)(1).

As indicated above, in each of these procurements, the contracting officer prepared a justification document, which concluded that multiple awards were not in the best interest of the government for these solicitations. In the justification documents, the contracting officer relies on four of the exceptions identified in the FAR for his conclusion that he could not use the multiple-award approach for these acquisitions. The contracting officer's reasons were first, that more favorable terms and conditions could be obtained through a single award (see FAR § 16.504(c)(1)(ii)(B)(2)); second, that the cost of administering multiple awards outweighed the expected benefit (see FAR § 16.504(c)(1)(ii)(B)(3)); third, that orders were so integrally related that only one contractor could reasonably perform the work (see FAR § 16.504(c)(1)(ii)(B)(4)); and fourth, that multiple awards would not be in the best interest of the government (see FAR § 16.504(c)(1)(ii)(B)(6)).² The

² In each of the agency reports, the Corps adds an additional argument that, in accordance with FAR § 16.504(c)(1)(ii)(B)(1), the services required here are so unique or highly specialized that only one contractor is capable of providing performance at the level of quality required. AR for O&M RFP, Tab B, CO Statement, at 4; AR for Renovation RFP, Tab B, CO Statement, at 5. However, the record in each protest contains no basis for this conclusion. While, as the agency asserts, it may well be that the capability to provide some particular services is "not common in every contractor's capability, experience, and/or past performance history," there is nothing in the form of market research or other information in the record to support the agency's view that only one contractor is capable of performing these contracts. Id. Indeed, FAR § 16.504(c)(1)(ii)(B)(1) appears to envision a sole-source contract award, something that clearly is not contemplated here by the Corps. In fact, the

(continued...)

contracting officer's reasoning in both procurements was largely the same on each point. We recognize that the existence of circumstances supporting any one of the exceptions would be sufficient to justify making a single award. However, in our view, the contracting officer's rationales contained in the justification documents are not sufficient to reasonably overcome the preference for multiple awards under these RFPs.

Regarding the first exception, that "more favorable terms and conditions, including pricing, will be provided if a single award is made," the contracting officer does not identify any more favorable terms and conditions that would result from a single award. Rather, the contracting officer focuses on the administrative convenience of issuing task orders under an ID/IQ contract to a single firm versus awarding individual contracts for each discrete project. The contracting officer explains that the Corps requires the ability to "efficiently facilitate the resolution of varying sustainment and maintenance problems that continually develop in the facility infrastructure of hospitals and clinics throughout MEDCOM." The contracting officer then emphasizes that the Corps seeks to "alleviate[s] the regulatory mandated lead times normally required for repeated advertisement and award of individual . . . contracts." The justifications also point out the importance of allowing "maintenance repair activities to begin within a few days (hours for emergencies) due to the pre-priced nature of the contract . . . and its ability to issue individual task orders in a rapid fashion." Finally the justifications emphasize the "intense price competition 'up-front'" and refer generally to the prospect of obtaining "[e]conomies of scale." AR for O&M RFP, Tab I, Determination & Findings, at 3; AR for Renovation RFP, Tab J, Determination & Findings, at 2.

In response, OSMS argues that, typically, task order competitions under a multiple-award approach "will certainly provide an advantage to the Government, by potentially receiving a true 'best value' proposal and providing a competitive savings." O&M RFP Protest at 8. Similarly, Kane argues that as a "fundamental tenet . . . more competition produces better quality services at a lower price." Renovation RFP Protest at 5. Thus, the protesters argue that better terms and conditions, including better quality services and pricing, will result from awarding multiple contracts.

We do not think the contracting officer has justified an exception to the preference for the multiple-award approach under this basis. As stated above, the contracting officer has not identified any more favorable terms and conditions that would result from a single award. His reasoning addresses the benefits of using an ID/IQ contract

(...continued)

Corps affirmatively states in each agency report that it "has knowledge of several contractors capable of competing to provide performance at the level of quality required." Id.

generally, as opposed to conducting full and open competition and then awarding an individual contract for each discrete project. However, this reasoning alone does not provide support for the claim that a single-award contract will result in more favorable terms and conditions than using a multiple-award approach. The contracting officer does not explain how concerns about lead times and flexibility cannot also be eliminated or minimized through the use of multiple awards. Also, where a more formal source selection procedure is necessary to evaluate multiple-award vendors, the contracting officer provides no explanation why such a competition cannot be conducted in a short period among multiple-award contractors prior to issuing a task order. See, e.g., SMF Sys. Tech. Corp., B-292419.3, Nov. 26, 2003, 2003 CPD ¶ 203 at 5 (for a multiple-award task order competition, time from issuance of a request for quotations to announcement of results was approximately 2 weeks when using negotiated procurement techniques). Nor do vague references to the prospect of obtaining greater economies of scale through a single award, without more supporting detail, overcome the preference for multiple awards in statute and regulation. See WinSTAR Communications, Inc. v. United States, 41 Fed. Cl. 748, 762 (1998) (agency reliance on predicted economies of scale, “[did] not provide a reasonable basis for overriding the Congressional preference for multiple awards”). In short, we do not think the contracting officer has shown why this exception to the use of multiple awards is applicable here.

