J. Cunningham
Pres

DECISION

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

FILE: B-186233 DATE: December 3, 1976

MATTER OF: Tidewater Protective Services, Inc., and Others

DIGEST:

1. Alleged impossibility of drafting specifications regarding "coordination of work tasks" does not justify negotiation since "coordination of work tasks" is inherent in proper furnishing of any product or service whether required under specification or not.

2. Assuming that impossibility of drafting specifications for management services related to furnishing immediate product or service is consideration which might otherwise justify negotiation even though specifications for furnishing basic product or service are known, fact remains that Air Force admits it could develop specification for management services--thereby negating any claim that it is impossible to draft specifications.

3. Since Air Force admits it has capability of drafting management services specifications, fact that it may not be able to specify all details of services for fear of lessening competition by limiting firms to specified management procedures does not justify determination that it is impossible to draft specifications for management services. Degree competition might be lessened is speculative; moreover, procurement regulation under which contracting officer negotiated procurement contemplates impossibility of drafting specifications, not difficulty, or inconvenience.

4. Problems with preaward surveys and performance difficulties that Air Force has encountered in obtaining adequate hospital cleaning service do not constitute reasons, in themselves, to authorize negotiation in lieu of advertised procurement method which is preferred by statute.

5. Record suggests that need to obtain higher level of quality of service than that thought obtainable under formal advertising method was also reason prompting choice of negotiated procurement method for hospital cleaning services. Legislative history

of Armed Services Procurement Act of 1947, source of authority for negotiated procurement in question, shows, however, that Congress specifically rejected proposal to permit negotiation to secure desired level of quality of services even when "health of personnel of the services are involved." Further analysis mandates conclusion that negotiated procurement method is not rationally founded under limits of existing law and regulation.

6. Recognizing difficulties encountered by Air Force in obtaining suitable hospital cleaning service and problem attending definition of common set of management procedures sufficient to presently permit reasonable degree of competition under advertised procurement, termination of contracts awarded under unauthorized negotiated solicitation is not recommended.

7. Recommendations made that: (1) options in negotiated hospital cleaning contracts and in any similar contracts to be exercised subsequent to June 1977 not be exercised; and (2) Air Force immediately commence study of alternative solutions to problems and difficulties which prompted unauthorized negotiated procurement method. Recommendation made under Legislative Reorganization Act of 1970.

8. No useful purpose in terms of remedy would be served by deciding protests against combination of requirements, experience clauses, and proposal evaluation under procurement which was improperly negotiated since protests, if found meritorious, assume either that award should be made under outstanding RFP, as perhaps modified, which would be contrary to holding that procurement was improperly negotiated, or that award should be made under advertised solicitation which may not be immediately possible.

9. Since nothing in Small Business Act or procurement regulations mandates that there be set-aside for small business as to any particular procurement and because it has been held that agency's decision not to make "8(a)" award for given procurement is not subject to review, protests demanding either small business set-aside or "8(a)" award are denied.

Tidewater Protective Services, Inc. (Tidewater), and others have questioned the authority of the Department of the Air Force to negotiate a requirement for "hospital aseptic management services." The services were described in Request for Proposals (RFP) No. F33600-76-R-0253 issued on February 4, 1976, by Wright-Patterson Air Force Base.

Services at 14 Air Force hospitals--possibly requiring the award of more than one fixed-price contract--were covered by the RFP. The services were for the period from October 1, 1976, through June 30, 1977, with an option reserved for two additional years of services. The required "aseptic" services (also referred to by the Air Force as "complete housekeeping service") were described in 80 pages of general specifications applicable to all hospitals and in separate "exhibits" keyed to the varying housekeeping needs of each hospital. Apart from housekeeping services pegged to custodial tasks (for example, floor maintenance, mopping, carpet vacuuming, wall cleaning, window cleaning, glass cleaning, drape and curtain cleaning), the services outlined in the RFP required the contractor to: (1) provide training of employees in infections control; (2) establish a "General Procedural Manual"--that is, written procedures to guide personnel in providing a hygienic environment for patient and staff; and (3) establish a "quality control program"--(under this provision the contractor(s) is required, among other things, to monitor bacteria in critical hospital areas--surgery, newborn nursery, OB delivery suite, and intensive care units).

