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M. Boyle

DECISION

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

FILE: B-190203 DATE: March 20, 1978

MATTER OF: Informatics, Inc.

DIGEST:

1. GAO will not object to contracting officer's determination to negotiate on basis that it is impracticable to secure competition by advertising where reasonable basis for determination exists.

2. Where it is possible to draft description of product or service adequate to permit competition, desire to conduct discussions with offerors to assure their understanding of specification or to cover matters traditionally related to responsibility cannot authorize negotiated procurement.

3. Where agency does not contend that there is any urgency, contention--that time constraints similar to those present in prior decision justify negotiation--is without merit.

4. Prior GAO decision not objecting to implementation of agency's proposed "resolicitation" was not and cannot be considered as approval of particular type (IFB v. RFP) of solicitation to be used.

5. Contention that protester was not prejudiced by agency's issuance of RFP rather than IFB is not relevant. Federal procurement law requires that purchases and contracts be made by formal advertising unless certain enumerated circumstances are present. Where those circumstances are not present, law requires procurement by formal advertising and no showing of actual prejudice to anyone is required.

6. Fact that prior attempts to procure using formal advertising failed to result in contract is insufficient basis to conclude that advertising would fail here because (1) current specifications are substantially different from prior solicitations, and (2) past attempts at advertising failed because of solicitation defects which are now cured.

7. Protester contends that pilot patent production demonstration is unnecessary because (1) Government has no need for assurance of service continuity, (2) it was waived in past, and (3) payment bond adequately protects Government's interest. It is not GAO's function to determine whether some other test or other means would satisfy Government's need to determine technical capability to perform; review is limited to ascertaining whether reasonable basis exists for specified test. Test has reasonable basis since it provides means to determine whether offeror has technical capability.

8. Contention--that pilot patent production demonstration (PPPD) must be performed under unduly restrictive time limits not permitting adequate time to prepare computer programs, acquire equipment, and train staff--is based in part on apparent misunderstanding of RFP's requirements. Since computer programs must be prepared prior to submission of initial proposal, preparation of final program has not been demonstrated by protester as being overly difficult in time allowed. Further, GAO cannot conclude that PPPD is unduly restrictive of competition as being overly costly relative to benefit derived from Government's ability to positively determine offeror's technical capability.

9. Where (1) agency has stated no reason to restrict start-up time to 2 months and GAO can perceive none, (2) some overlap of new contractor and incumbent is necessary, and (3) history of procurement has shown that 2 months is not long enough to produce acceptable results, 2-month start-up limitation is unduly restrictive.

10. Protester contends that agency has no need for Series 5 patent suspense file because need to provide contractor with smooth workflow could be satisfied in another manner and without suspense file. Where agency has rational basis for specification--one which does not prevent protester or other potential offerors from participating--

GAO has no basis to conclude that specification is violative of procurement laws or regulations.

11. Protester contends that size of specified suspense file is in excess of Government's actual minimum needs, wasteful of Federal funds and violative of sound procurement principles. GAO has no basis to object to size of suspense file specification where past experience has shown that specification is reasonable, specification was prepared based on best data available to Government and all relevant information has been made available to all potential offerors.

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This decision results from the protest of Informatics, Inc., against any award under request for proposals (RFP) No. JOJO178000001 issued by the Department of Commerce for preparation of patent data for the patent full-text data base--including all complex tables, equations, and chemical diagrams, in machine language on computer magnetic tape--and extraction of data for official publications and related matters.

Informatics contends that the RFP is defective and that no legal or proper award can be made thereunder because (1) Commerce's data preparation needs must be procured by formal advertising rather than by negotiation because in the circumstances there is no statutory authority to negotiate; (2) the RFP contains time limits for determining responsibility--in particular, technical capability--and for performance start-up which are unnecessarily restrictive of competition; (3) the work requirements and estimates contained in the RFP with respect to the Series 5 suspense file are ambiguous, conflicting, without a rational basis and in excess of the Government's actual minimum needs; and (4) the RFP's evaluation criteria are vague and incomplete.

NEGOTIATION V. ADVERTISING

The contracting officer determined that the proposed contract is "for property or services for which it is impracticable to secure competition" and, therefore, pursuant to the authority of 41 U.S.C. § 252(c)(10)(1970), as implemented by the Federal Procurement Regulations (FPR) § 1-3.210(a)(13) (1964 ed. circ. 1), the contract may be negotiated without formal advertising. FPR § 1-3.210(a)(13) illustrates one circumstance in which it is impracticable to secure competition--"[w]hen it is impossible to draft for an invitation for bids adequate specifications or any other adequately detailed description of the required property or services." The contracting officer's determination was supported by these findings, including selected aspects of this procurement's history:

"3. The prior award on this requirement (contract 7-36977 to International Computaprint Corporation [ICC] in August 1976) was protested to the General Accounting Office by Informatics, Inc. in September 1976. In decision B-187435, dated March 15, 1977, the GAO recommended that new best and final offers be requested from ICC and Informatics based upon the addition of a firm quantity estimate (in lieu of the 'range' quantity) of the number of pending patents that would be transferred from the current contractor to a successor contractor.

