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Morrigo Equipment, LLC

THE OFFICE OF PUBLIC ACCOUNTABILITY

In the Procurement Appeal of)
)
MORRICO EQUIPMENT, LLC,)
)
Appellant.)
_____)

HEARING BRIEF

Docket No. OPA-PA-14-011
Docket No. OPA-PA-14-012

Morrigo Equipment, LLC (“Morrigo”), hereby submits its hearing brief with respect to its appeal herein.

Morrigo appeals to the Office of Public Accountability with respect to the General Services Agency’s (“GSA”), decisions on Morrigo’s protests filed on November 10, 2014, and November 21, 2014, respectively. The appeals arise out of the GSA’s Invitation for Bid No. GSA065-14, a solicitation of school buses (the “IFB”). The GSA conducted a bid opening on August 12, 2014. On September 9, 2014, the GSA advised Morrigo that its bid was rejected for non-compliance with a specification requiring the use of rivets on all exterior body parts. The GSA further advised that it would rebid the IFB. The GSA also advised Triple J Enterprises, Inc. (“Triple J”), that its bid was rejected for failure to submit mandatory drawings/seating plans, and similarly advised that it would rebid the IFB. There were no other bidders on the IFB.

ORIGINAL

Triple J filed a protest with respect to its bid rejection on September 23, 2014. The GSA denied Triple J's protest on September 26, 2014, and that protest denial was signed received by Triple J on September 26th. On October 29, 2014, Triple J then filed an appeal to the OPA in OPA-PA-14-009, which was dismissed with prejudice on November 10, 2014.

On November 7, 2014, the GSA and Triple J entered into a settlement agreement by which the GSA would award nine (9) buses to Triple J and despite its bid being rejected as non-responsive for failure to submit descriptive literature, to include mandatory drawing/seating plans. This was and remains a material deviation from the mandatory requirements of the IFB.

On November 10, 2014, Morrico protested any award of a contract to Triple J because its bid was non-responsive at bid opening for failure to provide the required literature, to include the mandatory drawings/seating plans. Further, the Triple J bid did not include any specifications that would allow the GSA to determine whether Triple J was offering what the government was soliciting. This is a material omission and one that cannot be rectified after bid opening. Morrico is also informed and believes that the Blue Bird bus being offered by Triple J fails to meet the exterior rivet specifications of the solicitation. The GSA denied that protest on November 12, 2014, stating that it has the right to enter into settlement agreements. Morrico filed an appeal to the OPA on November 18, 2014. Morrico also filed a December 1, 2014, appeal to the OPA with respect to GSA's decision on Morrico's November 21, 2014, protest.

Whether the GSA can enter into a settlement agreement is not the question here. Rather, the GSA cannot award a contract to Triple J in violation of the procurement laws of Guam. Because Triple J's bid was non-responsive at bid opening, the GSA cannot award a contract to it, whether pursuant to a settlement agreement or any other form of contract. *See, Coulson Aviation (USA) Inc., B-409356.2, March 31, 2014, attached.* Triple J's failure to submit the mandatory drawings and

seating plans were not minor informalities that could be waived. So is the failure of Triple J to submit product specifications illustrating that it was offering what the government was soliciting.

The GSA commented in its agency report that “Morrice did not file with the Office of Public Accountability when the matter was filed and now is claiming that they should have been given the right to protest the [settlement] agreement.” The GSA conveniently omits that it is charged with providing notice to Morrice of the Triple J appeal to the OPA. *See*, 2 GAR § 12104(c)(2)(“The Chief Procurement Officer ... shall give notice of the Appeal ... to all Interested Parties ... and shall communicate to the Public Auditor the identities and addresses of said parties.”). The GSA also seems to argue that Morrice had no right to protest a proposed award to Triple J when the GSA itself rejected the Triple J bid for being non-responsive and, further, denied the Triple J protest for the same reason. But bidders have a right to protest proposed awards that violate the procurement code. An award to Triple J would be in violation of the procurement code and Morrice has every right to protest such an award.

Title 2 GAR §3109(n)(3), governing product acceptability, provides in part that “[t]he Invitation for Bids shall set forth any evaluation criterion to be used in determining product acceptability. It may require submission of bid samples, descriptive literature, technical data, or other material.” This section further provides that “[a]ny bidder’s offering which does not meet the acceptability requirements shall be rejected as nonresponsive.” The school bus IFB specifically required the submission of drawings and seating plans. Triple J did not submit these required documents and, accordingly, its bid had to be rejected as nonresponsive pursuant to the plain terms of the procurement regulations. The GSA had no discretion in the matter. This mandatory requirement that the Triple J bid be rejected as non-responsive clearly overrides any consideration

as sought by Triple J that is failure to comply with the mandatory requirements of the IFB was a mere minor informality.

Title 2 GAR § 3109(m)(4)(B), provides that minor informalities are only those matters in which the “effect on price, quantity, quality, delivery, or contractual conditions is negligible.” The failure to provide mandatory drawings and seating plans absolutely effects the quality of the product offered and the contractual conditions of the solicitation. The GSA could not determine from Triple J’s bid whether it was offering the product specified in the IFB. Further, 2 GAR § 3109(k)(2) expressly provides that “[n]o late bid, late modification, or late withdrawal will be considered unless received before contract award, and the bid, modification, or withdrawal would have been timely but for the action or inaction of territorial personnel directly serving the procurement activity.” Triple J’s attempt to provide a late modification to its bid through submission of the mandatory drawings/seating plans, was not due to any action or inaction of territorial procurement personnel and, therefore, cannot be considered.

Also, it is not clear that Triple J can meet the exterior rivet specification. At the hearing of this matter, Morrigo will offer photos of Blue Bird buses in use on Guam by Scuba Company and which photos show rub rails attached with screws. Blue Bird also produced a video that can be found on YouTube at: (<http://www.youtube.com/watch?v=-Wx11hn7d58>), which shows the manufacturing process for Blue Bird school buses. At 2:34 of the video, the manufacturing process shows the installation of exterior rub rails with screws. Right after that, the video shows the installation of interior ceiling panels with the use of a rivet gun. Accordingly, the Blue Bird buses offered by Triple J do not appear to meet the exterior rivet specification which the GSA utilized as a basis for rejecting the Morrigo bid. If the Morrigo bid had to be rejected for not meeting the exterior rivet specification, then the Triple J bid must be rejected on that same basis.

Even assuming that Blue Bird only uses rivets to install exterior components, this would appear to be a proprietary feature or a process peculiar to but one manufacturer. Morrico will offer evidence that GSA's Anita Cruz advised DPW's Paul Cepeda that Blue Bird's use of rivets appears proprietary or a process unique to Blue Bird. Morrico will also offer evidence that DPW director Carl Dominguez acknowledged that the DPW does not have evidence showing screws to have inferior anti-corrosive properties to rivets or that they are not as durable.

Because GSA advised Morrico it was going to rebid the procurement, Morrico sent a letter to GSA requesting modification of the rivet specification. Morrico explained that the exterior rivet specification is a restrictive specification that has no material effect on the school buses being acquired by the GSA. Morrico will provide evidence that its manufacturer, Thomas Built Buses ("TBB"), uses screws in certain exterior areas in order to make replacement or repair of those exterior components easier. Further, the evidence will show that there is no difference in corrosive resistance between rivets and the screws used by TBB.

The GSA's advice that it was going to rebid the procurement was false and misled Morrico to its detriment. Instead of rebidding the procurement, the GSA now intends to award a contract to Triple J. Had Morrico known that the GSA was not going to rebid the procurement but, instead, was going to award a contract to Triple J, Morrico would have protested the rejection of its bid on the rivet specification, as well as GSA's intent to award a contract to Triple J. Further, the GSA did not advise Morrico of Triple J's OPA appeal as it is required to do by the regulations governing proceedings before the OPA so that Morrico did not have a timely opportunity to intervene in that action.

Finally, Morrico offered a 180 day delivery time against a 240 day delivery time offered by Triple J. Delivery time can be considered by the GSA and measured against a cost difference

between vendors in determining who the lowest responsive and responsible bidder is. *See*, 5 GCA § 5010. Morrico's 180 day delivery time is at least 10% shorter than Triple J's 240 day delivery time. In addition, Morrico's bid price does not exceed 105% of the Triple J bid price. Accordingly, by all measures, this contract should have been awarded to Morrico.

