DCCUMENT RESUME

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[Protest against Cancellation of Request for Proposals]. B-188375. September 21, 1977. 6 pp.

Decision re: Washington Patrol Service, Inc.; by Robert F. Feller, Acting Ccmptrcller General.

Issue Area: Federal Procurement of Goods and Services (1900).
Contact: Office of the General Counsel: Procurement Law II.
Budget Function: General Government: Other General Government (806).
Organizatica Concerned: Department of the Air Force: Los Angeles Air Force Statior, CA; Inter-Con Security Systems.
Authority: 10 U.S.C. 2304(a). A.S.P.R. 1-706.5(b). A.S.P.R. 3-301. A.S.P.R. 3-401.3. A.S.P.R. 3-201. B-185481 (1976). B-178282 (1973). B-186559 (1976). B-162945 (1968). 50 Comp. Gen. 50. United States v. Mason Hanger Co., 260 U.S. 323 (1923). Arthur Venneri Company v. United States, 180 Ct. Cl. 920 (1967).

The protesters objected to the cancellation of a request for proposals being procured as a total set-aside for small business. The agency's determination to set aside procurement for small business concerns was an internal administrative matter. The ASPR did not require that a contracting officer's decision that small business restricted advertising was not feasible be afforded finality in the face of disagreement by agency superiors. Notwithstanding the protester's proposal preparation and negotiation efforts, the termination of a small business set-aside procurement which utilized the negotiation procedure and reinstatement of the procurement pursuant to small business restricted advertising procedure was appropriate. (Author/SC)

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DECISION

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

FILE: B-188375 DATE: September 21, 1977

MATTER OF: Washington Patrol Service, Inc., et al.

DIGEST:

1. Agency's previous decision that guard services were not suitable for SBA procurement under Section 8(a) program is not determinative of question whether agency should procure same services by negotiation or by formal advertising procedures because considerations underlying such decisions are not necessarily similar.

2. Agency's determination to set-aside procurement for small business concerns under 10 U.S.C. § 2304(a)(1) and procurement method decisions made thereunder are internal administrative matters. ASPR does not require that contracting officer's decision that small business restricted advertising is not feasible be afforded finality in face of disagreement by agency superiors.

3. Notwithstanding protester's proposal preparation and negotiation efforts, termination of small business set-aside procurement which utilized negotiation procedure and reinstatement of procurement pursuant to small business restricted advertising procedure is appropriate where agency officials determine that preferred restricted advertising procedures is feasible.

Washington Patrol Service, Inc. (Washington Patrol) and Inter-Con Security Systems, Inc. (Inter-Con) protest the cancellation of request for proposals (RFP) No. FO4693-77-09007 by the Space and Missile Systems Organization at the Los Angeles Air Force Station, California (SAMSO). Prior to its cancellation, the procurement for services to operate and manage the base security at SAMSO was being procured under the authority of 10 U.S.C. § 2304(a)(1) as a total set-aside for small business. The contracting officer decided to utilize

negotiated procedures because the services were considered unique and complex. Since the cancellation, SAMSO has issued invitation for bids (IFB) No. FO4693-77-09015, to procure the same services on the basis of Small Business Restricted Advertising which is conducted in the same manner as formal advertising except that it is limited to small businesses.

The change from the use of an RFP to an IFB resulted from a prior protest submitted to this Office by Joe Bell Enterprises. During the development of the protest, Air Force Headquarters concluded that the facts did not support use of negotiations and it directed SAMSO to procure the services by Small Business Restricted Advertising. Thus, the protest of Joe Bell Enterprises became moot.

The protesters contend that, as the services involve the management and operation of the entire security system, they require the use of judgment and competent management in the exercise of authority over Government personnel and property, the security of classified information relating to the national defense and the development and execution of policy and procedural directives. They assert that these services require more than what ordinarily is required in industrial and retail security operations. Because the services frequently deal with situations which cannot be anticipated, it is argued that attempts to formulate specifications for problems not yet fully identified or understood could seriously hamper the contractor's efforts to respond to unforeseen events.

Air Force Headquarters points out that prior to 1969, these services were procured by means of formal advertising and that satisfactory performance was obtained. It states that the adequacy of the management required by the guard services can be measured as an aspect of the responsibility determination prior to award pursuant to an IFB. It stresses that it is not procuring management services except as a part of a simple services contract. It refers to the 35 pages of specifications and contends that there is little evidence to support the contentions of the protesters that specifications adequate for an IFB approach cannot be drafted. The Air Force asserts that any determination to procure by negotiation procedures rather than by formal advertising could not be supported.

There is a clear statutory preference for formal advertising expressed in 10 U.S.C. § 2304(a) which contemplates use of negotiation techniques only when formal advertising is not feasible and practicable and only when one of seventeen exceptions is applicable. Unilateral small business set-asides, such as in this case, are authorized under the first stated exception whether they are conducted by restricted formal advertising or negotiation procedures, the primary concern being the elimination of a class of potential contractors from the competition. Although in such cases Armed Services Procurement Regulation (ASPR) § 1-706.5(b) permits conventional negotiations or "Small Business Restricted Advertising," the preference in this regulation for formal advertising is made clear by the statement that the "latter method shall be used whenever possible." (Emphasis supplied.)

Washington Patrol contends, however, that cancellation of the RFP after completion of negotiations was unfair to those small businesses, including itself, which had spent considerable time and money in proposal preparation and negotiations. While we can sympathize with this position, we believe that such considerations would not justify the continuation of a procurement which the agency believed to be in conflict with legal requirements. Vanport Manufacturing Company, B-186559, October 19, 1976, 76-2 CPD 343. Furthermore, we are not persuaded that a mere change in the procurement procedure utilized rendered futile protester's substantive preparations under the earlier negotiated procurement.

