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**Comptroller General
of the United States**

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

Decision

Matter of: VSE Corporation; Johnson Controls World Services, Inc.

File: B-290452.3; B-290452.4; B-290452.5

Date: May 23, 2005

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DIGEST

1. Protest of proposed sole-source contract must be filed within 10 days of the publication on the FedBizOpps Internet website of the agency's notice of its intent to enter into the sole-source contract where the notice does not request responses from other potential sources.
 2. Protest of award of sole-source bridge contract for storage, maintenance, and disposition services to handle personal property seized by various federal agencies, pending completion of competitive procurement for long-term services, is sustained, where the procuring agency failed to execute a justification and approval for the sole-source award and did not conduct reasonable advanced procurement planning.
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DECISION

VSE Corporation and Johnson Controls World Services, Inc.¹ protests the Department of Homeland Security (DHS), Bureau of Customs and Border Protection's (CBP) sole-source award of a contract to EG&G Technical Services, Inc., for storage, maintenance, and disposition services to handle personal property seized by various federal agencies.

¹ Since filing the protest, Johnson Controls changed its name to IAP World Services, Inc. For purposes of our decision, we refer to the company by its prior name.

We sustain VSE's protest and dismiss Johnson Controls' protest.

A significant resource of the federal government in its effort to prevent criminal activity has been the moneys derived from the sale of seized and forfeited property belonging to individuals who violated United States laws. To ensure that the moneys derived from the sale of forfeited and seized property involving criminal activity are specifically applied to the expenses of law enforcement programs, the government established several funds, one of which is the Treasury Forfeiture Fund, which is administered by the Treasury Executive Office for Asset Forfeiture (TEOAF) in the Department of Treasury.² As agent for the TEOAF, the U.S. Customs Service (formerly part of the Department of Treasury) managed the contracts administering the seized property that support the fund, including EG&G's contract with the agency for nationwide services involving the receipt, custody, management, and disposition of seized and forfeited personal property.³

In March 2000, the Customs Service issued request for proposals (RFP) No. CS-00-007 as a follow-on procurement to EG&G's contract. The RFP contemplated the award of a cost-plus-award-fee contract for a 4-month transition period (from September 19, 2000 to January 18, 2001), a base period (from January 19 to September 30), and nine 1-year options. The RFP provided that

[a] transition period will be required, necessitating an overlap of time when both contractors, previous and successor, will be in force. The overlap period will be used by the successor contractor for organizing the task, staffing, acquiring facilities, and accepting the transfer of subcontracts, equipment, records, property, and merchandise.

RFP § C.3.12.⁴

Prior to receipt of initial proposals, the Customs Service issued several amendments to the RFP that made extensive changes to the RFP involving such matters as the statement of work, the simulated inventory of seized property, and the estimated workload projections. Four offerors--VSE; Day and Zimmerman Services, Inc; Johnson Controls; and EG&G--responded to the RFP by the June 30, 2000 due date. After issuing numerous other amendments and conducting two rounds of

² The fund also covers seizures by the U.S. Secret Service; Bureau of Alcohol, Tobacco and Firearms; and the Internal Revenue Service.

³ These services were to cover the disposition of the inventory of seized vehicles, vessels, aircraft, and general property.

⁴ The RFP also stated that when the contract ends or is terminated, the contractor shall plan a transition to the Customs Service or the successor contractor. RFP § C.3.12.1.

discussions, the Customs Service made award to Day and Zimmerman on April 23, 2002, and EG&G protested the award to our Office. In response to that protest, the Customs Service took corrective action by terminating the award to Day and Zimmerman, revising the statement of work, and reopening the competition.

Meanwhile, effective May 17, 2001, the Customs Service entered into a sole-source contract extension with EG&G, the incumbent contractor for these services, to cover the services while this competition was being conducted. This sole-source contract expired on December 16, 2002, and DHS executed another sole-source contract extension with EG&G, extending the period of performance through October 1, 2003, with options that have allowed the contract to extend to April 1, 2005.

