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DECISION

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

FILE: B-213451 **DATE:** August 27, 1984

MATTER OF: Work System Design, Inc.

DIGEST:

1. GAO will not question a contracting agency's determination to secure technical support services through procedures applicable to the procurement of goods and services rather than through the procedures described in the Brooks Act for the selection of architect or engineering firms unless the protester demonstrates that the agency clearly violated the Act. Furthermore, the mere coordination and review of documents prepared by such firms does not indicate that the services in question are covered by the Act.

2. Agency contract for technical support services does not create illegal employer-employee relationship where the services rendered do not require government direction or supervision of contractor employees and adequate direction is provided through written technical directions issued under the contract.

3. One-year extension of incumbent's contract to provide critical technical support services while specifications were drawn and competition conducted for a new contract is justified where the agency reasonably concluded that the incumbent was the only firm that could meet the agency's requirements within the required time frame.

Work System Design, Inc. (WSD) protests the Naval Sea Systems Command's (NAVSEA) noncompetitive extension of contract No. N00024-83-R-4780(S) with Tracor, Incorporated, for technical services in support of the Shore Intermediate Maintenance Activity (SIMA) upgrade program. WSD contends that this work should be competed

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because other qualified firms are available; that the duration of the extension cannot be justified; that the procurement involves architectural and engineering services that should be obtained through the specialized procedures applicable thereto; and that Tracor's personnel are used in a manner which violates the prohibitions against contracting for personal services. We deny the protest.

Background

Under the SIMA upgrade program, the Navy is improving the shore-based repair and industrial facilities which provide intermediate level[1]/ maintenance services for ships in port. Organizationally within the Navy, SIMAs are under the control of the Fleet Commander who, together with the Chief of Naval Operations, determines whether a SIMA should be upgraded at a particular location and the numbers, classes and schedules of ships to be maintained there. Two activities within the Naval Material Command, the NAVSEA and the Naval Facilities Engineering Command (NAVFAC), have primary responsibility for carrying out these decisions. NAVSEA determines such things as the type of repair facilities needed at the SIMA (e.g., electronic), the industrial equipment required, equipment layout within the shops and the manning levels required to operate the shops. Based on this information, NAVFAC prepares the specifications and building designs and then constructs the necessary facilities.

NAVFAC awards contracts for specifications and designs to architect-engineer firms in accordance with the procedures of the Brooks Act, 40 U.S.C. § 541 et seq. (1976). NAVSEA, on the other hand, uses the services of a technical support contractor obtained under the procedures applicable to the procurement of goods and services (10 U.S.C. § 2304) in carrying out its functions. The technical support contractor assists NAVSEA in its initial determinations of the types of repair facilities needed, equipment requirements, and plant layout; in the subsequent coordination of field changes and progress reviews; and in its final approvals and certifications of the completed facility.

1/First level maintenance is performed by the ship's crew; third level, such as major overhauls, is performed in shipyards.

Since 1974, NAVSEA has obtained these services from Tracor, Inc. under a series of sole-source contracts. Upon the expiration of the most recent of these contracts at the end of fiscal year 1983, NAVSEA concluded competition was feasible for the follow-on effort. However, due to the time required for preparing a specification and conducting competition, NAVSEA noncompetitively extended Tracor's prior contract to provide 35,740 additional man-hours of support over a 6-month period, with two 3-month option periods of 17,671 additional man-hours each. This noncompetitive extension of Tracor's prior contract for up to a year is the subject of WSD's protest.

Architect-Engineer Services

The threshold question for consideration is whether the services must be secured through the special procedures prescribed in the Brooks Act for the procurement of architectural and engineering (A-E) services. WSD contends that the specification contains numerous references to A-E services that Tracor will perform under the contract extension and that Tracor has performed such services under its prior contracts in support of NAVSEA. The Navy contends that much of Tracor's work is related to equipment support or installation, which is not traditional A-E work, and that the other isolated references to A-E work in the specification involve review, coordination and funding justifications related to A-E functions performed by NAVFAC's contractors, not A-E work as such.

