DECISION

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

60469

FILE: B-184186 DATE: February 3,1976

MATTER OF: Nationwide Building Maintenance, Inc.

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~~99360~~
99154

DIGEST:

1. Authority in FPR § 1-3.805-1(a)(5) to make award on "initial proposal" basis operates only to permit acceptance of proposal exactly as initially received. Consequently, award, incorporating revised cost proposal submitted by successful offeror in response to call for "best and final" offers (which constituted negotiation), was not made under initial proposal authority.

2. GSA did not conduct meaningful negotiation with unsuccessful, albeit competitive-range, offeror, since it did not explore purported deficiency in phase-in costs.

3. Although defects in negotiation procedures would ordinarily prompt recommendation that contract be terminated, if contractor was not successful after further round of negotiations, recommendation is not made considering unusual circumstances of case.

4. Since question whether negotiated award method is proper for GSA's awards of janitorial services is of widespread interest, given number of janitorial services' awards made by GSA and number of protests pending involving negotiated janitorial services' awards, protest will be considered even though untimely raised under Bid Protest Procedures.

5. Notwithstanding desired use of negotiated award method for given procurement or range of procurements, negotiation must be objectively justified in view of statutory preference (41 U.S.C. § 252(c) (1970)) for formal advertising.

6. None of exceptions to formal advertising (as set forth in 41 U.S.C. § 252(c)(1)-(15) (1970)) expressly authorizes use of negotiations only to secure desired level of quality of janitorial services or to obtain incentive-type contract. Moreover, analysis of legislative history of Federal Property and Administrative Services Act (40 U.S.C § 471 (1970)), under which questioned negotiated award of services was made, shows that Congress specifically rejected proposal to permit negotiation to secure desired level of quality of supplies or services.

PUBLISHED DECISION
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7. Finding that janitorial services contract was improperly negotiated does not lead to conclusion that contract must be canceled, since cancellation is reserved for contracts illegally awarded and under rationale of Court of Claims decisions illegal award results only if it was made contrary to statutory or regulatory requirements because of some action or statement by contractor or if contractor was on direct notice that procedures being followed were violative of requirements.

8. Because of GSA's widespread difficulties with deficient performance on formally advertised janitorial services contracts, GSA's possible misunderstanding of the decisions of GAO as applied to "below cost" bidding, and GAO opinion that GSA should be given time to study alternative solutions to difficulties, termination of protested award is not recommended.

9. Recommendation made that options in questioned negotiated janitorial services contract, and similar outstanding janitorial services contracts, not be exercised and that GSA immediately commence study of appropriate methods and clauses for improving formal advertising procurement method for future needs of janitorial services.

On June 13, 1975, a protest was received from Nationwide Building Maintenance, Inc. (Nationwide), against the June 3, 1975 award of a cost-plus-award-fee contract under request for proposals (RFP) No. 03C5080101, issued by the General Services Administration (GSA). GSA issued the RFP on January 6, 1975, for janitorial services at the Internal Revenue Service Center, Philadelphia, Pennsylvania, for a one-year period from date of award with an option reserved for two additional years of services. The questioned award was made to Ensec Service Corporation (Ensec) after GSA considered proposals from nine offerors.

Nationwide contended that GSA failed to conduct meaningful negotiations with it concerning the award in question in contravention of Federal Procurement Regulations (FPR) § 1-3.805-1(a) (1964 ed. amend. 118) which requires that "After receipt of initial proposals, written or oral discussions shall be conducted with all responsible offerors who submitted proposals within a competitive range, price and other factors considered * * *."

Specifically, Nationwide points out that although its offer was considered deficient for failing to include a phase-in cost factor, GSA did not discuss this alleged deficiency with it. Nationwide further insists that it properly omitted phase-in costs for the requirement because, as the incumbent contractor, it would not incur phase-in costs.

GSA is of the opinion that it did not conduct discussions with competitive-range offerors (including Ensec and Nationwide) and, moreover, that it did not have to conduct discussions because, after obtaining "best and final" offers, it properly made award on an "initial proposal" basis under FPR § 1-3.805-1(a)(5) (1964 ed. circ. 1). The regulation provides, in effect, that award may be made on an initial proposal basis to the concern submitting the most favorable initial proposal if this would result in a fair and reasonable price and if there is no uncertainty as to the pricing or technical aspects of any proposals.

The authority to make an "initial proposal" award operates only to permit acceptance of a proposal exactly as it was initially submitted. 48 Comp. Gen. 663,667 (1969). Although GSA maintains that it did not conduct negotiations with offerors so as to give offerors opportunities to change their initial proposals, the request for "best and final" offers, and offerors' replies, must be considered "negotiation" since offerors were thereby afforded opportunities to revise their proposals. Dyneteria, Inc., B-181707, February 7, 1975, 75-1 CPD 86.

