

National Aeronautics and Space Administration
Office of Inspector General
Washington, DC 20546-0001



January 12, 2012

The Honorable Claire McCaskill
Chairman
Subcommittee on Contracting Oversight
Committee on Homeland Security and Governmental Affairs
United States Senate
Washington, DC 20510-6250

Dear Madam Chair:

This letter responds to your September 16, 2011, request that the Office of Inspector General (OIG) review the National Aeronautics and Space Administration's (NASA) award of a contract to Arctic Slope Regional Corporation Research and Technical Solutions (ARTS), a subsidiary of Arctic Slope Regional Corporation (ASRC), an Alaska Native Corporation.

Specifically, you requested that we examine: (1) NASA's award of a non-competitive letter contract; (2) NASA's use of a cost-plus fixed-fee contract rather than a fixed-price contract; (3) NASA's consideration of the past performance of the previous contractor and related company, ASRC Management Services (AMS); and (4) the commitment by Arctic Slope that incumbent AMS personnel would transition to work under the ARTS contract. As part of this review, we also considered whether a March 2011 change to the Federal Acquisition Regulation (FAR) pertaining to sole source contracts in excess of \$20 million to 8(a) small businesses was applicable to this contract.

In sum, we found that in awarding the ARTS contract NASA complied with the applicable rules and regulations in place at the time. Specifically, we found that (1) the contract was awarded non-competitively as part of NASA's required 8(a) Set-Aside Program and that using a letter contract allowed NASA to avoid a disruption in services; (2) a fixed-price contract would not have been suitable given the type of work involved; (3) it was appropriate for NASA to consider the past performance of AMS when contracting with ARTS; and (4) there was nothing improper about Arctic Slope's commitment to transition incumbent personnel to the ARTS contract. We also found that the March 2011 change to the FAR involving 8(a) small businesses was not applicable to the ARTS contract. We detail the results of our review below.

Background

Congress enacted the Alaska Native Claims Settlement Act in December 1971 to resolve long-standing aboriginal land claims and to foster economic development for Alaskan

Natives. The Act established 12 regional corporations and over 200 village corporations known as Alaska Native Corporations (ANCs). Under the Act, ANCs have the authority to conduct business for profit and to own various subsidiaries toward this end.

In 1986, the Small Business Act was amended to allow ANC subsidiaries to participate in the Small Business Administration's (SBA) 8(a) Program, one of the Federal Government's primary means for developing small businesses owned by members of socially and economically disadvantaged groups. Since that time, Congress has enacted special procurement advantages for ANC firms. For example, whereas other 8(a) companies had to compete for awards over specific dollar thresholds, ANCs were eligible for non-competitive contracts regardless of dollar value.¹ In addition, whereas other types of 8(a) firms may wholly own only one subsidiary that participates in the 8(a) Program, ANCs may own multiple such companies.

Like all Federal agencies, NASA is required to set aside a certain percentage of contracts for 8(a) Program participants. The NASA Administrator and the SBA jointly determine NASA's annual 8(a) set-aside goal based on the Government-wide statutory goals mandated in 15(g) (1) of the Small Business Act, and must approve any NASA contracts for acquisitions or awards to 8(a) participants. In addition, FAR 19.203(c) requires that once a particular acquisition has been accepted by the SBA into the 8(a) Program, it must remain in the Program unless SBA agrees to its release in accordance with 13 C.F.R. Parts 124, 125, and 126. Finally, if unable meet its annual goal for 8(a) set-aside contracts by the end of the fiscal year, NASA must provide justification to the SBA for not meeting the goal.

NASA's current contract with ARTS and its predecessor contract with AMS were both 8(a) set-aside contracts. The contract with AMS was a 5-year cost-plus-award-fee contract beginning in December 2005 and ending in November 2010. By the time the AMS contract was ending, AMS had been in the 8(a) Program for more than 9 years. Accordingly, AMS was no longer eligible to participate in the 8(a) Program under SBA guidelines.

On November 30, 2010, NASA awarded a sole-source letter contract to ARTS with a cost cap of \$2.1 million. ARTS performed under this letter contract for approximately 7 months; this period included several contract modifications to allow time for continued negotiations. On June 20, 2011, ARTS and NASA entered into a final cost-plus-fixed-fee contract with a total value of approximately \$46 million. Like the AMS contract, the ARTS contract provides NASA with engineering studies and technical support services for the (1) electromagnetic spectrum, (2) telecommunications systems as required for near-earth and deep space research, (3) spectrum regulatory support, (4) technology development, and (5) technical support to various conferences and other events.

¹ The National Defense Authorization Act of 2010 requires Federal agencies to issue a Justification and Approval (J&A) prior to awarding an 8(a) sole source contract for more than \$20 million. A J&A is documentation to justify and obtain appropriate level approvals to contract without providing for full and open competition as required by the FAR. The FAR Council published the rule to address this mandate on March 16, 2011.