Because the GSA misled Morrico, it is entitled to be placed back into the position it occupied on September 9, 2014, with all remedies available to it, including the right to protest the rejection of its bid over the rivet issue and to obtain an award of the contract. The Superior Court of Guam cited to the case of *Sendra Corporation v. Magaw*, 111 F.3d 162,167 (D.C.Cir. 1997), for the proposition that "[i]f for any reason the agency reopens a matter and, after reconsideration, issues a new and final order, that order is reviewable on its merits, even though the agency merely reaffirms its original decision The new order is, in other words, final agency action and as such, a new right of action accrues and starts the running of a new limitations period for judicial review." *See, Pacific Security Alarm, Inc., v. Department of Public Works*, Civil Case No. CV0591-05 (Decision and Order, July 11, 2006, p.3). The Superior Court in *Pacific Security Alarm*, also cited to *Gonzalez v. Sullivan*, 914 F.2d 1197, 1203 (9th Cir. 1990), for the proposition that "[o]ne of the fundamental requirements of procedural due process is that a notice must be reasonably calculated to afford parties their right to present objections." *See, Id.*, p. 5. The GSA did not notify Morrico of its determination to rescind its cancellation of the IFB or its determination to award the contract to Triple J despite the fact that it had previously rejected the Triple J bid as being non-responsive at bid opening. Essentially, any limitation period for a Morrico protest should be equitably tolled.


The GSA's intent to award a contract to Triple J violates the procurement code because the Triple J bid was non-responsive at bid opening for failure to provide the mandatory drawings/seating plans. Accordingly, the OPA should order that the GSA cannot award a contract

to Triple J. In addition, since the use of screws on exterior bus components is equal to the use of rivets there is no basis for the rejection of Morrico's bid on that basis. Finally, pursuant to 5 GCA § 5010, Morrico's 180 day delivery time is at least 10% shorter than Triple J's 240 day delivery time and Morrico's bid price does not exceed 105% of the Triple J bid price. Accordingly, the GSA should be ordered to award this contract to Morrico.

Respectfully submitted this 23rd day of December, 2015.

DOOLEY ROBERTS & FOWLER LLP

By:



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G A O

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United States Government Accountability Office
Washington, DC 20548

Comptroller General
of the United States

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: Coulson Aviation (USA) Inc.; 10 Tanker Air Carrier, LLC; Minden Air Corp.

File: B-409356.2; B-409356.3; B-409356.4; B-409356.5; B-409356.6

Date: March 31, 2014

Jonathan D. Shaffer, Esq., John S. Pachter Esq., Mary Pat Buckenmeyer, Esq., and Rhina M. Cardenal, Esq., Smith Pachter McWhorter PLC, for Coulson Aviation (USA) Inc.; Thomas P. Humphrey, Esq., James G. Peyster, Esq., Olivia L. Lynch, Esq., Derek R. Mullins, Esq., and Robert J. Sneckenberg, Esq., Crowell & Moring LLP, for 10 Tanker Air Carrier, LLC; and Peter B. Hutt II, Esq., and Joseph W. Whitehead, Esq., Akin Gump Strauss Hauer & Feld LLP, for Minden Air Corp., the protesters.

Robert K. Stewart, Jr., Esq., Davis Wright Tremaine LLP, for Neptune Aviation Services, Inc., the intervenor.

Elin M. Dugan, Esq., Inga Bumbary-Langston, Esq., Shawn S. McGruder, Esq., Mark G. Garrett, Esq., and Melissa D. McClellan, Esq., Department of Agriculture, for the agency.

Louis A. Chiarella, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protests of the award of a sole-source contract for firefighting airtanker services under the industrial mobilization exception to the requirement to conduct a competitive procurement are sustained where the sole-source contract resulted from a settlement agreement in exchange for the awardee's withdrawal of an earlier protest and the record does not contain an adequate justification reasonably supporting the agency's use of noncompetitive procurement procedures.

DECISION

Coulson Aviation (USA) Inc., of Port Alberni, British Columbia, Canada, 10 Tanker Air Carrier, LLC, of Albuquerque, New Mexico, and Minden Air Corp., of Minden, Nevada, protest the noncompetitive award of contract No. AG-024B-C-14-9000 to Neptune Aviation Services, Inc., of Missoula, Montana, by the Department of Agriculture (USDA), U.S. Forest Service, for next generation (NextGen) large airtanker services for wildland firefighting support. The agency justified the

sole-source award under 41 U.S.C. § 3304(a)(3)(A) (2006), which provides for a noncompetitive award to a particular source to maintain that supplier for a national emergency or to achieve industrial mobilization. See also Federal Acquisition Regulation (FAR) § 6.302-3. The protesters argue that the sole-source contract awarded to Neptune, which was promised in exchange for Neptune's withdrawal of an earlier bid protest, is not justified.

We sustain the protests.

BACKGROUND

The Forest Service's procurement of NextGen airtanker services has a long and contentious history.¹ On November 30, 2011, the Forest Service issued request for proposals (RFP) No. AG-024B-S-11-9009 for NextGen large airtanker services.² AR, Tab 67, NextGen RFP. The NextGen large airtankers are intended to replace the Forest Service's use of "Legacy" large airtankers, which are generally much older, slower, and less reliable aircraft.³ The NextGen solicitation was intended to be the primary, but not the only, means by which the Forest Service met its modernization strategy goal of 18-28 modern large airtankers. See Hearing Transcript (Tr.) at 67.⁴

The NextGen RFP, issued as a small business set-aside, contemplated the award of multiple fixed-price contracts under seven contract line items (CLIN) for airtanker

¹ Our decision in Coulson Aviation (USA) Inc.; 10 Tanker Air Carrier, LLC--Costs, B-406920.6, B-406920.7, Aug. 22, 2013, 2013 CPD ¶ 197, provides additional details concerning the history of this procurement.

² Large airtankers can carry 1,800-8,000 gallons of fire retardant. Agency Report (AR), Tab 143, Forest Service Large Airtanker Modernization Strategy, Feb. 10, 2012, at 2. The NextGen RFP required aircraft to have a minimum payload of 2,400 gallons, and a target of 3,000-5,000 gallons. AR, Tab 67, NextGen RFP, at B-11. Airtankers (of various sizes) are but one type of aviation resource used by the Forest Service to perform fire suppression missions; other assets include helicopters, aerial supervision fixed-wing aircraft, smokejumper aircraft, heat-detecting infrared aircraft, and water scoopers. Wildland Fire Management: Improvements Needed in Information, Collaboration, and Planning to Enhance Federal Fire Aviation Program Success, GAO-13-684, Aug. 20, 2013, at 6.

³ Most of the Legacy large airtankers relied on by the Forest Service are P2V aircraft, which have an average age of more than 50 years. AR, Tab 143, Forest Service Large Airtanker Modernization Strategy, Feb. 10, 2012, at 2.

⁴ In resolving this protest, GAO conducted a 2-day hearing to receive testimony from various agency officials involved in this procurement.

firefighting services on an exclusive-use basis. The CLINs, each of which had a 5-year base period and five 1-year options, contained sub-CLINs providing the Forest Service with the option to add up to 2 additional airtankers in the second contract year and 2 more airtankers in the third through tenth contract years, for a possible total of 5 aircraft and 44 aircraft-years per line item. Offerors were permitted to submit proposals for award of any or all of the CLINs, and were informed that awards would be made on a best value basis, considering price,⁵ structural integrity, maintenance, equipment, past performance, and organizational experience factors. AR, Tab 67, NextGen RFP, at M-4.

Nine offerors, including Neptune, Coulson, 10 Tanker, and Minden, submitted proposals by the February 15, 2012, closing date. A Forest Service technical evaluation board (TEB) evaluated offerors' proposals. Following the evaluation of initial proposals, the agency submitted a number of questions to the offerors. After receiving the offerors' responses, the TEB prepared an evaluation report that included the evaluators' final consensus evaluation and analysis of the offerors' evaluated prices. The TEB also provided award recommendations that were reviewed and accepted by the agency's source selection authority.

