

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

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FILE: B-183629

DATE: June 27, 1975

MATTER OF: Department of Health, Education and Welfare's use of
basic ordering type agreement procedure**DIGEST:**

Department of Health, Education and Welfare's (HEW) proposed use of a basic ordering agreement type method of prequalifying firms to compete for requirements for studies, research and evaluation in exigency situations where sole source award might otherwise be made is not unduly restrictive of competition but may actually enhance competition in those limited instances. Implementation of procedure which provides for awarding of basic ordering type agreements to all firms in competitive range in response to simulated procurement is tentatively approved.

By letter of April 7, 1975, the Deputy Assistant Secretary for Grants and Procurement Management, Department of Health, Education and Welfare (HEW) has requested an advance decision concerning an HEW proposal to establish procedures for the use of a series of "Basic Ordering Agreements" (BOA) as a mechanism for the procurement of expert services for studies, research and evaluation. Our opinion is sought inasmuch as the proposed procedures are somewhat similar to those proposed by the Department of Agriculture in connection with its proposal to enter into a series of "Master Agreements" for the procurement of consulting services which was considered and rejected in Department of Agriculture's use of Master Agreement, B-182337, January 20, 1975, 54 Comp. Gen. 606. The Deputy Assistant Secretary is of the view that the circumstances in which HEW proposes to use the BOA-type procedures are significantly distinct from those considered in the Agriculture Department case and warrant our approval.

In the Agriculture case, that Department sought to alleviate the administrative burden and delay incident to evaluating the large number of proposals it had been receiving in response to solicitations for consulting services. The Department had issued a request for proposals which would be used to select the ten most qualified firms in each of eight subject matter areas. Each firm

so qualified would receive a "Master Agreement" which for the one year period of its operation would entitle it to compete for particular task assignments issued thereunder. In this manner, the Department would be assured of receiving no more than ten proposals and would be assured in advance that all offerors possessed the capability to perform. In that decision we stated that the validity of any procedure limiting the extent of competition is dependent upon whether it unduly restricts competition or whether the restriction serves a bona fide need of the Government. We there distinguished several legitimate forms of prequalification such as a "Qualified Products List" (QPL) or "Qualified Manufacturers List" (QML) from the type proposed by Agriculture as follows:

"While the QPL/QML-type procedures referred to above are similar to those proposed under the Department of Agriculture's Master Agreement in that all involve a form of prequalification, they differ in several critical respects. Under QPL/QML-type procedures, no manufacturer or producer is necessarily precluded from competing for a procurement for which he is able to provide a satisfactory product and such manufacturer or producer may become eligible to compete at any time that it demonstrates under applicable procedures that it is able to furnish an acceptable item meeting the Government's needs. Under the procedures proposed by the Department of Agriculture, disqualification of an offeror would not be predicated upon a finding that it could not provide a satisfactory study, but that other firms could in all likelihood furnish a study of superior quality. Whereas disqualification under the QPL/QML-type procedures is based on a determination as to a potential offeror's ability to furnish the particular item needed by the Government, the Master Agreement would exclude a potential offeror upon a general finding as to the relative qualification of that firm to perform consulting services in the general area in which the Government might require a study. Moreover, we point out that the QPL/QML type procedures have been sanctioned based not merely on a showing of administrative expediency, but on a showing that the restrictive procedures were essential to assure the procurement of a satisfactory end product.

The Department of Agriculture has offered no such evidence as to essentiality for restricting competition, but has indicated only that obtaining maximum competition is administratively burdensome."

HEW urges that, rather than restricting competition, its proposed use of BOAs is designed to elicit the maximum competition practicable in those instances where, due to exigency a noncompetitive award might otherwise be made. HEW states that its use of the BOA procedures would be limited to exigency situations and that where time will otherwise permit, full competition under conventional procurement practices will be obtained. In presenting its proposal HEW explains the BOA procedure and its application as follows:

"The proposed BOAs are designed to assist the Office of the Assistant Secretary for Planning and Evaluation (ASPE) in responding to requirements placed upon that office by external organizations such as the Congress, the White House, and interagency committees. These requirements must often be met within time constraints which are sufficiently restrictive as to preclude either performance in-house or by contract if normal procurement procedures were to be employed.

"The efforts to be contracted for are in the areas of Health Care Financing and Delivery; Health Care Resources and Planning; Elementary and Secondary Education; Postsecondary Education; Program Impact and Income Distribution; Research and Evaluation Methodology; and, Income Maintenance.