The Department of Commerce advised GAO on April 20, 1977 of the problems of implementing their 'best and final' decision and as an alternate a new updated solicitation was proposed. In part, the decision of the Comptroller General, dated June 2, 1977 stated 'our Office has no objection to the implementation of Commerce's proposed resolicitation.'

"4. The solicitation resulting in contract 7-36977, currently in effect with ICC, was negotiated pursuant to the recommendation in C. G. decision B-185403 dated April 29, 1976. The prior solicitation numbers 4-36995 and 6-36976 had been formally advertised bids.

"5. In this resolicitation involving updated specifications from those used in the 1976 procurement, and the addition of new Patent and Trademark Office requirements, it is considered extremely important that in the event of any questions the Government may have following receipt of responses, especially Exhibit 1 (the detailed method

of inclusion in required products of complex work units, i.e. all tables, equations, and chemical structures/ diagrams/formulas), that there be an opportunity to clarify how the prospective contractor plans to accomplish the requirements of the contract. This opportunity is particularly needed if a prospective contractor elects to introduce optional processing of complex work units.

The specifications of the Patent and Trademark Office are explicit and voluminous with regard to the patent files that are turned over to the contractor. The specifications for production scheduling and what the output products are are likewise specific--however, they are complex and may be misinterpreted by offerors. It is the 'in-between' proposed actions of the contractor in the production of work between the input and the output which need careful review to ascertain whether he can accomplish the end result that precludes this requirement from being one that can be handled on a formally advertised basis.

"6. Under these circumstances, where the Government does not furnish the entire package but only the input and output specifications, leaving responders to determine the method of production, the selection of ADP equipment and peripheral units, and the development of software to accomplish the end results, there must be available a means of determining sufficient price comparability between offers, and compatibility with the existing patent data base coding.

> "7. The use of formal advertising for the procurement of the Patent Data Base requirements is impracticable because certain flexibility for the responders is required in order to take advantage of the most recent developments, and the Government prefers not to specify that aspect of the requirement."

The contracting officer, in a report to our Office, also explained that the reasons advanced for using negotiations rather than formal advertising may not fit neatly under any one of the enumerated illustrations set forth in FPR § 1-3.210(a), but there is no requirement that it so fit. The determination to utilize negotiation was directed at securing competition which may have been summarily eliminated under rigid formal advertising procedures.

Informatics argues that the use of negotiation is contrary to the Federal Property and Administrative Services Act and implementing regulations because: (1) prior solicitations for substantially similar needs have been issued using techniques of formal advertising, citing Nationwide Building Maintenance, Inc., 55 Comp. Gen. 693 (1976), 76-1 CPD 71; (2) the contracting officer's basis for determining that negotiation was permitted shows specific concern for matters relating to responsibility about which the solicitation provisions are lengthy, detailed and fully sufficient; and (3) the agency report describes the instant solicitation as a procurement perfect for formal advertising:

> "This procurement requirement sets forth complete specifications for the work products to be delivered. Consequently, the only comparative factor among different offers is the price evaluation total of the line items and the estimated quantities set forth in the solicitation. The low-price offeror, however, in order

> to receive the award, must meet the standards of responsibility * * *. It in no relevant way corresponds to * * * contracts where the deliverable product or service cannot be completely specified but can only be described in general terms. * * * In the subject solicitation, no * * * technical evaluation factors, or any other evaluation factors other than the total evaluated price were contemplated under, appropriate to, identified in, or in any manner applicable to this solicitation."

ICC, the incumbent contractor, contends that Informatics has asserted no prejudice to itself as a result of the procurement being issued as an RFP rather than an IFB. ICC states that when asked at the bid protest conference, Informatics mentioned a private attorney general's action to prevent taxpayer injury arising from a potentially more expensive negotiated contract, but in the circumstances of the present procurement, negotiation may well lead to a less expensive and more effective contract. Thus, ICC concludes that where a procurement such as the present involves the need for highly technical and specialized services, negotiation gives prospective offerors and the Government the opportunity to discuss prior to award how the offeror proposes to meet the Government's complex needs and the possibility of alternative and potentially cost-saving methods of performance; such opportunities may be lost in the more rigid confines of formal advertising.

