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DECISION

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

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FILE: B-198360

DATE: December 9, 1980

MATTER OF: Office of Federal Procurement Policy's films production contracting system; John Bransby Productions, Ltd.

DIGEST:

DLG 05633

Protest Against

1. Determination, made under Office of Federal Procurement Policy's uniform system for contracting for film and videotape productions, that small business concern is not qualified to participate in competition for Government contracts is essentially negative responsibility determination which must be referred to Small Business Administration under certificate of competency program.

2. Office of Federal Procurement Policy's prequalification of offerors in connection with its uniform system for contracting for film and videotape productions is not unwarranted restriction on competition because all firms may attempt to qualify. However, use of OFPP's qualified list by procuring agencies in soliciting for particular procurements is unduly restrictive of competition unless procurements are synopsized in Commerce Business Daily and interested firms on the prequalified lists are afforded opportunity to compete.

3. Procurements under Office of Federal Procurement Policy's uniform system for contracting for film and videotape productions are not "made by placing an order under an existing contract" because agreement between qualified firm and OFPP's executive agent is

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not "contract" within meaning of 15 U.S.C. § 637(e) (1976) and, therefore, must be synopsized in Commerce Business Daily.

This decision results from (1) our current survey of the uniform Government-wide system for contracting for motion picture and videotape productions established by the Office of Federal Procurement Policy (OFPP), and (2) a protest filed by John Bransby Productions, Ltd. (Bransby), against limitations on competition inherent in the uniform system. We have also considered the comments of the Small Business Administration's Chief Counsel for Advocacy (SBA) that the uniform system violates 15 U.S.C. § 637(b)(7)(A) (Supp. I, 1977), which empowers the SBA to conclusively certify the responsibility of small business concerns.

Bransby essentially contends that the system's prequalification of offerors, the limitation on the number of offerors that may respond to a solicitation, and the failure to require notice of requirements in the Commerce Business Daily violate procurement statutes and laws enacted for the protection of small business concerns. OFPP responds that the uniform system has resulted in more meaningful competition by providing fair and open prequalification of sources, by establishing uniform evaluation criteria, by standardizing contract terms and conditions, and by establishing a central location for information concerning procurement activity.

This decision will address only the legal issues presented by the parties, and our views on the efficacy of the uniform system will be reserved for consideration in our current audit investigation.

We conclude that:

(1) the uniform system's prequalification of offerors, without referral of negative determinations to SBA, violates SBA's conclusive authority to make responsibility determinations regarding small business concerns;

(2) the uniform system's prequalification of offerors does not constitute an unwarranted restriction on competition;

(3) the use of random lists of offerors in connection with the uniform system does not restrict the number of qualified firms that may compete in individual procurements; and

(4) procurements under the uniform system must be synopsized in the Commerce Business Daily.

By letters of today, we are bringing our views to the attention of the Administrators of OFPP and SBA.

I. Background

In the early 1970's, studies of audiovisual activities by the executive and legislative branches revealed waste, mismanagement, duplication, and inadequate on the private sector for expertise. In 1972, the Office of Telecommunications Policy, under the Office of Management and Budget's direction, suggested that the General Services Administration establish national requirements contracts or basic ordering agreements for audiovisual productions. In 1976, OFPP assumed the responsibility of directing improvement in audiovisual management. The main problem areas were: (1) prospective contractors could not obtain adequate information on opportunities and requirements; (2) prospective contractors did not have adequate time to submit proposals after publication in the Commerce Business Daily; (3) proposal evaluation procedures and criteria differed widely and resulted in unacceptably high administrative costs to the agencies; (4) in some instances more than 100 proposals were received in response to one solicitation, requiring extensive agency resources to evaluate proposals; (5) agencies lacked audiovisual expertise which resulted in costly delays and unsuitable final products; and (6) potential offerors experienced difficulty in establishing credentials and qualifications because of differing agency requirements.