To assist the contractor in focusing his work energies, the RFP divided hospital cleaning areas into "critical," "sub-critical," and "service areas." "Critical areas" were required to be cleaned with the "maximum level of aseptic technique to control and/or eliminate infections through housekeeping services." Notwithstanding the direction to use the maximum level of cleaning care for these areas, however, housekeeping employees were "not to clean surgical instruments, anesthesia machines, cautery machines, cardiac monitoring equipment or any other item so specified by the surgical/delivery from staff."

The RFP also cautioned offerors that only concerns with 2-years of suitable cleaning experience (especially relating to experience in "clean-up" of hospital areas used for surgery, recovery, labor and delivery, infant nursery, emergency room, intensive care, cardiac care, central sterile supply, oral surgery, cystoscopy, cardiac catheterization and isolation) in providing comparable hospital cleaning service would be considered for award. Prospective offerors were also required to propose a key manager ("Executive Housekeeper") for the service. The manager was also required to meet certain educational and experience requirements.

The RFP was negotiated under authority of 10 U.S.C. § 2304(a)(10) (1970) which provides that contracts may be negotiated if the contract is for "property or services for which it is impracticable to obtain

competition." According to the mandate in Armed Services Procurement Regulation (ASPR) § 3-210.3 (1975 ed.) (concerning limitations on the authority described in 10 U.S.C. § 2304(a)(10)) a determination and findings (D&F) justifying use of the authority was prepared. The D&F provides:

* * * * *

"Procurement by negotiation of the above described services is necessary to insure effective control of microorganism growth which is directly related to and the cause of infections. The control of microorganism in hospital critical areas such as operating suites, intensive care units and new born infant nurseries is of the utmost importance in order to optimize a healthful and safe patient environment and to insure continued accreditation of USAF hospitals. The technical specification is not sufficiently detailed to permit formal advertised bidding.

"Use of formal advertising for procurement of the above described services is impracticable due to the impossibility of drafting a definitized specification or any other adequately detailed description of the services required.

"Determination

"The proposed contract is for services for which it is impracticable to obtain competition by formal advertising."

Tidewater and others have questioned this determination in light of our decision in Nationwide Building Maintenance, Inc., 55 Comp. Gen. 693 (1976), 76-1 CPD 71. In our Nationwide decision we concluded that the decision of the General Services Administration (GSA) to negotiate purchases of janitorial services under authority similar to that cited by the Air Force in the subject procurement was not rationally founded. In the cited case, although GSA asserted that it could not draft specifications for janitorial services which would be suitable for formal advertising, we noted that: (1) GSA's negotiated solicitation for janitorial services contained 19 pages of specifications for the services; (2) GSA had used specifications similar to those in the RFP to previously procure janitorial services under formal advertising; and (3) the Department of Defense invariably

used formal advertising to procure janitorial services. Because of these facts, we felt that the actual reason for negotiating these services was GSA's view that it could obtain a higher level of "quality services" by using the negotiated rather than the advertised procurement method.

We pointed out, however, that none of the statutory exceptions (41 U.S.C. § 252(c)(1)-(15) (1970)) authorized GSA to negotiate only to secure a desired level of quality of services. Moreover, our reading of the legislative history of the Federal Property and Administrative Services Act (40 U.S.C. § 471 (1970)), under which GSA procured the services, showed that the Congress specifically rejected a proposal to permit negotiation solely to secure a desired level of quality services.

Here, the Department's D&F does not expressly state that negotiation of the hospital services is being employed to obtain a certain quality of services. Instead, the D&F cites crucial health concerns and the lack of sufficiently detailed specifications to permit formal advertising.

The Air Force has furnished us with additional written information bearing on the lack of detailed specifications suitable for advertising. The Air Force informs us that:

> "Over recent years, the Hospital Aseptic Management Services (HAMS) program has presented substantial difficulties to the Air Force. Originally, procurements of HAMS were advertised, and the procurement function was performed at base level. This approach proved to be totally unsatisfactory. Due to the clear relationship between the services to be performed and the health of individuals, a comprehensive technical evaluation was necessary for each bid. The evaluation was performed through the use of a rigorous pre-award survey (PAS). The impracticability of policing the PAS teams for each of the many bidders made it difficult to ensure that each bidder was evaluated on the same basis. In addition, many bidders did not understand the true scope of the HAMS requirement, particularly the management demands, at the time of bid submission. When the scope of the effort became apparent, they were unable, due to the restrictions inherent in formal advertising, to modify their approaches to the work and the resultant bid prices. This approach led to a serious deterioration in hospital asepsis and a consequent potential

for the spread of nosocomical infections among hospital patients. The capability of the Surgeon General of the Air Force to provide, to the extent possible, an infection-free hospital environment was in jeopardy.