"While the exact nature of each task to be performed under the BOA cannot be defined, we have attempted to achieve a high degree of specificity as is required by FPR 1-3.410-2(a). Also maximum competition was sought in the first instance. A brief description of the process employed is presented below by way of illustration.

"The competitive process used to establish the BOAs commences with the solicitation, from an unlimited number of sources, of technical proposals in any of the seven areas. Technical proposals respond to an example task for each scientific area. Proposals are evaluated in accordance with weighted criteria established for each set of specifications. Each evaluation is conducted as formally and thoroughly as though the competition were for a funded requirement. The solicitation imposes no restrictions regarding the geographical location of potential awardees.

"Business proposals are also solicited, which consist of hourly rates for well defined categories of labor. Following a program determination of technical acceptability or unacceptability, business proposals are opened and a determination is made concerning the reasonableness of the proposed prices. BOAs are then awarded to all offerors whose proposals are determined to be within the competitive range from both a technical and business standpoint. In effect, we are simulating what would be a typical requirement as contemplated by the BOA and not looking only at 'responsibility issues.' "

At the outset we wish to point out that HEW's use of the term "Basic Ordering Agreement" is not in consonance with the definition of that term as defined at subparagraph 1-3.410-2 of the Federal Procurement Regulations (FRP). While the agreement as proposed by HEW resembles a basic ordering agreement in that it sets forth the basic terms and conditions to be applicable to orders placed thereunder as well as a description of the types of services to be ordered, etc., its proposed use is not for the purpose for which a true basic ordering agreement is intended. Subparagraph 1-3.410-2(b) provides for use of a basic ordering agreement "where specific items, quantities, and prices are not known at the time of execution of the agreement but where past experience or future plans indicate that a substantial number of requirements for items or services of the type covered by the basic ordering

agreement will result in procurements from the contractor during the term of the agreement. " HEW does not contemplate the placing of any specific requirement with the recipient of its BOA-type agreements, but rather that those receiving agreements will be eligible to compete for such requirements as do arise.

As with the Master Agreement procedure offered by the Department of Agriculture, the BOA-type procedure proposed by HEW involves prequalification of offerors. In general we have objected to prequalification of offerors on the basis that the use of such a procedure is inconsistent with the requirement for full and free competition. 52 Comp. Gen. 569 (1973). As in the Agriculture Department case where the only justification offered for a prequalification procedure was the need to reduce the administrative burden of making large numbers of solicitations available or evaluating large numbers of offers, we have held prequalification procedures to be unduly restrictive of competition. See 53 Comp. Gen. 209 (1973) involving the National Highway Traffic Safety Administration's proposal to establish a "Qualified Offerors List" and 52 Comp. Gen. 569 supra, involving the use of a negotiation exception for the purpose of prequalifying firms.

We have not, however, objected to a prequalification procedure where it has been shown to serve a legitimate need of the procuring activity and not mere expediency. Thus in 36 Comp. Gen. 809 (1957) we upheld the use of a Qualified Products List based on our concurrence with the administrative finding that the Government's need to obtain products of reliable quality could not be met other than through prequalification testing procedures where the testing necessary was so extensive that, as a practical matter, it could not be performed within the time constraints of a procurement. Similar considerations militated toward our approval of the use of a Qualified Manufacturers List in B-135504, May 2, 1958, and of the National Aeronautics and Space Administration's practice of prequalifying microcircuitry manufacturers by means of production line certification procedures in 50 Comp. Gen. 542 (1971).

HEW's proposal for implementing BOA-type procedures for establishing sources eligible to submit offers for particular task assignments is a form of prequalification procedure. However, the HEW proposal differs from that of the Department of Agriculture in that it does not limit the number of firms to be awarded BOA-type agreements but provides for the award of such agreements to all firms found to be within the competitive range. Moreover, HEW proposes, to limit its use of the BOA-type procedure to an area where in all likelihood award on a sole source basis would otherwise be made. In this context HEW's prequalification procedure which will

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assure a source of competent offerors from whom proposals can be elicited in a short time frame should in fact enhance competition. For this reason we agree with HEW's view that its proposed use of a BOA-type procedure in the situation where it might otherwise make award on a sole source basis is not legally objectionable. B-167494, September 15, 1969.

For the foregoing reasons we will impose no objection to HEW's implementation of the BOA-type procedures proposed at this time. We do, however, reserve the right to reconsider its propriety based upon review of that Department's experience.

Deputy  Comptroller General
of the United States