OFPP Policy Letters 78-5 and 79-4, the culmination of 5 years of effort, established the uniform procurement system for motion picture and videotape productions with the following features:

(a) The Directorate of Audiovisual Activities (now called Directorate for Audiovisual Management Policy), Department of Defense, is designated as executive agent to establish and maintain the uniform system and to serve as the central information source on motion picture and videotape production programs.

(b) All firms interested in doing motion picture or videotape production work for the Government are invited to qualify for contracts containing general terms and conditions and for listing in the central automated source list (Qualified Film Producers List (QFPL) or Qualified Videotape Producers List (QVPL)), by submitting sample films to the Interagency Audiovisual Review Board (IARB). Contractors are also asked to provide a statement explaining the purpose of the film, the sponsor, the contract price and/or production costs.

(c) The IARB, which represents about 20 agencies, is responsible for evaluation of the sample films and videotapes in accordance with the following standardized criteria: achievement of purposes, creativity, continuity, and technical quality. Producers who attain a minimum score of 70 out of 100 points and who enter into a contract with the executive agent are placed on the QFPL or QVPL. These lists are always open for producers to submit films and videotapes to the IARB for qualification for a contract and placement on the QFPL or QVPL. Notice of the opportunity to submit films for consideration by the IARB is published at least semi-annually in the Commerce Business Daily and as often as feasible in the trade press.

(d) The QFPL and QVPL are mandatory for use by agencies with requirements for contracted motion picture or videotape production except in limited circumstances, such as where procurements under section "8(a)" of the Small Business Act are utilized

or sole source is justified by the agency; thus, producers not on the lists are ineligible to receive Federal Government contracts for these services.

II. Prequalification System

A. Violative of Small Business Laws?

SBA refers to 15 U.S.C. § 637(b)(7)(A) (1976 and Supp. I, 1977) as the statute empowering the SBA to certify to Government procurement officers all elements of responsibility of small business concerns. SBA notes that Government procurement officers may not preclude a small business concern from being awarded a contract on responsibility grounds without referring the matter to SBA for final disposition; therefore, the prequalification procedure established by OFPP is legally defective in that it deprives small businesses of the right to obtain a final responsibility determination from SBA. In SBA's view, the uniform system makes a determination on product quality, which is an element of responsibility. SBA believes that under the uniform system firms are disqualified due to their alleged lack of capacity without the benefit of an SBA determination.

Finally, SBA cites our decision, B-152757, July 15, 1964, as an example of a situation where a bidder prequalification procedure for a particular procurement was found to be defective because it deprived SBA of making the final determination on the capacity and credit of small business firms. In that decision, we found that the agency's prequalification of bidders in connection with specific proposed construction projects was inconsistent with SBA's statutory authority to make conclusive determinations of small business concerns' competency to perform Government contracts. The uniform system here is far worse, in SBA's view. Rather than merely disqualifying a small business from participating in a particular procurement, the failure of a small firm to qualify would disqualify it from all Federal audiovisual and videotape procurements, thus having the same effect as a de facto debarment, citing Myers & Myers, Inc. v. U.S. Postal Service, 527 F.2d 1252 (2d Cir. 1975).

OFPP explains that the IARB evaluates the quality of a vendor's sample production to determine if it meets the minimum acceptable level of quality, i.e., 70 points or more out of a possible 100, so that the vendor can be listed on the QFPL or QVPL; this qualification system remains open for submission, or resubmission in the event of failure to qualify, of films and videotapes at all times. OFPP states that product quality, as a factor affecting contractor responsibility, is a matter which, in general, is initially a determination to be made by the procuring agency or in this case by the executive agent. OFPP notes that a second opportunity for evaluation of a vendor's competency arises when the procuring agency receives proposals for motion picture or videotape production. It is the procuring agency here, not the executive agent, that makes responsibility determinations, which, if negative, would automatically be referred to SBA.

