

DOCUMENT RESUME

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[Request for Reconsideration of Decision on Authority to Use Negotiation in Lieu of Formal Advertising for Procurement]. B-186233. May 24, 1977. 8 pp.

Decision re: Tidewater Protective Services Inc.; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services: Reasonableness of Prices Under Negotiated Contracts and Subcontracts (1904).

Contact: Office of the General Counsel: Procurement Law II. Budget Function: National Defense: Department of Defense - Procurement & Contracts (058).

Organization Concerned: Department of the Air Force.

Authority: Armed Services Procurement Act of 1947 (10 U.S.C. 137). 10 U.S.C. 230^u(a)(10); A.S.P.R. 3-210.2. A.S.P.R. 1-903. B-181265 (1974). B-180669 (1974). B-186233 (1976). 53 Comp. Gen. 270. 55 Comp. Gen. 374. 55 Comp. Gen. 693.

The Department of the Air Force requested reconsideration of a decision holding the Air Force had not justified the use of negotiation in lieu of formal advertising for hospital aseptic management services. Prior decision was modified as Air Force's needs could be satisfied only by best service available, and adequate specification describing the services needed could not be prepared for formal advertising. (SS)

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B. Wolmer,
Proc. II

DECISION



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

FIL.: B-186233

DATE: May 24, 1977

MATTER OF: Tidewater Protective Services, Inc., and Others--
Reconsideration

DIGEST:

Prior decision holding Air Force to be without authority to negotiate contracts for "desired" high level of hospital aseptic management services is modified in view of record reasonably establishing that Air Force's minimum needs can be satisfied only by best service available and that Air Force cannot prepare adequate specification describing that service so as to permit competition under formal advertising procedures.

The Department of the Air Force requests reconsideration of our decision in the matter of Tidewater Protective Services, Inc., and Others, B-186233, December 3, 1976, 56 Comp. Gen. 76-2 CPD 462, in which we held that the Air Force had not sufficiently justified the use of negotiation in lieu of formal advertising to satisfy its requirements for hospital aseptic management services (HAMS).

The HAMS procurement covered 14 Air Force hospitals and was for general housekeeping services such as floor maintenance, vacuuming, wall and window cleaning, and curtain cleaning, along with more management-oriented services including training of employees in infections control, establishing written procedures to guide personnel in providing a hygienic environment, and establishing a quality control program. The specific housekeeping tasks were described in detailed specifications; the management-oriented services were described in more general terms.

The procurement was negotiated under 10 U. S. C. 2304(a)(10) (1970) which provides for negotiation of contracts for "property or services for which it is impracticable to obtain competition." The Determination and Findings (D&F) supporting the negotiation procedure stated that "negotiation * * * is necessary to insure effective control of micro-organism growth * * *. The control of micro-organism in hospital critical areas * * * is of the utmost importance in order to optimize a healthful and safe patient environment and to insure continued accreditation * * *. The technical specification is not sufficiently detailed to permit formal advertised bidding." The Air Force further explained to us that HAMS procurements had been advertised at one point, but that approach "proved to be totally unsatisfactory" because "a comprehensive technical evaluation,"

rather than a pre-award survey, was necessary to insure that Air Force needs would be met. This evaluation, we were informed, was to concern itself primarily with the management-oriented services regarded by the Air Force as necessary to insure that the minimum needs of HAMS would be satisfied. Further, the Air Force reported, since various commercial firms each had their own management techniques and programs, any attempt by the Air Force to specify a particular technique or program would have the effect of reducing competition.

We held that, on the record before us, the Air Force had not made a persuasive case for treating the HAMS procurement as coming within the exception of 10 U. S. C. 2304(a)(10) from the statutory requirement for formal advertising. We pointed out that (1) the impossibility of drafting specifications regarding "coordination of work tasks," one of the management functions referred to by the Air Force, was "not a reason sufficient to justify negotiation" since that effort "is generally required without specification"; (2) the Air Force, in any event, had admitted it could develop a specification, "thereby negating any claim that it is 'impossible' to do so; (3) the fact that competition might theoretically be lessened "by use of adequate specifications" did not justify negotiation "since it seems that a basic specification listing fundamental needs could be developed without unduly limiting competition"; and (4) the difficulties reportedly encountered by the Air Force when using formal advertising seemed to be "linked * * * with what it felt was a lower level of quality of service than that considered desirable," but that the statute does not permit the use of negotiation under such circumstances to secure a higher level of service. See Nationwide Building Maintenance, Inc., 55 Comp. Gen. 693 (1976), 76-1 CPD 71.

