

DOCUMENT RESUME

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[Use of Conventional Negotiation Techniques to Procure Janitorial Services under Small Business Set-Aside Solicitations]. B-187250; E-187254; B-187256; E-187257. April 25, 1977. 11 pp.

Decision re: Nationwide Building Maintenance, Inc.; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).
Contact: Office of the General Counsel: Procurement Law I.
Budget Function: General Government: Other General Government (806).

Organization Concerned: General Services Administration.

Authority: Property Act (63 Stat. 377). Small Business Act (15 U.S.C. 631). Defense Production Act of 1950, as amended, sec. 714(f)(2) (65 Stat. 143). 41 U.S.C. 252(c)(1). 41 U.S.C. 252(c)(10). 40 U.S.C. 471. 55 Comp. Gen. 693. 41 Comp. Gen. 306. 41 Comp. Gen. 314-315. 31 Comp. Gen. 347. 31 Comp. Gen. 431. 36 Comp. Gen. 187. F.P.R. 1-3.201(b). F.P.R. 1-1.706-5(b). B-177419 (1971). A.S.P.R. 1-706.5(b).

Protester objected to the decision of the General Services Administration to use conventional negotiation techniques to procure janitorial services under four separate small business set-aside solicitations. The use of negotiation procedures under the questioned procurements was lawful and not in violation of a prior GAC decision. The regulation requiring the use of formal advertising procedures under small business set-aside procurements was waived. The statute concerning the negotiating authority contains no indication of any limit on the negotiation procedures that can be used in such procurements.
(Author/SC)

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James Cunningham
Proc. I



DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20540**

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FILE: B-187257

DATE: April 25, 1977

MATTER OF: **Nationwide Building Maintenance, Inc.**

DIGEST:

1. Series of GAO decisions sanctioning use of "exception one" negotiating authority (41 U.S.C. § 252(c)(1) (1970)) for "small business set-aside" awards were premised on need to justify restriction of competition (which was otherwise found to be proper) to one category of bidders--small business concerns--since restriction of competition under current law is not compatible with formal advertising.
2. Procurement regulations have recognized that, even though a set-aside procurement was technically a negotiated procurement because competition was justifiably restricted to one class of bidders under "exception one" negotiation authority, procurement should otherwise be conducted under rules of formal advertising "wherever possible."
3. Since Administrator, GSA, has waived regulation requiring use of formal advertising procedures whenever possible under small business set-aside procurements and because statute containing "exception one" negotiating authority contains no indication of any limit on negotiation procedures that can be used in "exception one" set-aside procurements, use of negotiation procedures under questioned procurements is lawful and not in violation of prior decision.

Nationwide Building Maintenance, Inc., has protested the decision of the General Services Administration (GSA) to use conventional negotiation techniques (including the use of incentive-type contracting) to procure janitorial services under four separate small business set-aside solicitations (Nos. 4PBO-83; O3C6 1367 01; 4PBO-60; O3C6 1387 01). Nationwide insists that the use of conventional

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negotiation techniques under these procurements is contrary to our decision in Nationwide Building Maintenance, Inc., 55 Comp. Gen. 693 (1976), 76-1 CPD 71. Although Nationwide questions the use of these techniques, it does not otherwise object to the set-asides involved.

Our Nationwide decision held that GSA's use of "exception 10" negotiating authority--that is, 41 U.S.C. § 252(c) (10) (1970)--to negotiate procurements of janitorial services was not rationally justified under existing law and regulation. The cited statutory authority permits negotiation "for property or services for which it is impracticable to secure competition." GSA believed that the authority could properly be invoked to negotiate procurements of janitorial services in order to secure a "desired level of quality" in janitorial contracting. We pointed out, however, that the legislative history of the Federal Property and Administrative Services Act (40 U.S.C. § 471 (1970)), under which the contracts were being awarded, revealed that Congress specifically rejected the proposal to permit negotiation to secure a desired level of quality of supplies or services. Consequently, we rejected GSA's rationale for using the cited statutory authority.

The four solicitations involved in the current controversy were not negotiated under 41 U.S.C. § 252(c)(10), however. They were negotiated under "exception one" negotiating authority--that is, 41 U.S.C. § 252(c)(1)--which permits negotiation of contracts if "determined to be necessary in the public interest during the period of a national emergency declared by the President or by the Congress." (At present, a state of national emergency exists by reason of a 1950 Presidential Proclamation.)

