

Mr. Roberts
PLI 14427

DECISION



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

FILE: B-197244

DATE: July 22, 1980

MATTER OF: Chameleon Company, Incorporated

DIGEST:

Agency decision to use negotiation procedures in lieu of small business restricted advertising when awarding time and materials contract for construction services is not legally objectionable where record shows agency was purchasing management and technical competence along with labor and could not draft adequate specifications with respect to management capability.

Chameleon Company, Incorporated (Chameleon) protests request for proposals (RFP) No. 263-80-P(92)-0057, a 100 per cent set-aside for small business concerns issued by the Department of Health, Education and Welfare (now the Department of Health and Human Services). The solicitation called for general contracting services, on a time and materials basis, to accomplish specific tasks as ordered for renovating and maintaining existing facilities at the National Institutes of Health (NIH) at Bethesda, Maryland. Chameleon asserts that NIH's use of negotiation rather than formal advertising was improper in the instant case. We disagree.

As a preliminary matter we point out that small business set-asides are always technically considered to be negotiated procurements. Federal Procurement Regulations (FPR) 1-1.706-8 (1964 ed.). Nonetheless, the regulations prescribe a special method of procurement to be conducted in the same manner as formal advertising which is applicable to small business set-asides, i.e., small business restricted advertising.

*Federal
Procure*

[Protest Against Small Business
Set-Aside Solicitation]

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FPR 1-1.701-9. Thus, even though the procurement is restricted to one class of bidders, the regulation mandates a preference for formal advertising procedures whenever possible. FPR 1-1.706-5(b). Therefore, as in unrestricted procurements, the use of negotiated procedures in a small business set-aside is dependent upon the existence of factual situations which would bring the procurement within the statutory exceptions to formal advertising specified in 41 U.S.C. 252(c) (1976). See B.B. Saxon Company, Inc., 57 Comp. Gen. 501 (1978), 78-1 CPD 410.

By Determination & Findings dated November 14, 1979, the contracting officer found that:

"the proposed contract should be negotiated competitively since it is impracticable to secure competition by formal advertising for the contract contemplated because:

a. The services provided hereunder will be processed under individual Task Orders. It is imperative that a contract mechanism exist to react to various problem situations, primarily those with a short lead time. It is not possible to develop specifications and estimate the extent of work with any degree of confidence for these particular tasks."

Based on the findings, the contracting officer determined that:

"The proposed procurement is for construction services for which it is impracticable to secure competition by formal advertising and that negotiation of a contract for such purpose is authorized pursuant to 41 U.S.C. § 252(c)(10), as contemplated by FPR 1-3. § 210(a)(13), provided that the required services have been authorized by law."

Chameleon argues that the contract in question is a typical term contract for routine construction services, and that since NIH has awarded contracts of this type in

previous years for the same types of tasks outlined in the RFP's Scope of Work, NIH should have sufficient "background history" to draft adequate specifications.

In response, NIH asserts that negotiation was authorized under 41 U.S.C. § 252(c)(10) and FPR § 1-3.210(a)(9) and 1-3.210(a)(13). 41 U.S.C. § 252(c)(10) authorizes the negotiation of contracts for which it is "impracticable to secure competition" through formal advertising. FPR 1-3.210(a) provides 15 examples which it describes as "illustrative of circumstances with respect to which this authority may be used." The circumstances set forth in FPR § 1-3.210(a)(9) are described as:

"When the contemplated procurement involves maintenance, repair, alteration, or inspection and the exact nature or amount of the work to be done is not known."

The circumstance set forth in subsection (13) is "when it is impossible to draft for an invitation for bids adequate specifications or any other adequately detailed description of the required property or services."

We do not readily agree with NIH that the use of negotiation procedures was authorized merely because the exact nature or amount of work to be done was not precisely known. The regulations merely recite that circumstance as one where negotiation may be used, and FPR 1-3.10(a) provides that even where one of the illustrated circumstances could be invoked, formal advertising (or, in this case, restricted advertising) is nonetheless to be used when it is practicable to do so. See B.B. Saxon, supra. Neither do we agree with the NIH position stated in its report that the use of a time and materials contract automatically requires the use of negotiation. See Advanced Business Systems, et al., B-195117, et al., November 6, 1979, 79-2 CPD 329.

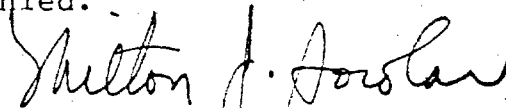
We do not conclude, however, that the use of negotiation procedures was improper here. Unlike the case in B.B. Saxon, where the agency was conducting only a price competition and in our view had adequate specifications to permit competition on a formally advertised basis, NIH here required the submission of technical proposals to enable it to evaluate

offeror capability to "provide and manage construction services in a mix of areas." Thus, it seems clear that while the price competition was based solely on fixed price hourly labor rates for various labor categories, the agency was buying more than labor--it was also buying technical competence that would necessarily have to accompany the provision of a labor force for a variety of jobs that would involve different skills, different time frames, and different requirements. We believe this technical and management expertise can be of considerable importance when a time and materials contract is to be awarded, since the use of this type of contract itself "does not afford the contractor with any positive profit incentive to control the cost of materials or to manage his labor force effectively" and "does not encourage effective management control." FPR § 1-3.406-1. In other words, given the nature of a time and materials contract, a contracting agency may well conclude that its minimum needs require a high level of quality with respect to the management of the services to be provided. See Tidewater Protective Services, Inc., and Others--Reconsideration, 56 Comp. Gen. 649 (1977), 77-1 CPD 361.

The agency's concern in this regard is adequately demonstrated in the RFP, which informed offerors that technical proposals would be evaluated, in part, on offerors' detailed procedures delineating how they would 1) effectively provide necessary supervisors and management to insure maximum productivity of labor forces, 2) provide craft labor hour estimates for proposed task order projects, and 3) prepare work schedules for timely accomplishment of the projects, and on the qualifications and experience of key personnel to be assigned to the project.

Consequently, under these circumstances, we believe the agency was justified under FPR § 1-3.210(a)(13) in utilizing negotiation procedures in lieu of small business restricted advertising.

The protest is denied.



For the Comptroller General
of the United States