

DECISION



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

60649

FILE: B-185966

DATE: March 17, 1976

MATTER OF: General Services Incorporated;  
Custom Janitorial Service

98475

DIGEST:

1. GAO does not agree that GSA's decision to cancel outstanding negotiated RFP for janitorial services is inconsistent with observation in Nationwide Building Maintenance, Inc., 55 Comp. Gen. \_\_\_\_\_, B-184186, February 3, 1976, that improperly awarded janitorial service contract need not be cancelled because, unlike Nationwide case, no award had been made under subject RFP at time when conclusions in Nationwide were publicly made known and because GAO cannot sanction the making of an illegal award which would, in all likelihood, result were GSA to make award under RFP.
2. Statutory list of exceptions which permit use of negotiated procurement method does not include desirability of incentive-type contract as exception permitting negotiation. Consequently, GSA cannot justify negotiation for required janitorial service by citing its need for or desirability of incentive-type contract.

Protests have been received from General Services Incorporated (General) and Custom Janitorial Service (Custom) against the cancellation of negotiated request for proposals (RFP) No. 4PBO-29, which was issued by the General Services Administration (GSA) for janitorial services at the Ballistic Missile Center, Huntsville, Alabama. GSA cancelled the RFP, which contemplated an incentive-type contract award, in reliance on our decision in Nationwide Building Maintenance, Inc., 55 Comp. Gen. \_\_\_\_\_, B-184186, February 3, 1976.

Our Nationwide decision held that GSA's determination to negotiate janitorial service contracts in order to secure a desired level of quality of service was not rationally founded within the limits of existing law.

General and Custom question GSA's application of our Nationwide holding to the subject RFP. Specifically, the concerns point out

that our Nationwide decision did not direct outright cancellation of the awarded contract involved because we did not find the contract to have been illegally awarded. Therefore, they argue that GSA's cancellation of the RFP here is inconsistent with our decision not to require cancellation of the existing contract in the Nationwide case.

We did not conclude that the Nationwide award (or any similar outstanding awards) was illegal under the rationale of several Court of Claims decisions. Under the Court of Claims rationale, as interpreted by our Office, an illegal award results only if it was made contrary to statutory or regulatory requirements because of some action or statement by the contractor or if the contractor was on direct notice that the procedures being followed were violative of the requirements. 52 Comp. Gen. 215, 218 (1972). Since the contractor in the Nationwide case was not aware of GSA's rationale for negotiating the janitorial services or that the rationale was not legally sound, the award (and any similar outstanding awards) had to be considered improper rather than illegal. Notwithstanding our conclusion that the awarded contracts were not illegal, we recommended that GSA not exercise options after June 1976 in outstanding contracts and begin to study ways to improve the formal advertising procurement method for future procurements.


By contrast, no award had been made under the cancelled RFP which is the subject of the present protests. Our Nationwide decision has been publicly available for more than 1 month to any prospective offeror or agency. Were GSA now to make an award under the subject RFP (which, presumably, was negotiated under the same rationale set forth in the Nationwide case), the contract would, in all likelihood, have to be considered illegally awarded. We cannot sanction the making of an illegal award even if, so as to avoid illegality, GSA is required to use the formal advertising procurement method now without the benefit of the results of our recommended study and even if the change to the formal advertising method works a hardship on the concerns involved. Consequently, we do not agree that GSA's decision to cancel the subject RFP and procure the services under a formal advertising approach is inconsistent with our Nationwide holding.

The protesters also suggest that GSA could properly negotiate the services in question by citing the need for an incentive-type contract. Our Nationwide decision responded to the thrust of this argument by concluding that we considered GSA's desire for an incentive-type contract to be an inseparable part of GSA's

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argument that only the negotiated procurement method would obtain quality service. In any event, we observed in Nationwide that none of the statutory exceptions which permit use of the negotiated procurement method allows negotiation solely because a procuring agency and interested companies believe that incentive-type contracts are desirable for obtaining a certain level of quality of services or products. Consequently, we do not agree that GSA could justify negotiation for the required service here by citing its need for or the desirability of the incentive-type contract.

Protests denied.

  
Deputy Comptroller General  
of the United States