Secondly, ICC argues that, in regard to the time constraints affecting this procurement, Informatics attempts to deny the time exigencies present by claiming that the incumbent contractor is "ready, willing and able" to extend its current contract. But, ICC continues, the current contract has already been extended for a period of at least 4 and possibly 6 months and in that context the Government is clearly entitled to move as expeditiously as possible in obtaining a new contract. Inasmuch as Informatics itself has proposed a schedule

wherein a new contractor would not be required to perform until well over 5 months after bids were submitted, ICC concludes that to require Commerce to start over again with a new solicitation in the form of an IFB is an inherently unreasonable burden to impose on both the Government and the current contractor. ICC states that the willingness of ICC to continue its performance by extensions is not the point; what is important is the Government's right to have a proper contract which meets its current needs.

Finally, ICC argues that, contrary to Informatics' claim, in Nationwide Building Maintenance, Inc., the fact that similar specifications have previously been used in a formally advertised procurement was not a "compelling factor" in holding a negotiated procurement improper. While similarity is mentioned in passing, the real reason was that the justification used by the procuring agencies for negotiation, in ICC's view, had been expressly rejected by Congress as an exception justifying negotiation.

Reasonable Basis Test

As indicated above, all purchases and contracts for property and services are required by Federal procurement law to be made by formal advertising, except that such purchases and contracts may be negotiated without advertising if the circumstances of enumerated exceptions are applicable; the tenth exception concerns property or services for which it is impracticable to secure competition. 41 U.S.C. § 252(c)(10) (1970). A determination to procure by negotiation may be made, provided that the circumstances described in one of the enumerated exceptions are applicable. 41 U.S.C. § 252(c) (1970). We will not object to a determination to negotiate on the basis that it is impracticable to secure competition where any reasonable ground for the determination exists. 41 Comp. Gen. 484, 492 (1962).

Impossibility of Drafting Specifications

The principal basis for the contracting officer's negotiation determination is his finding that it is impossible to draft specifications.

In general, the fact that a procurement is for "complex" supplies or services does not per se preclude the use of formal advertising. Sorbus, Inc., B-183942, July 12, 1976, 76-2 CPD 31; Bob Milner and Associates Co., B-181637, January 22, 1975, 75-1 CPD 41. Also, we have observed that the tenth exception to advertising authorizing negotiation contemplates the impossibility of drafting adequate specifications, not merely the inconvenience or difficulty of doing so. 52 Comp. Gen. 458, 461 (1973). In a protest connected with the advertised procurement of AN/PRC-77 radio sets, we recognized that no data package or specification can be expected to be totally without defects. 52 Comp. Gen. 219, 222 (1972). While we are not unaware of the administrative difficulties which can result during contract performance because of problems with the specifications, we do not believe that the hope of minimizing these difficulties through negotiations authorizes procurement by negotiation unless it is impossible to draft a specification adequate for advertising. Cf. Nationwide Building Maintenance, Inc., supra. To permit the use of negotiation under the circumstances of this case would be to suggest, in effect, that negotiation is authorized in any instance where a complex product is being procured and the agency desires to insure the offerors' understanding of an admittedly detailed specification.

In our view, the record does not demonstrate the impossibility of drafting adequate specifications; in fact, the record shows that the "explicit and voluminous" specifications describe in detail what the agency wants and makes competition among bidders based on that specification feasible and practicable in an advertised procurement.

Price Comparability

The second basis for the contracting officer's negotiation determination is his finding that "there must be available a means of determining price comparability between offers, and compatibility with the existing patent data base coding."

The RFP includes mandatory forms to be used by all offerors to submit unit prices which, when extended by disclosed estimated quantities and totaled for each year of the contract term, provides, as the contracting officer states, "the only comparative factor among different offers." Clearly, the RFP has established the means to obtain price comparability and the opportunity to conduct discussions could add nothing.

Compatibility with existing patent data base coding is a mandatory requirement of the RFP and the RFP includes a requirement that offerors affirmatively demonstrate that they are proposing compatible coding through the submission of "Exhibit 1" with their offers. Again in the RFP's responsibility determination procedures, which include a benchmark-type demonstration, offerors must affirmatively demonstrate such compatibility. The RFP also states that offers which include an incomplete, ambiguous or insufficiently clear Exhibit 1 conclusively demonstrating an understanding of the coding of complex work units will be rejected as technically unacceptable. Clearly, the RFP has established the means to determine the required compatibility; the opportunity to conduct discussions is foreclosed by the terms of RFP; and in any event the opportunity to conduct discussions here would add nothing.

Offeror's Technical Approach

The final basis for the contracting officer's negotiation determination is his findings that: (1) in the event of any questions the Government may have following receipt of proposals including Exhibit 1, there may be an opportunity to clarify how the contract

requirements will be accomplished, particularly if optional processing of complex work units is introduced; (2) while the input and output specifications are explicit and voluminous, the prospective contractor's "in-between" proposed actions need to be reviewed to ascertain whether the end result can be accomplished; (3) by not specifying how the end result was to be obtained, the contractor could take advantage of the most recent developments.

