DECISION

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

FILE: B-186654 DATE: October 18, 1976

MATTER OF: Michael O'Connor, Inc.

DIGEST:

1. Protest urging that no authority existed to negotiate building renovation contract on basis of 41 U.S.C. § 252(c)(2) (1970), which permits negotiations when public exigency will not permit delay incident to formal advertising, is sustained because record does not show any time and/or dollar savings apparent from negotiated procurement which was conducted as though formally advertised in all material respects, where project had been planned more than 1 year and D&F cites as justification costs incident to delay.

2. Award made on basis of initial proposals is proper where adequate competition is obtained and offerors are apprised in RFP of such possibility. Where negotiated procurement is conducted in all material respects as though formally advertised, protester's request for resolicitation on formally advertised basis is denied because it is tantamount to prohibited auction and protester was not prejudiced by use of negotiation.

3. Contention that agency is unfairly administering existing term renovation contracts is a matter of contract administration which GAO does not review, except for possible competitive impact. Since protested procurement was awarded on basis of initial proposals at lowest cost, no competitive impact seen.

Michael O'Connor, Inc. (O'Connor), protests any award under request for proposals (RFP GS-00B-03358) issued by the General Services Administration (GSA) for partial renovation of the fifth floor of the General Accounting Office (GAO) building.

The RFP was issued at an offerors meeting on June 2, 1976, and initially requested proposals by June 9. This date was extended by amendment No. 1 to June 14. O'Connor submitted the second low

proposal at $429,995. Free State Builders, Inc. (Free), proposed to perform the work at $425,434. Eight other offers were received.

A special notice to the Standard Form 20 was inserted, as follows:

> "You have been requested to participate in this negotiation and are put on notice of the possibility that award may be made without discussion of proposals received, and, hence that proposals should be submitted initially on the most favorable terms which you can submit to the Government."

Acting pursuant to this provision, GSA did not conduct discussions with any offeror. By letter dated July 8, 1976, GSA accepted Free's offer of $425,434. By determination and finding (D&F) dated June 28, 1976, the contracting officer determined that award must be made notwithstanding the pendency of this protest.

O'Connor contends that the circumstances permitting the use of negotiated procedures were lacking within the meaning of 41 U.S.C. § 252(c)(2) (1970). This section permits the use of negotiation procedures rather than formal advertising when "the public exigency will not admit of the delay incident to advertising." O'Connor maintains that the renovation project has been planned for over a year. Thus, O'Connor concludes that to claim at this time that a compelling urgency exists is an artificial contrivance.

Further, O'Connor maintains that all of the procedures followed by GSA paralleled formal advertising, except that there was no public bid opening. Also, the forms used in the RFP are those prescribed by the Federal Procurement Regulations (FPR) for formally advertised construction projects. Since GSA conducted no discussions and award was made on the basis of price alone, which is alleged to be a violation of FPR § 1-3.805-1 (1964 ed. amend. 153), O'Connor requests that we recommend that the award to Free be terminated for the convenience of the Government and the requirement resolicited.

Alternatively, O'Connor requests that the work be performed pursuant to its term contract encompassing the GAO building for ceiling and associated work. In Michael O'Connor, Inc., B-185502, April 5 and May 14, 1976, 76-1 CPD 224, 326, we concluded that

O'Connor's term contract was a requirement contract under which GSA was obligated to satisfy all of its applicable requirements, subject to any exclusionary limitations stated in the contract. Those cases concerned solicitations for certain renovation work which overlapped with O'Connor's term contract. In order to award the entire work under a separate solicitation, GSA terminated the applicable portion of O'Connor's contract for the convenience of the Government. Subsequent to GSA's actions regarding O'Connor's term contract, GSA utilized Free's term contracts for plaster and partition removal in the areas covered by the renovation. O'Connor interprets the totality of the foregoing events as indicating disparate treatment between O'Connor and Free, with GSA favoring Free to O'Connor's detriment. Thus, O'Connor requests that its term contract should be the vehicle to accomplish the appropriate part of this work.

Concerning O'Connor's protest that no authority existed to negotiate this procurement, on May 13, 1976, the contracting officer executed a D&F to negotiate this procurement. The D&F provided:

FINDINGS

"In accordance with the provisions and requirements of Sections 302(c)(2) and 307 of the Federal Property and Administrative Services Act of 1949, as amended, I make the following findings:

"1. 92,000 square feet of space is to be renovated on the fifth floor of the General Accounting Office (GAO) Building, Washington, D. C., for occupancy by the Office of Special Programs (OSP) and the Office of Program Analysis (OPA).

