

2528 + [signature]

DECISION



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

FILE: B-210216

DATE: May 31, 1983

MATTER OF: Baucom Janitorial Service, Inc.

DIGEST:

1. The determination of the Government's minimum needs and the best method of accommodating those needs is primarily the responsibility of the contracting agency, and GAO will not question an agency's determination of its minimum needs unless there is a clear showing that the determination has no reasonable basis.
2. GAO will not question the contracting agency's decision to cancel its request for proposals (RFP) for janitorial services and include those services under the RFP for the facilities operating services contract since the protester has not shown that the agency lacked a reasonable basis for its decision and, therefore, has not carried its burden of proof.

Baucom Janitorial Service, Inc. (Baucom), protests the fact that the janitorial services for the National Space Technology Laboratories (NSTL), Bay St. Louis, Mississippi, are not being procured under a formally advertised solicitation. The contracting agency is the National Aeronautics and Space Administration (NASA), and the requirement was initially solicited under request for proposals (RFP) No. 13-NSTL-P-82-16. However, after Baucom had filed its protest, NASA decided that the best way to obtain these services was to add the requirement to the facilities operating services contract and have the janitorial services performed as a subcontract. NASA therefore intends to cancel the RFP and amend the RFP for the facilities operating services. Baucom does not agree with this decision and continues to argue that the janitorial services for NSTL should be obtained by means of a formally advertised procurement.

We deny the protest.

NASA is the landlord for NSTL and is responsible for its operation and maintenance. Much of the work performed

025725

there is research and development. The tenants include both Federal and State departments and agencies. The original RFP was issued as a 100-percent small business set-aside with the intention of awarding "a level-of-effort, cost-type, award fee contract." In the contracting officer's opinion, it was impossible to draft specifications to allow a firm fixed-price, formally advertised contract. This was partly because a large percentage of the NSTL is laboratory space which requires a higher quality and more specialized janitorial service than office or warehouse space and the exact services needed vary from tenant to tenant and from time to time. In addition, administration of the contract is complicated by the fact that each tenant must pay its share of the janitorial services and, when on occasion a particular tenant requests special cleaning services, the contractor has to supply the service and then inform NASA so that a separate charge-back can be made to that tenant. Also, the work area at NSTL is frequently converted from office space to laboratory space or vice versa and this often changes cleaning requirements. Based on these various factors, the contracting officer believed that a negotiated, incentive-type contract was justified.

As noted above, NASA has decided to cancel the RFP and add the janitorial requirement to the RFP for the facilities operating services contract. NASA explains this decision by stating that, after consideration of the protest issue and a reassessment of the best way to acquire services adequate to meet the needs of NSTL, NASA concluded that it would be better for the janitorial work to be part of the larger facilities operating services contract. NASA states that a list of potential sources for the janitorial work, which will include Baucom's name, will be provided to all offerors so that Baucom and other small businesses will be considered for possible subcontracting by the prime contractors.

NASA maintains that the decision to transfer the work was made in the best interest of the Government and was not intended to injure Baucom or any other party. NASA further points out that, since cancellation took place before proposals were due, no one's competitive position has been harmed. In NASA's opinion, Baucom, the incumbent contractor, and any other interested firm still have a chance to obtain this work through a subcontract.

Baucom disagrees with both NASA's initial decision to conduct a negotiated procurement and with its latest decision to include the janitorial work under the facilities operating services contract. As to the use of a negotiated, incentive-type contract, Baucom states that it is common practice for janitorial contracts to be awarded to the firm

offering the lowest bid under a formally advertised procurement. Baucom points out that the General Services Administration, which is responsible for thousands of janitorial contracts a year, uses "low bid type contracts." In Baucom's opinion, NASA's argument that its need for unique services prevents the use of formal advertising is not convincing. Baucom believes that greater effort on the part of NASA inspectors is the way to insure that high quality service is obtained and, furthermore, that this is true regardless of the type of procurement method used.

As to NASA's decision to include the janitorial work under the facilities operating services contract, Baucom argues that this will drive up the cost of the janitorial work. Moreover, Baucom complains that the prime contractor will be allowed to take a percentage of the janitorial contract for handling it and, thus, reduce the value of the contract for the cleaning firms. Baucom also believes that NASA has chosen this approach as a means of handpicking a subcontractor through the prime contractor.

In Baucom's opinion, the janitorial contract should be awarded directly by NASA and solely on the basis of the lowest bid received under a formally advertised procurement.