While the agency was revising the RFP as part of its corrective action, Congress passed the Homeland Security Act of 2002, 6 U.S.C. §§ 101-557 (Supp. II 2002), in November 2002, which among other things transferred the Customs Service from the Department of Treasury to DHS and established the CBP. The CBP, which was created by the Act, became the contracting office for this procurement. The CBP also became responsible for various functions transferred to DHS from the Department of Agriculture and the Immigration and Naturalization Service (INS) of the Department of Justice, including the inspection and border protection activities of the Animal and Plant Health Inspection Service and the Border Patrol. The added functions resulted in increased workload projections related to the property covered by the contract.

In 2003, the CBP proceeded with the procurement, issuing several amendments, including one revising the RFP in its entirety and revising the workload estimates, and another advising offerors that a government-owned facility to store, maintain, and sell property may be provided. In 2004, the CBP decided that incorporating the additional requirements from the INS and the Border Patrol into the nationwide contract, which had previously been performed by small businesses, may constitute improper bundling, and that it would develop a plan to break out certain of the requirements for small business participation.⁵ After deliberating for more than a year as to how to proceed under this procurement, the CBP issued amendment No. 0045 on December 20, 2004 canceling the RFP. The CBP took this action because of the significant changes in the RFP from when it was initially issued, unresolved questions as to how to deal with the bundling issue as well as contract

⁵ Some of the seizure functions assumed by the CBP included functions being performed by the Border Patrol and the INS that were being managed by the U.S. Marshals Service under various small business contracts. Approximately 500 small business contracts associated with this work were transferred to the CBP after its reorganization. The CBP modified EG&G's nationwide contract to include the services that had been performed by these small businesses.

funding issues, significant increases in the estimated workload, and the belief that resoliciting the requirement could result in increased competition.

After canceling the RFP, on December 23, the CBP posted notice of intent to negotiate a sole-source contract with EG&G on the Federal Business Opportunities (FedBizOpps) website, which stated:

[the CBP] intends to negotiate on a bridge contract on a sole-source basis with EG&G . . . for the management and disposition of seized/forfeited property and the sale of general order merchandise for a base period of 6[]months and three (3) option periods. It is intended that award will be made under the authority of 41 USC [§] 253(c)(1). This notice is not a request for proposals and no solicitation information is available at this time.

Neither VSE nor Johnson Controls specifically responded to this notice. However, on December 30, VSE protested the cancellation of the RFP, arguing that the CBP's actions were arbitrary, capricious, and unreasonable, given that the agency had previously addressed significant changes by amendment, and that the cancellation was a pretext to rid itself of a burdensome procurement process to preserve the sole-source arrangement with EG&G. Johnson Controls, which did not protest the cancellation, requested to intervene in VSE's protest on January 27, 2005.⁶

After receiving the agency's documented report responding to the protest, VSE, in its comments submitted on February 10, attacked not only the agency's reasons for canceling the RFP, but also contended that the agency's proposed sole-source bridge contract with EG&G resulted from a lack of advanced planning. In VSE Corp., B-290452.2, Apr. 11, 2005, 2005 CPD ¶ ___, we denied VSE's protest of the cancellation of the RFP, finding that the agency had established a reasonable basis for this action. We decided to separately resolve the question of the propriety of the agency's proposed sole-source contract with EG&G, given that the agency had not addressed this question in its agency report. On March 11, Johnson Controls protested the proposed sole-source award within 10 days of a conference call between representatives of our Office, VSE and DHS, in which Johnson Controls' representative was permitted to participate, where the agency indicated that it intended to proceed with the sole-source award to EG&G.

On April 1, the CBP awarded a letter contract at an estimated funding level of \$11,500,000 to EG&G. This sole source award was not supported by a justification

⁶ In Johnson Controls' letter of intervention, it stated that, contrary to VSE's belief that VSE was the only contractor still interested in the requirement, "[Johnson Controls] is indeed still interested in competing." Letter from Johnson Controls, Jan. 27, 2005.

and approval (J&A).⁷ The letter contract was issued to extend these services while the CBP and EG&G negotiated the price and terms and conditions of a sole-source contract for a base period of performance extending from April 1 to September 30, 2005, with three 4-month option periods. The letter contract is to be finalized by July 29.