Further, GSA's record of proposal evaluation shows that Ensec submitted "revised data" (involving proposed lower costs in G&A amount, award fee, equipment and materials) in response to the "best and final" call and that the revised cost data were incorporated in the award. Since the Ensec award was made on the basis of a revised cost proposal, pursuant to negotiation, GSA could not properly cite FPR § 1-3.805-1(a)(5) as authority for the award.

Since GSA entered into negotiations with offerors, it was obliged to make those discussions meaningful. Raytheon Company, 54 Comp. Gen. 169 (1974), 74-2 CPD 137; 51 Comp. Gen. 431 (1972); 50 Comp. Gen. 117 (1970). As we stated in 50 Comp. Gen., supra, at page 123:

> "FPR 1-3.805-1 requires that discussions be conducted with all offerors within a competitive

> range, price and other factors considered. It is a well-established principle in Federal procurements that such discussions must be meaningful and furnish information to all offerors within the competitive range as to the areas in which their proposals are believed to be deficient so that competitive offerors are given an opportunity to fully satisfy the Government's requirements. 47 Comp. Gen. 336 (1967). When negotiations are conducted the fact that initial proposals may be rated as acceptable does not invalidate the necessity for discussions of their weaknesses, excesses or deficiencies in order that the contracting officer may obtain that contract which is most advantageous to the Government. * * *"

Because Nationwide's offer (which was $4,000 less than Ensec's offer in estimated cost) was within the competitive range for the award, we are of the opinion that meaningful negotiations, under the above-stated principles, should have been conducted with Nationwide to explore its purported deficiency in the phase-in cost area, especially since "phase-in-cost" was not specifically listed as a proposal evaluation factor. Cf. 50 Comp. Gen. 637 (1971).

Although the above-determined departures from well-established principles governing negotiated procurements would ordinarily prompt us to recommend termination for convenience of Ensec's contract, if it was not successful after a further round of negotiations, it is our conclusion, as explained below, that this remedy, under the particular circumstances of this case, should not be applied.

Nationwide's protest, as supplemented, also questioned GSA's authority to negotiate the award of the janitorial services. The legal propriety of the cost-type award was also questioned. Nationwide recognized that these questions related to the "form of the RFP" and therefore should have been raised, under our Bid Protest Procedures, prior to the date set for receipt of proposals. It argues, however, that we should consider these issues to be "significant to procurement practices or procedures" under section 20.2(c) of our Procedures, and, therefore, eligible for our review.

Since the question of the proper method of procuring these services is one of widespread interest, given the number of janitorial awards made by GSA and the number of protests currently pending in our Office involving GSA negotiated janitorial services' awards, these issues will be considered.

Cf. Ira Gelber Food Services, Inc.; T and S Service Associates, Inc., 54 Comp. Gen. 809 (1975), 75-1 CPD 186.

The RFP contains information that the subject solicitation was negotiated under authority of 41 U.S.C. § 252(c)(10) (1970) which provides that contracts may be negotiated by the agency head (in this case the Administrator of GSA) "for property or services for which it is impracticable to secure competition." The Administrator's power, in this particular case, was redelegated, under authority of 41 U.S.C. § 257(a) (1970), to the Regional Commissioner of the Public Buildings Service, GSA.

According to the mandate in FPR § 1-3.210(b) (1964 ed. circ. 1) (concerning limitations on the authority described in 41 U.S.C. § 252(c)(10)), a determination and findings (D&F) justifying use of the authority was prepared. The D&F provides:

"FINDINGS

"The use of formally advertised, low bid, fixed price contracting procedures by the General Services Administration has not resulted in the desired level of quality for services procured. The quality of work has shown a general declining trend apparently without regard to the size and experience of the contracting firm. There are strong indications that the present system of assessing penalty deductions for control of quality in service contracts is at fault. The penalty deduction system increases the susceptibility and probability of protests and appeals on the part of the contractors, which results in a general undesirable increase in administrative time and expense on the part of GSA in administering the contracts, while doing nothing to foster good relations with the contractors, or to improve performance.

"The requirement to award contracts to the low bidder has often resulted in receipt of irresponsible bids from firms which lack the professional capability, experience, and the required resources to satisfactorily perform the required services. In a few cases, contractors have submitted bids considerably below the Government's estimate of the minimum

reasonable cost to accomplish the services being solicited. It is factual that a contractor will not maintain an acceptable level of performance with a 'below cost' contract. Even so the Comptroller General ruled (B-171419) that because a bid is below reasonable cost expectations is not sufficient reason for rejection of the bid.

