

DECISION

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

FILE: B-217211

DATE: September 24, 1985

MATTER OF: United Food Services, Inc.

DIGEST:

1. Agency decision to use a cost-type, negotiated contract in lieu of a fixed-price, formally advertised contract in procuring mess attendant services is not justified by variations in meal counts and attendance, the lack of a contractual history, or the need for managerial and technical expertise. Although the Competition in Contracting Act of 1984 eliminates the preference for formally advertised procurements (now "sealed bids"), and would apply to any resolicitation, the implementing provisions of the Federal Acquisition Regulation (FAR) do provide criteria for determining whether a procurement should be conducted by the use of sealed bids or competitive proposals. GAO recommends that contracting agency not exercise contract renewal options, and instead conduct a new procurement according to the applicable FAR provisions.
2. Cost-plus-award-fee contract, authorized under the FAR, is not a prohibited cost-plus-a-percentage-of-cost contract where the award fee, while based on a percentage of costs, depends on government's subjective assessment of performance, with entitlement decreasing as costs increase, and is subject to a ceiling on fees to be paid.

United Food Services, Inc. (United) protests request for proposals (RFP) No. DABT47-85-R-0010, issued by the Army as a small business set-aside for staffing, managing and operating 33 food service and dining facilities at the Army's training base at Fort Jackson, South Carolina. The solicitation requested pricing proposals, for a base year

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and 4 option years, for each of the 33 food facilities on a cost per month basis. Unlike a fixed-price, formally advertised contract where award is based on lowest price, here, award was based on an evaluation of both the technical acceptability and cost realism of the proposals. Payments under the contract include reimbursements for allowable costs. The contract has been awarded. United contends that: (1) the services should have been procured through fixed-price, formal advertising rather than through negotiation of a cost-type contract; (2) payment under the contract is on a prohibited "cost-plus-a-percentage-of-cost" basis; and (3) certain minimum manning requirements contained in the RFP were excessive.

We sustain the protest as to the first allegation, deny it as to the second, and dismiss it as to the third.

United contends that the food services should have been procured by formal advertising with an invitation for bids (IFB) for a fixed-price contract. United argues that the government has procured such services, on a fixed-price basis, through formal advertising in the past, and cites a recent IFB for food and dining services issued by the Army at Fort Knox, Kentucky. United points out that both Fort Knox and Fort Jackson are under the same Army command, and contends that if it was practicable to formally advertise for the services at Fort Knox, it is inconceivable that formal advertising could not have been used at Fort Jackson.

The Army responds that the services required could not practicably be obtained through formal advertising on a fixed-price basis and that a cost-type, negotiated procurement was therefore appropriate. The Army points to the existence of variable factors and unknown risks, based in part on the lack of a contractual history, such as the number and type of meals to be served and attendance at the facilities in light of unpredictable recruitment results and personnel deployment. The Army reports that Fort Jackson has previously contracted for food services at only 7 of its facilities and that the instant contract for 33 facilities is significantly more complex. In addition, the Army maintains that the level of managerial and technical competence required to meet the base's food service needs could not be adequately described in an IFB.

We cannot agree that Fort Jackson's needs reasonably required the use of a cost-type contract which in turn

justified the use of negotiation. A cost-reimbursement contract is to be used only where "uncertainties involved in contract performance do not permit costs to be estimated with sufficient accuracy" to permit fixed-price contracting. Federal Acquisition Regulation (FAR), 48 C.F.R. § 16.301-2 (1984). The contracting officer argues that the variations in meal counts and attendance pose too great a risk to be borne by the contractor, and concludes that a cost-reimbursement contract was therefore justified. We have held, however, that bidders for military food services or so-called "mess attendant" services contracts can take such risks into account when computing their bids, and submit fixed-price bids on the basis of costs of individual meals or hourly rates of service to be provided. Palmetto Enterprises, 57 Comp. Gen. 271 (1978), 78-1 CPD ¶ 116; Space Services International Corp., B-207888.4, et al., Dec. 13, 1982, 82-2 CPD ¶ 525; Logistical Support, Inc., B-197488, Nov. 24, 1980, 80-2 CPD ¶ 391.