"2. The two organizations (OSP and OPA) are presently housed in privately leased space at 425 I Street, NW, at a cost to the government of approximately $22,000 per month.

"3. A delay in the renovation of the 92,000 square feet of floor space on the fifth floor will delay the renovation of an additional 25,000 square feet of space on the fifth floor to be occupied by the GAO's Regional Office. The

Regional Office is presently leasing space in Falls Church, Virginia, at a cost of approximately $6,000 per month.

"4. A delay in the renovation of the 92,000 square feet of floor space on the fifth floor of the GAO Building will cost the government $22,000 per month for leased space, plus extend the lease time for the Washington Regional Office in Virginia at a cost of $6,000 per month. Therefore, any delay in the renovation of the 92,000 square feet of space will be injurious to the government financially.

"5. The problems, difficulties and expense of operating with widely dispursed offices of the agency will be eliminated.

"DETERMINATION

"On the basis of the foregoing findings, I hereby determine as required by Section 302(c)(2) of the Federal Property and Administrative Services Act of 1949, as amended (41 U.S.C. 252(c)(2)) that:

"The urgent need for renovation of the space for the earliest possible occupancy constitutes a public exigency within the purview of the authority to negotiate contained in Section 302(c)(2) of the Federal Property and Administrative Services Act of 1949."

The cited statutory authority is implemented by Federal Procurement Regulations (FPR) § 1-3.202 (1964 ed. amend. 32). This section provides that:

"* * * the need must be compelling and of unusual urgency, as when the Government would be seriously injured, financially or otherwise, if the property or services to be purchased or contracted for were not furnished by a certain time, and when they could not be procured by that time by means of formal advertising. This applies irrespective of whether that urgency could or should have been foreseen. For example, this authority may be used when property or services are

> needed at once because of a fire, flood, explosion, or other disaster."

While the examples listed portray only extreme disaster situations, the list is not all-inclusive. Indeed, the detriment to the Government may be financial. In this instance, expenditure of $22,000 per month for space rental costs for the equivalent amount of space to be renovated was one cited figure. Also considered was the impact in extended leasing of space for $6,000 per month for another GAO component whose space was scheduled for renovation after the instant procurement. Thus, the findings were that costs of leasing space at $28,000 per month would seriously injure the Government financially. Based upon these findings, it was determined that this financial impact constituted a public exigency within the purview of 41 U.S.C. § 252(c)(2) (1970).

The D&F was prompted by a letter dated May 7, 1976, from the Director, Office of Administrative Services, GAO, requesting that the renovation procurement be conducted by using negotiation procedures. One reason cited concerned the disruption to work flow due to the dispersed locations of the employees affected by the renovation. The letter also anticipated that the use of formal advertising would add 4 months to the projected award date. Using this timeframe, the additional lease space costs were computed at approximately $113,000. Certainly, the residual economic impact of the delay anticipated to be caused by the use of formal advertising is a factor to be considered in determining if a public exigency situation exists. Notwithstanding this consideration, we are not convinced from the record that this case presents a proper circumstance to negotiate on the basis of a public exigency.

The history of this project is summarized in an August 19, 1976, letter from the General Counsel, GSA, as follows:

> "Initially, the General Accounting Office had requested only the removal and replacement of ceiling and lighting systems on the fifth floor. However, circumstances subsequently arose which had not been anticipated at the time GAO submitted its Reimbursable Work Authorization. One factor was that during the process of converting the requested services into contractual work requirements, it became apparent that more would be involved than GAO had initially contemplated. It evolved into a project encompassing not only removal and replacement of the ceiling, but also partitioning to create special purpose spaces, the provision of airconditioning for the

> special purpose spaces, and the installation of fire stops inasmuch as the space above the ceiling served as a return air plenum. Still later, it was decided to install a sprinkler system rather than installing fire stops. The increased scope, of course, involved an increase in cost which raised a question as to funding. While the funding question was still pending, O'Connor's protest No. B-185502 on the Sixth Floor Renovation was filed, and it was obvious that the outcome of that protest would also be pertinent to the prospective Fifth Floor Renovation. By the time the funding matter was resolved as well as the problems attendant as a result of the GAO decision in B-185502, GSA and GAO were in the situation described in the GAO letter of May 7 and in the Findings and Determination."

The costs for the leased space were constant figures which presented acceptable burdens for the period during which the renovation plans were modified and expanded. There is no indication of what, if any, steps were taken to appreciably shorten the time it took to formalize the work plans. The indication is that once the renovation plans were ultimately formalized, the contracting officer was persuaded that an immediate public exigency existed without consideration of the time it would take to formally advertise. While the May 7 letter from GAO cited a time savings of 4 months by the use of negotiation, we perceive no substantiation of that figure. Rather, since the procurement was conducted in all material respects as though it were formally advertised, the alleged time savings is not apparent to us. In this connection, we note that only 31 days elapsed from the date of the D&F to the closing date for receipt of proposals.