On June 13, the Forest Service made NextGen contract awards as follows:

| CLIN | Awardee | Aircraft Type |
|------|------------------|---------------|
| 1 | Neptune | BAe-146 |
| 2 | Neptune | BAe-146 |
| 3 | Minden | BAe-146 |
| 4 | Aero Air, LLC | MD-87 |
| 5 | Aero Air, LLC | MD-87 |
| 6 | Minden | BAe-146 |
| 7 | Aero-Flite, Inc. | RJ85 |

AR, Tab 71, Neptune Protest, May 16, 2013 (B-406920.8), exhib. D, 2012 NextGen Contract Award Abstract.

Coulson and 10 Tanker protested to our Office, challenging the agency's price and technical evaluations, communications with offerors, and source selection decision.⁶

⁵ The pricing of the NextGen contracts was based on both a 160-day daily availability rate (referred to as the "mandatory availability period" (MAP)) and flight hours actually incurred. AR, Tab 67, NextGen RFP, at B-1. Aircraft fuel was to be provided by the government or, if contractor-incurred, separately reimbursed.

⁶ Although the agency considered these communications to be clarifications rather than discussions, a number of offerors were questioned about substantive issues,

(continued...)

We conducted a hearing there to receive testimony concerning the agency's conduct of the procurement. At the end of the first day of the hearing, the GAO hearing official noted that the testimony thus far appeared to support the protesters' arguments that the communications between the agency and various offerors were discussions rather than clarifications, as described by FAR § 15.306. Thereafter, the agency decided to take corrective action by reopening the competition. AR, Tab 66, USDA Email to GAO, Sept. 6, 2012. Coulson's and 10 Tanker's protests were dismissed as academic. Coulson Aviation (USA) Inc.; 10 Tanker Air Carrier, LLC., B-406920 et al., Sept. 7, 2012. Subsequently, the Forest Service amended the NextGen solicitation and received revised proposals from offerors.

While it was conducting the NextGen large airtanker procurement, the Forest Service also awarded a number of Legacy contracts for large airtanker services. On March 27, 2013, the Forest Service awarded Neptune a Legacy contract for five P2V aircraft for 5-years, and for one P2V and one BAe-146⁷ aircraft for a base year with four option years, at a total estimated price of \$180,252,600.⁸ AR, Tab 56, Neptune Legacy Contract, at B-3 to B-21. Shortly thereafter the Forest Service modified Neptune's Legacy contract and added an additional BAe-146 aircraft for the 2013 fire season at a total estimated price of \$4,960,200.⁹ AR, Tab 61, Neptune Legacy Contract Mod. 001, May 15, 2013, at B-21.

On April 16, the TEB completed its reevaluation of offerors' NextGen large airtanker proposals. AR, Tab 69, TEB Report, Apr. 16, 2013. On May 6, the Forest Service announced its intent to make the following awards:

(...continued)

and their responses provided major revisions to their proposals. Coulson Aviation (USA) Inc.; 10 Tanker Air Carrier, LLC--Costs, supra, at 2.

⁷ Although awarded under the Legacy contract, the BAe-146 is a modern large airtanker (Neptune proposed the same type of aircraft in response to the NextGen RFP, albeit with a more advanced version of the fire retardant tank system). AR, Jan. 31, 2014, at 9 n.7; Tr. at 45.

⁸ Neptune's fuel costs were not included in the 2013 Legacy contract rates, as fuel was again to be government-provided or separately reimbursed. AR, Tab 56, Neptune Legacy Contract, at B-2. The Forest Service also made a Legacy contract award to Minden for one P2V aircraft. AR, Jan. 31, 2014, at 9.

⁹ The addition of a second BAe-146 large airtanker to Neptune's Legacy contract was not envisioned by the Forest Service to be a one-time occurrence. The agency anticipates issuing a similar contract modification for the 2014 fire season. Tr. at 79-80.

| CLIN | Awardee | Total Cost Estimate ¹⁰ | Aircraft Type |
|------|-----------------|-----------------------------------|---------------|
| 1 | Minden | \$39,459,250 | BAe-146 |
| 2 | 10 Tanker | \$43,214,043 | DC-10 |
| 3 | Coulson | \$41,312,500 | C-130Q |
| 4 | Aero-Air, LLC | \$38,941,453 | MD-87 |
| 5 | Aero-Air, LLC | \$38,941,453 | MD-87 |
| 6 | Aero-Flite Inc. | \$36,370,785 | RJ85 |
| 7 | Aero-Flite Inc. | \$36,370,785 | RJ85 |

AR, Tab 70, NextGen Contract Award Abstract, May 6, 2013.

Shortly after learning that it would not receive a NextGen contract award, Neptune informed the contracting officer of its intent to protest to our Office unless an “acceptable solution” could be worked out.¹¹ AR, Tab 11, Neptune Email to Contracting Officer, May 9, 2013. Neptune subsequently protested to our Office on May 16 challenging all of the NextGen contract awards.¹² AR, Tab 71, Neptune Protest (B-406920.8), May 16, 2013. In accordance with the Competition in Contracting Act (CICA), 31 U.S.C. § 3553(d)(3)(A), Neptune’s protest triggered a stay of the NextGen contract awards pending our resolution of the protest. Although the Forest Service had significant concerns about its ability to adequately respond to the 2013 fire season without the protested NextGen large airtankers being available, see Tr. at 127-29, the agency decided not to override the stay. See 31 U.S.C. § 3553(c)(2).

Neptune and the Forest Service had significant communications during the period between when Neptune learned it would not receive a NextGen contract and Neptune’s receipt of a sole-source contract. Specifically, the record contains many letters and emails between Neptune and the Forest Service during this period, and reflects a number of conversations between Neptune’s Chief Executive Officer

¹⁰ The total estimated cost was based on the 5-year base period for a single aircraft. AR, Tab 70, NextGen Contract Award Abstract, May 6, 2013. Although not stated in the award abstract, based on all aircraft and performance period options, the total amount per CLIN was approximately \$350-\$400 million.

¹¹ Neptune also ordered a one-day “stand down” of its flight operations after learning that it had not been selected for NextGen contract award. Tr. at 52. A stand down may be undertaken when the operator believes there is something which might distract the pilots from safely completing their missions. Tr. at 53.

¹² We dismissed Neptune’s challenge to the awards related to CLINs 1-3 because Neptune was not an interested party to challenge awards under line items for which it had not submitted a proposal. GAO Notice of Partial Dismissal (B-406920.8), June 5, 2013.

(CEO) and the Forest Service's Director of Fire and Aviation Management (FAM)¹³ and Director of Acquisition Management (AQM). See, e.g., AR, Tab 34, Forest Service Email, Sept. 10, 2013, at 1. Neptune's CEO was quite familiar with the FAM Director and other agency officials, as the CEO had been the Forest Service's AQM Director until his retirement in December 2010. AR, Jan. 31, 2014, at 57. As detailed below, the record indicates that the verbal representations of Neptune's CEO concerning the firm's financial viability were relied upon by the Forest Service when determining the agency's actions. For example, shortly before or after filing its protest, Neptune's CEO told the FAM Director that the company had made a significant investment in modern large airtankers and would go out of business without a NextGen contract award.¹⁴ Tr. at 55, 75; AR, Tab 1, FAM Director Declaration, Jan. 28, 2014, at 5.

Following a May 21 meeting between Neptune's CEO, Forest Service FAM and AQM Directors and staffs, and USDA counsel, the parties engaged in a series of settlement discussions concerning the Forest Service's noncompetitive award of a NextGen contract to Neptune pursuant to FAR § 6.302-3 (industrial mobilization) in exchange for Neptune withdrawing its May 16 protest. At the Forest Service's request, Neptune provided the agency with the firm's financial projections (i.e., expected revenue and expenses) based on various scenarios (e.g., Legacy contract only, Legacy contract plus two 10-year NextGen contracts, etc.).¹⁵ The Forest Service had USDA's Rural Utilities Service (RUS) analyze Neptune's continued financial viability based on the information provided by Neptune.¹⁶

On June 3, RUS provided USDA with its financial viability review of Neptune. AR, Tab 144, RUS Email to USDA, June 3, 2013. The RUS noted that the information provided by Neptune did not include detailed expense projections or a balance sheet and cash flow projections for the next 5-year period. Id. The RUS also

¹³ The FAM is the Forest Service program office that determines what aviation resources are needed to fulfill the agency's firefighting mission. AR, Jan. 31, 2014, at 16 n.14.

