



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Variable Staffing Systems

File: B-224105

Date: December 23, 1986

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### DIGEST

Agency decision to use negotiation procedures in lieu of sealed bidding procedures to acquire mess services is justified where the technical evaluation and discussion of offerors' proposed performance and price are required to reduce the risk of unsatisfactory performance.

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### DECISION

Variable Staffing Systems (Variable) protests the issuance of request for proposals (RFP) No. DABT58-86-R-0014 by the Department of the Army, Fort Monroe, Virginia, for the acquisition of "Full Dining Facility" services through a negotiated procurement. Variable contends that the procurement is for routine housekeeping services that have been acquired by the military agencies through formal advertising (now sealed bids) for many years. Variable also contends that the requirement for the submission of proposals will preclude many small businesses from competing because they lack a staff capable of preparing elaborate proposals, and that a preaward survey will provide the government with the information required to evaluate the capability of a prospective contractor.

The protest is denied.

The RFP, issued as a total small business set-aside, contemplates the award of a firm-fixed-price contract with a 1-year base period and four 1-year options. The RFP requires offerors to submit price proposals and technical proposals discussing staffing charts for direct labor personnel (cooks, mess attendants, and the dining facility manager) and indirect labor personnel (administrative managers and support personnel not directly assigned to the dining facility), quality control systems, and experience and capability. Further, the RFP advises offerors that proposals will be evaluated for technical merit in these areas, and that price also will be

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evaluated to determine whether it reflects the proposed performance. After the evaluation an award will be made to the responsible offeror whose technically acceptable proposal offers the lowest price.

The Army's position is that it cannot utilize sealed bidding here because technical evaluation of competing proposals and discussions with offerors are needed so that the Army can reasonably assure that it is getting the minimum performance necessary for full food service operations for the facility involved. The Army states that it used sealed bidding procedures to acquire the required service for the initial operation of the facility in 1985, but the resulting contract was terminated because the contractor provided unqualified personnel and inadequate quality control. The Army argues that evaluating and discussing the technical aspects of the offerors' proposals would substantially reduce the risk of unacceptable performance. In addition, the Army states that since the facility has been in operation for less than 2 years, there is insufficient historical data upon which to determine whether a low bid, received under sealed bidding procedures, is reasonable in price, and the discussion of offerors' projected costs and prices would be useful.

With the enactment of the Competition in Contracting Act -- (CICA), the former statutory preference for sealed bidding was eliminated. Under CICA, agencies simply are required to obtain full and open competition and to use the competitive procedure or combination of competitive procedures that is best suited under the circumstances of the procurement. 10 U.S.C. § 2304(a)(1) (Supp. III 1985). In determining the competitive procedure appropriate under the circumstances, the agency shall solicit sealed bids if: time permits; the contract award will be based on price and other price-related factors; it is not necessary to conduct discussions with the responding sources about their bids; and there is a reasonable expectation of receiving more than one sealed bid. 10 U.S.C. § 2304(a)(2)(A). Such a determination essentially involves the exercise of a business judgment by the contracting officer. Essex Electro Eng'rs, Inc., 65 Comp. Gen. 242 (1986), 86-1 CPD ¶ 92; see also NUS Corp. et al., B-221863 et al., June 20, 1986, 86-1 CPD ¶ 574.

We are unable to find an abuse of discretion in the contracting officer's exercise of that judgment. The contracting officer, based on past experience, has determined that discussions are necessary and that a technical evaluation must

be made. The protester has not shown that determination to be unreasonable. First, the fact that services of the type involved here may have been procured routinely through formal advertising in the past is simply not relevant in light of the former statutory preference for formal advertising that was eliminated by CICA. Under CICA, agencies may use negotiation procedures to acquire these services. See Military Services Inc. of Ga., B-221384, Apr. 30, 1986, 86-1 CPD ¶ 423; United Food Services, Inc., B-220367, Feb. 20, 1986, 86-1 CPD ¶ 177. Moreover, we have recognized that poor contractor performance may provide an agency with a legitimate basis for requiring technical proposal evaluation and discussions, and therefore the use of negotiation procedures, when subsequent contracts are awarded. See Servicemaster, All Cleaning Services, Inc., B-223355, Aug. 22, 1986, 86-2 CPD ¶ 216.

Second, we do not understand Variable's contention that negotiation will discourage small businesses from competing, since this solicitation was set aside for small businesses only, and was issued to 90 such concerns. Only two firms expressed interest in the protest, and both supported the agency's rationale for negotiation.

Finally, we reject Variable's contention that a preaward survey could adequately replace negotiation because a preaward survey, as part of the agency's investigation of an offeror's responsibility, focuses on the firm's ability to perform as required and involves matters such as financial resources, experience, facilities and performance record, but does not include negotiation of the contractual terms to be executed. In contrast, the focus of the negotiation process is to develop, through discussions if necessary, the contractual terms themselves, such as a promised method of performance, and thereby to define and frame the terms of a firm's offer. Essex Electro Enq.'rs, Inc., supra. In this regard, we point out that it is permissible in negotiated procurements to use traditional responsibility factors as technical evaluation criteria, Intelcom Support Servs., Inc., B-222547, Aug. 1, 1986, 86-2 CPD ¶ 135; Essex Electro Enq.'rs, Inc., supra.

The protest is denied.

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Harry R. Van Cleve  
General Counsel