VSE and Johnson Controls challenge the propriety of the latest sole-source bridge contract with EG&G. VSE argues that this award is the result of a lack of advanced planning. VSE explains that agency records, which it obtained during the course of its prior protest, demonstrate that the CBP was aware as early as June of 2004 of the likelihood that the solicitation would be canceled, but had no plan for acquiring the services from any source other than EG&G. Johnson Controls argues that the sole-source contract was unjustified because EG&G was not the only responsible source that could meet the agency's interim requirements.

The CBP initially argues that VSE's and Johnson Controls' protests of the sole-source contract with EG&G should be dismissed as untimely because the protests were not filed within 10 days from the publication of the agency's FedBizOpps notice of intent to negotiate a sole-source contract with EG&G.

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 protester knew or should have known its basis for protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2) (2005). We have previously recognized that publication in the Commerce Business Daily (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. In those cases where the CBD requested that potential sources submit an expression of interest and demonstration of capabilities, we have found that the protester's timely filing of the requested submission to the agency was a prerequisite to timely protesting to our Office. Fraser-Volpe Corp., *supra*. In situations where no such request for responses from potential sources was made, we have found that a protest of the proposed sole-source award must be filed within 10 days of the CBD announcement. S.T. Research Corp., *supra*. Similarly, we have found that publication on the FedBizOpps Internet site (which has replaced the CBD) puts 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.

⁷ Although the agency provided the parties and our Office with a draft J&A, which it characterized was part of its "deliberative processes," Letter from Agency to GAO, Apr. 1, 2005, at 1, it has neither provided, nor indicated the existence of, an executed J&A for this sole-source award during the course of this protest.

Here, we find that the December 23, 2004 FedBizOpps announcement, which invited no responses from potential sources, provided constructive notice of the proposed sole-source bridge contract with EG&G, such that the protesters were required to protest this proposed action within 10 days of publication. See id.

VSE's initial protest of the cancellation of the RFP, filed December 30, 2004, specifically argued that the "Government's real agenda [in canceling the RFP] is the status quo, perpetuating improper sole source extensions forever or until some indefinite future time." VSE's Initial Protest at 18-19. We find that this constitutes a timely protest of the proposed sole-source extension of EG&G's contract. Although the agency argues that VSE did not then contend that the sole-source extension of EG&G's contract was the result of a lack of advanced planning but only untimely raised this contention in its comments on the agency report, this contention was based upon documents provided in the agency report on VSE's initial protest and is thus timely raised in VSE's comments. We consider VSE's protest of the sole-source bridge contract to be timely filed.

On the other hand, Johnson Controls' protest, which was filed on March 11, 2005, more than 10 days after the announcement in FedBizOpps, is untimely and is dismissed. Johnson Controls argues that it would have been premature for it to protest the proposed sole-source action based upon the FedBizOpps announcement because no solicitation for the sole-source procurement had been issued and no sole-source justification had been prepared. However, nothing had really changed when Johnson Controls filed its "piggy-back" protest on March 11, 2005,⁸ in that the agency still had not issued a solicitation or prepared a sole-source justification.⁹ We dismiss Johnson Controls' protest as untimely.

Turning to the propriety of the sole-source bridge contract with EG&G, we first find that the sole-source award was improper because it is not supported by a written J&A. In this regard, when an agency uses noncompetitive procedures, such as 41 U.S.C. § 253(c)(1) (2000), which authorizes the use of noncompetitive procedures

⁸ As indicated, Johnson Controls' protest was filed within 10 days of a conference call on VSE's protest.

