DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

60624 98500

FILE: B-184263 DATE: March 10, 1976

MATTER OF: Minjares Building Maintenance Company

DIGEST:

1. Since negotiating rationale employed by GSA is same as was cited in Nationwide Building Maintenance, Inc., B-184186, February 3, 1976, 55 Comp. Gen.____, where it was found that GSA had no legal basis to negotiate janitorial services procurements, and since award has been made, option should not be exercised, and any future requirement for services should be formally advertised.

2. Where GSA improperly incorporated in contract old Service Contract Act DOL Wage Determination, which was revised with GSA's knowledge prior to award selection and over a month prior to award, and contract was soon modified to reflect revised wage determination, GSA's actions were tantamount to awarding contract different from that called for in RFP. Moreover, GSA failed to comply with DOL regulations in not submitting SF-98 to DOL both when it extended incumbent's contract and not less than 30 days prior to proposed award, despite extended period between closing date for proposals and award.

3. GSA's failure to reopen negotiations to incorporate in RFP Service Contract Act DOL Wage Determination was not justified on basis of GSA's assumption that revision would have equal effect on all offerors, would not affect relative standing of offerors, and would be impractical since successful offeror had been announced, as such assumptions are speculative and award under circumstances on basis of superseded wage determination is contrary to principles of competitive procurement system.

4. Since disclosure of relative weights of evaluation factors is essential requirement of procurement, GSA erred in failing to communicate to offerors material changes in evaluation scheme from that designated in RFP so offerors would not be misled by RFP's provisions.

PUBLISHED DECISION
[55 Comp. Gen. .....]

BACKGROUND

The General Services Administration (GSA) issued request for proposals (RFP) PBS-BMD-74-36(N) on March 29, 1974, to provide janitorial services under a cost-plus-award-fee contract at the Internal Revenue Service (IRS) Center, Fresno, California. The procurement was a 100-percent small business set-aside, with the closing date for receipt of proposals set for April 29, 1974.

The RFP included Department of Labor (DOL) Wage Determination 67-173, Revision 9, dated March 27, 1974, as required by the Service Contract Act of 1965, 41 U.S.C. § 351 (1970) and Federal Procurement Regulations (FPR) § 1-12.905-1(c) (1964 ed. amend. 50). The wage determination set forth the minimum prevailing wage for janitorial service employees in the Fresno area as $2.65 per hour. A contractor is required to pay the minimum wage and furnish the fringe benefits set forth in the wage determination to its covered employees.

After the receipt of proposals under the RFP, GSA found it had to revise its requirements and amend the RFP. The closing date for receipt of proposals was eventually rescheduled to October 15, 1974. The four highest rated proposals submitted at that time received the following scores:

Offeror	Technical Score	Cost and Fee
Diamond Janitorial Service and Supply Co. (Diamond)	76.8	$350,189
U. S. Eagle, Inc.	66.2	365,519
Executive Suite Service, Inc.	63.2	473,610
Minjares Building Maintenance Company (Minjares)	62.2	409,228

On June 9, 1975, the GSA Source Selection Board recommended to the contracting officer that award be made on an initial proposal basis to Diamond.

GSA has stated that as late as June 2, 1975, it asked DOL about the possibility of a new wage determination. GSA states that it was advised that Revision 9 of Wage Determination 67-173 would be applicable until December 1975. Nevertheless, on June 3, 1975, in response to DOL's request, GSA submitted a Standard Form 98 (SF-98), "Notice of Intention to Make a Service Contract and Response to Notice," notifying DOL of its intention to enter into negotiations for a service contract on June 16, 1975. On June 10 and June 11, 1975, GSA contacted DOL but was apparently given no information regarding the continuing validity of Revision 9. However, on June 12, 1975, GSA was advised by DOL that a new revision to Wage Determination 67-173 (Revision 10) had been issued. Revision 10 was issued effective June 12, 1975, and set a minimum prevailing rate of $3 per hour. DOL sent GSA Revision 10 on June 19, 1975, where it was received on June 22, 1975.

On June 13, 1975, GSA decided to make an immediate award to Diamond based on the old wage rates because approximately 10 days would pass before the revised wage determination was received by GSA, and since the existing contract services for the IRS Building expired on June 30, 1975, and approximately 2 weeks were needed to phase-in a new contractor. Therefore, GSA concluded that further delay would jeopardize continuous janitorial service at the IRS Center. On that same date, GSA notified the unsuccessful offerors of the proposed award to Diamond.