Again we point out that the compatibility with existing patent data base coding is a mandatory RFP requirement. We note that Exhibit 1 reflects only that an offeror is proposing the required coding scheme and that the offeror has the technical capability to code in machine readable format the required examples of complex work units. As the RFP is designed, Exhibit 1 does not reveal how an offeror achieved the required result and whether the offeror used the optimum approach. Should an offeror deviate from the required coding scheme, the RFP provides for automatic rejection of the offer as technically unacceptable. If an offeror's Exhibit 1 is technically acceptable, then it has the technical expertise to accomplish the required work; the RFP further requires such offerors, within 7 working days, to describe in comprehensive detail the technical approach intended to be used to accomplish the required work. The prospective contractor's "in-between" proposed actions (technical approach) do not need to be reviewed to ascertain whether the end result can be accomplished. After Exhibit 1 is found technically acceptable and the offeror's technical approach is substantiated in comprehensive detail, the RFP requires each offeror to affirmatively demonstrate the technical capability of the approach in a benchmark-type test. No discussions of technical approach are contemplated in the RFP and none are required or needed in view of the procedure employed.

Where there are specifications adequate enough to permit competition, the desire to conduct discussions with offerors to assure their understanding of the specifications or to cover matters traditionally related to responsibility (such as the "in-between" technical approach here) cannot, in our opinion, authorize a negotiated procurement. See Cincinnati Electronics Corporation, 55 Comp. Gen 1479 (1976), 76-2 CPD 286.

Urgency

ICC's contention--that the same time constraints affecting the procurement involved in our April 29, 1976, decision are present in the current procurement, thus justifying negotiation--is without merit. The agency does not contend that there is any urgency.

Effect of Our June 2, 1977, Decision

The contracting officer's determination and findings refers to our June 2, 1977, decision as stating that our Office had no objection to the implementation of Commerce's proposed "resolicitation"--the subject RFP being that proposed resolicitation. Our Office's approval of resolicitation was not and cannot be considered as approval of the particular type (IFB v. RFP) of solicitation to be used.

Protester's Failure to Show Prejudice

The ICC contention that the protester was not prejudiced by Commerce's issuance of the RFP rather than an IFB is not relevant. Federal procurement law requires that purchases and contracts be made by formal advertising unless certain enumerated circumstances are present. Where those circumstances are not present, the law requires procurement by formal advertising without a showing that anyone is or would be prejudiced by procurement by negotiation.

Failure of Past Issued IFB's to Result in Contract

The secondary basis for the contracting officer's negotiation determination is the past failure of issued IFB's to result in a contract. As noted, the two prior contracts resulted from RFP's. FPR § 1-3.210(a)(3)(1964 ed.) sets forth an illustrative example permitting negotiation when bids have been solicited and no responsible bid has been received from a responsible bidder. The issue here is whether a contracting officer may determine that formal advertising failed or would fail based on recent attempts to procure substantially similar products or services. Unquestionably, that example is directed at

the failure of formal advertising for the particular procurement involved. Even if the language could be interpreted to permit the failure of advertising determination to be based on similar past procurements, this procurement is substantially different from past procurements because the Government has clearly specified output (the current encoding scheme) from given input allowing offerors no discretion. Further, past attempts at formal advertising failed because of solicitation defects which have been cured here. In sum, there has been no showing that formal advertising failed or would fail here.

Accordingly, based on the present record, we must conclude that negotiation is improper and the RFP should be cancelled. Certain other issues raised by Informatics will be considered now to facilitate the future procurement of Commerce's requirements.

RESTRICTIVE TIME REQUIREMENTS

Informatics contends that the time periods for the "Pilot Patent Production Demonstration" (PPPD) and for start-up to full production are extremely burdensome, in excess of the Government's minimum needs, unreasonably restrictive of competition, and violative of procurement regulations.

PPPD

The RFP reserves to the Government the right to require prospective contractors to establish their technical ability to perform the work in a responsible and timely manner through a PPPD. The RFP states that prospective contractors would be notified one week (5 working days) in advance of the availability of 25 patent files representing chemical-type patents and two weeks (10 working days) would be permitted for actual production.

Commerce notes that computer programs are an indispensable tool to the production requirements of any contract awarded as a consequence of this solicitation and the workability of data capture and formatting programs will have

been established by the submission of offers. The remaining program, VIDEOCOMP inputs, is a mere translation of the keyboarded data into the Videocomp format. Commerce states that in the past this task was viewed by a potentional contractor as minimal since this translation can be performed routinely.

The solicitations issued in 1974 and 1975 required a demonstration and production of 200 patent files. The current requirement for a prospective contractor is to demonstrate competence utilizing 25 patent files (a reduction of 87 percent from the number required in the 1974 and 1975 solicitations). This volume of effort for a PPPD does not, in Commerce's belief, require a large staff.

