



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: New Breed Leasing Corporation

File: B-274201; B-274202

Date: November 26, 1996

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William E. Franczek, Esq., Vandeventer, Black, Meredith & Martin, an intervenor. Dana N. Smith, Esq., and Anita D. Polen, Esq., Department of the Navy, for the agency.

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DIGEST

Protests are sustained where agency's failure to recognize and correct obvious flaws in prior solicitations and contracts constituted lack of advance planning which precluded meaningful competition for requirements and resulted in sole source extensions of concededly flawed contracts with the incumbent contractor.

DECISION

New Breed Leasing Corporation protests the Department of the Navy's cancellation of solicitation Nos. N00189-94-R-0304 and N00189-94-R-0315 (hereinafter "R-0304" and "R-0315") for material handling and logistics support services at various sites throughout the world,¹ and the sole source extensions of contract Nos. N-00189-94-D-0003 and N-00189-94-D-0006 (hereinafter "D-0003" and "D-0006") for those services. The solicitations were issued as small business set-asides; the incumbent contractor, Management Consulting, Inc. (Mancon) is a large business, not eligible to compete under the canceled solicitations. New Breed maintains there is no rational basis for the cancellation of the solicitations or for the sole source extensions of Mancon's contracts, and that the agency's actions resulted from a lack of advance planning.

¹Solicitation No. R-0304 covers services for sites in the eastern half of the United States, Europe, Africa, the Middle East, and the Caribbean. Solicitation No. R-0315 covers services for sites in the western half of the continental United States, Hawaii, Guam, and Japan.

We sustain the protests on the basis that the agency's actions resulted from a lack of advance planning.

BACKGROUND

The requirements at issue are sought by the Department of the Navy's Fitting Out and Supply Support Assistance Center (FOSSAC), which provides logistical and material support services to the Department of Defense (DOD) and other federal agencies throughout the world under the Intra-Fleet Supply Support Operations Program (ISSOP).² Mancon's contracts were awarded in October 1993, for a base year with 2 option year periods extending through September 30, 1996. On July 5, 1994, FOSSAC submitted requisitions to the Fleet and Industrial Supply Center (FISC), Norfolk Acquisition Group to initiate follow-on procurements for the ISSOP support provided under Mancon's contracts. The requirements for the east coast solicitation (RFP No. R-0304) and west coast solicitation (RFP No. R-0315) were synopsized in the Commerce Business Daily (CBD) on September 5 and 6, 1994, respectively. Acquisition plans were approved approximately 7 months later, on April 25 and June 6, 1995, respectively; the two solicitations were subsequently issued in June of 1995.

Each solicitation contained a total of 112 contract line item numbers (CLINs), broken down into 75 firm, fixed-price CLINs, 26 time-and-materials CLINs, and 11 direct reimbursement CLINs. Each CLIN had sub-CLINs for the specific sites to be serviced.³ For each of the 75 fixed-price CLINs, offerors were required to propose fixed prices, reflecting differing labor rate mixes, for the performance of various tasks.⁴ The solicitation provided for award on the basis of the low-priced,

²Examples of the services provided through the ISSOP include material offload/backload, relocation, distribution, packing/packaging, requisitioning, excess material processing, receiving, stowing, inventorying, data entry, preparing and updating financial records, word processing/document preparation, sorting/distributing packages/mail, repairing, testing or modifying microcomputers, and witnessing household good reweighs.

³In solicitation No. R-0304 each CLIN had five sub-CLINS for: Charleston; Europe, Africa & MidEast; Mayport; Philadelphia; and Portsmouth. In solicitation No. R-0315 each CLIN had six sub-CLINs for: Bremerton; Guam; Yokosuka; Oakland; Pearl Harbor; and San Diego.

⁴For example, under CLIN 001 each offeror was required to propose a price per ton to "offload material from ships individual storerooms or complete offload to warehouse." Under CLIN 002, each offeror was required to propose a price per ton to "load material from warehouse ashore to storerooms aboard ship."

technically acceptable offer. Solicitation No. R-0304 was amended three times and solicitation No. R-0315 was amended twice. None of the solicitation amendments significantly altered the description of tasks to be performed and, as amended, solicitation Nos. R-0304 and R-0315 required that proposals be submitted by September 21, and October 5, 1995, respectively.