In requesting reconsideration, the Air Force states that we made an error in emphasis in concluding that negotiation was not justified because it was not impossible for the Air Force to draft specifications. What must be considered, according to the Air Force, is whether it is impossible to draft adequate specifications, as provided by Armed Services Procurement Regulation (ASPR) § 3-210.2 (1976 ed.) which implements 10 U. S. C. 2304(a)(10). The Air Force states that it cannot draft adequate specifications because its minimum needs can be satisfied only by a management effort that cannot be defined in advance. For example, the Air Force reports:

"* * * provision of hospital aseptic management services (HAMS) is a highly specialized service effort. Furthermore, there is no simple or basic definition of what constitutes such services. * * *

"There is no documented direct correlation between the incidence of * * * infection and the level of pathogenic micro-organisms in the hospital environment. Therefore, the Air Force * * * cannot in terms of micro-organism counts per a given area define an acceptable level of asepsis * * *. The most aseptic environment obtainable at a reasonable price is the minimum need of the Government. * * *

" * * * the management methodologies developed by private industry for the provision of these services are unique and may be proprietary to the respective companies. These methodologies, which change and develop with experience, are essentially what is being purchased in HAMS procurement. Each company's methodology is unknown to the Air Force, in detail, prior to negotiation.

"Therefore, the preparation of standard detailed specifications would not merely restrict competition * * * but would also prevent obtaining the minimum Government requirement for the most current and advanced aseptic management services commercially available at a reasonable price. It is reasonable to assume that * * * management which provides not only for training, procedures and quality control but also provides a complete overall company management system will provide the minimum requirements of the Government.

"Quality control in a hospital environment cannot be accomplished by only a visual inspection as it can be for regular janitorial services. To appear to be clean is not sufficient for it is the hospital's responsibility to maintain an aseptic environment. The company's quality control program must assure the aseptic environment. Part of this program requires not only locally performed inspections but also requires a company's management system that is structured to support the local personnel

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in identifying and correcting deficiencies. This must be accomplished prior to the aseptic environment being endangered.

"Air Force hospitals are a small segment of the universe of hospitals services by the HAMS industry. Standardization of management approaches, with precise and detailed specifications, would prevent the Air Force's ability to exploit continuing improvement in the management techniques of hospital aseptic services."

The Air Force further explains its position as follows:

" * * * The Air Force cannot draft adequate specifications because the services to be procured, the management function of hospital aseptic services, are incapable of precise definition or adequate description. Management science is an abstract discipline; it does not lend itself to quantification in specification format. The practice of management science requires flexibility and judgment and cannot be effectively accomplished through 'pat' predetermined solutions. In fact, it would be impossible to define by specification all conceivable management situations requiring action. The dynamics of the management services required in HAMS falls within this abstract realm as opposed to a concrete, task only oriented requirement.

"The HAMS requirement dramatically differs from normal janitorial services. The essence of HAMS is a management service, not the mere furnishing of a labor force or 'elbow grease.' Negotiation affords the Air Force, through evaluation of technical proposals, the opportunity to examine an offeror's understanding of the technical requirement and the capability of his management system to accomplish performance of the requirement. The offeror's management system is extremely important in that the requirement itself is for a management service. The management system must be capable of maintaining currency with the state-of-the-art and providing specific technical support to the on-site delivery of the service.

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"It must be remembered that what is being procured by this solicitation is not only the physical labor involved with cleaning a hospital, but rather the management planning, controlling, directing and coordinating functions (including quality control and training) encompassed by the role of the manager of aseptic services. For the first time the cleaning of critical care areas such as operating rooms will be accomplished by contract personnel. Assuring asepsis conditions in critical care areas is the function of management. That management function is the heart of this procurement.

"Management in the context of hospital aseptic management services is a constantly changing function. The management function requires constant attention to the ever changing art of aseptic procedures and coordination and direction of training, procedures, and quality control systems. Management methodology, the process of management which is critical to performance of the management function, is almost as diverse as the number of potential sources. In addition, not only is management methodology something that is unique to each management service, but the adequacy of management methodology, the actual minimum need of the Air Force, cannot be insured through the unyielding imposition of objective procedures which is the essence of an 'advertised' procurement. The adequacy of management methodology in this procurement can only be assessed by the application of subjective analysis to the offerors' proposals. This is the essence of a 'negotiated' procurement.