OFPP essentially admits that the IARB's evaluation of the work sample for purposes of determining the firm's technical competency is a responsibility determination. Further, OFPP's reliance on similarities between the uniform system and the prequalification system in the matter of Department of Agriculture's Use of Master Agreements, 56 Comp. Gen. 78 (1976), 76-2 CPD 390, leads us to conclude here, as we did there, that any small business firm found not to qualify for contracts for responsibility-related reasons should be referred to SBA. Unlike negotiated procurements, where the relative capability of offerors is considered to determine the relative technical merits of the proposals, and the question of referral to SBA is not involved (Electrospace Systems, Inc., 55 Comp. Gen. 415 (1979), 79-1 CPD 264), here, OFPP's purpose is to determine the responsibility of potential offerors.

Thus, SBA is correct and OFPP should revise the program to refer such negative determinations involving small business concerns to the SBA under the certificate of competency program. We note, however, that only one firm has protested its failure to qualify since the program started.

B. Violates Requirement for "full and free" Competition?

Bransby contends, relying on our decision in the matter of D. Moody & Company, Inc.; Astronautics, Corporation of America, 55 Comp. Gen. 1 (1975), 75-2 CPD 1, that the OFPP prequalification requirement for the purpose of administrative convenience is not justified because it results in an unwarranted restriction on full and free competition as contemplated in applicable procurement statutes and regulations. We note that Bransby is on the qualified list and we are addressing this aspect of the matter in connection with our audit investigation and not because Bransby is an interested party relative to this issue.

OFPP contends that its prequalification process actually enhances competition and is in accord with our decisions in the matter of Department of Agriculture's Use of Master Agreements, supra, and Department of Health, Education, and Welfare's use of basic ordering type agreement procedure, 54 Comp. Gen. 1096 (1975), 75-1 CPD 392.

In reply, Bransby argues that a qualified products list might be used where a Government agency has a need for a product whose specifications may readily be standardized; an example would be tires. Bransby states that tire manufacturers would submit samples, which would be evaluated by the agency, and tires which meet the agency standards would be placed on the qualified products lists. In Bransby's view, use of the lists assures the agency of a satisfactory end product; however, there is no way that evaluation of a motion picture film made in the past will assure an agency that it will receive a satisfactory film on a different subject in the future.

In the Department of Agriculture decision, we concluded that Agriculture's proposal to prequalify firms in connection with procurements for consulting services was not objectionable because (1) master agreements would be entered into with all qualified firms, and (2) it appeared that competition would be enhanced since (a) small firms would be better able

to compete for individual project requirements rather than large requirements-type contracts, (b) the costs of responding to subsequent solicitations would be reduced, and (c) the pressures for curtailing competition because of delays inherent in soliciting and evaluating a large number of proposals for each project would be eliminated.

In the Department of Health, Education, and Welfare decision, we concluded that the agency's proposal to prequalify firms in connection with procurements of expert services for studies, research, and evaluation was not objectionable because (1) all firms found to be within the competitive range would be eligible, and (2) the agency proposed to limit its use of the procedure to instances where award on a sole-source basis would otherwise be made. See also 36 Comp. Gen. 809 (1957) (the use of a Qualified Products List was approved because necessary testing was so extensive that, as a practical matter, it could not be performed within the time constraints of a procurement); B-135504, May 2, 1958 (approved use of Qualified Manufacturers List); 50 Comp. Gen. 542 (1971) (approved prequalifying microcircuitry manufacturers).

Thus, while prequalification of competitors is generally inconsistent with the requirement for full and free competition (52 Comp. Gen. 569 (1973)), we have not objected where prequalification serves a legitimate need of the procuring activity and not mere expediency, or administrative convenience (D. Moody & Company, Inc., supra).

Here, as in the Department of Agriculture and Department of Health, Education, and Welfare decisions, the uniform system permits all firms meeting a certain level of acceptability to participate. More than 540 firms have qualified and only one firm protested its rejection to our Office. Second, Bransby's contention--that new businesses cannot qualify because there are no work samples to submit--presents an academic question in view of the number of firms already qualified, the lack of protests, and the availability of assistance to small business concerns from the SBA. Third, although the uniform system is designed to be

used as the normal procurement method as compared with the exceptional method envisioned in the Department of Agriculture and Department of Health, Education, and Welfare decisions, we do not view this as a basis to object because as a practical matter, all qualified firms can participate. Thus, we cannot conclude that the OFPP's current prequalification of offerors constitutes an unwarranted restriction on competition.