¹⁴ Neptune had also previously made an advance payment request of \$424,750 under its Legacy contract for cash-flow reasons (i.e., the lack of revenue in advance of the fire season). AR, Tab 57, Neptune Letter to Contracting Officer, Apr. 15, 2013. Neptune subsequently withdrew its request before any advance payment was made, stating that the company no longer needed the advance payment. AR, Tab 63, Neptune Email to Contracting Officer, June 26, 2013.

¹⁵ Neptune also submitted various documents (e.g., business plan, historical balance sheets and cash flow statements) with its financial projections.

¹⁶ The Forest Service believed RUS possessed financial expertise that could be of assistance. See AR, Tab 22, Contracting Officer Letter to RUS, June 25, 2013.

questioned whether Neptune had the ability to modify the payment terms of any of its existing long terms debts. Id. Accepting the projected revenues and expenses as provided by Neptune on their face, RUS ultimately concluded that the only scenario in which the company could obtain a positive net income over the next 5 years was where Neptune received two NextGen contract awards in addition to its current Legacy contract.¹⁷ Id.

On June 6, the Forest Service and Neptune entered into a written settlement agreement, under which the agency agreed to award Neptune a sole-source contract for two NextGen large airtankers in exchange for Neptune withdrawing its protest (and thereby ending the CICA stay of the NextGen contract awards).¹⁸ AR, Tab 18, Neptune Settlement Agreement, June 6, 2013. As relevant here, the settlement agreement stated that:

the Forest Service will award the Contract using noncompetitive procedures, pursuant to 41 U.S.C. § 3304(a)(3), and will comply with all related statutory and Federal Acquisition Regulation (“FAR”) requirements, including, but not limited to, CICA, and FAR 6.303-6.305.

* * * * *

The Forest Service will oppose any . . . bid protest [challenging the award or performance of the Neptune contract] with no less vigor than that applied in any other bid protest filed against it.

Id. at 3.

Neptune then withdrew its bid protest (the parties’ settlement agreement was not provided to our Office). AR, Tab 72, Neptune Letter to GAO, June 6, 2013. Our Office confirmed the withdrawal of Neptune’s protest and closed the file without rendering a decision on the protest’s merits. AR, Tab 73, GAO Confirmation of Withdrawal (B-406920.8), June 7, 2013.

¹⁷ The RUS later prepared a more formal response regarding Neptune’s financial stability, but again, merely accepted the financial projections as submitted by Neptune without determining their validity. AR, Tab 23, RUS Financial Analysis of Neptune, June 26, 2013, at 1-4.

¹⁸ The settlement agreement specified that the contract to be awarded to Neptune would be the same duration as the NextGen contract awards (i.e., a 5-year base period with five 1-year options). AR, Tab 18, Neptune Settlement Agreement, June 6, 2013, at 3.

Subsequently, the Forest Service realized that the sole-source contract promised to Neptune would require the approval of USDA's senior procurement executive (SPE).¹⁹ See FAR § 6.304(a)(4). Accordingly, on June 21 the Forest Service informed the SPE of the settlement agreement that the agency had entered with Neptune, and requested that she execute a justification and approval (J&A) for the sole-source award. Tr. at 439-41.

The SPE did several things before taking any action on the Forest Service's request. First, the SPE and her staff familiarized themselves with the NextGen procurement and the Forest Service's requirements for large airtankers generally. Tr. at 457. The SPE made a series of requests of the Forest Service for additional information, including Neptune's financial statements and balance sheets, Neptune's Legacy contract, and documents related to the NextGen procurement. Tr. at 441, 451; AR, Tab 24, SPE Email to AQM Requesting Additional Neptune Information, July 12, 2013, at 1-2. The SPE also engaged FI Consulting, an external auditing firm, to perform an independent financial viability analysis of Neptune. Tr. at 451-52.

By August 2, FI completed its assessment of Neptune's financial viability. AR, Tab 29, FI Financial Analysis, Aug. 2, 2013, at 1-3. In reaching its conclusions, FI found that Neptune had based its revenue projections for years 2-5 of the Legacy contract on the base-year rates instead of the higher, option-year rates set forth in the contract. AR, Tab 31, FI Email to USDA, Aug. 13, 2013, at 4. FI also found that Neptune had based its revenue projections for the same period on the use of seven P2V aircraft, rather than six P2V and one BAe-146 aircraft (and the higher BAe-146 rates) as specified by the terms of the Legacy contract.²⁰ Id. After also finding Neptune's expected costs to be lower than the company's projections, FI concluded that Neptune would have the financial capacity to operate and continue performing on its in-place Legacy contract with the Forest Service through, at a minimum,

¹⁹ The settlement agreement was signed on the Forest Service's behalf by its AQM Director, who was the head of the contracting activity. Pursuant to the FAR, the head of a contracting activity only has the authority to approve noncompetitive awards of up to \$62.5 million. See FAR § 6.304(a)(3). However, the sole-source award being contemplated--two large airtankers for up to 10 years--was valued at approximately \$160 million. Tr. at 107; AR, Tab 18, Neptune Settlement Agreement, June 6, 2013, exhib. A, Neptune Rate Sheet.

²⁰ As a result, Neptune's total revenue projection for its "Legacy contract only" scenario was \$157,043,792, see AR, Tab 23, RUS Financial Analysis of Neptune, June 26, 2013, at 3, while, as set forth above, the total price of Neptune's Legacy contract (as amended) was \$185,212,800--an understatement of \$28,169,008.

calendar year 2016, without any further contract awards.²¹ AR, Tab 29, FI Financial Analysis, Aug. 2, 2013, at 1.

The SPE then asked FI to perform a comparison of its conclusions with those of RUS. Tr. at 464. FI found that the fundamental difference was that RUS had solely relied on Neptune-provided financial projections while FI had had access to a wider range of information that allowed it to develop its own projections. AR, Tab 31, FI Email to USDA, Aug. 13, 2013, at 1. One such example was the difference in Neptune's revenue projections detailed above. Id. at 4. Similarly, the cost projections developed by FI assumed, per the terms of the Legacy contract, that Neptune would be reimbursed its fuel costs in addition to aircraft flight rates. Id. By contrast, "Neptune did not provide any detail with its cost projections to RUS, so it is unclear if fuel is included, or if government reimbursement is considered." Id. In a subsequent meeting conducted by the SPE, RUS employees generally agreed with the FI findings and conclusions. Tr. at 466-67.

Based on her review of all information, including the FI financial analysis, the SPE concluded that the planned sole-source contract award to Neptune for industrial mobilization reasons was not presently justified ("Neptune didn't need a contract"). Id. at 471-73. Consequently, the SPE refused to approve the sole-source award to Neptune. Id. at 473.

On August 26, the Forest Service informed Neptune that the SPE would not approve the sole-source contract contemplated by the parties' settlement agreement, insofar as the financial analysis of the additional documents provided by Neptune indicated that the company was financially viable without such a contract.²² AR, Tab 32, Forest Service Letter to Neptune, Aug. 26, 2013, at 2. The record also reflects that, after August 26, there generally was no longer any disagreement among the parties about Neptune's present financial viability. Tr. at 469-70; AR, Tab 145, FAM Email to USDA, Sept. 3, 2013.

For the next three months the Forest Service tried to reach an alternative settlement agreement with Neptune. Options offered by the Forest Service to Neptune included: (1) adding two additional BAe-146 aircraft to Neptune's Legacy contract

²¹ FI limited its formal conclusions regarding Neptune's financial viability through the 2016 time period because that is what the SPE requested FI to review. Tr. at 452-53. However, FI also expressed its opinion to the SPE that Neptune remained viable (without a sole-source award) through the end of its Legacy contract (2017). Tr. at 462.

²² The agency subsequently provided Neptune with copies of both the RUS and FI financial analyses reports. See AR, Tab 35, USDA Email to Neptune, Sept. 17, 2013, at 1; Tr. at 597, 615-16.

(beyond the eight large airtankers then being provided), AR, Tab 32, Forest Service Letter to Neptune, Aug. 26, 2013, at 2; and (2) offering Neptune a sole-source contract of such size that it could be approved below the level of the SPE (i.e., less than \$62.5 million). Tr. at 477-78; AR, Tab 36, AQM Director Email, Oct. 30, 2013. Neptune, however, rejected all offers that differed materially from the terms of the parties' settlement agreement. AR, Tab 40, Forest Service Email, Nov. 7, 2013, at 1-2. Moreover, Neptune repeatedly informed the Forest Service that Neptune would file a lawsuit against the agency if the agency did not satisfy the terms of the parties' settlement agreement. Id. at 2; Tab 146, Neptune CEO Email to FAM, Sept. 23, 2013; Tab 147, FAM Email to Forest Service Chief, Oct. 4, 2013.

