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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Aleman & Associates, Inc.

File: B-287275.2; B-287356.2

Date: July 2, 2001

Albert T. Aleman, Jr., Aleman & Associates, Inc., for the protester.
Michael K. Cameron, Esq., Department of Justice, Immigration and Naturalization Service, for the agency.
Jeanne W. Isrin, Esq., and Jerold D. Cohen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Cancellation of request for quotations (RFQ) for 1 year of janitorial and grounds maintenance services, with 4 option years, on the basis that the services had to be procured pursuant to the Javits-Wagner-O'Day (JWOD) Act, was improper where only services for 240 days or fewer had to be acquired under the statute. Related RFQ to cover a shorter term properly was canceled, however, since a reasonable basis existed for cancellation.

DECISION

Aleman & Associates, Inc. protests the cancellation of request for quotations Nos. ACD-8-Q-0024 (RFQ-0024) and ACD-1-Q-0008 (RFQ-0008), issued by the Immigration and Naturalization Service (INS), Department of Justice, for janitorial and grounds maintenance services at border patrol stations and related INS facilities in the Laredo, Texas area.

We sustain the protest.

The RFQs cover 12 facilities that employ Border Patrol agents who are responsible for apprehending illegal immigrants and maintaining custody of them at the facilities. INS previously had procured the required janitorial and grounds maintenance services for 11 of the facilities competitively, which had resulted in purchase orders to three different contractors; the twelfth facility, the Laredo North Station, was not open at that time. INS then decided to consolidate its requirements in the interest of higher quality performance, efficiency in acquisition, and consistency in services

received, and in March 2000 issued RFQ-0024, set aside for small businesses, for long-term services (a 1-year base period plus 4 option years) to be provided at the original 11 facilities plus the Laredo North Station, which was scheduled to open on November 1, 2000.

Five quotations were received on June 2, 2000. The agency evaluated them and made a competitive range determination, which included Aleman's quotation. Subsequently, amendments were issued, and revised quotations were received on August 25. Due to a protracted review process and a lack of personnel resources, evaluation of revised quotations was delayed. On February 12, 2001, Aleman protested the delay in making award, an alleged solicitation defect, and a competitive advantage that one vendor had improperly gained, according to Aleman. Further revised quotations were requested by February 20. Meanwhile, INS issued RFQ-0008 to competitively procure its short-term requirements for the 12 facilities until the procurement under RFQ-0024 was completed.¹ On March 5, Aleman protested RFQ-0008, arguing that the solicitation was ambiguous and reflected numerous violations of the Federal Acquisition Regulation (FAR).

On March 20, INS canceled both RFQs based on the agency's determination that the required services had to be procured through the National Industries for the Severely Handicapped (NISH) pursuant to FAR Subpart 8.7, which implements the Javits-Wagner-O'Day Act (JWOD Act), 41 U.S.C. §§ 46-48c (1994). Subsequently, the agency awarded a short-term contract for the required services (and added a 13th facility) through NISH (which represents JWOD-participating nonprofit agencies), for 1 month with an option to extend for 6 months.

Aleman protested both cancellations on March 22, arguing that the agency was not required to procure either requirement from a mandatory source, and hence no reasonable basis for cancellation existed in either case.

We agree with Aleman as to RFQ-0024 and we therefore sustain the protest of that cancellation. We deny the protest with respect to RFQ-0008.

The JWOD Act provides authority for noncompetitive acquisitions for specified supplies or services. See FAR § 6.302-5(b)(2). The Act establishes the Committee for Purchase from People Who Are Blind or Severely Disabled (the Committee), and grants it exclusive authority to establish and maintain a procurement list of supplies and services provided by qualified nonprofit agencies for the blind or disabled.

¹ Before it issued RFQ-0008, INS had issued sole-source purchase orders to the incumbent contractors to cover the 11 original facilities, and also had issued a purchase order, following a competitive procurement, for the services for the Laredo North Station. In our decision Aleman & Assocs., Inc., B-287275, May 17, 2001, 2001 CPD ¶ ___, we denied Aleman's protest of those actions.

41 U.S.C. §§ 46(a), 47(a); see FAR Subpart 8.7. Once a service has been added to the procurement list, contracting agencies are required to acquire that service directly from a qualified workshop, if the service is available within the period required. 41 U.S.C. § 48; FAR § 8.704; JAFIT Enters., Inc., B-266326, B-266327, Feb. 5, 1996, 96-1 CPD ¶ 39 at 2.

INS maintains that it had to cancel both solicitations because the required services are on the procurement list and available through NISH via General Services Administration/JWOD Basic Ordering Agreement (BOA) No. GS07F-NISHT. “Temporary Administrative/General Support Services” for Texas, Oklahoma, Louisiana, Arkansas and New Mexico have been on the procurement list since August 30, 1996. The BOA is a written understanding for short-term (less than 240 days) JWOD-related contract actions, setting out terms and conditions that become effective, and binding, upon incorporation into an order or contract issued under the document.² BOA at 1. INS issued a short-term contract using the BOA³ and, for its longer-term need for the janitorial and grounds maintenance services, submitted a request to the Committee to begin the process to have that requirement added to the JWOD procurement list; on April 13, the Committee published in the Federal Register notice of its proposed intent to add the required services to the list.