Four offerors, including New Breed, timely submitted proposals for both solicitations which were subsequently evaluated by FISC Norfolk personnel. Technical evaluation of proposals under both solicitations was completed by November 17, 1995; all four proposals were determined to be technically acceptable. Evaluation of cost/price proposals under RFP No. R-0304 was completed in March 1996, and for proposals under RFP No. R-0315, in June 1996. By memoranda dated April 16 and July 10, FISC Norfolk personnel sought authority from Headquarters, Naval Supply Systems Command (NAVSUP), to proceed with the procurement by conducting discussions with all offerors. The memoranda stated that the evaluators had found significant disparities in prices among offerors, noting that the disparities were particularly prevalent among the 75 fixed-price CLINs.

On July 30, NAVSUP personnel met with FISC Norfolk personnel to discuss concerns regarding the procurement. NAVSUP personnel expressed specific concern that the RFP "lacked definitive [task] descriptions." Following this meeting, the contracting officer acknowledged that the solicitation was fundamentally flawed, stating:

"Although a separate statement of work was provided for each of the firm fixed contract line items, these statements lacked the basic information required for the proper use and reasonable pricing of, firm fixed price items. For example, the thirteen line items . . . requiring the movement of material do not provide information relative to the type, size, weight and quantity of the material, or the distance or location that the material is to be moved Without the information relative to what is to be moved, where it is to be moved, and how much is to be moved, unacceptable performance uncertainties exist in the statement of work, rendering them unsuitable for a firm fixed pricing arrangement."

On August 8, the agency canceled the solicitations, stating that it intends to completely revise them. Specifically, the agency states that it intends to perform "a thorough and comprehensive review and rewrite of the statements of work [for each line item]," noting that "because of the many sites serviced under these contracts, suitable statements of work would have to address the peculiarities of each location." The agency also states that it intends to change the source selection criterion from award of a contract based on the technically acceptable, low cost proposal, to a "best value" approach which will give greater weight to technical

capability, management, and past experience.⁵ In light of the magnitude of the proposed changes, the agency intends to use the entire amount of time normally allocated under Navy guidelines for processing a procurement of this size and type.⁶

Accordingly, since Mancon's contracts expired on September 30, agency officials concluded that those contracts would have to be extended on the basis of "urgent and compelling circumstances."⁷ 10 U.S.C. § 2304(c)(2) (1994). Because of the uncertainty resulting from the solicitation specifications, the agency states that it is "impossible to determine" whether extensions of Mancon's contracts will be more expensive to the government than award of a contract to one of the actual offerors.

DISCUSSION

New Breed protests that there is no rational basis for either the agency's cancellation of the solicitations or the sole source extensions of Mancon's contracts, and that the sole source award resulted from a lack of advance planning. As discussed below, we conclude that the agency's cancellation of the solicitations was

⁵In a "memorandum for the record," dated July 30, 1996, the contracting officer states:

"The evaluation criteria was the final topic of discussion [in the meeting between NAVSUP personnel and FISC Norfolk personnel], and NAVSUP advised [that] best value was the appropriate form of evaluation. Prior ISSOP contracts were awarded using best value. Since none of the same contracting specialists are processing the solicitation this time, we can only speculate why best value was not used in these solicitations."

⁶The agency refers to Navy Instruction 4200, dated November 27, 1995, entitled "Fiscal Year 1996 Customer Procurement Planning Guide," which contemplates "a period of 310 days to process competitively solicited requirements in excess of \$1 million in which the evaluation is performed on a best value basis."

⁷The agency states that there are currently more than 400 delivery orders being performed at more than 400 different locations, involving an estimated 1,700 contractor employees performing services that are critical to the ongoing interests of the United States. The protester does not dispute the government's ongoing critical need for the services at issue here.

appropriate, but we sustain the protest on the basis that the need for the sole source extension of Mancon's contracts was created by the agency's failure to engage in advance planning.⁸

Based on our review of the record, we agree with the agency that the solicitations were fundamentally flawed. Among other things, the solicitations required the movement of material on a fixed-price basis, but failed to provide information regarding the type, size, weight, and quantity of the material, or the distance or location that the material is to be moved. Absent this information, the agency could reasonably believe that offerors did not have a clear or common basis for pricing their offers and that the awardee would not necessarily understand what it would be obligated to do during contract performance.⁹ On this record, we have no basis to disagree with the agency's belief that cancellation of the solicitations was appropriate.¹⁰