Before awarding the contract, NASA conducted market research in accordance with FAR Part 10 and determined that ARTS had the capabilities to perform the requirements of the contract. Accordingly, the Agency communicated to the SBA its intent to proceed with the ARTS contract under the 8(a) Program, and the SBA accepted NASA's plan. Had NASA sought to satisfy the requirements for this contract outside the 8(a) Program, it would have been required to petition the SBA to release the underlying contract requirements from the 8(a) Program. NASA officials told us that they did not consider pursuing this option because the contract award to ARTS contributed toward the Agency's mandated 8(a) small business goals. They also indicated that because they had identified an 8(a) company with the required capabilities, they believed it unlikely SBA would have agreed to such a request.²

Noncompetitive Letter Contract Was Justified

As noted above, the underlying requirements for the ARTS contract were part of NASA's SBA-approved 8(a) Set-Aside Program. NASA has the authority under FAR 19.805-1(b)(2) to award contracts directly and noncompetitively to ANCs.³ Accordingly, NASA had authority to award a noncompetitive contract to ARTS.

We found that NASA chose to begin its contractual relationship with ARTS with a letter contract to avoid a disruption in service. Under FAR 16.603-2, a letter contract may be awarded when the Government's interests require that work start immediately but there is insufficient time to complete a definitive contract. In this case, NASA determined that the use of a letter contract was necessary to prevent substantial disruption to Agency functions such as conducting technical engineering studies in support of spectrum allocations, facilitating assignments and coordination in national and international spectrum management organizations, and supporting the U.S. commercial space communications industry.⁴

NASA finalized its acquisition plan for the ARTS contract on October 19, 2010, approximately 6 weeks before the AMS contract was scheduled to expire.⁵ According to NASA procurement personnel, 6 weeks is not enough time to complete all the steps

² Effective March 14, 2011, the SBA amended the 8(a) program eligibility requirements to prohibit agencies from awarding sole source 8(a) contracts to ANC subsidiaries when the immediate previous contract was held by another subsidiary of the same tribe. 13 C.F.R. § 124.109(c)(3)(ii). Had this rule been in effect in November 2010 when NASA signed the letter contract with ARTS, the Agency would have been prohibited from awarding the sole source contract to ARTS.

³ NASA negotiated a partnership agreement with the SBA to allow NASA to have direct contracting authority with 8(a) firms and to streamline the contracting process. See: <http://www.hq.nasa.gov/office/procurement/regspic10-03.html>.

⁴ NASA officials said they considered other options in lieu of awarding a letter contract, such as issuing a J&A for a contract extension with AMS or issuing an interim contract to another entity. However, they determined these options were either not viable or would not meet the Agency's requirements in a timely manner.

⁵ NASA acquisition personnel explained that they were unable to complete the acquisition plan earlier because they did not receive the requirements package from the project team until June 2010 and SBA's approval to proceed with ARTS until August 2010.

necessary to produce a final contract, which include reviewing and approving the solicitation, providing the contractor with sufficient time to submit a proposal, receiving a detailed technical evaluation of the contractor's proposal from the contracting officer's technical representative (COTR), obtaining information on the status of the contractor's accounting systems and recommendations regarding proposed rates from the Defense Contract Audit Agency, and negotiating contract terms.

We found that given these constraints, it was not unreasonable for NASA to award a letter contract to ARTS to avoid a disruption in service. We also found that the letter contract did not result in any additional cost to NASA.

Choice of Cost-Plus-Fixed-Fee Contract Was Reasonable

Based on our discussions with acquisition and project personnel, we determined that a firm-fixed-price contract would not have been appropriate for this award because the fluctuating nature of the workload made it impossible to rely on past cost history to predict future costs.

The ARTS contract is composed of two elements: a core services portion comprised of daily work that fluctuates in nature and an indefinite delivery/indefinite quantity (IDIQ) portion to address unanticipated studies and work. Day-to-day activities include fiscal year analysis, budget formulation and execution, funding distributions, financial reporting and analysis, and managing 15 websites on behalf of the Agency for the Space Communications and Navigation (SCaN) Program. Work performed under the IDIQ portion of the contract includes providing technical support in the area of advanced communications technology – such as laser communications, fiber optics, and software radios – in preparation for implementing national security directives and advanced digital communications techniques; producing official reports; and supporting the Agency in organizing and hosting special meetings and workshops.

According to FAR 16.301-2(a)(2), a cost-plus-fixed-fee type contract is appropriate when “uncertainties involved in contract performance do not permit costs to be estimated with sufficient accuracy to use any type of fixed-price contract.” Because the quantity and type of work performed under the contract fluctuate from day-to-day and because a significant portion of the contract was for IDIQ tasks, we believe the decision to award the contract as a cost-plus-fixed-fee vehicle was reasonable.