The general rule is that the determination of the Government's minimum needs and the best method of accommodating those needs is primarily the responsibility of the contracting agencies. This rule recognizes that, since Government procurement officials are the ones most familiar with the conditions under which supplies, equipment, or services have been used in the past and how they are to be used in the future, they are generally in the best position to know the Government's actual needs. Consequently, our Office will not question an agency's determination of its minimum needs unless there is a clear showing that the determination has no reasonable basis. Frequency Electronics, Inc., B-204483, April 5, 1982, 82-1 CPD 303.

As to the decision of what is the best method of accommodating the Government's minimum needs, we have held that the agency's use of negotiation procedures is proper where the contracting agency requires a high level of technical competence to satisfy its minimum needs and adequate specifications describing those needs cannot be drafted. Del Rio Flying Service, B-197444, September 4, 1980, 80-2 CPD 175. We have upheld this justification for the use of a negotiated method of procurement even when the protester has asserted that the services to be provided are "routine." Chameleon Co., Inc., B-197244, July 22, 1980, 80-2 CPD 59.

In view of the foregoing, the burden is on Baucom to show that NASA's decision to use a negotiated rather than a formally advertised method of procurement was unreasonable. Self-Powered Lighting, Ltd., 59 Comp. Gen. 298 (1980), 80-1 CPD 195. However, since NASA has decided to cancel the RFP, it is not necessary for us to consider the question further. The key issue now is whether NASA can properly cancel the RFP and add the requirement to the facilities operating services contract so that Baucom is then required to compete for the subcontract.

The contracting officer is clothed with broad powers of discretion in deciding whether a negotiated procurement should be canceled. Infodyne Systems Corp., B-185481, July 12, 1976, 76-2 CPD 33. Moreover, in making the decision to cancel a negotiated procurement, the contracting officer need only have a reasonable basis as opposed to the "cogent and compelling" reason required for the cancellation of an advertised procurement. Allied Repair Service, Inc., B-207629, December 16, 1982, 82-2 CPD 341. This distinction is based on the public exposure of competitive positions which occurs as a result of the public opening of bids in advertised procurements--an event which does not occur in negotiated procurements.

NASA's decision to cancel is closely linked to its discretionary authority to determine the best method of accommodating its minimum needs. As noted above, NASA reassessed its use of a separate RFP to obtain janitorial services after the protest had been filed and concluded that it could best acquire the quality of service and the administrative control it desired by placing the janitorial work under the more comprehensive facilities operating services contract. Baucom carries the burden of showing that this decision was unreasonable. Kentron International, Inc., B-195789, March 7, 1980, 80-1 CPD 180.

Baucom has argued that NASA's actions will drive up the cost of the janitorial services, allow the prime contractor to take a percentage of the janitorial subcontract as a fee for the prime contractor's administrative involvement and, finally, and more importantly, allow NASA to handpick the janitorial subcontractor with the prime contractor acting as NASA's agent.

The first two points are, in effect, a disagreement with NASA's decision regarding the best method of accommodating its minimum needs. In other words, Baucom believes that it would be more cost effective for NASA to contract directly with the janitorial firm rather than pay a markup to the prime contractor solely for the purpose of having the prime contractor act as an intermediary between NASA and the

janitorial firm. However, we have held that mere disagreement with an agency's discretionary decision is not grounds to disturb it. James G. Biddle Company, B-196394, February 13, ~~1980~~, 80-1 CPD 129. Consequently, Baucom's first two arguments do not demonstrate that NASA has acted unreasonably, but only that it can be argued that NASA's decision is wrong. This does not satisfy Baucom's burden of proof.

Regarding Baucom's claim that NASA intends to handpick the janitorial subcontractor, we note that our Office generally does not consider protests involving subcontracts except in certain limited circumstances. See Optimun Systems, Inc., 54 Comp. Gen. 767 (1975), 75-1 CPD 166. One of these exceptions is where the Government's active or direct participation in the selection of the subcontractor has the net effect of rejecting or selecting a potential subcontract source.

Baucom is alleging the above-mentioned exception; however, at this stage, this allegation is mere speculation. Baucom has presented no evidence that NASA is trying to handpick the janitorial subcontractor. If this happens under the RFP for the facilities operating services contract, then, at that time, Baucom may have a basis to protest and will have to furnish our Office with evidence of NASA's involvement in the subcontractor's selection. But, for the present, Baucom's speculative statements do not satisfy its burden of proving that NASA is trying to handpick the janitorial subcontractor or that the agency has acted unreasonably or improperly. See Harris Systems of Texas, Inc.; Anti-Pest Co., Inc., B-208670, B-208809, April 13, 1983, 83-1 CPD ____.

We conclude that Baucom has not shown that NASA lacked a reasonable basis for canceling the RFP and including the janitorial work under the RFP for the facilities operating services contract. Baucom therefore has failed to carry its burden of proof.

Protest denied.

for 
Comptroller General
of the United States