Various internal meetings also took place among senior Forest Service and USDA officials, including USDA's Undersecretary for Natural Resources and Environment (NRE Undersecretary) and the Assistant Secretary for Administration (ASA),²³ in an attempt to resolve the Neptune matter.²⁴ The SPE testified that, in the meetings she attended, she heard no rationale advanced for a sole-source award to Neptune that she had not previously considered, and no rationale that she believed properly justified such an award. Tr. at 536.

At that time, the request for approval of the J&A was elevated to the ASA, a level above the SPE within the agency's hierarchy. The SPE had several conversations with the ASA in which she recommended that he not approve the J&A as there was not a valid justification for doing so. Tr. at 480-85, 525-28; AR, Tab 149, SPE Briefing Paper for ASA, Oct. 7, 2013, at 1-7. On December 2, the SPE provided the ASA with a detailed memorandum and documents in support of her recommendation that he not approve the J&A. AR, Tab 44, SPE Memorandum to ASA Regarding Sole-Source Award to Neptune, Dec. 2, 2013, at 1-112. Specifically, in making her recommendation the SPE stated as follows:

General – Public policy, the Competition in Contracting Act, and the FAR promote competition to ensure a fair playing field for firms interested in doing business with the Federal government. Competition encourages innovation and lower prices. Noncompetitive awards should be limited to only what is needed to achieve the objective, in this case to maintain a vital source of supply In this case, we have a competitive field and recently

²³ The ASA is USDA's Chief Acquisition Officer, and the SPE reports to the ASA. Tr. at 480.

²⁴ One such meeting resulted in the Forest Service offering Neptune a smaller sole-source contract (based on a 70-day MAP) that had been approved by the AQM Director. AR, Tab 148, Neptune Settlement Contract Offer, Oct. 31, 2013.

awarded multiple contracts on a competitive basis to five firms from a pool of eight firms that submitted proposals on the solicitation.

Rationale – The rules do not support the issuance of a sole source award based on the fact that a firm did not win a competitive procurement or in exchange for a particular action, such as the withdrawal of a protest or [Freedom of Information Act] request.

Neptune's Financial Stability - . . . [A]n independent financial review revealed that Neptune has the financial capacity to operate and continue to supply planes under the current contract with no further contract awards. There's no evidence to support the assertion that Neptune would not be able to meet an emergency need for aircraft.

Maintain Capacity and Employee Skills - The [Forest Service] currently has a supplier base of five firms on the Next Gen contract. These firms are building both capacity and employees skills. [Forest Service] also has two firms on the legacy contract that can supply planes. Neptune has supplied Next Gen type planes on the existing legacy contract and others could be added provided it is within the scope of that contract.

Balanced Supply Source – It is not clear how a noncompetitive award to Neptune would create a balanced source of supply It seems like if we're interested in creating a balanced source of supply we would award more air tankers to the other legacy contractor, Minden, or add more air tankers to the current Next Gen contractors versus issuing a noncompetitive award to an unsuccessful offeror.

Id. at 3-4.

The SPE was not the only agency official providing advice to the ASA. On November 26, the NRE Undersecretary recommended the award of a sole-source contract to Neptune. AR, Tab 43, NRE Undersecretary Memo to ASA, Nov. 26, 2013, at 1-2. The NRE Undersecretary emphasized the importance of large airtankers for wildland firefighting and the Forest Service's need for additional airtankers, particularly with regard to the 2014 fire season. Id. at 1. The NRE Undersecretary also stated that, insofar as USDA counsel had determined that awarding a sole-source contract here was permitted and Neptune had airtankers available, he strongly recommended the award of two NextGen aircraft to Neptune for up to 10 years. Id.

On December 9, the ASA executed a J&A for the sole-source award to Neptune for two NextGen aircraft (for a 4-year base period with five 1-year options) at a total

estimated price of \$141,774,740.²⁵ AR, Tab 49, Neptune J&A, Dec. 9, 2013, at 1. The J&A stated the following justification for the sole-source award to Neptune:

Pursuant to FAR 6.302-3(b) [sic] (i),(ii),(iii) and (vi) [sic], the use of the industrial mobilization exception to the requirement to use full and open competition is appropriate when it is necessary to-- (i) [k]eep vital facilities or suppliers in business or make them available in the event of a national emergency; (ii) prevent the loss of a supplier's ability and employees' skills; (iii) maintain an acceptable balance of sources; and (vi) [sic] provide for an adequate industrial base by dividing the supply among two or more contractors. The Forest Service has determined that based on all the above reasons, it has become necessary to invoke this authority with respect to Neptune Aviation, whose resources and equipment must be available to provide key services if the Forest Service is to successfully fulfill its mission.

Critical to this justification are the following facts:

1. The Forest Service considers Neptune to be a vital supplier of airtankers.²⁶
2. Neptune currently has available and ready to operate two airtankers that meet the specifications of the NextGen contract.
3. The Forest Service is not confident that five of the seven contracted NextGen airtankers will be available to fight fires in 2014.²⁷
4. Even assuming all seven NextGen airtankers are available to fight fires in 2014, the Forest Service still will have only 16 [large

²⁵ The ASA did not find anything wrong with the SPE's rationale, and acknowledged her procurement expertise. Tr. at 691, 696. Rather, the ASA believed there existed a "professional disagreement" between her view and his regarding the matter, and that the SPE's procurement expertise did not extend to understanding the Forest Service's firefighting mission. Tr. at 691.

²⁶ "Neptune Aviation [presently] supplies the Forest Service with 8 of the 9 total Legacy airtankers, which represents 88 percent of the Legacy fleet." AR, Tab 49, Neptune J&A, Dec. 9, 2013, at 1.

²⁷ The Forest Service issued cure notices to Coulson, Minden, Aero Air, and Aero-Flite in September 2013 for failure to provide approved NextGen airtankers by the contracts' MAP start dates. Coulson made its airtanker available shortly thereafter, AR, Jan. 31, 2013, at 21, and the Forest Service accepted the cures proposed by the other contractors. See e.g., AR, Tab 84, Forest Service Letter to Aero-Flite, Dec. 12, 2013.

airtankers], which is two [large airtankers] fewer than the minimum needed to fulfill its firefighting mission.

5. 9 of the 16 potential [large airtankers] for 2014 are older and riskier to operate than newer NextGen airtankers.

6. In 2017, the number of [large airtankers] under contract to the Forest Service will decrease from 16 to 7, with the expiration of the Legacy contracts, unless additional NextGen airtankers are procured from the current NextGen contractors.

7. Only two of the five NextGen contractors are now in compliance with the contract and providing operational airtankers.

Id. at 3-4.

Absent from the J&A, however, was any discussion regarding Neptune's need for a sole-source contract to remain a source of supply.²⁸ See AR, Tab 49, Neptune J&A, Dec. 9, 2013, at 1-6.

The J&A also stated that the agency took into account alternative resources, and found there were no certified large airtankers currently available that were not already under contract with the Forest Service capable of meeting NextGen contract requirements.²⁹ Id. at 2, 4. In this regard, however, the J&A did not address the fact that both 10 Tanker and Coulson had previously approached the Forest Service about adding additional airtankers to their NextGen contracts (two additional airtankers in the case of Coulson), and that 10 Tanker had delivered a second certified airtanker to the Forest Service for the 2013 fire season. AR, Jan. 31, 2014, at 25-26; Tab 1, FAM Director Declaration, Jan. 28, 2014, at 7; Tr. at 138, 235.

A noncompetitive contract was awarded to Neptune on December 12. Although the J&A supported an award of two NextGen large airtankers for up to 9 years at a total estimated cost of \$141,774,740, the contract actually awarded to Neptune permitted (by mutual agreement) the addition of two more airtankers to the first CLIN and

²⁸ In fact, at the hearing conducted by our Office, the ASA testified that the financial analysis conducted by FI "led [USDA] to an understanding that Neptune would not go out of business." Tr. at 700. The ASA also stated (repeatedly) that his rationale for the sole-source award to Neptune concerned the Forest Service's ability to have enough large airtankers available for the 2014 fire season--not the viability of Neptune as a source of supply. Tr. at 657-693. Specifically, the ASA stated that he "wanted to be sure that we could ensure that the Forest Service would be able to meet its mission of responding to forest fires" for the 2014 season. Tr. at 658.