"In 1974, the Air Force concluded that HAMS had to be significantly improved. The Air Force reevaluated the HAMS program to determine what steps, if any, could be taken to facilitate procurement on a competitive basis. Originally, some thought was given to the development of a detailed specification for use in a formally advertised procurement. Development of a specification was contracted with the University of Oklahoma. Both that institution, and other agencies of the Government, indicated that there were a number of contractors who provided commercially a HAMS-type service; that each had its own management techniques and programs for HAMS; and that, if the Air Force were to specify its own procurement techniques and programs, the effect would be to exclude from competition most or all of the current commercial sources. This, in our judgment, would have had an adverse effect on both competition and price. Therefore, the Air Force authorized development of a more general specification (Hospital Aseptic Management Services Specifications, dated 1 October 1975), which emphasized the training and qualifications of personnel and allowed each contractor to develop his own program in the following areas: Procedural Manual (TP1.07), Quality Control Program (TP1.08), and Personnel Training (TP1.05). In addition, while the specification defines in some detail the individual tasks to be performed by a contractor, no attempt was made to describe the manner in which such tasks should be integrated into the contractor's overall effort."

The Air Force admits, in effect, that it could develop a specification suitable for advertising the required services. But because commerical firms have unique "techniques and programs," the Air Force believes that competition would be restricted by developing a detailed specification for these techniques and programs. The particular areas involving "techniques and programs" are currently referred to in the RFP as a "Procedural Manual," "Quality Control Program" and "Personnel Training." Additionally, the Air Force states that it has not attempted to specify how the individual cleaning tasks should be integrated into the contractor's overall effort."

We do not agree that the cited impossibility of drafting the specifications regarding "coordination of work tasks" justifies negotiation since "coordination of work tasks" is inherent in the proper furnishing of any product or service whether required under specification or not. Since "coordination of work tasks" is generally required without specification, the alleged impossibility of drafting specifications regarding this coordination is not a reason sufficient to justify negotiation under the cited exception.

Moreover, even if we assume, for the sake of discussion, that impossibility in drafting specifications for management services involved in providing a basic product or service is a consideration which might otherwise justify negotiation even though specifications for the basic product or service are known, the fact remains that the Air Force admits it could develop a specification for these management services--thereby negating any claim that it is "impossible" to draft specifications--but that it chose not to do so because it felt competition would thereby be restricted.

We understand that competition would be restricted, in the Air Force's view, because each company has its own management and procedures; consequently, an individual concern might not compete for an award unless its own procedures were specified. Since management services obviously vary from company to company, any attempt to specify all details of a particular management approach might lessen competition. The degree to which competition might be lessened is, of course, speculative.

Nevertheless, since the Air Force admits it has the capability of drafting management services specifications, the fact that it may not be able to specify all details of the services for fear of lessening competition does not justify a determination that it is impossible to draft specifications for these services. The regulation (ASPR § 3-210.2(xiii) (1975 ed.)) which was cited by the contracting officer as authority for negotiating the services, contemplates impossibility of drafting adequate specifications, not difficulty or inconvenience. 52 Comp. Gen. 458, 461 (1973). Neither do we consider that the theoretical possibility of restricting competition by use of adequate specifications is a sufficient reason to justify negotiation under the exception cited here since it seems that a basic specification listing fundamental needs could be developed without unduly limiting competition. In the alternative, the Department could permit bidders to bid on any of a number of existing management procedures that are considered satisfactory.

We appreciate the problems with preaward surveys and performance difficulties that the Air Force has encountered in obtaining adequate

hospital cleaning service, especially in critical areas. These problems and difficulties, however, do not constitute reasons, in themselves, under 10 U.S.C. § 2304(a)(1)-(17) (1970) or ASPR, section III, Procurement by Negotiation, to authorize negotiation in lieu of the advertised procurement method which is preferred by statute (10 U.S.C. § 2304(a) (1970 ed.)).