Minjares was the incumbent contractor and held the contract pursuant to section 8(a) of the Small Business Act, 15 U.S.C. § 637(a)(2) (1970). Minjares' contract had expired on June 30, 1974, but it had been extended on several occasions to June 30, 1975. On June 27, 1975, negotiations were concluded to extend the Minjares' contract to July 31, 1975.

On June 23, 1975, Minjares protested the proposed award. Its bases for protest include, among other things, that Diamond was other than a small business concern, the wrong wage determination was used in the contract awarded and the proposals were not evaluated in accordance with the evaluation criteria set forth in the RFP.

On July 3, 1975, the Small Business Administration (SBA), to which the protest concerning Diamond's size had been referred, determined that Diamond was a small business concern. Subsequently, GSA decided it did not serve the Government's best interest to again extend the Minjares' contract at significantly higher costs than Diamond's proposed estimated costs. Therefore, in view of the necessary

Our review of this procurement reveals that Minjares' protest is otherwise meritorious, and that we would have recommended that the option not be exercised in any case. However, no award for the term remaining under the protested contract can be made because of these deficiencies, since any subsequent award under the subject RFP would be contrary to the Nationwide holding that janitorial services requirements cannot be negotiated, and since an award for the remaining term under formal advertising procedures is not feasible at this time. See Three D Enterprises, Inc., B-185745, February 20, 1976. Nevertheless, we will discuss below the meritorious bases for protest we have found because they have the effect of seriously undermining the integrity of the competitive procurement system and are generally applicable to Federal procurement. Also, Minjares' protest was completely developed under our Bid Protest Procedures, 40 Fed. Reg. 17979 (1975), prior to the holding in Nationwide, supra.

INCORPORATION OF ERRONEOUS WAGE DETERMINATION

The situation involved in the present protest with regard to the applicability of the revised wage determination is substantially similar to that extant in Dyneteria, Inc., 55 Comp. Gen. 97 (1975), 75-2 CPD 36, affirmed & Sons, Inc., B-178701, November 20, 1975, 75-2 CPD 332. In Dyneteria, supra, bids were opened under an invitation for bids (IFB) for mess attendant services on April 30, 1974, the same date the incumbent contractor entered into a new collective bargaining agreement (cba) with the union representing the mess attendant service employees. On May 16, 1974, a revised wage determination was issued to reflect the cba's higher wage rates. As a result of protracted negotiations between the Air Force, SBA, and the apparent successful bidder regarding the responsibility of the latter, the contract was not awarded to that bidder until August 14, 1974. The contract awarded incorporated the wage determination contained in the IFB which was applicable prior to the consummation of the cba. At DOL's insistence, on December 10, 1974, the contract was modified to reflect the revised wage determination retroactive to the contract's commencement date. Under the circumstances, we found that the mess attendant services requirement should have been resolicited when the Air Force was informed of the applicability of a new wage determination. We reached this conclusion because the Air Force's actions were tantamount to awarding a contract different from the one advertised and a contractor should not be selected on a different basis than that under which it must perform the contract.

Although Dyneteria, supra, involved a formally advertised rather than a negotiated procurement, it is a basic principle of competitive procurements that all offerors be afforded the opportunity to compete on an equal basis. Bidders or offerors are not competing on an equal basis where they compete to solicitation specifications and requirements which are not reflective of what is to be required under the contract or where the contract is awarded with the intent or likelihood of changing specifications after award. See 37 Comp. Gen. 521 (1958); 46 Comp. Gen. 281 (1966); A & J Manufacturing Company, 53 Comp. Gen. 838 (1974), 74-1 CPD 240; Illinois Equal Employment Opportunity Regulations for Public Contracts, 54 Comp. Gen. 6 (1974), 74-2 CPD 1. Therefore, the principles enunciated in Dyneteria, supra, are equally applicable to negotiated procurements. See Management Services Incorporated, B-184606, February 5, 1976, 55 Comp. Gen._____.