Regarding the second exception, that administrative costs of multiple awards will outweigh the benefits, the contracting officer in his justifications asserts that if multiple contracts were to be awarded, the Corps would be required to use a complex evaluation process to issue task orders, and often would not select the low-priced task order response. Thus, the contracting officer asserts that the administrative costs of the process would eliminate any anticipated savings from competitions among multiple contractors.

The protesters respond that the administrative burden of selecting among multiple awardees should not be much greater than issuing a task order to a single contractor, particularly given a decade of experience by the Corps in obtaining these services under task order contracts. O&M RFP Protest at 9; Renovation RFP Protest at 5. The protesters also argue that the savings accruing to the Corps are more significant than the costs, and that competition for task orders does not need to be elaborate. Protester’s Comments on O&M RFP at 5; Protester’s Comments on Renovation RFP at 7.

In his justification documents, the contracting officer provides no meaningful support for his conclusion that the administrative costs of multiple awards will outweigh the benefits. For example, the contracting officer does not explain why a “formal” competition among contract holders for each task order would be necessary. The regulations applicable to the task order competitions urge agencies

to employ a streamlined process in placing task orders.³ Indeed, the purpose of multiple-award ordering is to provide a simplified process and to permit flexibility in issuing task orders. S. Rep. No. 103-258, at 16 (1994), reprinted in 1994 U.S.C.C.A.N. 2561, 2576 (seeking to provide “agencies broad discretion in establishing procedures for the evaluation and award of individual task orders under multiple award contracts”). The record contains no indication that the effect of competition among multiple contractors or the flexibility of having multiple contractors available was meaningfully considered by the contracting officer. Cf. Office of Federal Procurement Policy, Office of Management & Budget, Best Practices for Multiple Award Task & Delivery Order Contracting (interim ed. 1997) at chapter 4, available at <http://www.acqnet.gov/AcqNet/Library/OFPP/BestPractices> (“When developing ordering procedures for multiple award contracts, agencies are encouraged to . . . develop more streamlined and simplified procedures [than traditional single-award contracts] in order to take advantage of the flexibilities envisioned by FASA and the FAR guidance.”).

In an effort to further support the contracting officer’s position that the administrative costs of multiple awards will outweigh the benefits, the agency reports contain analyses that evaluate the costs, time required, and expected savings resulting from a hypothetical task order competition among multiple vendors versus issuing an order to the single awardee under the contract. AR for O&M RFP, Tab M, Memorandum for Record (Jan. 22, 2004); AR for Renovation RFP, Tab L, Memorandum for Record (Mar. 5, 2004). These analyses are based on assumptions that increase the costs of the multiple-award approach. For example, the analyses assume that the process of soliciting “proposals” and issuing the task order would take twice as long as ordering from a single contractor. However, the differing assumptions are unexplained, such as a 10-day “scheduling lag” for site visits and a 3-day pre-proposal conference for a competition among multiple awardees. It is not apparent that either analysis was based on any relevant agency historical experience with multiple awards. Further, the analyses assume a more formal source selection process not required by the FAR or DFARS, which again lacks any supporting basis. Without meaningful support for the timeframes and process assumed in these analyses, we do not believe it is appropriate to give any weight to them.

Regarding the third exception, that task orders will be so integrally related that using multiple contractors would be unreasonable, the justifications describe how having

³ In fact, the regulations established pursuant to Section 803 of the National Defense Authorization Act for Fiscal Year 2002, Pub. L. 107-107, 115 Stat. 1012, 1178 (Dec. 28, 2001) (Section 803) states that the contracting officer should keep contractor submission requirements to a minimum, and that the contracting officer can use streamlined procedures. Defense Federal Acquisition Regulation Supplement (DFARS) § 216.505-70(d) (2003).

multiple contractors would necessitate holding competitions for a task order for each separate part of a project at a particular site. Therefore, according to the contracting officer, if the agency's source selections result in awards to multiple firms for different, but related, projects at a particular site, the consequences would be increased delay in mobilizing to perform the work and greater likelihood of difficulties in coordinating contractors.