III. Restrictions on Individual Procurements

A. Limits on the Number of Bidders?

Under the uniform system, a contracting agency notifies the executive agent of its need to contract for a motion picture or videotape production and the executive agent supplies the names of five producers selected at random by computer from the list. At the contracting agency's request, more names are provided in groups of five. For each group of five names supplied, the contracting agency can add the names of two producers of its selection from the list. For any particular procurement, solicitations are sent only to those few firms. As a result, Bransby has been invited to participate in only one procurement and since agencies' procurement needs are not announced in the Commerce Business Daily, Bransby has no means available to discover when particular procurements are in process.

OFPP explains that the uniform system requires that proposals be solicited from at least five producers for each requirement but agencies determine whether more than five proposals should be solicited, except when the estimated cost is less than $100,000; then, generally only two increments of producers should be requested. OFPP also explains that agencies retain the ability to solicit the number of producers considered appropriate to assure a satisfactory end product.

OFPP contends that the uniform system does not violate 10 U.S.C. § 2304(g) (1976), as Bransby argues, because proposals are solicited from the maximum number of qualified sources consistent with the nature and

requirements of the service to be procured. In OFPP's view, this aspect of the uniform system enhances competition because many small businesses with limited resources that were unable to cope with multiple agency requirements and thus were discouraged from engaging in business with the Government now are able to compete.

Bransby disagrees with OFPP's assessment and argues that since the average number of producers solicited is 7.2 out of 540, the maximum number of qualified sources is not being solicited. Further, Bransby points out that about 70 percent of the awards during the first year of the uniform system's operation went to one of the producers added to the random list by procuring agencies; thus, Bransby believes that the system unduly restricts competition.

In our view, the uniform system does not restrict the number of competitors that may compete in a particular procurement because the procuring agency is free to request all the names on the list and notify all listed firms of its requirements. In practice, however, procuring agencies may have used the uniform system so as not to maximize competition in individual procurements. For now, we will reserve comment on these and other aspects of the uniform system's operation until our current audit investigation is completed. Further, as discussed below, in the future, because procuring agencies are required to comply with statutory synopsis requirements, potential offerors will be able to compete for these contracts, thus maximizing competition.

B. Synopsis in Commerce Business Daily?

Bransby believes that competition would be enhanced if producers could learn of agency requirements through the Commerce Business Daily and express their interest in the procurement. Bransby contends that 15 U.S.C. § 637(e) (1976) requires synopsis of all proposed procurement actions (in excess of specified dollar amounts) and that the uniform system does not comply with that requirement.

OFPP states that there is an exception to the synopsis requirement: procurement actions which are made by an order placed under an existing contract do not have to be synopsized; each qualified firm under the uniform system has a contract. In reply, Bransby argues that "contracts" under the uniform system are basic ordering agreements and not "contracts" within the meaning of the exception to the synopsis requirement because it contains no promise for the breach of which the law gives remedy; it contains no promise of performance which the law recognizes as a duty; and it does not contain a promise enforceable at law directly or indirectly.