Washington Patrol further contends that this Office previously upheld a negotiated procurement to obtain "precisely the same services" in Metropolitan Security Services, Inc., B-162945, February 14, 1968. In that case, however, we noted with approval the agency's decision to study the feasibility of using formal advertising for procuring future guard services.

In support of its position that the security services involved are so unique and complex that negotiations are warranted, Inter-Con points out that two years ago SAMSO determined that the services were not suitable for award to the Small Business Administration (SBA) under the Section 8(a) program because it was essential that the Air Force review and evaluate all prospective contractors to insure selection of the most highly

qualified. We do not find this point persuasive because the considerations upon which a decision is made to award the SBA a contract under the Section 8(a) program are not necessarily similar to those upon which determinations to procure by negotiations or formal advertising are made.

Inter-Con points out a disagreement between the contracting officer at SAMSO and the Air Force officials in Washington who overruled him as to the use of negotiation procedures for this procurement. Inter-Con challenges the authority of higher level Air Force officials to overrule the contracting officer's reasonable exercise of his discretion. It cites a number of cases where the courts have held that a contracting officer's judgment cannot be overruled by superiors who would seek to substitute their judgment. Inter-Con contends that if this Office sustains the Air Force, the operative effect would be the substitution of its discretion for that of the contracting officer. This result, it states, would conflict with the traditional position of this Office that it will not interfere with the reasonable exercise of the contracting officer's discretion.

We believe that the real issue is not whether this Office can substitute its discretion for that of the contracting officer, but whether the higher level Air Force officials' discretion can be substituted for that of the contracting officer.

Inter-Con cites a number of court cases in support of its contention that the direction to SAMSO to cancel the RFP and resolicit on an IFB basis was improper. We believe that they do not provide such support. In United States v. Mason & Hanger Co., 260 U.S. 323 (1923), the court held that under the contract involved, the Comptroller of the Treasury could not overturn a decision made by the contracting officer as to the amount payable under a contract. (There was no disagreement between the contracting officer and his agency superiors.) In Arthur Venneri Company v. United States, 180 Ct. Cl. 920 (1967), the court held that the contracting officer was acting within his authority when he entered into a stipulation that a decision on a similar case by the Armed Services Board of Contract Appeals would be considered a final determination of the issues of law and fact raised by the contractor. The court stated that the authority of contracting officers to settle claims does not end with a decision under the disputes clause and that the Government could not override a decision made pursuant to such authority. In Southern, Waldrip and Harrick Company v. United States, 167

Ct. Cl. 488 (1964), the court held that where an IFB contains a provision in the instructions to the bidders that the timeliness of a telegraphic bid modification will be determined by the officer awarding the contract, the head of the contracting agency was without authority to overrule the contracting officer on the timeliness matter. In John A. Johnson Contracting Corp. v. United States, 132 Ct. Cl. 645 (1955), the court held that under the contract, the contractor was entitled to a decision with respect to a request for an extension of delivery from the contracting officer and not by a superior who chose to supersede him. All of these cases involved contracts or solicitations designating a particular official to make a certain determination affecting the rights of the contractors or bidders. The courts held that such designations were agreements between the Government and the contractors or prospective contractors and must be observed.

In Sol O. Schlesinger v. United States, 182 Ct. Cl. 571 (1968), the contract gave default termination power to "the Government" and did not designate the contracting officer as the official to make the determination. The court set aside a default termination which the contracting officer was directed to make because neither the contracting officer nor his superiors ever made a judgment on the merits of the case but used the contractor's technical default as the basis for taking action felt to be necessary on grounds unrelated to the contractor's performance.

The instant case involves no commitment to contractors or prospective contractors who are in no way involved in the internal decisions as to procurement methodology. The determination to set aside a procurement for small business concerns under 10 U.S.C. § 2304(a)(1) and the decisions made thereunder as to procurement method are internal administrative matters. There is no suggestion in ASPR § 3-301 that such determinations and decisions must be afforded finality within the agency.

Inter-Con correctly points out that the contracting officer used as authority for procurement by negotiation 10 U.S.C. § 2304(a)(1) as implemented by ASPR § 3-201. It further points out that ASPR § 3-401.3 provides that in the case of small business set-asides, the authority of ASPR § 3.201 shall be used in preference to any other authority in ASPR § 3- Part 2 and that ASPR § 1-706.5(b) states that formal advertising "shall

be used whenever possible" even where 10 U.S.C. § 2304(a)(1) has been invoked. Inter-Con then directs our attention to the parenthetical statement "see 3-201.3" in ASPR § 1-706(5)(b). Based on this, Inter-Con contends that it is clear that the decision as to whether formal advertising is possible rests solely with the contracting officer who cannot be overruled so long as his decision is reasonable. We do not reach this conclusion. There is nothing in these ASPR provisions suggesting finality of a contracting officer's decision that Small Business Restricted Advertising is not feasible in the face of disagreement by his agency superiors

Further, we do not agree with Inter-Con that a failure of this Office to direct the Air Force to cancel the IFB and reinstate the RFP would conflict with cases of this Office which Inter-Con cites. Infodyne Systems Corp., B-185481, July 12, 1976, 76-2 CPD 33, IMED Corporation, B-178282, July 27, 1973 and 50 Comp. Gen. 50 (1970) all involved cases where the protester asked this this Office to disturb the decision of the contracting officer or the agency and none involved the finality of such decisions within the agency.

We believe that the protesters have not clearly shown that the nature of the guard services and that the required management and judgment differ so greatly from that required in many procurements for complex hardware and services successfully procured through formal advertising. In our opinion an exception from the statutory and regulatory preference for formal advertising is not clearly justified.

Accordingly, these protests are denied.

Acting Comptroller General
of the United States