"GSA experience has shown that the use of an incentive type contract has produced the desired results in obtaining a very high quality performance for service contracts. An incentive type contract allows reimbursement of audited costs, and provides incentive for excellence in the form of a performance award fee which is awarded in whole or in part as determined by an Award Fee Determination Board, based upon a graded level of performance. The fee schedule is designed to provide motivation for excellence in contract performance in areas of quality, cost effectiveness, and ingenuity, while at the same time holding the fee well below the maximum of 10% of cost for service contracts.

"The incentive contracting program has truly upgraded the level of quality for services in Government buildings. Incentive contracts have been eminently successful in procuring quality service at costs below the GSA Force Account estimate.

"Budgetary and manning restrictions require increased procurement of services from commercial sources. The record shows that the incentive contracting program of competitive selection and negotiation with qualified offerors provides the desired level of quality service at a most reasonable cost.

"As required by Section 302(c)(10) of the Federal Property and Administrative Services Act, and for the reasons set forth above, it is determined that it is impracticable to secure services of the kind and quality required without the use of an incentive type contract, and it is recommended that authorization

be given to negotiate an incentive contract to provide the required services.

"DETERMINATION

"Based upon the foregoing findings, it is hereby determined, in accordance with Section 302(c)(10) of the Federal Property and Administrative Services Act of 1949, (63 Stat. 377), as amended, and FPR 1-3.210(a)(13), that this requirement is 'for property or services for which it is impracticable to secure competition' because it is impossible to set out adequate detailed specifications which will describe the performance objectives by definite milestones, targets or goals susceptible of measuring actual performance to provide satisfactory services for the Government, and the negotiation of an incentive contract is hereby authorized to provide janitorial services at the IRS Service Center, 11601 Roosevelt Boulevard, Philadelphia, PA."

The Findings reveal GSA's opinion that the formal advertising method has not achieved the level of service thought desirable for janitorial services. Thus, the phrases "desired level of quality," "quality of work," "quality in service contracts," "quality services," "level of quality," "very high quality performance" and "quality required," are found in the paragraphs of the Findings. Moreover, in a report on a similar protest, GSA has advised:

> "The circumstances justifying negotiation in this instance are not related to quantities, however, but to the Government's inability in general to specify and obtain the level or quality of service required to meet the Government's needs."

This inability to obtain the desired level of quality for the required janitorial service, coupled with the belief that only a negotiated, incentive-type contracting method would improve service, prompted the Determination that adequate specifications, suitable for formal advertising, could not be drafted.

We note, however, that Section C, Part 4, Custodial Specifications, of the RFP, contains 19 pages of detailed specifications for the janitorial services. Further, it is implicit from the narrative in the

Findings that GSA has used specifications similar to those in the RFP to previously procure janitorial services under formal advertising. It is also our understanding that the military services, which also are involved in a significant number of procurements of janitorial services, invariably use formal advertising (although restricted to competition among small business concerns) to procure janitorial services.

Notwithstanding the desired use of the negotiated method for a given procurement or range of procurements, negotiation must be objectively justified in view of the statutory preference (41 U.S.C. § 252(c) (1970)) for formal advertising. None of the exceptions to formal advertising (as set forth in 41 U.S.C. § 252(c)(1)-(15) (1970)) expressly authorizes the use of negotiation only to secure a desired level of quality of services or to obtain an incentive-type contract. Moreover, our analysis of the legislative history of the Federal Property and Administrative Services Act (40 U.S.C. § 471 (1970)), under which the purchase was made, reveals that the Congress specifically rejected the proposal to permit negotiation to secure a desired level of quality of supplies or services. As we stated in 43 Comp. Gen. 353, 370 (1963):

> "In this connection it would appear to be especially pertinent to note that H.R. 1366, 80th Congress, which subsequently was enacted as the Armed Services Procurement Act of 1947, originally included, as Section 1(xii), a request for authority to negotiate under the following circumstances:
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> "'(xii) for supplies or services as to which the agency head determines that advertising and competitive bidding would not secure supplies or services of a quality shown to be necessary in the interest of the Government.'
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> "As passed by the House of Representatives, H.R. 1366 included this authority, and the necessity and justification for its enactment by the Senate was presented to the Senate Committee on Armed Services by the Assistant Secretary of the Navy during hearings on June 24, 1947, with the following concluding statement:
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> "'Where quality is a matter of critical--in many cases life-and-death--importance,

> discretion must reside in the services to select sources where experience, expertness, know-how, facilities and capacities are believed to assure products of the requisite quality. Where national security or the safety and health of personnel of the services are involved, any compromise of quality dictated by mandatory considerations of price would be indefensible.' (See page 15, Hearings before the Committee on Armed Services, United States Senate, on H. R. 1366, 80th Congress.)

