

DECISION



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

FILE: B-187624

DATE: March 24, 1977

MATTER OF: Consolidated Elevator Company, Inc.

DIGEST:

1. Agency's determination that it was unable to locate qualified sources to perform elevator, escalator, and dumbwaiter maintenance and repair services other than manufacturers of the equipment does not constitute rational basis for sole source procurement from manufacturers where agency did not make its requirements known to the public and where agency's determination does not appear to have a factual basis.
2. Sole source procurement of repair and maintenance service from item's manufacturer is not justified merely because manufacturer can supply replacement parts on a priority basis. Agency has not shown that replacement parts cannot readily be obtained other than by award to the manufacturer.
3. While negotiations are justified where a procurement is for (1) technical services in connection with highly specialized equipment or where (2) the extent and nature of maintenance and repair of such equipment is not known such circumstances do not of themselves justify procuring the Government's minimum needs from a sole source of supply.

Consolidated Elevator Company, Inc. (Consolidated) has protested the October 7, 1976 award of sole source maintenance and repair contracts by the Smithsonian Institution to Otis Elevator Company (Otis), Armor Elevator Company (Armor), Horner Elevator Company (Horner), and Haughton Elevator Company (Haughton). Consolidated's position is that the Smithsonian has insufficient justification for concluding that the elevator manufacturers are the only firms capable of maintaining the Smithsonian's 81 elevators, escalators, and dumbwaiters. The contracts are to be financed with appropriated funds.

In the case of each of the four contractors, the following findings were advanced in support of the determination that competition was not feasible:

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"2. The equipment and machinery involved are of the type which embody intricate patented electronic control systems and which, to the best of my knowledge, only the manufacturer can maintain.

"3. The standardization of inspection, maintenance, testing, repair techniques, and genuine manufacturer approved replacement parts is essential for assurance of safety, quality, and other mechanical evaluations and for protection against obsolescence. Only the manufacturer of the equipment is in a position to maintain an uninterrupted supply of genuine service parts to maintain proper operation of the equipment and to limit the 'out-of-service' period to the absolute minimum."

We note, however, that the contracting officer concluded that only the Horner Elevator Company could perform the maintenance and repair work on:

"* * * equipment and machinery * * * of the type which embod[ies] intricate patented electronic control systems and with built in safety factors which only the manufacturer can maintain."

The one elevator in question was a standard hydraulic freight elevator without an intricate electronic control system, and it is undisputed that Horner was not, and is not, a manufacturer. Under these circumstances, we question the adequacy of the factual basis for the contracting officer's determination. Moreover, our experience indicates that other agencies, e.g., the Veterans Administration and GSA, have recently solicited offers from other than manufacturers for elevator, escalator, and dumbwaiter maintenance and repair services on relatively sophisticated equipment. See e.g., Haughton Elevator Division, Reliance Electric Company, 55 Comp. Gen. 1051, 76-1 CPD 294.

Based on the record we do not believe that the Smithsonian has shown that only manufacturers are qualified to meet the Smithsonian's minimum needs for the maintenance and repair services. This is in line with our holding that the conclusions or opinions of the contracting officer on the availability of qualified or responsible offerors may not be accepted as controlling prior to public solicitation of offers. 52 Comp. Gen. 987, 993 (1973), and cases cited therein.

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The Smithsonian has also advanced a reason for justifying sole source contracts with the manufacturers grounded on other than the manufacturer's qualifications. That argument concerns the availability of what are characterized as "durable" replacement parts which can be obtained only from the manufacturers. Basically, the Smithsonian has asserted that it cannot afford to be "last" priority for such parts because of its heavy responsibility to the visiting public. We are unable to determine from the present record the validity of this rationale. In our view, however, in order to use it as a basis for a sole source justification, the Smithsonian should show (1) what "last" priority means in terms of equipment out-of-service time, as opposed to some higher priority; (2) that down time solely attributable to such "last" priority would interfere in a material way with the Smithsonian's obligations to its visitors; and (3) that there is no other reasonable way to attain the necessary supply priority.

The Smithsonian also argues that these sole source procurements may be authorized for additional reasons. It contends that sole source procurements are justified where:

"(1) the contemplated procurement is for technical non-personal services in connection with the assembly, installation, or servicing * * * of equipment of a highly technical or specialized nature, or;

"(2) the contemplated procurement involves maintenance, repair, alteration, or inspection and the exact nature or amount of the work to be done is not known."

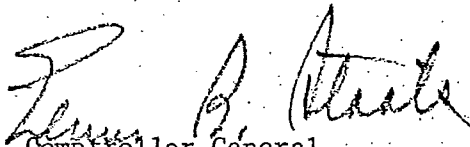
While under the proper circumstances the first reason will justify negotiating rather than formally advertising for the Government's minimum needs, it does not preclude competition among qualified firms. 52 Comp. Gen. 346, 349 (1972). The second reason merely justifies negotiation where the circumstances do not lend themselves to the price competition envisioned in formally advertised procurements. See, 40 Comp. Gen. 508 (1961). Neither set of circumstances justifies a sole source award absent an additional determination that the agency's needs can be met by only one supplier. See, Federal Procurement Regulations (FPR) § 1-3.210(a)(i) (1964).

Finally, the Smithsonian cites our decisions B-172958, September 27, 1971 and NORTEC-Corporation, B-180429, May 23, 1974, 74-1 CPD 283. In those cases we held that where an agency properly awarded a sole source contract, no prejudice accrued to those who were not aware of the procurement or who could not have provided an acceptable article in a timely manner. Those cases are inappropriate here because sole source awards have not been justified.

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Therefore, we recommend that the Smithsonian (1) re-evaluate its minimum needs in light of this decision and the preference for competitive procurement; (2) at such time as is practicable, and if appropriate, hold a competitive procurement for the services in question; and (3) after such procurement process has been executed, terminate the existing contracts for the convenience of the Government, if award under the competitive procurement would be more advantageous to the Government.

Because our decision contains a recommendation for corrective action, we have furnished a copy to the congressional committees referred to in section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1970).⁴ That section requires the Smithsonian to submit written statements concerning the action taken with respect to our recommendation to the House and Senate Committees on Appropriations, the House Committee on Government Operations, and the Senate Committee on Governmental Affairs.


Comptroller General
of the United States

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



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The Honorable S. Dillon Ripley
Secretary
Smithsonian Institution

Dear Mr. Ripley:

We have enclosed our decision dated today regarding the protest of the Smithsonian Institution's recent procurement of elevator, escalator, and dumbwaiter maintenance and repair services. You will note that we have found deficiencies in the procurement and are requiring that appropriate corrective action be taken.

Please inform us as to your intentions in the above matter.

Sincerely yours,

WALTER D. BROWN, JR.

Comptroller General
of the United States

Enclosure



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

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MAR 24 1977

The Honorable Abraham A. Ribicoff
Chairman, Committee on Governmental
Affairs
United States Senate

Dear Mr. Chairman:

We have enclosed our decision in the matter of Consolidated Elevator Company, Inc. pursuant to Section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1970). The case involves a protest against the Smithsonian Institution's award of elevator, escalator, and dumbwaiter maintenance and repair contracts without competition.

For the reasons stated in our decision we concluded that the Smithsonian did not have sufficient justification for awarding the contracts without issuing a competitive solicitation. We recommended, therefore, that the Smithsonian evaluate its minimum needs in light of our decision and the preference for competition and, if appropriate, conduct a competitive procurement for the services and supplies in question.

Sincerely yours,

STANLEY FLAHERTY - ATTY GEN

Comptroller General
of the United States

Enclosure