Informatics contends that an offeror must have on hand all computer programs, substantial amounts of equipment, and a trained staff in order to perform the PPPD whether it consists of 25 or 200 patents. In the current time limits it is simply not feasible to write the computer programs, acquire the equipment, and train the staff during this short period.

Informatics also contends that, contrary to Commerce's belief, no computer programs need be prepared before the submission of an initial proposal and Commerce's remarks on the so-called "remaining program"--translation into Videocomp format--are confusing and misleading. In connection with this Office's June 2, 1977, decision, Informatics stated that translation of its existing computer output into Videocomp format would be a simple task. Informatics argues that the crucial context of that remark--a context well known to Commerce--was Informatics' preexisting coding scheme and the associated photocomposition software; however, as the Commerce Department knows, that context has changed materially--the instant solicitation requires the use, by all offerors, of the incumbent's encoding scheme. Informatics concludes that since photocomposition software is unique to each encoding scheme, the computer programs developed by Informatics at its expense are useless; thus, the earlier statement by Informatics is no longer valid and time limits which Informatics once found unobjectionable are now onerous and would be to any non-incumbent offeror.

As further explanation, Informatics argues that the computer programming task facing any non-incumbent offeror is huge and has been squeezed into an impossibly tight deadline because the effort required to estimate the cost of contract performance and the effort required for actual performance are substantially different. Informatics states that a reasonably competent offeror ought to be able to predict the costs of writing a computer program with sufficient accuracy to propose fixed contract prices, without actually writing the program. Informatics submits that its own staff, with its extensive experience in similar data processing assignments, is better able to judge the adequacy of the time periods involved than the Government, which does not have responsibility for meeting data processing production deadlines. Citing 39 Comp. Gen. 101 (1959), Informatics states that in order to be unduly restrictive of competition, agency specifications need not make the task of a non-incumbent offeror physically impossible; they need only make it overly difficult and costly and the terms and conditions of the instant solicitation make competition overly difficult and costly for any non-incumbent offeror without any adequate reason.

Secondly, Informatics contends that not only are these time periods restrictive of competition, they are unnecessary since there is no pressing need here to assure continuity of service at the end of the incumbent's contract. Further, postponements of the original proposal due date have made an extension of the incumbent's contract necessary, indicating Commerce's confidence that extensions of the present contract can be readily negotiated.

Informatics notes that in a protest of the 1975 solicitation for these services, the decision held that Commerce's action in determining an offeror to be responsible notwithstanding its failure to "pass" the PPPD had the effect of waiving the requirement for passage of the PPPD and convinced GAO that passage was an unnecessary requirement of the Government. Further, in the 1976 solicitation, the PPPD was expressed as an optional test and it was again waived for the successful offeror. Informatics concludes that Commerce has no

new justifications for this often-waived procedure and so it is as unnecessary and improper now as it was in the 1975 IFB. Further, in Informatics view, in addition to an expensive, time-consuming, outmoded, and unnecessary PPPD, the solicitation requires a payment bond and contains stringent penalties for a large variety of defaults and derelictions so that the Government's interests are more than adequately protected and the addition of the PPPD is unnecessarily obstructive of competition and merely serves to perpetuate the incumbent's monopoly.

Thirdly, Informatics contends that the PPPD time requirements are violative of the spirit and letter of the procurement statutes and regulations: (1) requiring that all purchases and contracts shall be made on a competitive basis to the maximum practicable extent; (2) requiring the contracting officer to solicit all such sources as are deemed necessary to insure such full and free competition as is consistent with the agency's requirements; and (3) requiring the contracting officer to question any performance schedule which appears unrealistic and, if necessary, make appropriate adjustments.

In this regard, Informatics argues, citing Winslow Associates, B-178740, May 8, 1975, 75-1 CPD 283; Globe Air, Inc., B-180969, June 4, 1974, 74-1 CPD 301; Winslow Associates, 53 Comp. Gen. 478 (1974), 74-1 CPD 14, that RFP-required performance time periods, as here--so short that no non-incumbent offeror could reasonably be expected to meet them, thus effectively limiting competition to a single source--should be closely scrutinized by this Office.

It is ICC's contention that Informatics' objections to the timeframe set forth in the RFP for the accomplishment of the PPPD are indicative not of the restrictive nature of the time limits set forth in the RFP, but of Informatics' desire to avoid having to demonstrate its capabilities prior to award by means of a PPPD. ICC states that at no time had Informatics ever presented such a request in the context of its willingness to perform a PPPD.

ICC also states that Informatics incorrectly characterized our decision of April 26, 1976, as finding that successful performance of a PPPD was a requirement in excess of the Government's needs, whereas that decision conditioned that finding on the contracting officer's conclusion that a bidder could be responsible without meeting the standards of the PPPD.

