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December 18, 2017

Government Accountability Office
General Counsel
Attn.: Procurement Law Control Group
441 G Street, NW.
Washington, DC 20548

Sent via email to: protests@gao.gov

To the Government Accountability Office:

I am writing on behalf of Fenton Communications and New Heights Communications to protest Environmental Protection Agency (EPA) contract EP18H000025, awarded on December 7, 2017 to Definers Corp.. This grant was awarded on a no-solicitation basis, even though the services sought are industry standard and could be performed by dozens of firms and organizations, including Fenton Communications and New Heights Communications. We are seeking a finding that the contract was impermissibly awarded on a no-bid basis, and a recommendation that the December 7 contract be rescinded and an open bidding process undertaken.

The Protesting Firms

Fenton Communication is a 35-year old full-service communications agency with offices in Washington, D.C., New York, Los Angeles and San Francisco, with more than 45 staff serving a diverse array of clients. Among the many services Fenton provides, it routinely collects news clips and provides analysis of media coverage of its clients. Fenton has performed government contracts in the past, but does not currently. Fenton provides the services covered by EPA contract EP18H000025, so far as it can be determined what the contract involves, would have offered a bid if it had been solicited, and would bid for the contract if an open-bid process were to be held. Fenton Communications is an interested party for the purpose of filing a protest to contract EP18H000025.

New Heights Communications is a communications agency based in Washington, D.C. Among the many services New Heights Communications provides, it routinely collects news clips and provides analysis of media coverage of its clients. New Heights Communications has previously performed as a government subcontractor. New Heights Communications provides the services covered by EPA contract EP18H000025, so far as it can be determined what the contract involves, would have offered a bid if it had been solicited, and would bid for the contract if an open-bid process were to be held. New Heights Communications is an interested party for the purpose of filing a protest to contract EP18H000025.

Basis for Protest

On December 7, 2017, the EPA awarded contract EP18H000025 to Definers Corp. for \$125,000.¹ The contract description states the contract is awarded for: “NEWS ANALYSIS AND BRIEF SERVICE FOCUSING ON EPA WORK AND OTHER TOPICS OF INTEREST TO EPA.”² The contract was not competed.³ EPA noticed on November 29 that it planned to issue the contract on a sole-source basis with a similarly obscure contract synopsis that did not plainly describe the services sought: “Sole Source Notification for News analysis and brief service focusing on EPA work and other topics of interest to EPA.”⁴

News reports⁵ indicate the contract is a successor contract to EP16H000137, a \$207,597 contract awarded on February 25, 2016 to Bulletin Intelligence, Inc.⁶

EPA spokesperson Nancy Grantham told Mother Jones, “The Definers contract is for media monitoring/newsclip compilation.” Another EPA spokesperson, Jahan Wilcox, told the New York Times, “Definers was awarded the contract to do our press clips at a rate that is \$87,000 cheaper than our previous vendor and they are providing no other services.”

The 2016 contract was competitively bid, in a simplified process involving eight bidders.⁷ The statement of work for the contract describes a news clipping and compilation service to provide a daily briefing to EPA: a “daily news briefing which will summarize, interpret, and electronically disseminate print and broadcast news related to EPA interests.” The statement of work requires that the contractor be familiar with EPA’s mission, be able to access a broad range of media sources, and synthesize news clips into multiple daily briefings.⁸ These are standard services for communications companies, and do not require any particular specialized or proprietary skills or technologies, as evidenced by the multiple bidders for the 2016 contract.

Federal law establishes that full and open competition is the standard means for contracting.⁹ There are exceptions to the strong presumption of competitive bidding. These include instances where this is “only one responsible source and no other supplies or services will satisfy agency

¹ <https://www.usaspending.gov/Transparency/Pages/AwardSummary.aspx?AwardID=59978626>

² <https://www.usaspending.gov/transparency/Pages/TransactionDetails.aspx?RecordID=53D2AF0E-B566-47BB-8EB4-728DAC00CEB7&AwardID=59978626&AwardType=C>

³ <https://www.usaspending.gov/transparency/Pages/TransactionDetails.aspx?RecordID=53D2AF0E-B566-47BB-8EB4-728DAC00CEB7&AwardID=59978626&AwardType=C>

⁴ <https://www.fbo.gov/index?s=opportunity&mode=form&id=479f24101a13dd3ab53e37f06c231a4f&tab=core&tabmode=list&=>

⁵ See <http://www.motherjones.com/politics/2017/12/the-epa-hired-a-major-republican-opposition-research-firm-to-track-press-activity/> and <https://www.nytimes.com/2017/12/15/us/politics/epa-scott-pruitt-foia.html>

⁶ <https://www.usaspending.gov/Transparency/Pages/AwardSummary.aspx?AwardID=49688963>

⁷ <https://www.usaspending.gov/transparency/Pages/TransactionDetails.aspx?RecordID=3B728BF9-DC6E-45F1-BF65-BA5E42ACFE4C&AwardID=49688963&AwardType=C>

⁸ Statement of Work, Daily News Briefing, U.S. Environmental Protection Agency, available at: https://www.fedconnect.net/FedConnect/PublicPages/PublicSearch/Public_Opportunities.aspx.