²⁹ The J&A also stated that no other sources had expressed interest in this acquisition, but then acknowledged the agency had made no effort to solicit responses from any other sources before making its determination. Id. at 4-5.

three more airtankers to the second CLIN in each contract year. AR, Tab 54, Neptune Contract No. AG-024B-C-14-9000, at B-1. Based on all possible aircraft, the total estimated cost of the sole-source contract actually awarded to Neptune is \$496,211,590.³⁰

These protests followed publication of the sole-source award to Neptune in FedBizOpps.

DISCUSSION

CICA's overriding mandate is for "full and open competition" in government procurements, obtained through the use of competitive procedures. 41 U.S.C. § 3301(a)(1). Agencies are provided, however, with authority to conduct noncompetitive procurements in specific limited circumstances. 41 U.S.C. § 3304(a). When an agency uses noncompetitive procedures under 41 U.S.C. § 3304(a), it is required to execute a written J&A with sufficient facts and rationale to support the use of the cited authority. See 41 U.S.C. § 3304(e); FAR §§ 6.302-3(c), 6.303, 6.304; Sabreliner Corp., B-288030, B-288030.2, Sept. 13, 2001, 2001 CPD ¶ 170 at 5. Our review of an agency's decision to conduct a noncompetitive procurement focuses on the adequacy of the rationale and conclusions set forth in the J&A. Missouri Mach. & Eng'g Co., B-403561, Nov. 18, 2010, 2010 CPD ¶ 276 at 3; SSI Tech., Inc., B-298212, B-298212.2, July 14, 2006, 2006 CPD ¶ 183 at 4.

Where a federal agency makes a sole-source award for purposes of maintaining a particular source for an item or service, concern for maximizing competition is secondary to the agency's industrial mobilization needs. Outdoor Venture Corp., B-405423, Oct. 25, 2011, 2011 CPD ¶ 241 at 2; Ridgeline Indus., Inc., B-402105, Jan. 7, 2010, 2010 CPD ¶ 22 at 3. Decisions as to which suppliers should be included in a mobilization base, and which restrictions are required to meet the needs of industrial mobilization, involve complex judgments that are generally left to the discretion of the federal agencies. We will question those decisions only if the evidence shows that the agency has abused its discretion. See Ridgeline Indus., Inc., supra; Minowitz Mfg. Co., B-228502, Jan. 4, 1988, 88-1 CPD ¶ 1 at 3. We will sustain a protest, however, where an agency's J&A fails to demonstrate that it is in fact necessary to award a contract to a particular source for industrial mobilization purposes. NI Indus., Inc., Vernon Div., B-223941, Dec. 15, 1986, 86-2 CPD ¶ 674 at 3.

As explained below, the record does not support the USDA's decision to award a sole-source contract to Neptune for industrial mobilization purposes. Rather, the

³⁰ The \$496,211,590 figure consists of Neptune's \$70,887,370 total cost per aircraft times seven aircraft. See AR, Tab 49, Neptune J&A, Dec. 9, 2013, attach. A, Calculation of Total Estimated Cost.

record demonstrates that the sole-source contract--promised by the Forest Service in exchange for Neptune's withdrawal of an earlier bid protest--was without a reasonable basis.

Interested Party Status of Coulson and Minden

As a preliminary matter, USDA argues that the Coulson and Minden protests should be dismissed because these protesters are not interested parties. Specifically, the agency contends that Coulson and Minden did not have additional large airtankers available at the time the J&A was signed that would be capable of performing the requirements of the Neptune sole-source contract (which has an April 28, 2014, start date).³¹ The USDA contends, citing to our decision in Merlin Int'l, Inc., B-310611, Jan. 2, 2008, 2008 CPD ¶ 66, that a protester is not an interested party to challenge a sole-source award unless it can meet all of the agency's requirements at the time of the sole-source determination.

Coulson and Minden respond that they are interested parties to protest here because they have a direct economic interest that would be affected by the award of a sole-source contract to Neptune. Coulson points to the fact that in October 2013 it offered to provide the Forest Service with two additional large airtankers under the NextGen contract, and argues it would be available and ready to perform by an April 28, 2014, start date (as established by the contract awarded to Neptune). Coulson Protest, Dec. 20, 2013, at 7-8; Coulson Protest, Feb. 10, 2014, at 4. Likewise, Minden states that it owns a second aircraft (BAe-146) that it is converting into an airtanker, and would be able to submit a proposal should the Forest Service conduct another competitive procurement. Minden Protest, Feb. 10, 2014, at 2-3. Both Coulson and Minden also point to the fact that the sole-source award to Neptune makes it less likely that the Forest Service would execute airtanker options under the competitively-awarded NextGen contract.

In order for a protest to be considered by our Office, a protester must be an interested party, that is, an actual or prospective offeror whose direct economic interest would be affected by the award or failure to award a contract. 4 C.F.R. §§ 21.0(a)(1), 21.1(a) (2013); Cattlemen's Meat Co., B-296616, Aug. 30, 2005, 2005 CPD ¶ 167 at 2 n.1. Determining whether a party is interested involves consideration of a variety of factors, including the nature of the issues raised, the benefit or relief sought by the protester, and the party's status in relation to the

³¹ The agency points to the fact that the NextGen contracts include "exclusive-use" restrictions, such that the large airtankers that Coulson and Minden each already have under NextGen contract cannot also be offered to meet additional agency requirements. AR, Jan. 31, 2014, at 32. The agency does not dispute that 10 Tanker had an additional airtanker available (in fact, already performing) that met Forest Service requirements at the time the J&A was signed.

procurement. Sales Res. Consultants, Inc., B-284943, B-284943.2, June 9, 2000, 2000 CPD ¶ 102 at 5. The determination of whether a party is interested to challenge a sole-source award involves considering, among other things, the basis of the sole-source award.

We find Coulson and Minden (and 10 Tanker) to be interested parties to challenge the reasonableness of the agency's sole-source award to Neptune for industrial mobilization reasons, as the protesters all have a direct economic interest that would be affected by the award of such a contract. If the protesters were to prevail in their challenge, and the agency decided to meet its requirements by means of another competitive procurement for large airtankers, the protesters here would all be eligible to compete. Similarly, if the protesters were to prevail in their challenge and the agency decided to meet its requirements by exercising options available to it under the NextGen contract, the protesters would be interested and eligible to receive such orders.

The Settlement Agreement

The protesters contend that the sole-source award to Neptune was improper, insofar as the agency promised to enter into the contract in exchange for Neptune withdrawing its protests of the NextGen contract awards. In this regard, the protesters claim that the agency's actions have been motivated by the desire to fulfill the terms of a settlement agreement and to avoid a lawsuit by Neptune for allegedly breaching that agreement. The protesters argue that the agency "put the cart before the horse," and agreed to settle Neptune's protest before properly determining that the promised sole-source award complied with CICA. Coulson Protest, Feb. 10, 2014, at 55. The protesters also point to the fact that the only legitimate financial analysis conducted (the analysis by FI) demonstrated that Neptune did not require a sole-source contract to remain viable, as recognized by the agency's SPE, who refused to approve the J&A. 10 Tanker Protest, Feb. 10, 2014, at 120-35.

The USDA does not dispute that its consideration of a noncompetitive award to Neptune was motivated by its promise of a sole-source contract in exchange for Neptune withdrawing its bid protest and thereby ending the CICA stay that then precluded the Forest Service from fielding NextGen large airtankers for the 2013 fire season. See AR, Jan. 31, 2014, at 55. Nevertheless, USDA argues that it did not act improperly because the sole-source award complied with all applicable procurement statutes and regulations. Id. at 55-56.