ICC further states that a performance bond (in the amount of 10 percent of the bid price) is insufficient protection for the Government and Informatics' demand that the Government pass on its proposal without demonstrating conclusively its responsibility is unreasonable and detrimental to the best interests of the Government.

Finally, ICC explains that, in the 1975 IFB and the 1976 RFP, all of the encoding schemes necessary to implement the procurement were made mandatory with the exception of that for complex work units where each offeror was free to devise its own scheme. ICC states that its encoding scheme for complex work units was adopted by the Government after certain modifications were made. In this regard, ICC points out that this particular encoding scheme was developed at ICC's own expense and not subsidized by the Government.

ICC also contends that mandatory use of the encoding scheme for complex work units constitutes only a small part of the contract requirements under the 1977 RFP and would not require the development of completely new software but merely an addition to existing computer programs; furthermore, Informatics has had ample opportunity to make whatever additions to existing programs were necessary in order to add the required encoding scheme for complex work units; and Informatics has been aware since April 1977 that Commerce intended to make the use of such encoding scheme mandatory and, at that time, could have had access to such encoding scheme under the Freedom of Information Act had it believed substantial changes would be necessary in its software.

Instead, ICC concludes that Informatics has apparently made no attempt whatsoever to adapt its software to the

encoding scheme required for complex work units. As a result, it is apparent to ICC that Informatics simply does not yet process the technology necessary to perform the PPPD and, therefore, wishes to delay matters until such time as is necessary for it to obtain such technology.

We have recognized that Government procurement officials, who are familiar with the conditions under which supplies, equipment or services have been used in the past, and how they are to be used in the future, are generally in the best position to know the Government's actual needs and, therefore, are best able to draft appropriate specifications, including performance tests. Maremont Corporation, 55 Comp. Gen. 1362 (1976), 76-2 CPD 181; Manufacturing Data Systems Incorporated, B-180586, B-180608, January 6, 1975, 75-1 CPD 6. Consequently, we will not question an agency's determination of what its actual minimum needs are unless there is a clear showing that the determination has no reasonable basis. Jarrell-Ash Division of the Fisher Scientific Company, B-185582, January 12, 1977, 77-1 CPD 19; Maremont Corporation, supra; Newton Private Security Guard and Patrol Service, Inc., B-186756, November 30, 1976, 76-2 CPD 457; Johnson Controls, Inc., B-184416, January 2, 1976, 76-1 CPD 4.

On the other hand, we have recognized that procurement agencies are required to state specifications in terms that will permit the broadest field of competition within the minimum needs required and not the maximum desires. 32 Comp. Gen. 384 (1953). Specifications based only on personal preference in excess of the Government's actual needs are generally considered overly restrictive. Precision Dynamics Corporation, 54 Comp. Gen. 1114 (1975) 75-1 CPD 402; 32 Comp. Gen. supra.

Further, FPR § 1-3.101(d) (1964 ed. amend. 153) calls for maximum practical competition in negotiated procurements; however, once an agency adopts any kind of specification or limiting condition--such as the specific timeframe for the PPPD--competition is automatically restricted to some extent. The vital point is not that competition is restricted due to certain

legitimate needs of an agency, but whether it is unduly restricted. Also, we have often pointed out that the fact that a particular prospective offeror is unable or unwilling to compete does not establish that the competition as a whole is unduly restricted. CompuServe, B-188990, September 9, 1977, 77-2 CPD 182.

With these principles in mind, we note that the PPPD, like benchmark passage requirements in other solicitations, is generally a legitimate means to ensure that a prospective contractor has the technical capability, in whole or in part, to provide the Government with required services. Informatics' contention that the PPPD is unnecessary--based on (1) lack of Government's pressing need for assurance of continuity of services; (2) fact that the PPPD was waived in the past; (3) availability of payment bond to protect Government's interests in event of default--must fail. The contracting officer must determine a prospective contractor's capability of performing prior to award. FPR § 1-3.805-1(c) (1964 ed. amend. 153). Obviously, there is no better way to determine a prospective contractor's technical capability than through a PPPD. It is not our function to determine whether some other test would satisfy the Government's need to determine capability to perform. Our review is limited to ascertaining whether there is a reasonable basis for the required testing procedure. We find the need for this test to have a reasonable basis. Secondly, waiver of testing requirements is a matter of administrative discretion and will not be questioned unless arbitrary. Boston Pneumatics, Inc., B-188275, June 9, 1977, 77-1 CPD 416. Certainly, in the case of an incumbent contractor the PPPD may serve no purpose and waiver of the test would be in order. Other circumstances may arise where waiver would be in order also but the reasonableness of the need for specifying the test as a possible method to examine technical capability cannot be questioned.