The Determinations and Findings (D&F) supporting the negotiation of the janitorial services requirement under solicitation No. 4PRO-83 is representative of the D&F's supporting negotiation under the other solicitations involved. The cited D&F provides:

"In accordance with the requirements of Section 302(c)(1), 304(b) and 307 of the Federal Property and Administrative Services Act of 1949 (the Property Act), the 63 Stat. 377, as amended, I make the following findings:

"FPR 1-3.201 provides that Section 302(c)(1) of the Property Act is to be used as the authority to negotiate unilateral set-aside contracts with small business concerns when it is determined to be in the interest of assuring that a fair proportion of the purchases and contracts for property and service for the Government are placed with small business concerns.

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"The General Services Administration has consistently awarded the majority of its custodial services contracts to small business firms by making the procurements total small business set-asides. It is now proposed to make all such procurements by negotiating unilateral set-aside contracts with small business concerns.

"While it is recognized that contracts involving total small business set-asides should be procured by small business restricted advertising whenever possible (FPR 1-1.706-5(b)), it must also be recognized that contracts involving such set-asides may properly be entered into by conventional negotiation.

"A major factor in determining whether to use conventional negotiation or small business restricted advertising is which method will better promote the interests of small business concerns * * *.

"GSA has found that procurement of custodial services through the statutorily preferred method of formal advertising of small business restricted advertising (hereinafter collectively called 'formal advertising') procedures for large and complex buildings has not been successful in obtaining the performance results for which contracted. The contractor's level of performance indicated a constant and persistent decline without apparent regard as to whether the firm was classified as small business or large business. The sanitary and esthetic condition of buildings serviced by contracts steadily and cumulatively deteriorated to what most agencies termed unsatisfactory status because of the several factors discussed below.

"Procurement of services by contract expanded rapidly in recent years in conformance to the policies of Budget Circular A-76 and the ever increasing dependence on the private sector for contract custodial services because of manning and budgetary constraints. Many new firms were established to participate in this expanded market in the hopes of obtaining Government contracts. Many of these firms were lacking in experience, poorly organized and short of resources such as management expertise, experienced supervisors, and capital assets, yet able to qualify as responsible firms with the assistance of the small business program under the Small Business Act (15 U.S.C. 631).

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"Lack of management expertise and the extreme competition among these new firms caused poor estimating practices and irrational bidding. Bid prices on some contracts have been below the minimum reasonable cost expectations to perform. The Comptroller General ruled (F-171419, March 12, 1971) that because a bid is below reasonable cost expectations, is not a sufficient reason for rejection of the bid. It is factual that a contractor of the type normally bidding on custodial service contracts will not maintain an acceptable level of performance with a 'below-cost' contract, yet it is very difficult for the Contracting Officer to refuse an award based primarily on the lowest bid price, considering the constraints of the statutes.

"Because of the large quantity of service contracts; the time factor for operational support, and personnel ceiling restrictions, GSA published general custodial service specifications which were meant to be standard for all buildings under Government control. Because of the individual requirements of specific buildings, the standard specifications resulted in some overstatement and some understatement of tasks and frequencies, yet there was no way to allow contractor flexibility in meeting contract requirements as to tasks, frequencies of performance, and the quality of work under a fixed-price low-bid contract.

"Contract enforcement under these conditions requires 100-percent inspection of contract work, which GSA is unable to provide because of budget and manning constraints. To mollify this weakness, a penalty deduction system was resorted to for control purposes. Minimum man-hours were specified and monetary deductions were taken for failure to meet minimum man-hour requirements, or for omissions of service and inadequate performance. This system burdened GSA with management of the contract operations by exception. Contractors initiated a constant stream of protests and subsequent appeals, which resulted in very heavy extra and unproductive administrative cost at all echelons of GSA, and a hindrance to the program support of agencies. The penalty deduction system was not successful as a contract enforcement tool to improve performance. It actually caused an adversary relationship between the contractors and GSA.

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"Formal advertising procedures are intended to broaden the competition to the maximum extent. Under the circumstances cited herein, the competition was actually narrowed to the point where marginally qualified and inexperienced contractors formed the major portion of the bidders. Reputable, experienced and qualified contractors deserted the competition for GS/A contracts in favor of commercial business since this type firm was not willing to lower its performance and production standards and prices below the point of fair and equitable return for satisfactory services given.