The protesters basically argue that these concerns are overstated and fail to take into account the discretion, afforded by the regulations, to a contracting officer in placing task orders to address projects that are integrally related at a particular site. The protesters note that the Corps also does not appear to argue that all work within a single site is integrally related, much less that work at different sites is integrally related. Protester's Comments on O&M RFP at 4; Protester's Comments on Renovation RFP at 5.

As pointed out by the protesters, the contracting officer is not required to consider more than one contractor for a task order where the contracting officer determines that the order must be issued on a sole-source basis in the interest of economy and efficiency because it is a logical follow-on to an order already issued under the contract, provided that all awardees were given a fair opportunity to be considered for the original order.⁴ See FAR § 16.505(b)(2)(iii); DFARS § 216.505-70(b)(1). The contracting officer's justification documents do not discuss these flexibilities found in the FAR and DFARS. Moreover, the Corps does not claim that task orders performed at different facilities would have any integral relationship—only certain orders at a single site or facility. See AR on O&M RFP, Tab B, Contracting Officer's (CO) Statement, at 6 (“Task orders for continuing maintenance at a given site . . . are integrally related”); AR on Renovation RFP, Tab B, CO Statement, at 7 (“For a given construction and/or repair requirement, the site survey, work plan, and construction/repair work are integrally related”).⁵ Thus, it does not appear from the record that the contracting officer considered the latitude afforded him under the regulations to address integrally related tasks at a particular site. Further, the contracting officer does not provide any information as to the number of orders under these contracts that are, in his view, integrally related. Under these

⁴ The same exception applies directly for task orders between \$2,500 and \$100,000, even though those task orders are governed by the “fair opportunity” standard of FAR § 16.505(b)(2), rather than by the “competitive basis” requirement of Section 803. FAR § 16.505(b)(2)(iii).

⁵ The contracting officer appears to reinforce the protester's argument that, even though some construction/repair work at a site is integrally related, not all of the work at a site must be assigned to one contractor. AR on Renovation RFP, Tab B, CO Statement, at 7.

circumstances, the contracting officer's reliance on this exception is not reasonably supported.

Regarding the final exception, that a single award is in the best interest of the government, as cited in both justifications, the contracting officer basically refers to his previous conclusions under the other exceptions and concludes that, together, these grounds support a determination that the best interest of the government does not support making multiple awards. For the same reasons that we found these rationales insufficient under the previous exceptions, we find them insufficient to support the best interest exception.

In the best interest section of the justification for the O&M RFP, the contracting officer also makes a more extensive argument, asserting that "it is impossible to accurately shape and articulate the [task order] maintenance performance requirements in 100% biddable detail," which supposedly could be needed in order to permit task order competition.⁶ AR on O&M RFP, Tab I, Determination & Findings, at 4. To the extent that the contracting officer justifies the single-award approach on the basis that the individual projects are not well defined or cannot readily be estimated, these difficulties would exist regardless of whether a single contractor was available, or multiple contractors were available, to perform the work.

In summary, we conclude that the contracting officer's rationale for employing the exceptions under FAR § 16.504(c)(1)(B) is not adequately supported. Therefore, our Office concludes that the Corps failed to comply with the FAR in determining whether these solicitations should have been issued on a multiple-award basis.

The protests are sustained.⁷ Our Office recommends that the Corps reconsider whether, in accordance with FAR § 16.504(c), these solicitations should be competed

⁶ Rather than relying on preparation of specifications in "100% biddable detail," the FAR directs that "[p]erformance-based work statements must be used to the maximum extent practicable, if the contract or order is for services." FAR § 16.505(a)(3).

⁷ As indicated above, in its protest, OSMS raised the additional issue of whether the Corps had reasonably decided not to set aside for small businesses, either partially or in its entirety, the O&M RFP. After the Corps submitted additional documentation (including contemporaneous approval by the Small Business Administration (SBA) representative), the SBA provided comments to our Office indicating that the SBA agreed that a set-aside was not required. Although OSMS maintains that its research demonstrates that acceptable offers from two or more small businesses would be expected if the O&M RFP were to be set aside, based on the record, we conclude that the Corps conducted a sufficient inquiry and reasonably concluded that the procurement did not need to be set aside in any manner. See Rochester Optical Mfg.
(continued...)

on a multiple-award basis, and that the Corps document a well-supported rationale for the conclusion reached with respect to each solicitation. Our Office also recommends that each of the protesters be reimbursed for the reasonable costs of filing and pursuing its protest. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (2004). Each protester should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the Corps within 60 days after receipt of this decision.

Anthony H. Gamboa
General Counsel

(...continued)

Co., B-292247, Aug. 6, 2003, 2003 CPD ¶ 138 at 3. We, therefore, deny this ground of protest.