⁹ The case cited by Johnson Controls in support of its assertion that a protest based upon the FedBizOpps announcement would have been premature, Tri-Ex Tower Corp., B-245877, Jan. 22, 1992, 92-1 CPD ¶ 100, is readily distinguishable. In that case, the agency had cancelled a procurement with the stated intent of proceeding with a sole-source award to another source, but had not yet published a CBD announcement of the intended sole-source, so as to allow other potential sources to respond. Here, the agency published an announcement of its proposed sole-source action in the FedBizOpps and did not request responses.

when the property or services are available from only one responsible source, the contracting officer is required to execute a written justification with sufficient facts and rationale to support the use of the authority, certify its accuracy and completeness, and obtain approval of the action from the cognizant agency official prior to making an award. See 41 U.S.C. § 253(f)(1)(A), (B), (C); Federal Acquisition Regulation (FAR) §§ 6.303, 6.304. The only exception to this requirement is where the agency uses noncompetitive procedures because the agency's need for the property or services 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 bids or proposals. See 41 U.S.C. § 253(c)(2), (f)(2). Here, the agency did not execute a J&A prior to awarding the letter contract, as required by the statute.¹⁰ While a draft J&A has been provided during the course of our consideration of this protest, the agency advises that this document is only the agency's "deliberative processes" until a final document is issued. See Agency Letter, Apr. 1, 2003, at 1. In fact, despite our requests, the agency still has not provided an executed and approved J&A. Thus, the agency's letter contract award to EG&G constitutes an improper sole-source award. See Saltwater, Inc.--Recon. and Costs, B-294121.3, B-294121.4, Feb. 8, 2005, 2005 CPD ¶ 33 at 3.

Notwithstanding its failure to prepare a J&A, the agency argues that the sole-source award is still appropriate because only one responsible source--EG&G--can meet its requirements so as to avoid an interruption of these services. In this regard, the CBP argues that because any change in contractor requires a 4-month transition period, there was insufficient time to conduct a competition.

While we do not question the agency's need for a transition period (even though the record does not clearly establish that this period is required to take as much as 4 months¹¹), we agree with VSE that the agency's predicament of not being able to complete a transition period in the event of an award to a firm other than EG&G was caused by the agency's failure to consider meeting its requirement for these bridge services with any firm other than EG&G. In this regard, the record evidences that the agency was aware from the start of 2004, and increasingly certain as the year passed, that the RFP might well be canceled;¹² that EG&G's latest contract extension

¹⁰ FAR § 16.603-3 provides that a letter contract may only be used after the head of the contracting activity determines in writing that no other contract is suitable and shall not be entered into without competition when competition is otherwise required.

¹¹ Although in response to the protest, the contracting officer provided a statement justifying a 4-month transition period, the prior solicitation for the long-term provision of the services only contemplated 4 months as the outer limit of the period for transition. See RFP § F.4.a.

¹² For example, the DHS Chief Procurement Officer stated:

(continued...)

would expire on April 1, 2005; that a follow-on contract would require a transition period; and that there were other capable contractors, such as VSE and Johnson Controls, which had competed during the agency's protracted competitive procurement, that might be interested in the agency's interim requirements.¹³ Yet the agency did not take any steps to avoid having to negotiate exclusively with EG&G to satisfy its requirements.

Under the Competition in Contracting Act of 1984 (CICA), 41 U.S.C. § 253(a)(1)(A), contracting officers have a duty to promote and provide for competition and to provide the most advantageous contract for the government. In doing so, contracting officials must act affirmatively to obtain and safeguard competition; they cannot take a passive approach and remain in a noncompetitive position where they could reasonably take steps to enhance competition. See Signal & Sys., Inc., B-288107, Sept. 21, 2001, 2001 CPD ¶ 168 at 14-15. Thus, 41 U.S.C. §253(f)(5)(A) provides that under no circumstance may noncompetitive procedures be used due to a lack of advanced planning by contracting officials. Signal & Sys., Inc., *supra*, at 9. Although the requirement for advanced planning is not a requirement that such planning be successful or error-free, see Abbott Products, Inc., B-231131, Aug. 8,

(...continued)

With respect to the follow-on solicitation, the justification to continue the RFP given the elapsed time (four years) since the solicitation was issued and the volume of amendments (44 issued amendments with the 45th amendment in progress) is weak at best. This solicitation can be cancelled in accordance with FAR 15.206(e). Additionally, the issues surrounding bundling continue to apply to the follow-on requirement.