"The concept of custodial service contracting is unique by virtue of the fact that management and supervision is the paramount ingredient for success. All contractors use essentially the same labor source, since none can afford to maintain a work force without a contract. The work force is hired when an award is won. Reputable contractors depend on a fair profit return to maintain a nucleus of experienced and qualified supervisors as a cost of doing business. An under-financed contract eliminates any prospect of providing a supervisory training program; thus, incompetent and inadequate supervision becomes the rule rather than the exception. Often an under-financed contractor must assign one supervisor to several contract locations in an attempt to keep costs within his low bid price. The result is unsatisfactory span of control and poor contract management evidenced by poor planning and scheduling, ineffective inspection and quality control, inefficient use of manpower, recurring performance deficiencies, poor supply and equipment control, and total poor performance.

"The problems and factors discussed * * * above, support a determination to use procurement by competitive negotiation as an exception to the use of formal advertising which is found to be neither feasible nor practicable under the conditions and circumstances cited, e.g. irrational bid prices; inexperienced and marginally qualified bidders; lack of management quality and expertise; enforceable, manageable specifications cannot be drawn nor

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administered; the narrowing of the bidders market; the very heavy extra and unproductive contract enforcement administrative costs suffered which are never reflected in the bid price; and the hindrance to the program support of agencies.

"Competitive negotiated procurement of custodial services for Government buildings of large size and complexity, under the conditions and circumstances cited above, is more advantageous to the Government in terms of economy, efficiency and effectiveness than is procurement by formal advertising and, is the better method for promoting the policies of 15 U.S.C. 631 and the small business set-aside program.

"Competitive negotiated procurement is also considered likely to be consummated at less real cost to the Government, all costs considered, and value received for money spent, than could be obtained through the use of low-bid, fixed-price contracting methods.

"The use of the cost reimbursement type contract with an award fee or an incentive-type contract is also more advantageous since the use of audit service can identify real costs as allocable and allowable. The profit factor is also known and can be controlled. The contractor can be competitively selected and the contract award can be made to the best advantage of the Government, price and other factors considered. Thus, the Government is assured of getting exactly what it pays for and the competition is expanded to all offerors on an equal basis.

"A further advantage of a cost-type contract is the fact that a prospective contractor has no problem with contract financing since any commercial credit institution will not hesitate to provide a line of credit on an assigned Government cost reimbursement contract. This further expands the competition and facilitates operations and continues viability of service contractors to a much greater extent than a full risk low-bid contract at a suspect price.

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"The use of the ITC not only aids the Government in overcoming * * * [these] deficiencies * * *, but it also is helpful to building service contractors and the building cleaning industry in general. It enables the contractors, for example, to invest in sophisticated equipment and systems, etc., which would not be possible under formally advertised contracts. A cost-type incentive contract fosters a stronger, more viable small business service contracting industry by removing financial risk, improving management expertise and removing the undesirable adversary relationship through profit incentives geared to performance.

"* * * [these] findings * * * have been found applicable to the requirement for custodial services at the Social Security Building, Birmingham, Alabama.

"Determination

"Based on the foregoing findings, I hereby determine, within the meaning of Section 302(c)(1) of the Property Act that:

"The services described are to be procured by a total small business set-aside;

"Conventional negotiation is necessary, in order to carry out the policy of the Small Business Act and to further the purposes of the small business set-aside program; and,

"Such negotiation is in the best interest of the Government.

"Based on the foregoing findings, I also determine, pursuant to Section 304(b) of the Property Act, that it is impractical to secure the services of the kind or quality required without the use of a cost-plus-award-fee (incentive type) contract.

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"Upon the basis of these findings, I hereby authorize the negotiation of an incentive-type contract for the procurement of the services described in these findings pursuant to Section 302(c)(1) of the Property Act."

We read the D&F as advancing essentially the same line of reasoning previously argued by GSA in the prior Nationwide protest for justifying "exception ten" negotiating authority of janitorial services. Then, as now, GSA: (1) criticizes the advertised procurement method for not permitting the achievement of the "level of performance" felt necessary in janitorial contracts; (2) cites our Office for not permitting the rejection of a "below cost" janitorial services bid; (3) describes the enormous burden of adequately supervising advertised janitorial services contracts; (4) argues that adequate janitorial services specifications cannot be "drawn or administered"; and (5) extolls the merits of negotiation in general and incentive-type contracting in particular.