The Brooks Act does not require that contracts be awarded to A-E firms merely because architects or engineers might do part of the contract work. Consulting Engineers Council of Metropolitan Washington, B-211553, Nov. 7, 1983, 84-1 CPD ¶ 92. Rather, the Act's procedures, and the restriction to A-E firms attached to them, apply to the procurement of services which uniquely or to a substantial extent require performance by a professionally licensed and qualified A-E firm. Ninneman Engineering--reconsideration, B-184770, March 9, 1977, 77-1 CPD ¶ 171. Of necessity, the determination concerning the applicability of the Act to a particular procurement is the responsibility of the contracting agency, not our Office, because it concerns the nature and the scope of the work to be done and the needs of the contracting agency. We have recognized therefore the broad discretion on the part of the contracting agency to make these determinations and we will not disturb them unless the

agency clearly violates the Act. See Association of Soil and Foundation Engineers, 62 Comp. Gen. 297 (1983), 83-1 CPD ¶ 362.

Here, the record indicates that work which is clearly A-E in nature, i.e., the design of specific facilities needed for the SIMA upgrade program, are obtained by NAVFAC through procurements conducted under the Brooks Act. Those functions performed by NAVSEA's support services contractor, Tracor, on the other hand, primarily involve NAVSEA's responsibilities, which relate to the type of repair facility required, equipment, equipment layout, staffing and approvals of the completed facilities. The fact that this effort involves coordination, review and approval of A-E work performed by NAVFAC's contractors does not, in our opinion, indicate that NAVSEA's contractor is performing work that should be restricted to an A-E firm. Although WSD disagrees with this conclusion, it has not furnished evidence that the determination to procure the services under the procedures applicable to obtaining goods and services was so unreasonable as to warrant a conclusion that NAVSEA circumvented the Brooks Act.

Personal Services

WSD also contends that Tracor's contract is a prohibited personal services contract because under it the contractor's personnel receive their assignments from government personnel. WSD points out that the Contract Data Requirements List attached to the contract specify that reports shall be submitted "as required by task assignment," but that when WSD asked the Navy for copies of those task assignments, it was advised none were available. Further, WSD argues, the contract does not provide a format or procedure that directs the preparation, content, negotiation or execution of written technical instructions or of task assignments. From this, WSD argues that the only way work could have been performed under the contract was by direct assignment by Navy supervisors. WSD has furnished copies of various memoranda and letters relating to Tracor's contract which, it argues, show that Tracor employees acted for the Navy or were directly supervised by the Navy, in violation of the restrictions imposed upon the use of contractor personnel.

The Navy replies that the contract contains an appropriate mechanism for giving written directions to the

contractor, i.e., the provision entitled Technical Instruction which provides for the issuance of written instructions through the established points of contact between the government and the contractor. Copies of technical instructions issued under both the original contract and the extension have been forwarded for our review. According to the Navy, these examples show that NAVSEA has complied with the instructions and policies regarding non-personal service contracts. Finally, the Navy examines the various instances where WSD alleges that Tracor employees violated these policies and explains why, in the Navy's opinion, the actions were proper.

We find no basis to conclude that the Navy's procurement format establishes an employer-employee relationship between the government and the contractor's employees so as to create an unauthorized personal services type contract. In order for such a situation to occur, the contract must provide for detailed government direction or supervision of the contractor's employees. Logistical Support, Inc., B-197488, Nov. 24, 1980, 80-2 CPD ¶ 391. The mere fact that the contract does not contain a detailed procedure for the preparation, content, and execution of written instructions is of no consequence so long as appropriate written instructions are in fact provided by the government pursuant to the contract terms. As noted, the Navy has provided Tracor with written technical instructions. Our review indicates that those instructions satisfy the requirement for written guidance and that the contract contains no contrary terms permitting the Navy to give direct supervision or detailed direction to Tracor's employees.

