DECISION

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

no 109 number.

FILE: B-184776 DATE: February 19, 1976

MATTER OF: Nationwide Building Maintenance, Inc. 98585

DIGEST:

Small business set-aside procurement for janitorial services which employed negotiation techniques pursuant to 41 U.S.C. § 252(c)(10), on bases that formal advertising had not in past achieved desired quality of services and that it was impossible to set out specifications, was not proper since negotiation solely to secure desired quality of services is contrary to statutory authority for negotiation and RFP contains 19 pages of detailed specifications for services. Therefore, recommendation is made that GSA cancel instant procurement and resolicit under proper authority.

Request for proposals (RFP) No. 03C5098601(NEG) was issued by the General Services Administration (GSA) Region 3, Public Buildings Service, on July 18, 1975. The RFP sought proposals for the furnishing of janitorial services at the New Executive Office Building in Washington, DC. The RFP contemplated the award of a cost-plus-incentive-fee contract with a ceiling cost. Although the procurement was a 100-percent small business set-aside, the agency indicates that the procurement "* * * is being negotiated pursuant to 41 U.S.C. 252(c)(10)." In this regard, GSA states that:

> "It is recognized that when a contract is set aside for small business the small business restricted advertising method is to be used whenever possible. FPR [Federal Procurement Regulations] 1-1.701-9. It is our practice, therefore, to use conventional negotiation in a set aside procurement only in those instances where it is otherwise justified pursuant to 41 U.S.C. 252(c). * * *"

See in this regard our discussion in Ira Gelber Food Services, Inc., 54 Comp. Gen. 809, 812 (1975), 75-1 CPD 186.

As such, GSA prepared a formal Determination and Findings (D&F) justifying its use of negotiation. That D&F is set forth below:

"FINDINGS

"A service contract is required for janitorial services at Federal Building No. 7 (New EOB), 726 Jackson Place, NW., Washington, DC.

"The use of formally advertised, low bid, fixed price contracting procedures by the General Services Administration has not resulted in the desired level of quality for services procured. The quality of work has shown a general declining trend apparently without regard to the size and experience of the contracting firm. There are strong indications that the present system of assessing penalty deductions for control of quality in service contracts is at fault. Assessment of deductions has shown a general rising trend. The penalty deduction system has fostered a sharp rise in the amount of protests and appeals on the part of the contractors, and caused a general undesirable increase in administrative time and expense on the part of GSA in administering the contract, while doing nothing to foster good relations with the contractors, or to improve performance.

"The requirement to award contracts to the low bidder has also fostered a rash of irresponsible bids from firms which have neither the professional experience nor the required sources to satisfactorily perform the required services. In a few cases, contractors have submitted bids considerably below the Government's estimate of the minimum reasonable cost to accomplish the requirements for quality services. It is factual that a contractor will not maintain an acceptable level of performance with a 'below cost' contract. Even so, the Comptroller General ruled (B-171419) that because a bid is below reasonable cost expectations is not sufficient reason for rejection.

"The existing GSA incentive contracting program has upgraded the level of quality for services in Government buildings. Incentive Contracts have been successful in procuring quality service at costs below the GSA Force Account estimate.

"Budgetary and manning restrictions require expanded procurement of services from commercial sources. The record shows that the incentive contracting program of competitive selection and negotiation with qualified offerors provided the desired level of quality service at a most reasonable cost.

"As required by FPR 1-3.202(b) and Section 304(b) of the Federal Property and Administrative Services Act, and for the reasons set forth above, it is determined that it is impracticable to secure services of the kind and quality required without the use of an incentive type contract, and it is recommended that authorization be given to negotiate an incentive contract to provide the required service.

"DETERMINATION

"Based upon the foregoing findings, it is hereby determined, in accordance with Section 302(c)(10) of the Federal Property and Administrative Services Act of 1949, as amended, and FPR 1-3.210(a)(13), that this requirement is 'for property or services for which it is impracticable to secure competition,' because it is impossible to set out adequate detailed specifications which will describe the performance objectives by definite milestones, targets or goals susceptible of measuring actual performance to provide satisfactory services for the Government, and the negotiation of an incentive contract is hereby authorized to provide the janitorial services for the Federal Building No. 7, Washington, DC."

41 U.S.C. § 252(c)(10) (1970) states that contracts may be negotiated by the agency head without advertising where it is "impracticable to secure competition." Examples of circumstances wherein this authority may be used are set forth in FPR § 1-3.210(a)(1)-(15) (1964 ed. circ. 1). Specifically, section 1-3.210(a)(13) states that such authority may be used when it is impossible either to draft adequate specifications or any adequately detailed description of the required property or services so as to permit formal advertising.

As to the propriety of GSA's action in this regard, we quote from our decision in Nationwide Building Maintenance, Inc., B-184186, February 3, 1976:

"The Findings reveal GSA's opinion that the formal advertising method has not achieved the level of service thought desirable for janitorial services. Thus, the phrases 'desired level of quality,' 'quality of work,' 'quality in service contracts,' 'quality services,' 'level of quality,' 'very high quality performance' and 'quality

required,' are found in the paragraphs of the Findings. Moreover, in a report on a similar protest, GSA has advised:

> "'The circumstances justifying negotiation in this instance are not related to quantities, however, but to the Government's inability in general to specify and obtain the level or quality of service required to meet the Government's need.'