What is new in the current D&F (other than the citation of "exception one" authority) is the argument that conventional negotiation better promotes the interests of small business concerns. GSA believes that negotiation promotes the interests of "reputable, experienced and qualified" small business contractors as opposed to those small business concerns considered by GSA to be "marginally qualified and inexperienced"--even though these marginal concerns might possess "certificates of competency" from the Small Business Administration for janitorial services procurements in which the "marginal" concerns are competing.

In our prior decision we held that the numbered arguments were not legally sufficient to justify "exception ten" negotiating authority. The question now presented, of course, is whether these arguments carry any greater weight to justify use of conventional negotiation techniques when advanced under "exception one" authority.

In a series of decisions in the 1950's, our Office authorized the use of "exception one" negotiation authority to permit small business set-aside awards. We reviewed these decisions in 41 Comp. Gen. 306, 314-315 (1961) when we said:

"In 31 Comp. Gen. 347 [1952] we held that contracts may be awarded to small business firms by negotiations, under section 2(c)(1) of the Armed Services Procurement Act of 1947 upon a proper determination by the agency head that the award is necessary in the public interest [during the period of a national emergency] * * *

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"The decision reasoned that:

"* * * if the contracts here contemplated properly may be negotiated with small business firms at a higher cost to the Government than is otherwise obtainable, the fact that bids are first solicited would not preclude the contracting agency from negotiating the contract with a small-business concern at a higher price. In that connection, it would appear that important considerations indeed would be necessary to determine that the public interest requires the award of contracts to small business concerns when it is known at the time that the procurement could be made from other sources at less cost to the Government. In apparent recognition of such fact, section 714(f)(2) of the Defense Production Act of 1950, as amended, 65 Stat. 143, provides that--

"The Congress has as its policy that a fair proportion of the total purchases and contracts for supplies and services for the Government shall be placed with small-business concerns. To effectuate such policy, small-business concerns within the meaning of this section shall receive any award or contract or any part thereof as to which it is determined by the Administration [Small Defense Plants Administration] and the contracting procurement agencies (A) to be in the interest of mobilizing the Nation's full productive capacity, or (B) to be in the interest of the national defense program, to make such award or let such contract to a small-business concern."

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"In 31 Comp. Gen. 431 [1952] we held that although it would not be legally proper for a procuring agency to enter into a contract with a small business concern at a higher price than otherwise might have been obtained in instances where advertising is required and formal bids are solicited, where joint determinations (such as under section 714(f)(2) of the Defense Production Act of 1950), are made in advance, the procurement may be negotiated with small business concerns at higher prices than otherwise obtainable. Finally see 36 Comp. Gen. 1d7 [1956]."

Acting in agreement with our decisions, the Administrator of GSA formally determined in the 1950's that contracts could be negotiated by executive agencies with small business concerns under "exception one" negotiating authority. See Federal Procurement Regulations (FPR) § 1-3.201(b) (1964 ed. amend. 32).

Our decisions sanctioning the use of "exception one" negotiating authority were premised on the need to justify the restriction of competition (which we otherwise found to be proper) to one category of bidders--small business concerns. Restriction of competition to one class of bidders, however, is not compatible with formal advertising procedures under current law. Since we found the restriction of competition to be otherwise proper, the small business set-aside procedure had to be justified within the context of negotiation.

Nevertheless, both FPR and the Armed Services Procurement Regulation (ASPR) soon recognized that, even though a set-aside procurement was technically a negotiated procurement because competition was justifiably restricted to one class of bidders under "exception one" negotiation authority, the procurement should otherwise be conducted under the rules of formal advertising "whenever possible." See, for example, ASPR § 1-706.5(b) (1976 ed.) and FPR § 1-1.706-5(b) (1964 ed. amend 101).

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It is our view that the above-numbered (previously considered and rejected) reasons do not justify negotiation under any of the statutory exceptions to formal advertising. This conclusion is not dispositive of the legality of the procedure, however. The Administrator of GSA, the official designated under the Federal Property and Administrative Services Act of 1949, as amended, to prescribe the FPR, has signed a waiver of the FPR mandate requiring use of formal advertising procedures whenever possible under small business set-aside procurements. In view of the waiver, and in the absence of any limit on the negotiation procedures that can be used in "exception one" procurements, we must conclude that GSA's use of conventional negotiation procedures under the questioned procurements is lawful and not in violation of our prior Nationwide decision.

Protests denied.

Deputy

R. F. Kutt
Comptroller General
of the United States