Pursuant to its authority under the Service Contract Act, DOL found that GSA acted erroneously in failing to include the June 12, 1975, wage determination (Revision 10) in the contract awarded. GSA has modified the contract to remedy this defect retroactive to the beginning of the contract period. Therefore, in view of (1) GSA's knowledge of Revision 10 prior to formalizing its award selection on June 13, 1975; (2) the extended period between the closing date for receipt of proposals and the award date (October 15, 1974, to July 16, 1975); (3) the extended period from the prior wage determination to when the award was made (March 27, 1974, to July 16, 1975); (4) GSA's failure to comply with the requirements in 29 C.F.R. § § § 4.4, 4.143, 4.145 (1974) to submit SF-98's for the periodic extensions of the Minjares' contract; (5) GSA's failure, without any explanation of exceptional circumstances, to follow the requirement in 29 C.F.R. § 4.4 (1974) and FPR § 1-12.905-3 (1964 ed. amend. 53) to submit a SF-98 not less than 30 days prior to when GSA proposed to complete award negotiations under the RFP; (6) the period in excess of a month prior to award when GSA knew that a higher wage determination was applicable (June 12, 1975, to July 16, 1975); and (7) the modification of the contract retroactive to its commencement date to reflect the proper wage determination, we believe GSA's actions are tantamount to awarding a contract different from that called for in the RFP. Tombs & Sons, Inc., supra. GSA should have reopened negotiations when it was informed that a revised determination was applicable, so that

all offerors could have the opportunity to revise their proposals to be reflective of the Government's actual requirements regarding service employees' wage rates.

GSA has asserted that Revision 10 of Wage Determination 67-173 would have an equal effect on the offerors. However, as we stated in Dyneteria, supra.

> "* * *Competition is not served by assuming that the new wage rates would affect all bids equally. It may well be that another bidder was already paying wages at or above those in the new determination so that his prices would not have increased at all. Thus, it is possible that the contract as amended no longer represents the most favorable prices to the Government. Speculation as to the effect of a change in the specifications, including a new wage determination, is dangerous and should be avoided where possible. See B-177317, [December 29, 1972]. The proper way to determine such effect is to compete the procurement under the new rates."

Similarly, GSA has stated that it believed it was unlikely that the inclusion of Revision 10 would have any effect on the relative standing of the offerors. In this regard, we stated in B-177317, supra:

> "* * *It has been our position that the order of bidders should be based on prices computed using the wage rates which will actually prevail. It is normally not proper to arrive at prices under new wage rates by extrapolating from the prices submitted under the old rates.* * *"

Also, see Management Services, Incorporated, supra. Moreover, GSA did not make any empirical study which clearly demonstrated that the revised wage determination would not affect the award selection. Contrast B-177317, supra, and 52 Comp. Gen. 686 (1973).

GSA also notes that since it notified offerors of the award selection on June 13, 1975, this had the effect of informing the offerors of their relative standing. GSA states that this made it impractical to reopen negotiations on the basis of the revised wage determination. However, GSA knew a new wage determination was applicable prior to announcing its award selection. Moreover, we stated in response to a similar argument in Tombs & Sons, Inc., supra:

> "The Air Force fears that to have amended the IFB and called for new bids would have encouraged an 'auction' atmosphere. There is another consideration present which we believe is to be of greater significance: the requirement that the contract be awarded in the form advertised to the low responsive and responsible bidder. This requirement relates not only to the equality of the bidding, but to the ultimate determination of lowest price. Of course, to reject all bids and cancel an IFB after bids have been opened tends to inhibit and prejudice competition in that bidders have expended time and money to prepare bids without a prospect of receiving an award. On the other hand, we are greatly concerned that the integrity of the competitive bid system be maintained by conducting procurements in accordance with applicable statutes and implementing regulations. The possibility that a contract may not reflect true competition on the basis of actual performance has a greater effect on the overall integrity of the competitive bid system than the fear of an auction atmosphere necessitated by an action taken to assure full equality of competition."

We believe the foregoing discussion is also applicable to the present RFP. The possibility that the contract may not reflect true competition by offerors on an equal basis has a more harmful effect on the overall integrity of the competitive procurement system than the premature disclosure of the apparent successful offeror.

GSA also contends that the time exigency problems caused by the Minjares' contract's impending expiration on June 30, 1975, made it impractical to reopen negotiations. However, this problem was caused by GSA's failure to comply with applicable DOL regulations by not submitting SF-98's when it periodically extended the Minjares' contract and by failing to submit the SF-98 not less than 30 days prior to its proposed award date. Also, it appears that GSA made no effort to ascertain whether it could extend the Minjares' contract when it received notification of the revised wage determination. GSA had no previous reluctance to extend the Minjares' 8(a) contract, and it extended the Minjares' contract again upon receipt of the protest.

