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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: eFedBudget Corporation

File: B-298627

Date: November 15, 2006

John E. Cleckner for the protester.

James K. Kearney, Esq., and Holly Emrick Svetz, Esq., Womble Carlyle Sandridge & Rice, LLC, for RGII Technologies, Inc., an intervenor.

Dennis J. Gallagher, Esq., Department of State, for the agency.

Kenneth Kilgour, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency reasonably concluded that protester is not an acceptable source to perform a contract for maintenance and support of contracting agency's software system, where the record shows that use of proprietary software belonging to the incumbent contractor, and currently unavailable to any other firm, is necessary for successful performance of the contract.

2. Protest of proposed sole-source award is sustained where the record shows that the agency did not satisfy its obligation to engage in reasonable advance planning and to promote competition.

DECISION

eFedBudget Corporation protests the proposed award of a contract on a sole-source basis to RGII Technologies, Inc. pursuant to presolicitation notice No. B-P-06, issued by the Department of State (DOS) for continued implementation, maintenance, enhancement, and support for DOS's worldwide budget and planning software systems. The protester asserts that the agency's decision to procure the software services on a sole-source basis was improper. Specifically, the protester argues that the required justification and approval (J&A) was deficient; that the agency unreasonably refused to consider the protester's approach of developing a non-proprietary software system; and that, in any event, the need for the sole-source procurement arose from the agency's lack of advance planning.

We sustain the protest.

BACKGROUND

Under contract with DOS, beginning in 1997, RGII, with the protester as a subcontractor,¹ developed the central resource management system of the agency's Bureau of Resource Management, including the allotment control system, the budget control system, and the budget resource management system. For the past 9 years, the agency has relied on the services of RGII exclusively to maintain and enhance that budget and planning software. In 2000, the agency and RGII entered into a licensing agreement limiting the government's rights in the software that operates the budget and planning systems;² the original software was then copyrighted by RGII under the name "Monument."

The scope of the license, however, is broader than simply the Monument software. Under the license agreement, "Licensed Product" means:

any product made by, made for, used, sold, offered for sale, leased, offered for lease by Licensor that includes, combines, incorporates and/or implements the Software, and any modification or derivation thereof, with software and/or hardware provided by Licensor for purposes of adding to and/or increasing the value, functionality or utility of the Software.

AR, Tab 1, License Agreement, at 2.

The agreement provides DOS rights to use the licensed product only within the agency, precludes the combination of the licensed software with other software for the purpose of implementing the software, and precludes the agency from disclosing the licensed software to other contractors or to other government agencies. At the agreement's inception, the agency's expectation was that the agency "would benefit from receipt without additional cost of improvements that would be made to RGII's software," an expectation that has been "disappointed." Agency's Response to GAO Questions, Oct. 4, 2006, at 3. Either party may terminate the agreement with at least

¹ The protester, whose principals had left RGII by the end of 2004 under less than amicable circumstances, asserts that its principals wrote more than 50 percent of the code implemented at DOS for this system. Protest at 7.

² The parties recognized that the government was relinquishing the broad rights it otherwise would have had in the software, in exchange for receiving full use of any enhancements and modifications to the software developed in the future by RGII. Agency Report (AR), Tab 1, Contract Modification No. 6, at 1-2; see also Federal Acquisition Regulation (FAR) §§ 27.404(f)(iv), 52.227-14(c)(1).

90 days prior written notice; upon termination, the agency ceases to have any rights in the software. The licensing agreement continues in place, with one modification.³

The agency published a presolicitation notice stating that the proposed sole-source award to RGII was for a “follow-on contract for continued implementation, maintenance, enhancement, and support for the [agency’s] worldwide budget and planning systems” that are based on proprietary software packages owned by RGII, and that the contract period would be for a base year plus four 1-year options. The notice stated that the contractor “will be required to maintain and support legacy core systems and interfaces and to provide the services necessary to develop improvements which enhance the functionality and efficiency of the systems.” AR, Tab 4, Modification of Presolicitation Notice, at 1. Although the estimated value of the services in the presolicitation notice was \$19 million, the agency states that, currently, the estimated value is approximately \$10 million, with the work now expected to focus on maintaining the existing software, with little emphasis on developing enhancements.

In support of the proposed award to RGII, the agency drafted a J&A citing as authority to proceed on a sole-source basis 41 U.S.C. § 253(c)(1) (2000), which states that an agency may use noncompetitive procedures only when the property or services needed by the agency “are available from only one responsible source and no other type of property or service” will satisfy the agency’s needs. The J&A states that “[w]ithout seeking a follow-on contract with its current software vendor, the [agency] would experience an immediate and substantial time delay or actually be unable to fulfill its requirements to adequately meet agency budgeting and financial responsibilities,” and lists several attributes of the incumbent that “make it a unique source for these services.” AR, Tab 3, J&A, at 1, 2.