⁹ 41 USC 3301(a)(1) (“[A]n executive agency in conducting a procurement for property or services shall— (1) obtain full and open competition through the use of competitive procedures in accordance with the requirements of this division and the Federal Acquisition Regulation”).

requirements,” where there is an urgent condition, where there is a public interest rationale, or in national security and other grounds that are not relevant here.¹⁰

In the case of simplified acquisition procedures, for smaller-sized contracts, the law requires agencies to “promote competition to the maximum extent practicable.”¹¹ If a formal notice of contracting opportunity is not afforded, agencies are encouraged to “consider solicitation of at least three sources to promote competition to the maximum extent practicable.”¹² In determining whether to solicit competition, the contracting officers shall take into account a number of factors, including whether the service to be obtained is highly competitive, the urgency and dollar value of the contract, and past experience.¹³ Sole-source solicitation is permitted where only one vendor is reasonably available, following the same general guidelines as regular contracting (e.g., urgency) or there is reason to use a sole-sourced brand-name product.¹⁴

All of these factors point to a single conclusion: Contract EP18H000025 should have been open to competitive bidding, or at minimum should have been awarded only after solicitation of at least three sources. The competition information provided at USASpending.gov states that the rationale for sole sourcing is that only one source is available.¹⁵ This is plainly implausible. The desired service – assuming per media reports that it involves news clippings and is comparable to the predecessor contract – is highly competitive and there are many responsible sources that could provide the service. These include Fenton Communications, New Heights Communications, presumably the eight bidders for the predecessor contract, and literally dozens of other firms. It also would be unreasonable to assert urgent conditions necessitating sole-source contracting; the need for news clips is not a new development for EPA and indeed the agency had previously contracting for similar services. The only conceivable urgency is expiration of the prior contract. But if that contract was not extended, it should have expired nine months prior. At any point during that time or prior to expiration, the agency could have rebid the contract; and in general, agencies may not create urgent conditions by dint of failure to plan properly. Moreover, if the agency had gone approximately nine months without provision of the service, that suggests a lack of urgency and that EPA could have delayed weeks more for a properly bid contract. Past experience also counsels for competitive bidding: the predecessor contract was successfully bid competitively.

In light of the known facts, there is no public interest in a sole-source contract; in fact, this appears to a prototypical example of the need for competitive bidding. The agency is seeking a service that can be easily provided by dozens of firms; and the award of the contract on a sole-source basis suggests or at minimum creates the appearance that the public interest in competitive bidding is being thwarted and a contract allocated improperly to a politically connected firm.

¹⁰ Federal Acquisition Regulation 6.302.

¹¹ 41 USC 3305(d).

¹² Federal Acquisition Regulation 13.104.

¹³ Federal Acquisition Regulation 13.106-1(a).

¹⁴ Federal Acquisition Regulation 13.106-1(b).

¹⁵ <https://www.usaspending.gov/transparency/Pages/TransactionDetails.aspx?RecordID=53D2AF0E-B566-47BB-8EB4-728DAC00CEB7&AwardID=59978626&AwardType=C>

Requested Action

In light of the above, Fenton Communications and New Heights Communications request action by the Comptroller of the United States. The firms request that the contract EP18H000025 be rescinded and that a competitive tender be issued.

This bid protest is timely filed. The contract was awarded on December 7, 2017. Ten days later falls on Sunday, December 17; and so a filing on the next business day, December 18, is timely. Fenton Communications and New Heights Communications first learned of the contract through a news report in Mother Jones published on December 15.

Fenton Communications and New Heights Communications further request the following documents be provided to them:

- Written justification for the sole-source award, if any.
- Materials related to EPA's planning for this procurement, in advance of the November 29 sole-source announcement.
- Communications with contractor Definers Corp. in advance of the sole-source award.

These materials will help establish the grounds, or lack of grounds, for issuing the contract on a sole source basis.

Sincerely,



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