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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-189319

DATE: February 15, 1978

MATTER OF: Capital Recording Company, Inc.

DIGEST:

1. Sole-source procurements of integrated national advertising campaigns from non-profit organization utilizing volunteered services of member advertising firms were justified where record indicates agency had reasonable basis for believing organization was unique in its ability to furnish required services.
2. Decision to procure on "package" basis rather than to break out components for separate competitive procurements is matter for agency determination which will not be disturbed unless without a reasonable basis.

Capital Recording Company, Inc. (Capital) has protested the award of two contracts on a sole-source basis to the Advertising Council, Inc. (A.C.). These contracts were awarded by the Department of Transportation (DOT) for the management and coordination of nationwide advertising campaigns to encourage adherence to the 55 mile per hour speed limit and to promote energy conservation and a clean environment by the use of carpools, vanpools and public transportation.

The A.C. is a private non-profit organization which conducts, on a volunteer basis, a number of selected public service campaigns each year to promote voluntary citizen actions to help solve national problems.

In a typical campaign, the A.C., through its constituent founding, sponsor and cooperating organizations, solicits on a volunteer basis an advertising agency which contributes its full creative services; a coordinator who serves without compensation as a project director and liaison between the sponsoring

B-189319

organization for which the campaign is undertaken and the volunteer advertising agency; and a campaign manager who is responsible for seeing that out-of-pocket campaign expenses do not exceed the funds budgeted for the purpose, and for insuring that campaign planning objectives and work deadlines are met.

While the planning, writing and designing of the campaign are contributed by the volunteer advertising agency, and the space in which the advertisements are printed or posted and the time given to broadcast messages are donated by the national and local media, ultimately the materials which are developed for distribution to an estimated 20,000 media outlets must be paid for by the sponsoring organization.

Accordingly, the two contracts at issue were awarded on a "cost no fee" basis under which the A.C. and the volunteering organizations are reimbursed for out-of-pocket costs incurred in producing and distributing such materials as films, tapes, recordings, plates, electros, mats, proofs, etc. In addition, the A.C. is to be reimbursed for its indirect costs at the provisional indirect cost rate of 8.5 percent of allowable direct costs. Representative items are the cost of maintaining buildings and equipment, depreciation, travel, telephone and supply expenses.

Capital's protest is essentially two-pronged. First, it objects in general to the sole-source awards, contending that DOT did not comply with applicable regulatory provisions. Secondly, Capital states that while it does not object to the awards to A.C. for the planning and designing of a concept, acting as a consultant, and writing and directing a campaign, the contracting officer should have separately procured, on the basis of price competition, the production and distribution work which is being subcontracted by the A.C.--the work for which the A.C. is being

B-189319

reimbursed for "out-of-pocket" costs. Capital believes that it and other firms could perform this work at lower cost to the Government than is presently being incurred as a result of the placing of such work with "preferred" subcontractors of the A.C.

DOT's position basically is that the sole-source awards were proper because the services provided by the A.C. are "unique". In this regard, DOT states that it is absolutely essential to the success of the campaigns which it is conducting that the campaign message receive maximum exposure from all media during a fairly limited but specified time period, and that in its opinion no other single national organization has the capability and/or will to obtain and coordinate the needed management services and media exposure on a volunteer basis. DOT also states that for every dollar which it spent on its 1975 carpool program with the A.C., it received \$105 of traceable free time and space for a total of more than \$23,000,000 of donated advertising. Capital disputes that assertion, contending that there has been no empirical substantiation of that statement. Capital further contends that DOT has not adequately established a lack of competition in the open market that would justify the sole-source procurements since DOT failed to perform any "test survey of the market."

DOT, on the other hand, states that approval for the sole-source awards was granted only after a careful review by its Sole Source Board in accordance with DOT internal procedural regulations, and that although it did not "test the market" through a competitive solicitation resulting in the receipt of proposed prices, it did undertake an "informal review of the market" through relying upon the advice of expert cognizant agency personnel who determined that only the A.C. possessed the capabilities needed. Accordingly, DOT maintains that it took all necessary actions to reasonably determine whether fruitful competition could be obtained.