Agency Report, Tab 9, Memorandum, Feb. 24, 2004, at 2. Additionally, on June 30, 2004, the contracting officer stated:

When we go to [TEOAF], we're criticized for not ensuring we're getting the best value from EG&G but we're in a sole-source situation that they know has no end in sight.

I feel now is the time to make a decision to move forward with a firm plan or cancel and begin to look at how we want to proceed after April 2005.

Agency Report, Tab 39, June 30, 2004 e-mail.

¹³ The agency admits that both VSE and Johnson Controls are qualified to perform the services. Agency Report at 23. Although the agency has argued that it was unaware that either VSE or Johnson Controls was interested until their protests were filed, this argument does not consider the interest that VSE and Johnson Controls had expressed in the initial procurement and the continuing interest shown by VSE's December protest and Johnson Controls' intervention in that protest.

1988, 88-2 CPD ¶ 119, the advanced planning must be reasonable. Signal & Sys., Inc., supra, at 13. Also, even where the agency has a basis to conduct a noncompetitive procurement, it is still required to request offers from as many potential sources as is practicable under the circumstances. 41 U.S.C. § 253(e); Signal & Sys., Inc., supra, at 8-9.

As described above, even though the agency was increasingly aware many months in advance that the on-going competitive solicitation for these services might well be cancelled, the only alternative considered by the agency was the sole-source extension of EG&G's contract. If the agency had earlier planned to compete for these interim services, as required, a transition period between EG&G's existing contract and the bridge contract could have been accommodated, given that there were more than 4 months between when the RFP was actually cancelled and when EG&G's contract expired. In this regard, the record evidences that the agency could easily have decided earlier to cancel the RFP, given that virtually all of the reasons for the cancellation were apparent months earlier. Thus, we find that the circumstance of not having sufficient time to complete a transition period was created by the CBP's failure to engage in reasonable advanced procurement planning. See Techno-Sciences, Inc., B-257686, B-257686.2, Oct. 31, 1994, 94-2 CPD ¶ 164 at 9, 11 (agency needs to account for reasonable phase-in periods to achieve adequate advance procurement planning).

The situation here is exacerbated by the fact that EG&G's incumbent contract expired in May 2001 and has been extended on a sole-source basis for the past 4 years. Moreover, while the base period for the protested sole source contract extension is only for 6 months, the record evidences that the agency anticipates that the full 18 months will be needed before the new contractor selected under the anticipated competitive procurement can start contract performance.¹⁴ See Draft J&A. In sum, we do not think that the agency could sit idly by in the face of the circumstances present here and not consider obtaining more competition for its sole-source requirements.

Johnson Controls' protest is dismissed as untimely and VSE's protest is sustained.

¹⁴ The CBP also argues that awarding this short-term contract to a contractor other than EG&G would be financially burdensome because of the transition costs that the agency might be required to pay twice within a short time period if award were made to a contractor other than EG&G. As noted, this bridge contract is anticipated to last the full 18 months and it may be that the savings achieved by acquiring these services under the crucible of competition may offset potentially duplicative transition costs. Under the circumstances present here, we find this argument provides no justification for the sole-source award.

We recommend that the agency either obtain these interim bridge services under full and open competition, or, if it can prepare a properly documented and supported J&A, promptly conduct a limited competition with those offerors capable and interested in performing these services, that is, EG&G, VSE, and Johnson Controls, giving due consideration to transition and the possibility of extending EG&G's contract for a short period while this takes place. We also recommend that VSE be reimbursed the reasonable costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). That firm's certified claims for costs, detailing the time spent and costs incurred, must be submitted to the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

Anthony H. Gamboa
General Counsel