The language of 15 U.S.C. § 637(e) provides that publication of notice of proposed procurements in excess of certain dollar amounts is required unless the procurement involves one of a few exceptions, for example, when the procurement is made "by an order placed under an existing contract." Subsection (e) was added by the Small Business Act Amendments of 1961, Public Law No. 87-305, September 26, 1961, 75 Stat. 666. The legislative history of that act reveals that Congress intended to "secure for small business a greater participation in Government procurement" by requiring that all procurements in excess of low dollar amounts be synopsized to give notice to a larger number of businessmen of Government procurements. The amendment excepted procurements which for security reasons are classified, procurements for perishable substances, public utility services, and procurements in emergency situations. Although military and civilian agency procurement regulations were amended, prior to passage of the act, to provide for the synopsis requirement, Congress deemed it necessary to make the synopsis requirement a permanent statutory provision. The twofold purpose of subsection (e) was to obtain benefits from a nearly complete public listing of procurement actions for large and small businesses, as well as for the Government itself through maximized competition. Congress believed that small businesses need this additional assistance to better compete for Government contracts. S. Rep. No. 802, 87th Cong., 1st Sess. 4, 5 (1961); H.R. Rep. No. 8762, 87th Cong., 1st Sess. (1961) (conference report); Cong. Rec. S1759 (daily ed. Feb. 9, 1961).

Thus, in view of the legislative intent of subsection (e), we believe that the exception to the synopsis requirement must be narrowly interpreted, and we conclude that the document issued to qualified firms under the uniform system is not a "contract" within the meaning of the exception to the synopsis requirement of subsection (e). In our view, it is not possible to place an order under the document issued to each of the 540 qualified firms because too many essential elements are missing: there is no description of the item to be procured, there are no delivery terms, and there is no price to be paid. Therefore, procurements under the current uniform system do not qualify for that exception to the synopsis requirement.

We recognize that OFPP has the authority, under 41 U.S.C. § 402 (1976), to provide overall direction of procurement policies, regulations, procedures, and forms for executive agencies but OFPP must do so in accordance with applicable laws (Id.). Thus, we disagree with OFPP's conclusion that it is within the statutory authority of OFPP to determine for the purposes of procurement policy within the executive branch that the agreement resulting from Policy Letter 79-4 is a "contract" for purposes of subsection (e). In our view, OFPP's authority does not extend to redefining the meaning of the synopsis requirement set forth in 15 U.S.C. § 637(e).

Regarding the use of rotating lists of potential offerors, we have considered situations involving the Government Printing Office's "rotating bid list" procedure and the General Services Administration's "rotation of bidders mailing list" procedures and we have not found these procedures inherently improper. Coastal Services, Inc., B-182858, April 22, 1975, 75-1 CPD 250; American Drafting and Laminating Company, B-186425, July 26, 1976, 76-2 CPD 82. In both cases, the synopsis requirement was not observed and we recommended that future procurements strictly adhere to it. Thus, the uniform system's employment of a computer-selected list of offerors to receive a request for proposals is not improper as long as the synopsis requirements are observed.

C. Negotiation v. Formal Advertising?

Bransby points out that all procurements under the uniform system are negotiated but 41 U.S.C. § 252(c) (1976) requires the use of formal advertising unless certain circumstances are present. Bransby argues that the uniform system's blanket determination--that all film contracting involves situations where it is impracticable to secure competition with formal advertising--constitutes an interference prohibited by 41 U.S.C. § 405(f) with the determinations of executive agencies regarding specific actions in the award of contracts.

OFPP contends that its authority under 41 U.S.C. § 408 supersedes the authority of executive agencies under any other laws to prescribe policies for procurement and authorizes it to determine that motion picture and videotape production procurements should be negotiated pursuant to the authority of 41 U.S.C. § 252(c)(10).

It seems apparent to us that because of the nature of film and videotape productions, generally the negotiation authority of 41 U.S.C. § 252(c)(10) would be appropriate since it is impracticable to secure competition through formal advertising.

IV. Conclusion

Our consideration of OFPP's uniform system to date reveals that the program's prequalification of offerors should be revised to refer negative determinations involving small business concerns to SBA.

We also conclude that, while the use of computer-selected lists of offerors to receive solicitations in individual procurement is not improper, such procurements must be synopsized in the Commerce Business Daily as required by statute. Further, procuring agencies or the executive agent must provide a copy of the solicitation to potential offerors, upon request, and procuring agencies must consider proposals submitted by all offerors on the prequalified lists.

Milton J. Socolar

For the Comptroller General
of the United States