Federal Procurement Regulations (FPR) 1-3.101(d) (1964 ed. amend. 153), which encompasses the regulatory provisions cited by Capital, requires that procurements be

conducted on a competitive basis to the maximum practical extent, that a sole-source award not be made unless the procuring agency assures itself that a competitive procurement is not feasible, and that the agency take steps to avoid a subsequent non-competitive procurement by, inter alia, possible breakout of components for competitive procurements. Capital regards the latter provision as being violated because DOT awarded a similar sole-source contract to A.C. in 1974.

Because of the requirement for maximum practical competition, agency decisions to procure sole-source must be adequately justified and are subject to close scrutiny. Precision Dynamics Corporation, 54 Comp. Gen. 1114 (1975), 75-1 CPD 402. Such decisions, however, will be upheld if there is a reasonable or rational basis for them. Winslow Associates, 53 Comp. Gen. 478 (1974), 74-1 CPD 14 and B-178740, May 8, 1975, 75-1 CPD 283. Thus, sole-source awards have been upheld where the Government's minimum needs could be satisfied only by items or services which are unique, B-175953, July 21, 1972; and where only one firm could reasonably be expected to develop or produce a required item without undue technical risk, Control Data Corporation, 55 Comp. Gen. 1019 (1976), 76-1 CPD 276, and Hughes Aircraft Company, 53 Comp. Gen. 670 (1974), 74-1 CPE 137. However, we have also held that sole-source awards may not be made solely on the basis that the contractors are non-profit, volunteer type organizations. Environmental Protection Agency sole-source procurements, 54 Comp. Gen. 58 (1974), 74-2 CPD 59.

After carefully considering Capital's assertions and the various documents of record, we are unable to conclude that the awards to A.C. are legally objectionable.

With respect to the breakout argument, DOT's sole source justification document states that the contracts with the A.C. purchase a "package" which includes, in addition to production and distribution elements, the creative talent which is donated absolutely without cost to the Government by the volunteer advertising agency,

B-189319

and an evaluation of the campaign both from the viewpoint of the consumer and the media, and of the attitudinal and motivational effects that the campaign is having on the public. DOT asserts that it would not be in the best interest of the Government to divide this "package" because DOT "requires an overall manager for the campaigns" and that it would be "uneconomic" for the Government to perform that function.

As we have previously stated in response to a prior protest filed by Capital, it is for the contracting agency to determine whether to procure by means of a total package approach rather than by separate procurements for divisible portions of the total requirement, and that in the absence of clear evidence that such determinations lack a reasonable basis, they will not be disturbed by this Office. See Capital Recording Company, Inc., B-188025, B-188152, July 7, 1977, 77-2 CPD 10, and citations therein. Since the need for overall campaign coordination by a contractor appears to be a legitimate need of DOT, we find that DOT's determination to procure on a "package" basis was reasonable.

We also find no basis for objecting to the determination to award this package to the A.C. on a noncompetitive basis. There is no evidence in the record to refute DOT's position that no other organization exists which possesses the capability to organize and manage an integrated national advertising campaign on a volunteer basis. In this regard, we note that a notice of intent to contract with the A.C. was published in the Commerce Business Daily, and, according to DOT, no other advertising agency expressed an interest in competing on a nonprofit volunteer basis with the A.C. Thus,

B-189319

this situation is easily distinguished from that in the Environmental Protection Agency case, where the record indicated that several nonsolicited firms could provide the services required. Moreover, under the circumstances, we are inclined to concur with DOT that any more formal "testing of the market" (e.g., through the issuance of a competitive solicitation) was unnecessary, and in any event was not legally required. See Control Data Corporation, supra, 55 Comp. Gen. at 1025.

For the foregoing reasons, the protest is denied. However, since it appears that Capital's primary interest is in being able to compete for the production and distribution phases of the contracts, we point out that the two contracts awarded to the A.C. require that maximum competition be obtained in the award of subcontracts, and the A.C. states that it will subcontract with the lowest bidder of acceptable quality.

R. J. K. 19
Deputy Comptroller General
of the United States