The J&A also describes the burden on the agency of adopting any other approach. Without continued support from the incumbent, according to the J&A, the agency “would need to redesign its budget and planning systems to work with another software product, redesign its interfaces and duplicate the requirements analysis, design, and development stages of implementation to accommodate a new software package to perform the business functions” of the current, proprietary software. Id.

³ In 2004, prior to having its own personnel perform the task of extracting DOS data from the software system for use in developing another software program called the “Executive Dashboard,” discussed further below, the agency entered into a memorandum of understanding with RGII that modified the license agreement. That memorandum specifically granted the agency the “right to receive and use the Source Code solely to allow its direct-hire personnel to construct a staging database that extracts and separates State Department data from RGII software for use in a separate executive reporting application.” AR, Tab 2, Memorandum of Understanding, at 1.

at 3. In this regard, at the hearing that our Office convened to consider the issues raised in this protest, the agency's program office representative indicated that the agency had considered the purchase of a replacement software system but that none was available as an off-the-shelf product. The program office representative asserted that the time commitment necessary for agency staff to properly determine the requirements for a new system--the first step in the process--would be a significant burden, even if the agency had the funds to procure the development of such a replacement system.

Although the J&A states that "[l]icensing restrictions dictate that only RGII Technologies can do this work," id. at 2, it identifies no actions the agency has considered taking to remove or overcome any barriers to future competition resulting from the restrictive license, such as purchasing additional, broader license rights. The J&A notes only that RGII is "assessing the ability" to license other vendors to operate its software, and that the agency "will consider other application, maintenance, and support options based on the degree of success RGII achieves in these endeavors." Id. at 4.

RGII had been providing support on a labor hours basis under a DOS task order that was set to expire October 31, 2006, but has been extended for 3 months. The agency expects to complete the negotiation and award of a new contract with RGII before the expiration of that extension. The protester first filed an agency-level protest challenging the agency's plan to award the contract on a sole-source basis. After that protest was denied by the agency, this protest followed.

DISCUSSION

Although the overriding mandate of the Competition in Contracting Act of 1984 (CICA) is for full and open competition in government procurements obtained through the use of competitive procedures, 41 U.S.C. § 253(a)(1)(A), CICA permits noncompetitive acquisitions in certain circumstances, such as when the services needed are available from only one responsible source. 41 U.S.C. § 253(c)(1). When an agency uses noncompetitive procedures under section 253(c)(1), it is required to execute a written J&A with sufficient facts and rationale to support the use of the cited authority. 41 U.S.C. § 253(f)(1)(A), (B); FAR §§ 6.302-1(d)(1), 6.303, 6.304. Our review of an agency's decision to conduct a sole-source procurement focuses on the adequacy of the rationale and conclusions set forth in the J&A. As a result, an agency's decision in this regard will not be questioned by our Office so long as the J&A sets forth reasonable justifications for the agency's actions. Lockheed Martin Sys. Integration--Owego, B-287190.2, B-287190.3, May 25, 2001, 2001 CPD ¶ 110 at 10. Moreover, an agency has broad discretion to determine its needs and the method for accommodating those needs. Digital Controls Corp., B-255041.2, Mar. 28, 1994, 94-1 CPD ¶ 219 at 12. Use of noncompetitive procedures is not justified, however, where the agency created the need for the sole-source award through a lack of advance planning. 41 U.S.C. § 253(f)(5)(A).

The agency asserts that, because the licensing agreement restricts access to the software source code, its conclusion that the protester is not an acceptable source was reasonable. The protester argues, first, that the agency improperly refused to consider the protester's alternative proposal--that the agency replace the proprietary software system with a non-proprietary system--and, second, that the protester is able to perform the contract without holding a license to the proprietary software.

Our review of the record indicates that the agency reasonably chose not to accept the protester's proposed alternative. The protester's proposal presupposes a transition period during which the incumbent, RGII, would operate the existing systems while the protester develops non-proprietary software systems to replace them. Protester's Response to AR, Sept. 26, 2006, encl. 2, at 10. An agency may restrict a procurement to a single contractor to ensure that one firm is responsible for a technical system so that the government is relieved of the need to analyze the source of technical problems and to avoid "finger pointing" between contractors, see Tucson Mobilephone, Inc., B-256802, July 27, 1994, 94-2 CPD ¶ 45 at 3, or to ensure the technical integrity and performance of a computer system. MASSTOR Sys. Corp., B-211240, Dec. 27, 1983, 84-1 CPD ¶ 23 at 3. Here, under the protester's alternative proposal, two firms who have an admittedly contentious relationship would share responsibility for the successful functioning of mission-critical software. Under these circumstances, we think that the agency properly considered the potential pitfalls in the protester's alternative proposal and reasonably decided that this approach would not meet its needs.