As to WSD's allegation that Tracor employees have nevertheless been directly supervised by the Navy on a number of specific occasions under the original contract, our Office will not review a protest that a contract has not been administered properly. See Master Sofa Company, B-213864, Feb. 2, 1984, 84-1 CPD 144. Under our Bid Protest Procedures, 4 C.F.R. Part 21 (1984), we consider whether an award, or proposed award, of a contract complies with statutory, regulatory, and other legal requirements; we do not consider how contracting officers administer contracts that have been awarded.

Noncompetitive Contract Extension

WSD also protests the Navy's noncompetitive extension of Tracor's contract for up to a year to permit the drafting of specifications and the conduct of a competitive

procurement. WSD points out that Tracor has performed this work under a series of sole-source awards for 9 years and that this extension results in 10 years without competition. According to WSD, neither the duration nor the magnitude of the extension can be justified by the Navy's asserted need to continue the SIMA upgrade program while competing for the follow-on work. In WSD's opinion, many of the SIMA projects could be postponed while a new contractor is selected.

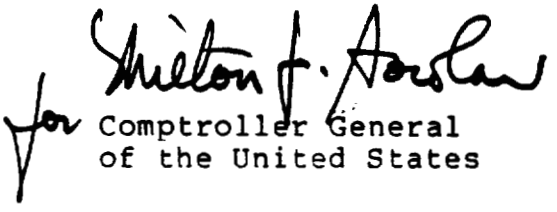
As a general matter, government procurements must be conducted on a competitive basis to the maximum extent practicable. This requirement applies to contract extensions and renewals. Taylor Associates, B-206070.2, April 22, 1983, 83-1 CPD ¶ 431. Because competitive procurements are preferred, our Office will scrutinize closely a sole-source determination. Kent Watkins and Associates, Inc., B-191078, May 17, 1978, 78-1 CPD ¶ 377. We have held, however, that sole-source acquisitions may be authorized where (1) the procuring agency's minimum needs can be met only by items or services that are unique, (2) time is of the essence and only one known source can meet the agency's needs within the required time frame, (3) a sole-source award is necessary to insure compatibility between the procured item and existing equipment, or (4) an award to other than the proposed sole-source contract would pose unacceptable technical risks. Cerberonics, B-205063, April 14, 1982, 82-1 CPD ¶ 345.

The Navy reports that it is in the process of preparing a specification and conducting a competition, but that it must have continued contract support in the interim to provide urgently needed services for the SIMA upgrade program. In this regard, because Tracor is involved in SIMA upgrades that are now in progress at specific naval installations, the Navy contends that Tracor is the only known source that can meet the agency's needs in the required time frame.

We have not been shown that an interruption of the SIMA upgrade program would not impair the Navy's ability to maintain ships. Consequently, we do not believe that the upgrade program should be delayed until the results of the planned competition are known, provided that the Navy exercises reasonable diligence in accomplishing that objective. Further, we cannot envision how an interim

contractor could have been obtained competitively for this interim period, given the complexity of the requirement and the necessity for awarding the contract to a competent, responsible contractor. To require the agency to conduct an interim competition that did not insure that it would receive the same quality of service as the ongoing procurement would not be in the interest of the government. Taylor Associates, supra. Consequently, we find the Navy's actions, of extending Tracor's contract on a sole-source basis for up to a year to permit a competitive procurement, to be reasonable. Therefore, the protest is denied.

Finally, with regards to WSD's objection to the contract extension notwithstanding the protest, since the Navy determined that an award must be made promptly and the determination was approved at a level higher than the contracting officer in accordance with the applicable regulations, it is not subject to question by our Office. See Vi Mal, Inc., B-208012, Sept. 20, 1982, 82-2 CPD ¶ 244.



for Comptroller General
of the United States