Further, since we are not persuaded that the time necessary to formally advertise was appreciably greater than that necessary to negotiate, it follows that the magnitude of the alleged dollar savings is also questionable. Moreover, the alleged disruption of work flow cited by the GAO was only considered by GSA as an incidental difficulty. As such, it also cannot justify the use of negotiation.

Certainly, it is reasonable that at some point in the procurement cycle an otherwise routine procurement may become urgent. This is contemplated in FPR § 1-3.202, supra, when it permits the use of the public exigency irrespective of whether the urgency could or should have been foreseen. However, the decision that such

a point has been reached must be reasonable. The present record does not support the determination here.

Notwithstanding that the procurement should not have been negotiated, it is not apparent that O'Connor was prejudiced. O'Connor maintains that the procurement now should be resolicited on a formally advertised basis. However, as O'Connor points out, the procurement was conducted in all material respects as though it were formally advertised. The RFP cautioned that award might be made on the basis of initial proposals and, consequently, proposals should be submitted on the most favorable terms. When adequate competition is obtained, such as here, and the RFP clearly apprises the offerors of the possibility, award on the basis of initial proposals is proper. FPR § 1-3.805-1(a)(5) (1964 ed. amend. 153); Raytheon Company, B-184375, January 28, 1976, 76-1 CPD 55. In this light, even if the procurement had been formally advertised, the results would have been the same. Thus, to accede to O'Connor's request for a readvertisement would be tantamount to sanctioning a prohibited auction. FPR § 1-3.805-1(b)(1964 ed. amend. 153). Therefore, O'Connor's protest on this point is denied.

O'Connor also infers from the administration of the term contracts covering the GAO building that GSA is deliberately avoiding utilizing O'Connor's term contract. The record contains a handwritten memorandum dated December 29, 1975, which expresses the view of the Building Manager, GAO building, that the project should not be done by term contract. This opinion was based not only upon the scope of the work, but also on the view "* * * that the current term contractor is neither experienced nor qualified enough to handle a project of this scope ($499,000)." O'Connor disputes this assessment of its responsibility. O'Connor also alleges that it is not the need to schedule work in an integral manner that prompted the decision to advertise this project (as proffered by GSA in Michael O'Connor, Inc., supra). Rather, the decision is characterized as an improper predetermination of responsibility.

The General Counsel, GSA, has termed the note as "* * * views that GAO had expressed to GSA." Notwithstanding that the "* * * note inaccurately paraphrased GAO statements or whether GAO was somewhat inartfully expressing an opinion that the work was not suitable for performance of term contracts * * * term contracts are not designed

for use in accomplishing general renovations * * *." See Michael O'Connor, Inc., supra.

As a general proposition, the administration of a contract is entrusted to the discretion of the cognizant agency, over which our Office exercises no review function. D.C. Electronics, Inc., B-184266, March 8, 1976, 76-1 CPD 160. We will consider alleged preferential treatment as it may impact upon the impartiality of a competitive procurement. Service Industries, Inc., 55 Comp. Gen. 502 (1975), 75-2 CPD 345. We do not see any such impact in the present case.

O'Connor has raised two other matters. First, O'Connor states that the RFP was not synopsized in the Commerce Business Daily (CBD) as required by FPR § 1-3.103(a) (1964 ed. Circ. 1). Second, the Standard Form documents in the RFP were those prescribed for formal advertising.

In response, GSA states that FPR § 1-1.1003-2(a)(4) (1964 ed. amend. 150) exempts from the synopsis requirement procurements in which the Government would be seriously injured if bids or offers were permitted to be made more than 15 days after the issuance of the procurement. On the second point, GSA maintains that FPR § 1-16.403 (1964 ed. amend. 118) recommends the use of Standard Form documents for formally advertised construction or alteration projects with appropriate adaptations.

Assuming that proper circumstances existed to permit negotiation pursuant to the public exigency exception, GSA's position would be correct. However, even if the procurement had been formally advertised, with a proper determination GSA could have dispensed with notice in the CBD, as the cited FPR contemplates an exemption even in formally advertised procurements. In any event, since O'Connor attended the preproposal conference and had an equal opportunity to compete on the procurement, we do not feel that it has in any way been damaged. As for the use of the Standard Form documents, we perceive no prejudice arising from their use.

In view of the above, the protest is denied.

R.F. Keller

Acting Comptroller General
of the United States