

LACK OF ADVANCE PLANNING IS AN IMPROPER REASON FOR USING NONCOMPETITIVE PROCEDURES

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10 U.S.C. § 2304 and 41 U.S.C. 3301 require, with certain limited exceptions that contracting officers promote and provide for full and open competition in soliciting offers and awarding Government contracts. See also FAR 6.101(a). Any contract awarded without full and open competition must be justified, and the FAR prohibits the justification to be based on a “lack of advance planning by the requiring activity.” FAR 6.301(c). The justification for most common awards made without full and open competition are that there are (1) only one responsible source and no other supplies will satisfy agency requirements (FAR 6.302-1); or (2) unusual and compelling urgency (FAR 6.302-2). There are five other less commonly used justifications for awards made with less than full and open competition. See FAR 6.302-3 – 6.302-7.

As noted above, an agency may not justify other than full and open competition if there has been a lack of advance planning. Two recent bid protests demonstrate the two ends of the spectrum. First, in *American Sys. Corp.*, B-412501, March 18, 2016, the Government Accountability Office (“GAO”) found that the Navy properly issued a short-term, sole source contract for professional support services when it encountered some new problems after changing a solicitation. The Navy had to cancel the solicitation and resolicit its requirements, but needed a bridge (short-term contract) in order to continue the services while conducting a new procurement. Although the bridge contract was protested, the GAO found that the Navy had proactively sought to address concerns with the solicitation, but when their efforts introduced new problems, the attempt to correct the solicitation was unsuccessful and they needed to issue a new solicitation. There was no lack of advance planning.

On the other hand, in *Xtec, Inc.*, B-410778.3, Oct. 1, 2015, the GAO sustained a protest because of a clear lack of advance planning. In that protest, the General Services Administration (“GSA”) had to cancel a solicitation for personal identification verification of government employees. As a result, GSA issued a sole source extension of a previously awarded task order to provide the products and services contemplated in the canceled solicitation. The GAO found lack of advance planning because GSA knew of, and had documented the need for detailed solicitation requirements nearly 4 years prior to the solicitation’s cancellation. However, when GSA issued the solicitation it contained only “high level” requirements, which were insufficiently detailed to conduct the procurement. GSA had to cancel the solicitation because it had failed to adequately plan how to address flaws in the solicitation that had been known by the agency for years.

While it may be difficult to show lack of advance planning, when an agency knows its requirements and then doesn’t act on them for four years, a protest is likely to succeed.