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DECISION



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

FILE: B-190663

DATE: April 26, 1978

MATTER OF: Tymshare, Inc.

DIGEST:

1. Agency's conducting informal competition whereby order for data base development was to be placed under one of two vendors' basic ordering agreements--where no adequate written solicitation was issued--was procedure at variance with fundamental principles of Federal negotiated procurement, and also raises question of improper prequalification of offerors. GAO recommends that agency review its procedures for issuing such orders and conduct any further competition in manner not inconsistent with decision. Case is also called to attention of General Services Administration for possible revision of Federal Procurement Regulations.
2. Where GAO finds that agency's negotiated procurement procedure was fundamentally deficient--no adequate written solicitation issued--and recommends that agency review procedures before conducting any further competition, issues concerning propriety and results of benchmark tests under deficient procurement procedure are academic.

Tymshare, Inc., has protested to our Office concerning the refusal of the Federal Aviation Administration (FAA) to award it an order under its basic ordering agreement (BOA) No. DOT-OS-50255.

Background

The record indicates that pursuant to orders issued under its BOA No. DOT-OS-50252, Boeing Computer Services Company (Boeing) has been performing what is described as data base development and analysis for FAA. The work apparently involves consolidating certain FAA data requirements through the use of a data base management system software

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package. (In this regard, both Boeing's and Tymshare's BOA's merely provide that, pursuant to certain agreed-upon terms and conditions, FAA may place orders for "remote access computing services.")

By letter dated October 29, 1976, subsequent to an FAA benchmark of Tymshare, the protester submitted what it called an unsolicited proposal to FAA. To investigate possible cost savings, FAA decided to run benchmarks of both Boeing and Tymshare systems. They were concluded by September 1977. By letter dated October 17, 1977, FAA advised Tymshare that it had decided to retain Boeing as the timesharing vendor to be used for data base development and analysis.

Tymshare's protest is essentially that since the 1977 benchmark showed its cost was lowest, it was and is entitled to an award. FAA, on the other hand, believes that the 1977 benchmark was poorly structured and did not reflect the costs FAA would actually incur. In its January 26, 1978, report to our Office, FAA indicates that it is continuing with Boeing as the contractor and is going to run another benchmark of Boeing and Tymshare to determine the current lowest cost for the work.

Discussion

The submissions by the protester, FAA and Boeing address various factual issues concerning the conduct of the benchmarks and the two vendors' costs. However, we believe the basic legal issue concerns the procurement methodology being used by FAA.

Federal Procurement Regulations (FPR) § 1-3.410-3(a) (1964 ed. amend. 149, June 1975) describes a BOA as an agreement which sets forth the negotiated contract clauses which shall be applicable to future procurements entered into between a procuring agency and a contractor, as well as a description of the supplies or services to be furnished when ordered and a method of determining the prices to be

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paid. In this regard, a BOA itself is not a contractual commitment by the Government to make any purchases. Cf. B-169209, June 11, 1970; FPR § 1-3.410-3(c)(2). FPR § 1-3.410-3(b) states that a BOA can be used as a means of expediting procurement where specific requirements are not known at the time the BOA is executed but it is expected that substantial requirements will result in procurements from the contractor during the term of the BOA. FPR § 1-3.410-3(c)(1) further provides that orders may be placed under a BOA only if it is determined at the time the order is placed that it is impracticable to obtain competition by either formal advertising or negotiation.

We note that the FPR's are silent on the subject of conducting a competitive negotiated procurement in which award is to be made by issuing an order under the successful offeror's BOA. However, the Armed Services Procurement Regulation (ASPR), though not applicable to the present procurement, does provide some guidance on this point. ASPR § 3-410.2(c) (1976 ed.) states in pertinent part:

"(1) Basic ordering agreements shall not in any manner provide for or imply any agreement on the part of the Government to place future orders or contracts with the contractor involved, nor shall they be used in any manner to restrict competition.

"(2) Supplies or services may be ordered under a basic ordering agreement only under the following circumstances:

"(i) If it is determined at at the time the order is placed that it is impracticable to obtain competition

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by either formal advertising or negotiation for such supplies or services; or

- "(ii) If after a competitive solicitation of quotations or proposals from the maximum number of qualified sources (see 3-101), other than a solicitation accomplished by use of Standard Form 33, it is determined that the successful responsive offeror holds a basic ordering agreement, the terms of which are either identical to those of the solicitation or different in a way that could have no impact on price, quality or delivery, and if it is determined further that issuance of an order against the basic ordering agreement rather than preparation of a separate contract would not be prejudicial to the other offerors.

In situations covered by (ii), the choice of firms to be solicited shall be made in accordance with normal procedures, without regard to which firms hold basic ordering agreements; firms not holding a basic ordering agreement shall not be precluded by the solicitation from proposing or quoting; and the existence of a basic ordering agreement shall not be a consideration in source selection."

See, also, 51 Comp. Gen. 755 (1972). There, pursuant to a determination and findings to negotiate a contract under 10 U.S.C. § 2304(a)(10) (1970), a request for quotations (RFQ) for the procurement of certain parts was issued requiring that offers incorporate the terms and conditions of the offerors' current BOA's. The RFQ also established a cutoff

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date for submission of proposals, and set forth other requirements concerning firm unit prices, discount terms, delivery schedule, and packaging.