This inability to obtain the desired level of quality for the required janitorial service, coupled with the belief that only a negotiated, incentive-type contracting method would improve service, prompted the Determination that adequate specifications, suitable for formal advertising, could not be drafted.

"We note, however, that Section C, Part 4, Custodial Specifications of the RFP, contains 19 pages of detailed specifications for the janitorial services. Further, it is implicit from the narrative in the Findings that GSA has used specifications similar to those in the RFP to previously procure janitorial services under formal advertising. It is also our understanding that the military services, which also are involved in a significant number of procurements of janitorial services, invariably use formal advertising (although restricted to competition among small business concerns) to procure janitorial services.

"Notwithstanding the desired use of the negotiated method for a given procurement or range of procurements, negotiation must be objectively justified in view of the statutory preference (41 U.S.C. § 252(c) (1970)) for formal advertising. None of the exceptions to formal advertising (as set forth in 41 U.S.C. § 252(c)(1)-(15) (1970)) expressly authorizes the use of negotiation only to secure a desired level of quality of services or to obtain an incentive-type contract. Moreover, our analysis of the legislative history of the Federal Property and Administrative Services Act (40 U.S.C. § 471 (1970)), under which the purchase was made, reveals that the Congress specifically rejected the proposal to permit negotiation to secure a desired level of quality of supplies or services. As we stated in 43 Comp. Gen. 353, 370 (1963):

"'In this connection it would appear to be especially pertinent to note that H.R. 1366, 80th Congress, which subsequently was enacted as the Armed Services Procurement Act of 1947, originally included, as Section 1(xii), a request for authority to negotiate under the following circumstances:

> "'"(xii) for supplies or services as to which the agency head determines that advertising and competitive bidding would not secure supplies or services of a quality shown to be necessary in the interest of the Government."

"'As passed by the House of Representatives, H.R. 1366 included this authority, and the necessity and justification for its enactment by the Senate was presented to the Senate Committee on Armed Services by the Assistant Secretary of the Navy during hearings on June 24, 1947, with the following concluding statement:

> "'"Where quality is a matter of critical--in many cases life-and-death--importance, discretion must reside in the services to select sources where experience, expertness, know-how, facilities and capacities are believed to assure products of the requisite quality. Where national security or the safety and health of personnel of the services are involved, any compromise of quality dictated by mandatory considerations of price would be indefensible." (See page 15, Hearings before the Committee on Armed Services, United States Senate, on H. R. 1366, 80th Congress.)

"'Notwithstanding the above, the Senate Armed Services Committee deleted this provision from the bill and explained its action at page 3, Senate Report No. 571, 80th Congress, as follows:

> "'"The bill was amended by deleting the authority to negotiate contracts for the purpose of securing a particular quality of materials. Your Committee is of the

> opinion that this section is open to considerable administrative abuse and would be extremely difficult to control. For this reason it has been eliminated."
>
> "'As indicated by the legislative history of the Federal Property and Administrative Services Act, that act was intended to extend the same procurement principles to civilian agencies of the Government as had previously been conferred upon the military departments by the Armed Services Procurement Act of 1947. See page 6, House Report No. 670, and page 5, Senate Report No. 475, 81st Congress.' (Emphasis supplied.)

The Court of Claims made a similar analysis of the legislative history involved in Schoenbrod v. United States, 410 F.2d 400, 402-403 (1969).

> "When agencies have failed to obtain priced proposals in negotiated procurements or having obtained price proposals have neglected to secure appropriate price competition, we have concluded that negotiation was actually being employed solely to obtain services and products of the highest quality in contravention of the expressed congressional intent. See B-175094, May 9, 1972; 50 Comp. Gen. 679 (1971); 50 Comp. Gen. 117, supra; 43 Comp. Gen., supra; 41 Comp. Gen. 484 (1962). * * * [I]t is our view that using negotiation solely to secure a desired quality of services was contrary to the statutory authority for negotiation. We consider GSA's preference for an incentive-type contract as part of its desire for quality services and do not view the preference as constituting a separate reason for the negotiation. We must therefore conclude that the determination to negotiate the service requirement is not rationally founded within the limits of existing law."

We believe that the rationale expressed in Nationwide Building Maintenance, supra, is equally applicable to the instant case. Therefore, we believe that in this procurement GSA's decision to negotiate is not proper.

In Nationwide Building Maintenance, supra, we did not recommend terminating the award there protested, but recommended that no options under the contract be exercised. However, the instant case involves a before-award situation. Therefore, and in view of our conclusion that

the use of competitive negotiations rather than formal advertising is clearly improper, we recommend that GSA cancel the instant procurement and procure its needs under appropriate authority.

Since this decision contains a recommendation for corrective action to be taken, a copy has been sent to each of the congressional committees referenced in section 232 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1172 (1970).

Deputy Comptroller General
of the United States