We next consider New Breed's assertion that the Navy's sole source extensions of Mancon's contracts are the result of a lack of advance planning by the Navy. In responding to this issue, the contracting officer asserts:

"The determination that the solicitations' requirements were not adequately defined was not anticipated, and not realized until the end

⁸The agency argues that New Breed is not an interested party for purposes of filing this protest because its initial proposal did not offer the lowest price. However, that concern is obviously irrelevant to this issue. See, e.g., Tri Tool Inc., B-229932, Mar. 25, 1988, 88-1 CPD ¶ 310; Free State Reporting, Inc.; Neal R. Gross and Co., Inc., B-225531 et al., Jan. 13, 1987, 87-1 CPD ¶ 54.

⁹We find unpersuasive New Breed's assertion that, because Mancon has successfully performed the prior contracts awarded under similarly defective specifications, the agency must now award a contract to a new contractor on the same basis. The fact that Mancon has been able to successfully perform the contracts pursuant to similar flawed specifications provides no assurance that a new contractor will experience similar success.

¹⁰The agency states that, notwithstanding the flawed specifications, Mancon has demonstrated its capability to successfully perform the contract. At New Breed's request, the agency produced all change orders issued under Mancon's prior contracts. Those documents demonstrated that virtually no change orders had been issued under Mancon's prior contracts. As New Breed, itself, recognizes, "in a world-wide ISSOP program valued well in excess of \$100 million . . . the Navy has paid a total of \$13,226.97 in claims [to Mancon] To put the claims in perspective, in total those claims represent .0091 percent of the contract value."

of July 1996. Therefore, the need for the extension is not due to lack of planning, [but] rather, to an unanticipated need for changes realized in the execution of the Navy's planning."

The record here simply does not support the contracting officer's assertion that the fundamental flaws in these solicitations were not reasonably anticipated or realized "until the end of July 1996."

Specifically, the record shows that the solicitation requirements were identified by FOSSAC in July 1994 and synopsised in the CBD in September of that year. The agency then spent 7 and 9 months respectively preparing acquisition plans for each solicitation; a plan for RFP No. R-0304 was approved on April 27, and for RFP No. R-0315 on June 6. More time elapsed before each solicitation was issued: RFP No. R-0304 was issued on June 19; RFP No. R-0315 was issued on June 28. The solicitations were amended three and two times, respectively. Proposals responding to RFP No. R-0304 were submitted on September 21, and proposals responding to RFP No. R-0315 were submitted on October 5. While both sets of technical proposals were evaluated by November 17, the agency absorbed another 6 months evaluating the cost/price proposals under RFP No. R-0304, and 8 months evaluating the cost/price proposals under RFP No. R-0315, completing those tasks in March and June 1996, respectively. Another month elapsed before business clearance memoranda, dated April 29, for RFP No. R-0304 and July 10 for RFP No. R-0315, were prepared and sent to NAVSUP. These memoranda noted significant pricing disparities among the proposals.

On this record, we agree with New Breed's position that the agency's sole source extensions of Mancon's contracts just 2 months prior to their expiration resulted from a lack of advance planning.

The Competition in Contracting Act (CICA) permits noncompetitive acquisitions in specified circumstances, such as when the agency's need for the services is of unusual and compelling urgency, and they are available from only one responsible source. 10 U.S.C. § 2304(c)(2)(1994). However, under no circumstances may noncompetitive procedures be used due to a lack of advance planning by contracting officials. 10 U.S.C. § 2304(f)(5); TeQcom, Inc., B-224664, Dec. 22, 1986, 86-2 CPD ¶ 700.

Our Office has recognized that the requirement for advance planning is not a requirement that such planning be entirely error-free or that such planning be successful. See, e.g., Sprint Communications Co., L.P., B-262003.2, Jan. 25, 1996, 96-1 CPD ¶ 24. Nonetheless, as with all actions taken by an agency, the advance planning required under 10 U.S.C. § 2304 must be reasonable. In enacting CICA, Congress explained: "Effective competition is predicated on advance procurement planning and an understanding of the marketplace." S. Rep. No. 50, 98th Cong., 2d

Sess. 18 (1984), reprinted in 1984 U.S.C.C.A.N. 2191. The Senate Report also quoted with approval the following testimony regarding the need for advance planning:

"Opportunities for obtaining or improving competition have often been lost because of untimely, faulty, or the total lack of advance procurement planning. Noncompetitive procurement or inadequate competition also has resulted many times from the failure to develop specifications By requiring effective competition, Congress will serve notice on the agencies that they will need to do more than the minimum to comply with the statute." S. Rep. No. 50, 98th Cong., 2d Sess. 19 (1984), reprinted in 1984 U.S.C.C.A.N. 2192.