GSA has cited FPR § 1-12.905-4(a) (1964 ed. amend. 53) in support of the award incorporating the old wage determination. This regulation provides in pertinent part that revisions to wage determinations received later than 10 days before the opening of bids shall not be effective on the particular contract except where the Federal agency finds that a reasonable time is available in which to notify bidders of the revision.

By its own terms this regulation is not applicable to negotiated procurements, notwithstanding GSA's attempt to analogize this provision to the similar provision in Armed Services Procurement Regulation § 12-1005.3 (1975 ed.), which is applicable to negotiated procurements. Even if such a provision were applicable in this case, GSA could not rely upon it to excuse itself from reopening negotiations in view of the factors listed above which made this award tantamount to awarding a contract different from that called for in the RFP. Most notable among these factors in this regard are the extended period from the closing date for receipt of proposals to the award date and GSA's failure to furnish a SF-98 notification to DOL not less than 30 days prior to the commencement of negotiations as required by applicable regulations.

PROPOSAL EVALUATION ON DIFFERENT BASIS THAN IN RFP

GSA also erred in evaluating the proposals on a different basis than that designated in the RFP without informing the offerors of the material changes made in the evaluation scheme.

The RFP listed the major factors to be considered in the proposal evaluation in descending order of importance as follows:

"a. Organization and Plan of Operation

(1) Organizational structure, the comprehensiveness and the detail of the operating plan, and the subcontracting plan.

(2) Labor mix and wage rate reasonableness.

(3) Labor relations plan.

(4) Phase-in Plan comprehensiveness and detail.

"b. Cost Factors and Fee Data

"c. Company Resources, Experience and Past Performance

"d. Degree of Responsiveness to Proposal Instructions

"e. Key Personnel"

GSA apparently completely revised the RFP's evaluation scheme sometime after the RFP's issuance. However, it did not issue an amendment to the RFP informing the offerors of the material changes made. The actual factors used in the evaluation of the proposals and their relative weights are as follows:

"Responsiveness to Proposal Instructions	10%
Management/Organization	30%
Resources	30%
Cost Factors	30%
Fee Data	10%"

Although GSA has termed the changes in the evaluation scheme "slight" and "more a matter of form than substance," we cannot agree on the basis of the record. Under the revised evaluation scheme, more weight was given to the cost factors and fee data criterion than indicated in the RFP. Also, it would appear that the relative importance of the organization evaluation factor was deemphasized. We do not know what consideration or weight was actually accorded the key personnel criterion or to the offerors' experience and past performance. Although it would be speculative to find that the change in the evaluation scheme affected the award selection, we believe it cannot be concluded, with certainty, that it could not have had such an effect had offerors been given an opportunity to revise their proposals to respond to the true evaluation scheme.

We have on many occasions held that offerors must be advised of the relative importance of technical, price and other evaluation factors in relation to each other. See Signatron, Inc., 54 Comp. Gen. 530 (1974), 74-2 CPD 386, and decisions cited therein. The reason for this rule is to provide all offerors with the information necessary to properly prepare their proposals. Since the disclosure of the relative weights of the evaluation factors is an essential

requirement of a procurement, a material change from the evaluation scheme indicated in the RFP should be communicated to the offerors so they will not be misled by the RFP's provisions and can properly prepare their proposals. Therefore, GSA should have duly informed the offerors of the factors in the new evaluation scheme and their relative importance to one another. See FPR §§ 1-3.802(c) (1964 ed. amend. 118), 1-3.805-1(d) (1964 ed.); B-166779(2), August 1, 1969; 50 Comp. Gen. 637 (1972); Willamette-Western Corporation, 54 Comp. Gen. 375 (1974), 74-2 CPD 259; Union Carbide Corporation, B-184495, February 26, 1976, 55 Comp. Gen.___. We note that this procurement deficiency would not have occurred if the janitorial services requirement was formally advertised rather than negotiated.

As indicated above, it is recommended that GSA not exercise the July 31, 1976, option, and that it formally advertise its future requirements for janitorial services for the IRS Center in accordance with Nationwide, supra. In addition, we are bringing the serious procurement deficiencies we have found to the attention of the Administrator of GSA.

Deputy Comptroller General
of the United States