Informatics' contention that the PPPD's time limits are unduly restrictive of competition--because it is not feasible to write the computer programs, acquire the equipment, and train the staff in the time allowed--is based,

in part, on its apparent misunderstanding of the RFP's requirements. As Commerce points out, the RFP requires the preparation of data capture and formatting programs prior to the submission of an initial proposal; to complete the PPPD, only preparation of the Videocomp-format-from-keyboard-data program is required. We cannot conclude, based on the record before us, that the task's complexity would make it overly difficult. Nor can we conclude that the PPPD is overly costly to any non-incumbent offeror relative to the benefit derived from the Government's ability to positively determine an offeror's technical capability. Accordingly, we have no basis to conclude that the PPPD's time limits are unreasonable.

Start-up

The RFP indicates that after award the successful offeror will have 2 months for start-up to full production. Commerce explains that this solicitation as well as previous solicitations included a 2-month start-up period and this time has been considered as operationally sound since it permits an orderly acquisition of the necessary resources. Commerce states that longer periods of time will require the new contractor to employ an idle workforce and incur possible unnecessary expense of non-productive equipment since it is understood that training requirements can be completed within a 2-month period.

Informatics contends that the start-up time should be at least 120 days because the incumbent contractor with long experience in patent data preparation and with an existing staff and facility had enormous difficulties in meeting contract requirements: (1) 14 of the first 21 patent issues were rejected; and (2) 2,200 unprocessed patents were built up as of May 1977.

Keeping in mind the principles mentioned above, the reasonableness of the 2-month requirement must be examined. Unquestionably, Informatics is unwilling to make the preaward investment required for it to meet the 2-month requirement. That in itself would not be enough to establish unduly restrictive requirements, but Commerce has not shown any reason for the 2-month limitation other than the belief that the start-up can be accomplished in 2 months. Where

(1) there is no need to have the next contractor begin immediately at full production capacity and some overlap of new contractor and incumbent is necessary and (2) where the history of a similar procurement shows that 2 months is not long enough to produce acceptable results, we must conclude that Commerce has failed to establish a reasonable basis (and we can perceive none) for the 2-month start-up time limitation and the requirement is unduly restrictive.

SERIES 5 PATENT SUSPENSE FILE REQUIREMENTS

Series 5 patents are patents which have passed examination and are awaiting fee payment before being released for publication. In the interim, they may be given to the contractor for initial processing and held in a suspense file. Series 4 patents are those patents transmitted to the contractor for processing and immediate issuance.

Need For Suspense File

Commerce explains that the purpose for the suspense file is to smooth the flow of work to the contractor. Informatics contends that the suspense file is not needed for that purpose because Commerce has been able to give its contractor a very steady flow of work with and without the suspense file; thus, the suspense file can only be considered a waste of public funds and an impediment to competition. Informatics bases its conclusion on the Official Gazette publication figures for the patent issues applications of July 3, 1973, to December 14, 1976, which show a surprising regularity of patent workload with only a few issues varying from the prevailing trend. This consistency is maintained even during the period (issues of November 4, 1975, to April 19, 1977) when no patents were added to the suspense file. The consistency and regularity at some points suggest to Informatics that Commerce has maintained a small backlog of fee-paid patents to smooth the workflow.

Informatics states that Commerce has absolute control over the number of patents added to the suspense file--by simply deciding whether to send a patent application to

the contractor for processing before the fee has been paid or to hold the application until fee payments; similarly, Commerce can control temporary irregularities in the weekly workflow by maintaining a small, 1-week backlog of fee-paid patents.

In addition, Informatics states that since 1975 all soli 'tations contained a weekly workload guarantee of a basic number, here 1,200, plus or minus 15 percent and Commerce can easily keep contractor workloads within that range.

Finally, Informatics contends that another possible reason for the discontinuance of the suspense file in early 1976 was its cost. When discontinued, the suspense file contained about 4,500 patents which were deleted because the application was deemed to be abandoned; the cost of processing these later-discarded patents was about $400,000; although an undisclosed number of these patents were later used, after the applications had been reopened, much of this $400,000 was doubtlessly wasted.

In response, ICC offers the following figures for October and November 1977:

Patents Received by Contractor for Keyboarding

Issue Date	Series 4	Series 5
10/04	1,096	-
10/11	1,124	-
10/18	903	387
10/25	847	540
11/01	968	387
11/08	994	387
11/15	998	387
11/22	944	443
11/29	1,000	387

As an example, ICC refers to the week of October 25, 1977, when Commerce transmitted to the contractor only 847 Series 4 patents which was 39.5 percent less than the 1,200 patents called for by the contract.

ICC concludes, therefore, that without the flexibility offered by the existence of the suspense file, all of the patent issues in October and November would have been below the minus 15-percent limit allowed by the contract, thereby creating serious problems for both the contractor and the Government.