Consideration of Past Performance of AMS Was Appropriate

In awarding the contract to ARTS, NASA considered the performance of AMS under the predecessor contract. We found this action to be reasonable and consistent with the FAR.

In a recent decision (B-403035.2, B-403035.3), the Government Accountability Office (GAO) found that when considering an award to an affiliated company, the agency properly considered the past performance of a related company. Specifically, GAO found that

[A]n agency may properly attribute the experience or past performance of a parent or affiliated company to an offeror where the firm's proposal demonstrates that resources of the parent or affiliate will affect the performance of the offeror. . . . The relevant consideration is whether the resources of the parent or affiliated company – its workforce, management, facilities, or other resources – will be provided or relied upon for contract performance, such that the affiliate will have meaningful involvement in contract performance. . . . Furthermore, under Federal Acquisition Regulation (FAR) sect. 15.305(a)(2)(iii), agencies are instructed to take into account past performance information regarding the past performance of predecessor companies or key personnel who have relevant experience that will perform major or critical aspects of the requirement.

In accordance with the GAO decision, NASA considered the past performance of AMS in deciding whether to award the contract to ARTS because 100 percent of the personnel from AMS would be transitioning to the new ARTS contract. According to contract documentation, these employees are experts in their field and have the specialized skills necessary to perform the requirements of the new contract.

Moreover, the FAR provisions pertaining to 8(a) contracts encourage agencies to consider this type of information. FAR 19.803 requires that “the SBA and an agency match the agency's requirements with the capabilities of 8(a) concerns to establish a basis for the agency to contract with the firm under the program.” In this regard, 19.803 requires agencies to review “background information on the concern, including any and all information pertaining to the concern's technical ability and capacity to perform.” Similarly, FAR 19.804-1 states that agencies should evaluate “any other pertinent information about known 8(a) contractors” and permits agencies to review “other aspects of the firms' capabilities which would ensure the satisfactory performance of the requirement being considered for commitment to the 8(a) Program.” Because AMS was planning to transition the entire workforce performing tasks for NASA on the expiring AMS contract to the new ARTS contract, it was appropriate for NASA to consider how this workforce had performed under the previous contract.

Transfer of Incumbent Personnel Was Appropriate

It is a relatively common acquisition practice for personnel from a previous contract to transition to a new contract, and we did not identify anything improper about ARTS utilizing the incumbent personnel from the AMS contract in this case. According to the COTR for the ARTS contract, these individuals are experts in their fields and well qualified to perform the required work. Moreover, NASA project personnel told us they were pleased with their performance under the AMS contract. Finally, all of the incumbent personnel continue to work on the ARTS contract and have been performing in accordance with the contract and NASA's expectations.

FAR Revision Did Not Apply to ARTS Contract

The National Defense Authorization Act of 2010 requires Federal agencies to issue a J&A prior to awarding an 8(a) sole source contract over \$20 million. While the Act also required the FAR to be amended within 180 days to reflect this requirement, agencies were not required to comply with the new provision until this amendment took effect. The FAR Council published the rule amending the FAR to address this mandate on March 16, 2011.

Because the ARTS contract was a sole source acquisition with a total value of \$46 million, we examined whether this amendment applied to the ARTS contract. We determined it did not.

FAR 1.108(d) states:

Unless otherwise specified—

- (1) FAR changes apply to solicitations issued on or after the effective date of the change;
- (2) Contracting officers may, at their discretion, include the FAR changes in solicitations issued before the effective date, provided award of the resulting contract(s) occurs on or after the effective date; and
- (3) Contracting officers may, at their discretion, include the changes in any existing contract with appropriate consideration.

NASA issued the request for proposal for the ARTS contract on November 18, 2010. Because this was prior to the effective date of the revised FAR rule, NASA was not required to issue a J&A for the ARTS contract.⁶

⁶ The ARTS letter contract provides that the definitive contract will include “all clauses required by law on the date of execution of the definitive contract.” However, the J&A requirement is not a contract clause but rather a rule pertaining to solicitation of 8(a) contracts.

Conclusion

We found that in awarding the ARTS contract NASA complied with all applicable procurement rules and regulations in effect at the time of the award.

We hope this information addresses your concerns. Please contact me or Jim Morrison, Assistant Inspector General for Audits, at (202) 358-0378 if you have follow-up questions.

Sincerely,



Paul K. Martin
Inspector General

cc: The Honorable Rob Portman
Ranking Member
Subcommittee on Contracting Oversight
Committee on Homeland Security and Governmental Affairs

Charles F. Bolden, Jr.
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NASA Advisory Council – Audit, Finance, and Analysis Committee