A settlement agreement promising award of a contract on a sole-source basis in exchange for abandoning ongoing litigation, such as a bid protest, is not a permissible basis for restricting competition and excluding potential offerors. Earth Prop. Servs., Inc., B-237742, Mar. 14, 1990, 90-1 CPD ¶ 273 at 4-5, aff'd, B-237742.2, June 11, 1990, 90-1 CPD ¶ 546; Techplan Corp., B-234161, May 12,

1989, 89-1 CPD ¶ 452 at 5. For example, our Office upheld a protest of a sole-source award where an agency justified its failure to conduct a full and open competition on the basis that it had entered a settlement agreement promising the award of a contract in exchange for abandoning a threatened contract claim. Earth Prop. Servs., Inc., supra. Quite simply, the existence of a settlement agreement does not permit a contracting agency to act in ways not otherwise permitted by applicable statutes and regulations. Id. at 5; see York Int'l Corp., B-244748, Sept. 30, 1991, 91-2 CPD ¶ 282 at 4-5 (settlement agreements will not be enforceable if they fail to comply with applicable statutes and regulations).

As detailed below, the Forest Service entered into a settlement agreement with Neptune on the basis that the award of a sole-source, NextGen-type contract was necessary to maintain Neptune as a vital source of large airtankers. The independent financial analysis subsequently performed by FI on behalf of USDA concluded that Neptune did not require the award of a sole-source contract to remain financially viable. Nothing in the record refutes FI's conclusions, nor is there any evidence to suggest that Neptune intends to go out of business now merely because its future prospects appear uncertain. In sum, while the agency may not have entered into a settlement agreement promising to disregard applicable procurement statutes and regulations, the agency's subsequent decision to award a sole-source contract to Neptune so as to comply with the terms of the settlement agreement and avoid a Neptune-threatened lawsuit was without a reasonable basis.

Sole-Source Award Justification

As set forth above, agencies are generally required to conduct procurements using procedures designed to obtain full and open competition. 41 U.S.C. § 3301(a)(1); FAR § 6.101. One exception to this requirement is where an agency determines that it is necessary to maintain a vital source of supply for industrial mobilization.³² In relevant part, the FAR states as follows:

(2) Full and open competition need not to be provided for when it is necessary to award the contract to a particular source or sources in order--

³² While there is both documentation and testimony suggesting some USDA and Forest Service officials believed the sole-source award here was based on urgency (i.e., having enough large airtankers available for the 2014 fire season, see Tr. at 658), the agency acknowledges that the 9-year, sole-source contract awarded to Neptune was based on the industrial mobilization exception to CICA. AR, Jan. 31, 2014, at 34-54.

(i) To maintain a facility, producer, manufacturer, or other supplier available for furnishing supplies or services in case of a national emergency or to achieve industrial mobilization.

FAR § 6.302-3(a).

The protesters generally do not dispute that the Forest Service requires additional large airtankers to perform its firefighting mission. Rather, the protesters challenge the reasonableness of the agency's determination that the sole-source contract here is necessary to maintain a vital source of supply. Specifically, the protesters argue that: (1) Neptune is not a vital supplier such that the large airtanker industrial base can be maintained without resorting to noncompetitive procurements; and (2) Neptune does not require a sole-source contract to remain a source of large airtankers.

In responding to the protests, the agency has acknowledged that it was initially concerned that Neptune would "immediately go out of business in during [sic] the 2013 fire season, leaving the Forest Service without any of the Legacy air tankers Neptune supplied under the contract awarded March 27, 2013." Agency Post-Hearing Comments, Mar. 18, 2014, at 5. The agency admits, however, that ultimately it concluded there was no concern with Neptune's present viability, but only with its viability after 2017.³³ *Id.* at 6-7. Consequently, the agency argues, the J&A was not grounded on the agency's belief that Neptune would immediately go out of business without a NextGen contract, but was based on its concern with Neptune's continued availability as a large airtanker supplier after 2017 when its Legacy contract expired.³⁴ AR, Feb. 19, 2014, at 3-7. However, changing its focus during the course of the protests, the agency has also argued that its actual concern is whether it could obtain sufficient NextGen airtankers for the 2014 fire season. See Agency Post-Hearing Comments, Mar. 18, 2014, at 9-10, 21; see also Tr. at 657-693. In this regard, the agency maintains that it cannot tolerate any further delay in acquiring additional NextGen airtankers for the 2014 fire season. Agency Post-Hearing Comments, Mar. 18, 2014, at 28. The Forest Service contends that this immediate need for additional NextGen airtankers provided it with "an industrial mobilization need in December 2013" when it decided to award Neptune a sole-source, 9-year contract for NextGen airtanker services. *Id.* at 32.

³³ In fact, the agency acknowledges that "[t]he record demonstrates Neptune did not represent to the Forest Service, that it would immediately go out of business without a NextGen contract." AR, Feb. 19, 2014, at 5 (emphasis in original).

³⁴ For this reason, the agency argues, the FI financial analysis, which did not look beyond a 5-year period, was not relevant or relied upon in the J&A. AR, Feb. 19, 2014, at 3-4, 8.

Based upon our review of the record, including the J&A, its supporting documentation, the agency's submissions in response to these protests, and the testimony of the agency's representatives at the hearing held at our Office, the agency has failed to demonstrate that Neptune requires a sole-source contract to remain a source of large airtanker services for the Forest Service. Although the J&A documents the agency's belief that Neptune is, presently, a vital supplier of large airtanker services under Neptune's Legacy contract,³⁵ the J&A is devoid of evidence or analysis supporting the need to provide Neptune with a sole-source award for the firm to remain a viable source of supply. Rather, the record demonstrates, as acknowledged by the agency, that Neptune is presently financially viable and is expected to remain financially viable through the term of its Legacy airtanker contract (2017). Moreover, apart from Neptune's own unsupported statements and the anecdotal views of various agency officials, the record contains no analysis or evidence of Neptune's financial condition after 2017.³⁶

As detailed above, the agency had two financial analyses of Neptune conducted after the company alleged it would go out of business without a NextGen contract award. First, RUS's conclusion, that Neptune needed a NextGen contract to remain viable, was based entirely on unverified financial projections as provided by Neptune. By contrast, the second analysis conducted by FI--which did not simply accept Neptune's projections--found that Neptune's revenue projections were inconsistent with the terms of the Legacy contract, that Neptune's expected costs were lower than the company had itself projected, and that Neptune did not require a NextGen contract to remain viable through the term of the Legacy contract. At no

³⁵ To the extent Neptune now represents a vital source, it is because of its Legacy contract. Neptune currently provides eight of nine "Legacy" airtankers (this includes the two BAe-146 aircraft provided by Neptune for the 2013 fire season). Although the Forest Service's long term modernization strategy calls for 18-28 modern large airtankers, the Forest Service is currently dependent upon Legacy large airtankers to meet its needs. Consequently, the Forest Service's belief that Neptune is a vital source, as documented in the J&A, is based upon Neptune's supply of Legacy large airtankers, which the NextGen contract awards were designed to ultimately replace.

³⁶ Neptune and USDA reason that because Neptune currently has no contract in place for large airtanker services after 2017, this demonstrates that Neptune cannot remain viable after 2017. Further, USDA argues the fact that Neptune would not have Legacy-contract revenues after 2017 "was so obvious as to not warrant any business analysis focused on the years after 2017." Agency Post-Hearing Comments, Mar. 18, 2014, at 7. These assertions, however, ignore the possibility or likelihood of Neptune acquiring additional work over the course of the next 4 years. See Tr. at 735-36 (the agency plans to conduct additional competitions in the coming years under which Neptune would be eligible to compete and could receive awards).

time before the J&A was approved were FI's conclusions disputed or shown to be in error.³⁷ Moreover, while FI's conclusions were limited to the period through 2017, at no time did the agency conduct any other analysis to determine Neptune's financial viability after 2017. Tr. at 735; Agency Post-Hearing Comments, Mar. 18, 2014, at 7. Accordingly, while the agency contends that the J&A did not rely on the FI financial analysis to assess Neptune's long-term viability, neither did the agency rely on any other information when making such an assessment. In fact, there is simply no record--in the J&A or otherwise--of any assessment by the agency of Neptune's long-term viability.