Informatics has presented a very convincing and uncontested case that the method elected by Commerce to smooth the contractor's workflow may not be the best--views which we believe Commerce should reconsider before resoliciting for its future needs. However, as stated above, it is not our function to substitute our judgment for an agency's decision on how best to accomplish its mission. Where, as here, the agency has a rational basis for a particular specification--one which we note does not prevent Informatics or other potential offerors from participating in the procurement, we have no basis to conclude that procurement laws or regulations have been violated. See The Raymond Corporation--reconsideration, B-188277, September 16, 1977, 77-2 CPD 197.

Size of the Suspense File

The maximum period a Series 5 patent may reside in the supense file is 3 months. If the fee is not paid within that time, the patent is considered abandoned and it is withdrawn from the suspense file. Relatively few patents are abandoned at this stage, however, and most proceed to publication. The total number of Series 5 patents which will be withdrawn annually from the file for publication is estimated in the RFP to be 2,000. Recently, the size of the current suspense file has been about 1,100 patents. The Commerce Department says that it expects that this size will be fairly constant through February 1978.

The RFP also states that the contractor must establish and maintain an automated system capable of storing a subsidiary file of full-text patent application data equivalent to an estimated 20,000 patent applications resident in the Series 5 suspense file.

Based on this information, Informatics reasons that 3 months after receipt by a new contractor of the suspense file, all these 1,100 patents will leave the suspense file system, either by abandonment or by publication, and since only 2,000 patents are estimated to be withdrawn from the suspense file for publication, only about 1,000 patents will be withdrawn during the remaining 9 months of the first contract term. But since Series 5 patents remain in the suspense file for no more than 3 months, Informatics concludes that not many more than 1,000 patents can be added to the suspense file during this 9-month period and thus the size of the suspense file during contract performance is not likely to exceed 2,000.

Informatics contends that the RFP's 20,000-patent suspense file requirement is costly--approximately 10 times the cost of maintaining a 2,000-patent suspense file--and vastly in excess of the Government's actual maximum needs, wasteful of Federal funds, and violative of the sound procurement principles expressed in Drexel Dynamics Corporation, B-188277, June 2, 1977, 77-1 CPD 385.

In response to Informatics' inquiries prior to the closing date, Commerce explained that the 2,000 patent file number in the RFP was merely an estimate based on experience; however, the precise maximum number of patent files to be stored in the suspense file cannot be predicted. The record indicates that all available data regarding suspense file size have been made available to all potential offerors, thus prejudicing no potential offerors.

ICC explains that in November 1977 the suspense file exceeded 3,600 patent files and in 1973 the suspense file exceeded 16,000 patent files. ICC contends that the increased cost of maintaining a suspense file of 20,000 versus 2,000 is de minimis relative to the total price of the contract. ICC explains that the only real cost involved is the cost of the storage media. First, ICC states that the cost of the disc storage equipment needed to store such patents would be at most less than $3,000 greater than the cost

of the equipment necessary to store 2,000 patents, depending on which system is chosen; this cost is a one-time-only cost and represents the only real overhead involved in maintaining a suspense file of 20,000 patents. Secondly, ICC states that even if the contractor were required to search and retrieve from the 20,000-patent suspense file all of the patents necessary to make its weekly quota of 1,200 patents, such a process would take at most a period of 2 hours; thus, there is no need to acquire "costly stand-by hardware" as the maximum 2 hours' computer time per week needed for suspense file purposes can easily be obtained from computer hardware already acquired for other contract requirements.

It appears to us that the RFP's estimate of 2,000 and maximum of 20,000 are based on the best data currently available, and supported by historical figures, thus providing a reasonable basis for the specification. These figures represent Commerce's belief that offerors would be able to realistically price their proposals based on their business judgments of the expected size of the suspense file and at the same time shift to the contractor the risk--however small that risk may be--that the size of the suspense file may go beyond presently foreseeable maximum limits. All potential offerors have the available data required to make the necessary business judgment; all potential offerors have been treated equally. We have no basis to object to the specification.

EVALUATION FACTORS

The RFP states that the offer selected will be the one which is "most advantageous to the Government, price and other factors considered." If this procurement is to remain a negotiated one, then Informatics contends that the evaluation criteria (for example, the relative weight of price vis-a-vis technical factors) should be stated with sufficient clarity to permit intelligent competition. For this reason also, Informatics argues that the solicitation is defective and must be canceled.

Commerce explains that under the solicitation award would have been made to the low-priced, responsible offeror.

In view of our recommendation based on the lack of authority for negotiation, consideration of this issue is unnecessary.

CONCLUSION

Protest sustained.

By letter of today to the Secretary of Commerce, we recommend that the start-up time be extended beyond 2 months. In addition, since this procurement is essentially being conducted as an advertised procurement, resolicitation should be so designated.

As this decision contains a recommendation for corrective action to be taken, it is being transmitted by letters of today to the congressional committees named in section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1970).

Acting Comptroller General
of the United States