Moreover, it seems to us that these difficulties and problems were linked in the Air Force's view with what it felt was a lower level of quality of service than that considered desirable. Although the contracting officer has not expressly cited a need to obtain a higher level of quality service under the negotiated method than that thought obtainable under the formal advertising method, the record suggests that this need was considered important. We observe, however, that the legislative history of the Armed Services Procurement Act of 1947, the source of the authority (See 10 U.S.C. chapter 137 (1970)) under which the RFP was issued, shows that Congress specifically rejected the proposal to permit negotiation to secure a desired level of quantity of services even when "safety and health of personnel of the services are involved." As we stated in 43 Comp. Gen. 353, 370 (1963), cited in our Nationwide decision:

> "In this connection it would appear to be especially pertinent to note that H.R. 1366, 80th Congress, which subsequently was enacted as the Armed Services Procurement Act of 1947, 41 U.S.C. 151 note (1952 Ed.), originally included, as Section 1(xii), a request for authority to negotiate under the following circumstances:
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> "'(xii) for supplies or services as to which the agency head determines that advertising and competitive bidding would not secure supplies or services of a quality shown to be necessary in the interest of the Government.'
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> "As passed by the House of Representatives, H. R. 1366 included this authority, and the necessity and justification for its enactment by the Senate was presented to the Senate Committee on Armed Services by the Assistant Secretary of the Navy during hearings on June 24, 1947, with the following concluding statement:
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> "'Where quality is a matter of critical--in many cases life-and-death--importance, discretion must reside in the services to select sources where experience, expertness, know-how, facilities and capacities are believed to assure

products of the requisite quality. Where national security or the safety and health of personnel of the services are involved, any compromise of quality dictated by mandatory considerations of price would be indefensible. (Emphasis supplied.) (See page 15, Hearings before the Committee on Armed Services, United States Senate, on H.R. 1366, 80th Congress.)'

"Notwithstanding the above, the Senate Armed Services Committee deleted this provision from the bill and explained its action at page 3, S.Rept.No.571, 80th Congress, as follows:

"'The bill was amended by deleting the authority to negotiate contracts for the purpose of securing a particular quality of materials. Your Committee is of the opinion that this section is open to considerable administrative abuse and would be extremely difficult to control. For this reason it has been eliminated.'"

Because of our analysis we must conclude that the determination supporting the negotiated method of procurement used here is not rationally founded under the limits of existing law and regulation. At the same time it is our view that the Department should be given additional time to study alternative solutions to its difficulties--especially in light of the problem attending the definition of a common set of management procedures sufficient to permit a reasonable degree of competition. For this reason, we are not recommending termination of the contracts which were recently awarded under the subject RFP or under any outstanding contracts which may have been awarded under similar negotiating authority. We are recommending, however, that the options in the awarded contracts and in any similar contracts to be exercised subsequent to June 1977 not be exercised and that the Air Force immediately commence a study of alternative solutions to its problems and difficulties that do not involve "exception 10" negotiating authority.

As this decision contains recommendations for corrective action to be taken, it is being transmitted by letters of today to the congressional committees named in the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1970).

Other Protests

Other protests have been filed by companies under this RFP, namely: (1) the combination of requirements for the 14

hospitals involved worked an unfair burden on small businesses competing under the RFP; (2) the 2-year experience requirements and requirement for an "Executive Housekeeper" are excessive; (3) the services requirements should be a small business set-aside or an "8(a)" procurement; and (4) certain individual proposals (submitted by Oneida Chemical Company, Inc., Batchelor's Building Maintenance Service, Inc., and Nationwide Building Maintenance, Inc.) were improperly rejected.

No useful purpose in terms of a remedy would be served by deciding protests Nos. 1, 2, and 4 since these protests, if found meritorious, assume that award would have to be made under the outstanding RFP, as perhaps revised, or under formal advertising procedures, if the RFP were canceled. Any subsequent award under the subject RFP would be contrary, however, to our holding that use of the cited negotiation authority was not rationally founded within the limits of existing law and award under formal advertising procedures may not be possible to satisfy the immediate requirements involved. Consequently, we will not decide these protests. See Thrae D Enterprises, Inc., B-185785, February 20, 1976, 76-1 CPD 117.

Further, as to the protests that the procurement should be a small business set-aside or an "8(a)" contract, we have recently held: (1) that nothing in the Small Business Act or procurement regulations make it mandatory that there be a set-aside for small business as to any particular procurement (Groton Piping Corporation and Thames Electric Company (joint venture), B-185755, April 12, 1976, 76-1 CPD 247); and (2) that an agency's decision not to make an "8(a)" award for a given procurement is not subject to review by our Office (Welmetco, Ltd., B-185583, March 11, 1976, 76-1 CPD 173). Consequently, these protests are denied.

Deputy Comptroller General
of the United States