Additionally, the agency's apparent belief that an immediate need for NextGen airtankers in 2014 justified the award of a sole-source, 9-year contract on the basis of industrial mobilization is not supported and has no rational basis. The industrial mobilization exception to competition requirements may be used where an agency determines that "it is necessary to award the contract to a particular source . . . in order . . . [t]o maintain a . . . [vital] supplier" FAR § 6.302-3(a)(2)(i). As noted above, no reasoned analysis has been presented to support a determination that a 9-year, sole-source contract was required to maintain Neptune as a source. To the extent the agency believed an urgent need for large airtanker services would justify a noncompetitive 9-year contract, there is no analysis or explanation in the record demonstrating that this is so.³⁸

We find it both premature and unreasonable for USDA to determine that Neptune requires a sole-source contract now in order to maintain Neptune as a source of large airtanker services after 2017. In addition to its current Legacy contract (including options for more airtankers being placed under the Legacy contract), Neptune is not precluded from competing on work--Forest Service or otherwise--in the coming years. The record also reflects that the NextGen contracts represent the primary, but not only, means by which the Forest Service plans to meet its

³⁷ In fact, Neptune states that its "going out of business" concerns applied to the period after the end of the Legacy contract in 2017. Neptune Comments, Feb. 24, 2014, at 3-5, citing AR, Tab 150, Neptune Financial Assumptions, May 29, 2013 ("[b]ased on denial of contracts under the Next Generation Airtanker Services Solicitation, Neptune is now faced with extinction after the expiration of the Legacy Contracts").

³⁸ Any sole-source contract based on urgency presumably would have been 1 year in length (i.e., the 2014 fire season), not 9 years. See FAR § 6.302-2(d) (the total period of a noncompetitive contract awarded on the basis of urgency generally may not exceed the time necessary to satisfy the urgent needs). Moreover, had the agency used this separate authority as the basis for its noncompetitive contract award, the agency would have been required to request offers from as many potential sources as is practicable under the circumstances. FAR § 6.302-2(c)(2).

modernization strategy goal of 18-28 modern large airtankers. In fact, the ASA testified that the agency plans to conduct additional competitions in the coming years under which Neptune is eligible to compete and could receive awards. Tr. at 735-36. Moreover, given the contract options available to the Forest Service under the competitively-awarded NextGen contracts, Neptune may no longer represent a vital source that must be maintained by the Forest Service after 2017. While agencies have authority to make noncompetitive awards when necessary to maintain vital sources, they do not have authority to make noncompetitive awards merely because an offeror is unsuccessful in a competitively-conducted procurement, or because such action was promised in a settlement agreement. See York Int'l Corp., supra; Department of the Army--Recon., B-237742.2, June 11, 1990, 90-1 CPD ¶ 546.

Accordingly, while the J&A may demonstrate that the Forest Service needs more large airtanker services than it currently has under contract, the J&A completely fails to demonstrate that Neptune must be the supplier of such services or that Neptune currently requires a 9-year sole-source contract to keep it in business as a vital supplier for the agency's post-2017 needs. Just as an agency is not permitted to make a noncompetitive award that exceeds the size or duration of an identified urgency, see FAR § 6.302-2(d), an agency is also not permitted to make a noncompetitive award for industrial mobilization reasons where, as here, there has been no showing that the award is presently necessary to maintain a supplier even if deemed vital. NI Indus., Inc., Vernon Div., supra. Neptune would undoubtedly prefer the financial security that would accompany a long-term NextGen contract, but this is simply not the standard by which an agency is permitted to make a noncompetitive award for industrial mobilization purposes. See FAR § 6.302-3.

Inaccuracies in J&A

As a final matter, in addition to the fundamental lack of support for the J&A's premise that Neptune now requires a 9-year sole-source contract in order to maintain the firm in the future as a vital supplier of aircraft, the record reflects that the J&A was premised on materially inaccurate information. As stated above, our review of an agency's decision to conduct a noncompetitive procurement focuses on the adequacy of the rationale and conclusions set forth in the J&A. The adequacy of the rationale and conclusions set forth in the J&A is dependent on the completeness and accuracy of the information included in the J&A. See Sabreliner Corp., supra. We find the J&A to be incomplete and inaccurate in certain key regards.

FAR § 6.303-2 identifies information required for an agency's justification of a noncompetitive procurement, stating, among other things, that the J&A "shall include . . . [a] description of the supplies or services required to meet the agency's needs (including the estimated value)," "[a] demonstration that the . . . nature of the acquisition requires use of the authority cited," and "[a] description of the market

research conducted . . . and the results or a statement of the reason market research was not conducted.” FAR § 6.303-2(b)(3), (5), (8). Here, the Forest Service’s description in its J&A of its noncompetitive requirements, as well as its consideration of alternative sources of supply, is inaccurate.

Specifically, the J&A describes the services to be provided by Neptune as two NextGen large airtankers for up to 9 years, at a total estimated value of \$141 million. AR, Tab 49, J&A, Dec. 9, 2013, at 1. The record shows, however, that the contract subsequently awarded to Neptune included the option of five additional large airtankers, for up to 9 years each, at a total estimated value of approximately \$496 million--more than three times greater than what was approved. See AR, Tab 54, Contract No. AG-024B-C-14-9000, at B-1. Thus, the agency’s J&A inaccurately described the services to be obtained from Neptune on a noncompetitive basis.³⁹ This is significant because where, as here, an agency proposes to award a sole-source contract under the industrial mobilization exception to the general competition requirements, the amount being ordered must meet--not exceed--the objectives of this authority. See FAR § 6.302-3(b)(iii) (when the quantity required is substantially larger than the quantity that must be awarded in order to meet the objectives of this authority, that portion not required to meet such objectives will be acquired by providing for full and open competition); Honorable Dan Burton, B-265884, Nov. 7, 1995, 1995 U.S. Comp. Gen. LEXIS 735 at *12. Alternatively, if the J&A was accurate here, then the contract awarded to Neptune impermissibly exceeded what the ASA had approved.

Similarly, when considering alternative sources and the market research regarding such sources, the J&A states that “[t]here are no certified [large airtankers] currently available that aren’t already under contract with the Forest Service. Aircraft capable of meeting these standards and requirements are not readily available and would take a considerable amount of time to be developed and operationally ready for service.” AR, Tab 49, J&A, Dec. 9, 2013, at 4. This statement is also factually inaccurate insofar as 10 Tanker had a certified large airtanker currently available, which the Forest Service actually contracted for in 2013. The J&A also failed to consider the additional large airtankers that Coulson had offered to make available to the Forest Service. The fact that the J&A was inaccurate with regard to alternative sources is also important because where, as here, an agency proposes to award a sole-source contract premised on the vital nature of a supplier, it must

³⁹ The agency argues that it did not have to include the additional aircraft in the J&A’s description, inasmuch as these bilateral options would not be included in determining the required justification approval level as set forth in FAR § 6.304(d). AR, Feb. 19, 2014, at 17. We find this argument to be entirely without merit, and the reliance on FAR § 6.304(d) misplaced; an accurate description of the services being obtained on a noncompetitive basis is not limited to the options that must be included when determining the J&A’s approval authority.

accurately consider whether the industrial base can be maintained without resorting to noncompetitive procurements. While the agency argues the fact that other contractors may have airtankers available to perform Neptune's contract to be irrelevant here, AR, Jan. 31, 2014, at 52, we fail to see how the agency can reasonably find Neptune to be a vital source without accurately considering all sources. See FAR § 6.302-3; see also Lance Ordnance Co. Inc.; Martin Elecs., Inc., B-246849, B-246952, Mar. 31, 1992, 92-2 CPD ¶ 29 at 3-4.

RECOMMENDATION

In sum, the J&A and its supporting documents, as well as the agency's submissions in response to these protests and the testimony of the agency representatives at the hearing held by our Office, demonstrate that the sole-source award to Neptune was promised in exchange for Neptune's withdrawal of an earlier protest, and that there was not a reasonable basis for the agency's action.

Accordingly, we recommend that the agency reassess whether a sole-source contract with Neptune--for industrial mobilization reasons or any other reason--is necessary to meet its needs with regard to large airtanker services. If the agency reasonably determines that the award of a contract on a sole-source basis to Neptune is necessary for large airtanker services, the agency should execute a properly-reasoned J&A for the sole-source award. If the agency determines the award of a contract on a sole-source basis to Neptune for large airtanker services is not necessary or that the contract awarded to Neptune does not reflect the agency's reasonably justified needs, the agency should terminate that contract or modify it as appropriate. We also recommend that the agency reimburse Coulson, 10 Tanker, and Minden the costs of filing and pursuing their protests, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). The protesters should submit their certified claims for costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days after receipt of this decision. Id., § 21.8(f)(1).

The protests are sustained.

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General Counsel