Cancellation of RFQ-0024

A contracting agency needs a reasonable basis to support a decision to cancel an RFQ. USA Elect., B-283269.2, Oct. 5, 1999, 99-2 CPD ¶ 67 at 3. We have recognized that a solicitation properly may be canceled where, during the course of the procurement, the items or services involved are discovered to be on, or have been added to, the JWOD procurement list. See Best Foam Fabricators, Inc., B-259905.3, June 16, 1995, 95-1 CPD ¶ 275 at 2; Microform Inc., B-246253, Nov. 13, 1991, 91-2 CPD ¶ 460, aff’d on recon., B-246253.2, Mar. 31, 1992, 92-1 CPD ¶ 338.

² The BOA (at 1) specifies:

This agreement is pursuant to and meets the requirements of the Javits-Wagner-O’Day Act (41 U.S.C. 46-48(c)) and the rules of the Committee for Purchase From People Who Are Blind or Severely Disabled (41 CFR Part 51). Orders or contracts issued under the scope of this agreement are considered to meet the requirements of FAR Part 8.7 and no agency need seek further competition, justification or comply with the synopsis requirements of FAR 16.703.

³ We have no basis to dispute INS’s position that the janitorial and grounds maintenance services involved here are administrative/general services within the BOA’s purview.

There was no reasonable basis to cancel RFQ-0024, since the services it covered were not on the JWOD procurement list, and INS was therefore not required to procure the services through NISH—indeed, it was not permitted to purchase the services through NISH. RFQ-0024 represented an INS requirement for 1 base year plus 4 option years. Quotations were solicited on that basis in March of 2000, and discussions, amendments, and evaluations were founded on a need covering that time frame. The only related services currently on the procurement list are “temporary”; the BOA, through which such services presumably would be ordered, similarly is clear that it applies only to temporary services, not to exceed 240 days. As indicated above, services to cover the length of time involved in RFQ-0024 have been proposed for the procurement list, but they have not yet been added. Neither the presence of short-term services on the list, nor the anticipation of longer-term services being added, supports INS’s action.⁴

Cancellation of RFQ-0008

As stated above, RFQ-0008 was issued on a competitive basis to ensure the continuity of services while the RFQ-0024 procurement was being completed. We have no legal basis to object to the cancellation of RFQ-0008. The solicitation contemplated a 2-month contract with 1-month options, which put it within the parameters of the temporary services now on the JWOD procurement list, as well as those covered by the BOA, making award through NISH required. As stated above, cancellation of a solicitation is proper where the agency determines that it is required to procure the required supplies or services from a non-profit agency pursuant to the JWOD Act.

We note that Aleman argues that procurement from NISH is not required based on the following BOA provision:

NONMANDATORY STATUS

This agreement is for nonpersonal ‘temporary’ Administrative and General Support Services. The Government is not required to order any services from the associated nonprofit agencies.

BOA at 3. The meaning of this standard clause in the JWOD context is not altogether clear from the record – it may be intended simply to clarify that the existence of the BOA document does not obligate the government to order any services through that procurement vehicle. In any case, however, the provision clearly does not alter the

⁴ We have held that an agency violated the statutory requirement for full and open competition in a negotiated procurement where it relied on the JWOD Act authority in making a noncompetitive award for services that were added to the procurement list only after the contract was awarded. JAFIT Enters, Inc., supra.

mandatory character of the JWOD procurement list with respect to covered temporary administrative/general support services.

Recommendation

Since RFQ-0024 was improperly canceled, we would ordinarily recommend that INS reinstate the solicitation and complete the procurement. As noted above, however, the required services were proposed to be added to the procurement list on April 13, and the Committee advises us that the approval process is approaching completion. We believe that it therefore is unlikely that INS could revive and complete the dormant procurement and make award before the addition of the required services to the procurement list, so that no useful purpose would be served by recommending that the agency reinstate RFQ-0024.⁵ Cf. JAFIT Enters., Inc., *supra* (where we did not recommend that outstanding purchase orders improperly issued to Goodwill Industries under JWOD Act authority be terminated, since most if not all of the services involved had since been added to the procurement list). However, because INS violated procurement laws and regulations, we find Aleman entitled to the costs of filing and pursuing its protest of the RFQ-0024 cancellation, and its quotation preparation costs in connection with that procurement. Bid Protest Regulations, 4 C.F.R. § 21.8(d) (2001). The protester should submit its certified claim for such costs, detailing the time expended and the costs incurred, directly to the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Anthony H. Gamboa
General Counsel

⁵ We therefore need not consider the specific issues Aleman raised regarding the solicitation and the evaluation process.