"Notwithstanding the above, the Senate Armed Services Committee deleted this provision from the bill and explained its action at page 3, Senate Report No. 571, 80th Congress, as follows:

> "'The bill was amended by deleting the authority to negotiate contracts for the purpose of securing a particular quality of materials. Your Committee is of the opinion that this section is open to considerable administrative abuse and would be extremely difficult to control. For this reason it has been eliminated.'

"As indicated by the legislative history of the Federal Property and Administrative Services Act, that act was intended to extend the same procurement principles to civilian agencies of the Government as had previously been conferred upon the military departments by the Armed Services Procurement Act of 1947. See page 6, House Report No. 670, and page 5, Senate Report No. 475, 81st Congress." (Emphasis supplied).

The Court of Claims made a similar analysis of the legislative history involved in Schoenbrod v. United States, 410 F.2d 400, 402-403 (1969).

When agencies have failed to obtain priced proposals in negotiated procurements or having obtained price proposals have neglected to secure appropriate price competition, we have concluded that negotiation was actually being employed solely to obtain services and products of the highest quality in contravention of the

expressed congressional intent. See B-175094, May 9, 1972; 50 Comp. Gen. 679 (1971); 50 Comp. Gen. 117, supra; 43 Comp. Gen., supra; 41 Comp. Gen. 484 (1962). Cost proposals from nine offerors were obtained here--although GSA erroneously believed that it did not conduct cost discussions (other than a request for "best and final" offers) with offerors because adequate cost experience existed from prior procurements of services. Notwithstanding the solicitation of cost proposals, it is our view that using negotiation solely to secure a desired quality of services was contrary to the statutory authority for negotiation. We consider GSA's preference for an incentive-type contract as part of its desire for quality services and do not view the preference as constituting a separate reason for the negotiation. We must therefore conclude that the determination to negotiate the service requirement is not rationally founded within the limits of existing law.

Our finding that the contract was improperly negotiated does not lead us to the further conclusion, as urged by Nationwide, that the contract must be canceled. Cancellation is reserved for contracts illegally awarded. An illegal award, under the rationale of several Court of Claims decisions, results only if it was made contrary to statutory or regulatory requirements because of some action or statement by the contractor or if the contractor was on direct notice that the procedures being followed were violative of the requirements. 52 Comp. Gen. 215, 218 (1972). Since Ensec was not aware of GSA's rationale for negotiating the janitorial services or that the rationale was not legally sound, the award must be considered improper rather than illegal. Consequently, the only theoretically available remedy is termination for convenience rather than cancellation.

We appreciate the administrative difficulties GSA has had in administering janitorial services contracts. These difficulties are similar to those that the Department of the Navy had recited in the past as justification for negotiating mess attendant (KP) services contracts. However, the Department of the Navy has since advised our Office that the use of the negotiated format generated numerous protests because offerors were "unable to reasonably predict the application of the [RFP's] evaluation factors" and that procurement of mess attendant services by formal advertising would result in a "more uniform treatment of bidders, in addition to encouraging more realistic competition." Ira Gelber Food Services, Inc., supra. The five protests that we have received

this year involving GSA's negotiated awards of janitorial services are some evidence, in our view, that the Navy's cited experience may be repeated in GSA's negotiation of janitorial services contracts.

GSA's problems in janitorial services contracts involve contract administration and contractor motivation. We question that suitable administrative/motivation solutions to these problems cannot be found within the context of the statutory preference for formal advertising. For example, the Findings cite B-171419, March 12, 1971, for the proposition that "below cost" bidding is not a sufficient reason for rejecting a bid. The Findings fail to acknowledge, however, that we have recognized that "below cost" bidding may affect the responsibility of the bidder. See Columbia Loose-Leaf Corporation, B-184645, September 12, 1975, 75-2 CPD 147; B-173276, August 19, 1971. In that regard, FPR § 1-2.407-2 (1964 ed. amend. 139) requires that the contracting officer determine that a prospective contractor is responsible before awarding a contract. See FPR Subpart 1-1.12 (1964 ed. amend. 95).

Because of GSA's widespread difficulties with deficient performance on formally advertised janitorial services contracts, GSA's possible misunderstanding of the decisions of our Office as applied to "below cost" bidding, and our opinion that GSA should be given time to study alternative solutions to its difficulties, we are not recommending termination of the protested award. We are recommending, however, that the options in Ensec's contract and options for requirements subsequent to June 1976 in similar outstanding negotiated janitorial services contracts not be exercised and that GSA immediately commence a study of appropriate methods and clauses for improving the formal advertising procurement method for future needs of janitorial services.

As this decision contains recommendations for corrective action to be taken, it is being transmitted by letters of today to the congressional committees named in section 232 of the Legislative Reorganization Act of 1970, Public Law 91-510.

Deputy Comptroller General
of the United States