The protester next asserts that, even if the agency properly rejected its proposal to develop a replacement system, it can perform the requirements of the proposed contract without holding rights under the license, and without violating the license. The agency and RGII both challenge that assertion. As explained below, we conclude that the protester has failed to show that the proprietary software is unnecessary to satisfactory performance of the contract here. See Federal Computer Int'l Corp., B-251132, Feb. 24, 1993, 93-1 CPD ¶ 175 at 4; Hydra Rig Cryogenics, Inc., B-234029, May 11, 1989, 89-1 CPD ¶ 442 at 4.

One of the agency's overriding concerns with the implementation of the protester's proposal to perform the contract without a license is the potential disruption to its performance of mission-critical tasks posed by the risk of litigation between the protester and RGII. Besides disagreeing over whether the extraction of DOS data necessary to perform as the protester proposes would violate the license agreement, RGII and the protester dispute at least three fundamental issues related to the scope of the license.⁴ We find it reasonable for the agency to reject an alternative approach

⁴ First, the protester maintains that the license does not prohibit third party "use" of the proprietary software, only DOS "disclosure" of the same. Second, the protester and RGII disagree on the extent to which the protester may use its staff's knowledge
(continued...)

to meeting its needs that carries with it the serious possibility of litigation between two contractors. See Tucson Mobilephone, Inc., supra.

The protester points to the successful development and launch of the Executive Dashboard (ED) software as proof that enhancements to the existing system can be created without access to RGII's proprietary source code.⁵ The agency challenges that assertion on two grounds. The agency argues that the ED is a minor piece of software that merely displays data and is not required to interface with Monument, while at least some portion of the contract performance here would require creating software with such an interface. In addition, before the contractor could begin development of the ED software, a separate database containing the necessary DOS raw data had to be created by the agency's own IT personnel,⁶ since extraction of data from the existing system by any unlicensed party would violate the license. The agency explains that a similar effort, and the corresponding burden on the agency's staff resources, would be required here, only this time on a much larger scale. In response, the protester states only that it "believes" that the extraction of data could be performed without violating the license. Video Hearing Transcript (VHT), Oct. 13, 2006, at 9:49.

Further, even if the launch of ED supports the protester's position--and neither the agency nor the intervenor concedes that it does--the scope of work of the contract at issue here has shifted from creating virtually stand-alone enhancements for the software to maintaining and supporting it. The record shows that maintenance and support of the software systems would require not only that the protester extract data from the system, but restore and add data to the system, as well. For example, when the data is extracted from the current system for reuse in a program such as ED, the contractor constructs new fields and arranges the data in a manner suitable to that new program. In this case, however, if a contractor working without a license were required to add a new employee as part of its support responsibilities--that is, to add to and not extract data from the existing systems--that contractor will not know precisely into which existing fields the data pertaining to that individual should be added or how the existing fields are structured. VHT, supra, at 10:02-10:04.

(...continued)

of the software, gained through their prior employment relationship with RGII, in performing the contract. Third, the protester asserts that RGII has waived its right to assert that certain information is proprietary because RGII has placed it in the public domain, and that therefore the protester may rightfully use that information.

⁵ The contract for the development of the ED was awarded to Booz Allen Hamilton; the protester served as a subcontractor.

⁶ Before the agency could begin constructing the database, the agency and RGII had to resolve licensing issues surrounding access to that data. See note 3, supra.

The protester asserts that through a quick and fairly simple system of trial and error, it will be able to make additions to the database. The agency argues that such modifications to the database happen repeatedly throughout the day, every day, and are sometimes very complex. The agency maintains that delays will inevitably result from a contractor who is learning data field locations and structure by trial and error and that those unknown delays are a burden that the agency may reasonably choose to avoid. We agree. The protester itself estimates that, in the instances where issues with the software require the contractor to write new programs, the new programs could take as little as a day or as long as 3 weeks to write. The protester's own estimation is that operating without access to the proprietary software would increase the time necessary to write programs to generate needed reports by 10 to 15 percent, VHT, supra, at 9:44, or, in some instances, more than 2 days.