In the present case, while FAA developed certain benchmark criteria to be applied to Boeing's and Tymshare's systems, there is no indication in the record that the agency issued an RFP or any type of formal written solicitation. Rather, the competition-- which has now extended over a period of several years-- has apparently been carried out informally, through the exchange of various letters and by meetings with the vendors. For example, by letter dated September 30, 1977, FAA advised Tymshare of both Tymshare's and Boeing's 1977 benchmark processing costs, requested written "comments" by October 7, 1977, and advised that a final decision as to which vendor would be used for the data base development work would be communicated to Tymshare by October 14, 1977. A similar letter was sent at the same time to Boeing.

The requirement for a written solicitation describing the Government's needs, setting forth the evaluation factors and their relative weights, and establishing a common cutoff date for submission of proposals is fundamental in Federal negotiated procurement. See Complete Irrigation, Inc., B-187423, November 21, 1977, 77-2 CPD 387, and FPR § 1-3.802(c) (1964 ed. amend. 118, September 1973). This requirement is not only for the protection of the Government's interests but also to assure that all offerors are fully informed of the Government's needs and thus are able to compete on an equal basis. See DPF Incorporated, B-180292, September 12, 1974, 74-2 CPD 159; Union Carbide Corporation, 55 Comp. Gen. 802, 807-808 (1976), 76-1 CPD 134. Also, in a negotiated procurement the disclosure prior to award of the number, identity or relative standing of offerors is prohibited by FPR § 1-3.805-1(b) (FPR circ. 1, 2d ed., June 1964).

In view of the foregoing, we believe that FAA's conducting an informal competition for an order to

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be issued under one of several vendors' BOA's without the issuance of an adequate written solicitation was a procedure at variance with fundamental principles of Federal negotiated procurement. In addition, we believe there is a further question concerning prequalification of offerors if a competition of this type is limited to vendors having BOA's. In this regard, in several instances our Office has tentatively approved special agency procedures in which competition for a contract is limited to offerors which have previously entered into certain types of agreements with the agency. See Department of Health, Education, and Welfare's use of basic ordering type agreement procedure, 54 Comp. Gen. 1096 (1975), 75-1 CPD 392, and Department of Agriculture's Use of Master Agreements, 56 Comp. Gen. 78 (1976), 76-2 CPD 390. However, absent such special circumstances, the general rule is that prequalification of offerors is an undue restriction on competition. See, generally, D. Moody & Co., Inc., et al., 55 Comp. Gen. 1, 11 (1975), 75-2 CPD 1. Cf. also ASPR § 3-410.2(c)(2), which provides that the choice of firms to be solicited is to be made in accordance with normal procedures and without regard to which firms hold BOA's.

Conclusion

In view of the foregoing, we recommend that FAA review its procedures for the competitive issuance of orders under BOA's of this type, and that any further competition for the services in question be undertaken in a manner not inconsistent with the views stated in this decision. By letter of today we are advising the Secretary of Transportation of our recommendation.

In addition, by letter of today we are furnishing a copy of this decision to the Director, Federal Procurement Regulations Staff, General Services Administration, and recommending that consideration be given to amending the FPR's to include a provision similar to ASPR § 3-410.2(c) concerning competitive solicitations leading to an award made by means of issuing an order under a BOA.

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As already indicated, we believe FAA's procurement procedures in this case were fundamentally deficient. In these circumstances the questions whether Tymshare should have been selected in October 1977 based upon the benchmark results at that time or whether the agency acted properly in deciding to run another benchmark are academic, and there is no basis for our Office to recommend, as the protester urges, that it be issued an order for these services. Accordingly, the protest is denied.

R. F. K. 1111
Deputy, Comptroller General
of the United States



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

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APR 1976

Mr. Philip G. Read
Federal Supply Service
Washington, D.C. 20405

Dear Mr. Read:

Enclosed is a copy of our decision of today concerning a protest by Tymshare, Inc., which deals with a competition for an order to be issued to one of two vendors having basic ordering agreements (BOA's) with the Federal Aviation Administration.

For the reasons indicated in the decision, we recommend that consideration be given to amending the Federal Procurement Regulations to include a provision similar to Armed Services Procurement Regulation § 3-410.2(c) (1976 ed.) concerning competitive solicitations leading to an award made by means of issuing an order under a BOA.

We would appreciate being advised of whatever action is taken in response to our recommendation.

Sincerely yours,

H. F. KELLEY

Deputy Comptroller General
of the United States

Enclosure

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

B-190463

APR 2 1978

The Honorable
The Secretary of Transportation

Dear Mr. Secretary:

We refer to a letter to our Office dated January 26, 1978, from the Associate Administrator for Administration, Federal Aviation Administration (FAA), which responded to a protest by Tymshare, Inc., concerning the issuance of an order for computing services under a basic ordering agreement (BOA).

Enclosed is a copy of our decision of today. While the protest has been denied, we recommend for the reasons indicated that FAA review its procedures for the competitive issuance of orders under BOA's, and also that any further competition for the services involved in this case be undertaken in a manner not inconsistent with the views stated in the decision.

We would appreciate being advised of whatever actions are taken in response to our recommendation.

Sincerely yours,

R.F. KELLER

Deputy, Comptroller General
of the United States

Enclosure

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