"Simply put, the key point to be grasped in this entire reconsideration is that the Air Force cannot adequately define the function of management in the present procurement. If it could do so by task description, as it admittedly can for janitorial services, then this battle would need not be fought. The elemental fact, however, is that the Air Force cannot definitize the methodology of management necessary in this instance for accomplishment of the Air Force's minimum needs. The function is a cerebral function, a process of intensive coordination and direction, a process which requires a high degree of

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flexibility in order to achieve its goal. To require that the function be defined as a collection of physical acts (similar to janitorial services) is to destroy the possibility of achievement of that very item the Air Force requires, the flexibility and freedom inherent in the concept of effective, efficient and successful management."

The heart of this Air Force position, it appears, is twofold. First, under the HAMS program, it is essentially buying management services, and the physical custodial tasks to be performed under the contract are ancillary to those management services. Second, the management services to be procured cannot be adequately described in a specification so as to permit full and free competition under formal advertising procedures.

In originally considering this matter, it was our view that the D&F, along with the amplifying Air Force statements contained in the record, did not establish that the Air Force was purchasing management services. Rather, it appeared that the Air Force was buying janitorial services, and that the management-oriented tasks to which the solicitation referred were an inherent part of providing those janitorial services. Thus, we felt that the detailed specifications covering the housekeeping tasks, when combined with indications in the record that the Air Force could specify what it wanted in the way of management, mandated the conclusion that the determination that the "proposed contract is for services for which it is impracticable to obtain competition by formal advertising" was "not rationally founded."

We think it is axiomatic that management is an inherent and often essential part of any procurement contract. What is usually being purchased, however, is not management itself, but rather the goods or services that management can provide. For that reason, management in most cases is a responsibility matter--that is, it is a basic consideration in a determination as to whether a prospective contractor has the capacity, tenacity and perseverance to adequately perform the contract. See District 2, Marine Engineers Beneficial Association--Associated Maritime Officers, AFL-CIO, B-181265, November 27, 1974, 74-2 CPD 298; Hydromatics International Corporation, B-180669, July 29, 1974, 74-2 CPD 66; see generally ASPR § 1-903.

For this reason, we think any assertion by a procuring agency that it must purchase management services apart from the basic product or services sought must be subject to close scrutiny, since it is apparent that an agency could attempt to justify negotiation in

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lieu of formal advertising merely by reciting the need to procure management services for which adequate specifications cannot be drafted even when a relatively uncomplicated product or basic service is being procured. We agree with the Air Force's position that its HAMS needs can be satisfied by a particularly effective management on the part of its HAMS contractors. However, we do not agree that the Air Force is actually "purchasing" management services in this regard.


Nonetheless, upon reconsidering this entire matter, and particularly in view of the Air Force's statement that its minimum needs can be satisfied in this area only by the best available services, we believe the Air Force could properly justify negotiating for its HAMS requirements.

As we pointed out in our prior decision, it is clear from the legislative history of the Armed Services Procurement Act of 1947 (10 U. S. C. chapter 137) that Congress did not intend to allow agencies to negotiate contracts in order to obtain a particular quality of supplies or services when a lesser level of quality would satisfy the Government's needs, and the record on which that decision was based suggested that the Air Force was seeking a desired, "higher level of quality service * * * than that thought obtainable under * * * formal advertising * * *." We think the Air Force has now made it clear that the quality of service it seeks is not merely "desired" but is that actually demanded by its minimum needs. Of course, an agency's determination of its minimum needs is not subject to objection by this Office absent bad faith or arbitrary action. Julie Research Laboratories, Inc., 55 Comp. Gen. 374 (1975), 75-2 CPD 232; 53 Comp. Gen. 270 (1973). The record now before us affords us no basis for finding bad faith or arbitrary action on the part of the Air Force. Its statements to the effect that crucial health concerns, with possible life and death consequences, are involved, with the result that the Air Force's minimum needs can be satisfied only by the best available service that will bring about the highest possible aseptic environment, are not contradicted by anything in the record and appear to be reasonable under the circumstances.

Neither can we disagree with the Air Force's conclusion that it cannot prepare an adequate specification describing those minimum needs. We think the Air Force has reasonably established that its view of the best available services will depend extensively on management techniques and approaches and that it cannot describe those techniques and approaches in sufficient detail to permit competition under formal advertising.

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Therefore, we now conclude that the Air Force may negotiate its HAMS procurements without running afoul of the Armed Services Procurement Act. Accordingly, our prior decision is modified to the extent that it holds the Air Force to be without authority to negotiate the HAMS procurement and recommends against the exercise of contract options. However, we believe that the original D&F utilized by the Air Force to justify negotiation should be revised to reflect in appropriate detail why it is impracticable to formally advertise.


Deputy Comptroller General
of the United States