In the factual context presented here, the solicitation flaws--as described and explained by the agency itself--are so fundamental as to indicate an unreasonable attempt at advance planning. As noted above, the agency agrees that the statements of work for individual CLINs lacked "basic information" such as "the type, size, weight and quantity of the material, or the distance or location that the material is to be moved." The agency further agrees that "[w]ithout the information relative to what is to be moved, where it is to be moved, and how much is to be moved," meaningful competition is impossible. Nonetheless, the contracting officer asserts that these fundamental flaws were "unanticipated and not realized until the end of July, 1996." The agency could not have engaged in reasonable advance planning, yet first have realized that the solicitation was fundamentally flawed more than a year after the solicitations were issued and more than 8 months after proposals were submitted.

The rudimentary omissions in the agency's preparation for this procurement are not limited to a failure to provide competitors with "basic information" regarding the tasks to be performed. In July 1996, agency officials concluded that, rather than awarding a contract on the basis of the technically acceptable proposal offering the lowest cost, the procurement should be awarded on a "best value" basis. In a memorandum dated July 30, 1996, the agency notes that "prior ISSOP contracts were awarded using best value," but concludes--without further explanation--"we can only speculate why best value was not used in these solicitations." The acquisition plans for both procurements were approved by June 6, 1995. It was not reasonable for the agency to take nearly 13 months to reach the conclusion that the solicitation was materially flawed regarding the basis for contract award.

Finally, the extraordinary length of the sole source extension to Mancon's contract demonstrates that the agency's activities leading up to that extension were entirely ineffective with regard to meaningful preparation for a competitive award. The agency maintains that the sole source modification of Mancon's contract must extend for an entire year because the solicitation must undergo "a thorough and comprehensive review and rewrite." Issuance of the revised solicitations is not

anticipated before February 1997, and the agency maintains it will be unable to make a competitive award "until June 1997 at the earliest." In the event discussions are conducted and best and final offers submitted, the agency does not anticipate award until August 1997. The agency asserts that this schedule "is an ambitious one," noting that its internal guidelines contemplate a period of 310 days to completely perform a procurement of this size and type. Clearly, the agency's need to use the entire time period normally required to complete planning for and implementation of this type of procurement provides further support for our conclusion that its prior planning activities were inadequate.

Based on the record summarized above, we conclude that the Navy used non-competitive procedures because of a lack of reasonable advance planning by its officials, thereby violating 10 U.S.C. § 2304(f)(5). In short, the agency's failure to provide the basic information required for meaningful competition, the fact that the solicitations' basis for award was not sound, and the fact that the agency contemplates using at least the entire 10-month period normally allotted for conducting a procurement of this type, leads to the conclusion that the agency failed in its obligation to engage in reasonable advance planning as required by CICA. See Freund Precision, Inc., 66 Comp. Gen. 90 (1986), 86-2 CPD ¶ 543; Techno-Sciences, Inc., B-257686; B-257686.2, Oct. 31, 1994, 94-2 CPD ¶ 164; K-Whit Tools, Inc., B-247081, Apr. 22, 1992, 92-1 CPD ¶ 382; TeQcom, Inc., supra.

The protests are sustained.

RECOMMENDATION

In view of the agency's undisputed need for the services at issue, we do not recommend that Mancon's contracts be immediately terminated. However, we do recommend that the agency make expeditious efforts to finalize competitive procurements for these requirements and terminate Mancon's contracts upon award of those contracts. We also recommend that New Breed recover its cost of filing and pursuing these protests including reasonable attorneys' fees. Bid Protest Regulations, § 21.8(d)(1), 61 Fed. Reg. 39045, 39046 (July 26, 1996) (to be codified at 4 C.F.R. 21.8(d)(1)). The protester should submit its certified claim for such costs, detailing the time expended and costs incurred, directly to the agency within 60 days after receipt of this decision. Bid Protest Regulations, supra

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