We conclude that the protester has not met its burden of demonstrating that the contract could be performed without access to the source code and without violating the license agreement. In fact, the record demonstrates the need for any contractor other than RGII to have access to the proprietary software, by means of a license from RGII, to adequately perform the full scope of work. An agency may properly take into account the existence of software licenses when determining whether only one responsible source exists. FAR § 6.302-1(b)(2); see AAI ACL Techs., Inc., B-258679.4, Nov. 28, 1995, 95-2 CPD ¶ 243 at 6; Marconi Dynamics, Inc., B-252318, June 21, 1993, 93-1 CPD ¶ 475 at 5. The protester does not have license rights to the existing system, and we thus find reasonable the agency's determination that eFedBudget was not an acceptable alternative source. MFVega & Assocs., LLC, B-291605.3, Mar. 25, 2003, 2003 CPD ¶ 65 at 4. As explained below, however, we also conclude that the agency has failed to satisfy its statutory obligation to engage in reasonable advance planning before proceeding with a sole-source award to RGII.

Under 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 their role of promoting and providing for competition, 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. VSE Corp., Johnson Controls World Servs., Inc., B-290452.3 et al., May 23, 2005, 2005 CPD ¶ 103 at 8; HEROS, Inc., B-292043, June 9, 2003, 2003 CPD ¶ 111 at 7; National Aerospace Group, Inc., B-282843, Aug. 30, 1999, 99-2 CPD ¶ 43 at 8. See also S. Rep. No. 98-50, at 18 (1984), reprinted in 1984 U.S.C.C.A.N. 2174, 2191 (stating that CICA requires agencies to "make an affirmative effort to obtain effective competition").

CICA further provides that under no circumstance may noncompetitive procedures be used due to a lack of advance planning by contracting officials. 41 U.S.C. § 253(f)(5)(A); Signals & Sys., Inc., B-288107, Sept. 21, 2001, 2001 CPD ¶ 168 at 9. Although the requirement for advance planning is not a requirement that such planning be successful or error-free, see Abbott Prods., Inc., B-231131, Aug. 8, 1988, 88-2 CPD ¶ 119, at 8, the advance planning must be reasonable. Signals & Sys., Inc.,

supra, at 13. Here, we conclude that the agency has failed to comply with the CICA mandate for reasonable advance planning.

With regard to the feasibility of alternatives to a sole-source award, the agency principally focuses on the difficulties associated with either acquiring a new software system, or having another firm perform the required services without license rights to the RGII software. The agency also asserts that its advance planning efforts have been reasonable in that it has taken steps to avoid expansion of its reliance on RGII. In this regard, the agency notes, for example, that it has been considering using a program developed by another agency office, the Bureau of European Affairs, to meet its needs here, instead of contracting with RGII for the development of additional proprietary software. Agency's Response to GAO Questions, supra, at 4.

While, as discussed above, it is reasonable to conclude that, given the restrictive nature of the agency's current licensing agreement with RGII, only RGII can now meet its needs, the agency's arguments simply do not address the issue of whether the agency's acquisition planning--in the face of those restrictions--was reasonable, given the requirement that the agency make an affirmative effort to obtain competition. The agency has produced no record of any steps that it has taken to end its reliance on the services of the incumbent to maintain the existing software systems; in fact, this latest proposed sole-source award has a potential term of 5 years. It is possible, for example, that the agency could purchase additional rights to the proprietary software in order to promote competition, see Environmental Tectonics Corp., B-248611, Sept. 8, 1992, 92-2 CPD ¶ 160 at 5, rights that the government relinquished nearly 6 years ago. In this regard, the protester asserts that in 2004 RGII offered the agency a source code license to multiple copies of Monument for less than \$1.2 million, and that at the time RGII stated that the value of Monument was less than \$1 million. Protest, Tab E, Letter from Protester to Agency, Aug. 7, 2006, at 2. Further, the agency acknowledges that the "value of the software may in fact now be quite limited." Agency's Response to GAO Questions, supra, at 3.

Under the circumstances here--where the agency ceded substantial rights in the software created by RGII under the development contract, and where there is no indication that the agency has explored the possibility of acquiring additional rights from RGII--we think that, to satisfy its obligation to engage in reasonable advance planning and to promote competition, the agency was required to consider whether the costs associated with a purchase of additional license rights, or some other alternative, outweigh the anticipated benefits of competition. See HEROS, Inc., supra, at 7, 10.

RECOMMENDATION

Consistent with our discussion above, we recommend that the agency conduct a documented cost/benefit analysis reflecting the costs associated with obtaining

competition, either through purchasing additional rights to the proprietary software or some other means, and the anticipated benefits. If the cost/benefit analysis reveals a practicable means to obtain competition, we recommend that the agency proceed with a competitive procurement.

We also recommend that the protester be reimbursed for the expenses it incurred in filing and pursuing its protest. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (2006). In accordance with section 21.8(f)(1) of our Regulations, eFedBudget's certified claim for such costs, detailing the time expended and the costs incurred, must be submitted directly to the agency within 60 days after receipt of this decision.

The protest is sustained.

Gary L. Kepplinger
General Counsel