Moreover, we have generally rejected the argument that variations in meal requirements and attendance justify the use of negotiation instead of formal advertising, ABC Management Services, Inc. et al., 53 Comp. Gen. 656 (1974), 74-1 CPD ¶ 125; Ira Gelber Food Services, Inc. et al., 54 Comp. Gen. 809 (1975), 75-1 CPD ¶ 186, and all three military departments routinely have been able to procure these mess attendant services through the use of formal advertising. See J.E.D. Service Co., B-218228, May 30, 1985, 85-1 CPD ¶ 615 (Army [Fort Knox]); Military Services, Inc. of Georgia, B-218071, May 21, 1985, 85-1 CPD ¶ 577 (Navy); Kime-Plus, B-215979, Feb. 27, 1985, 85-1 CPD ¶ 244 (Air Force). Here, although we recognize that the Army was expanding the food services under contract at Fort Jackson, the Army does not explain why its own prior experience in manning the facilities and in contracting for mess attendant services, see Space Services International Corp., *supra*, along with recruitment and training goals that presumably are established and budgeted for, is not sufficient to enable it to prepare specifications and structure a contract suitable for formal advertising. Finally, we also cannot accept the Army's position that the level of managerial and technical expertise required precludes adequate specification description, justifying the use of negotiation, because the Army has only offered its unsupported conclusion on this matter; it has failed to show that its management requirements are so unique or complex that they are incapable of description. We therefore agree with United that the Army's use of a cost-type, negotiated contract does not appear justified.

United also alleges that the cost-plus-award-fee method of reimbursement described in the solicitation is in fact an improper cost-plus-a-percentage-of-cost method.

The solicitation directs offerors to include in their cost proposals a proposed "total available fee amount," the sum of a base fee amount and a maximum award fee amount. These fees are to be expressed in terms of percentages of the estimated costs of the contract, which cannot exceed either the percentage limitations set forth in applicable regulations (FAR, 48 C.F.R. § 15.903; Department of Defense Supplement, 48 C.F.R. § 216.404-2(b) (1984)), or the offeror's proposed total dollar fee amount.

Contract payments of the fee amounts, while based on a percentage of costs incurred under the contract, are to be determined by the contracting officer in light of recommendations from a performance evaluation board consisting of agency technical and administrative personnel. The amount will depend upon the board's subjective evaluation of the contractor's performance, with higher awards to be made for the most efficient and economical performance, but subject to the contractor's proposed total dollar fee amount.

First, we note that a cost-plus-award-fee type of contract is authorized under the FAR, 48 C.F.R. §§ 16.305 and 16.404-2. It is distinguished from a prohibited cost-plus-a-percentage-of-cost contract, as the latter automatically allows the contractor a fee based on a fixed percentage which increases unchecked as costs increase, thus providing an incentive for inefficient performance. United has offered no evidence that this would be the case under the Army's proposed cost-plus-award-fee method of reimbursement. To the contrary, as discussed above, the award fee rewards efficient performance and so, while with increased costs the base for the fee calculation will be higher, the amount of fee to which the contractor will be entitled will decrease as contractor costs increase. Also, the total fee is subject to a fixed dollar ceiling. Accordingly, we do not believe this payment scheme violates the statutory prohibition of cost-plus-a-percentage-of-cost contracting.

Finally, we dismiss as academic United's allegation regarding the minimum manning requirements, as the Army reports these requirements were in fact deleted by a subsequent amendment to the solicitation.

While we sustain the protest against the use of a cost-type, negotiated contract, we note that the Competition in Contracting Act of 1984, (CICA) eliminates the statutory preference for formally advertised procurements (now "sealed bids"). 10 U.S.C. § 2304, as amended by Pub. L. No. 98-369, § 2723(a)(1), 98 Stat. 1175, 1187. However, the provisions of the FAR, which have been revised to implement CICA (Federal Acquisition Circular 84-5, Dec. 20, 1984, effective for solicitations issued after March 31, 1985), do provide criteria for determining whether a procurement should be conducted by the use of sealed bids or competitive proposals (FAR, § 6.401(a)). We are therefore recommending that the Army not exercise any options to renew the contract and instead conduct a new procurement according to the applicable FAR provisions.

By letter of today, we are advising the Army of our recommendation.



Acting Comptroller General
of the United States