

DECISION



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

9746

FILE: B-193241

DATE: April 10, 1979

MATTER OF: International Computaprint Corporation

[Protest of NASA Issuance of RFP]
DIGEST:

1. "Exception 10" negotiating authority for NASA computerized information processing system has been justified because: (1) NASA needed offerors' approaches to work requirements to evaluate proposed acceptability and to assist in defining reasonable needs for service unlike negotiated procurement in Informatics, Inc., B-190203, March 20, 1978, 78-1 CPD 215, where procuring agency intended to evaluate offerors' approaches only as part of responsibility evaluation and not as part of proposal evaluation; and (2) there is no indication NASA ever formally advertised prior procurements for similar system unlike prior advertised procurement history in Informatics decision.
2. Two-month phase-in period is appropriate limitation where it appears that phase-in period will cost less than longer phase-in and it is speculative that higher performance cost will necessarily follow 2-month phase-in when nothing in record of experience supports that view.

International Computaprint Corporation (ICC) has protested the issuance of request for proposals (RFP) W10-20668/HWE-2 by the National Aeronautics and Space Administration (NASA). NASA issued the RFP on July 18, 1978, for the "personnel, services and supplies necessary to support the operation of the NASA Scientific and Technical Information Facility" on a cost-plus-award-fee basis. ICC contends that the procurement should have been issued under formal advertising procedures. Further, ICC insists that the RFP's stated "phase-in period" unnecessarily restricts competition because the period is too short. For the reasons set forth at length below, we reject ICC's grounds of protest.

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Background

By Determination and Findings (D&F) dated December 16, 1977, NASA's contracting officer for the procurement found that:

"The proposed contract will require the contractor selected to continue with the performance of the above facility and associated services and be responsible for a wide-ranging complex of highly specialized documentation and information functions; and the production of scientific and technical information and NASA technology utilization products which must be coordinated and integrated at multiple points and levels to insure control and continuance of activities without disruption to the program. This will involve a comprehensive direct access computerized information system necessitating high-speed input processing, publication preparation, search and retrieval, and dissemination of information from world-wide aerospace and aeronautics subject matter to the world-wide aerospace and aeronautics scientific community on demand and at scheduled intervals. These activities are dependent upon keeping abreast of scientific information and technology, as well as, possessing a high degree of competence in documentation techniques, information services, microfiche production, computer operations, management information systems, system design and programming, process and method improvement, and quality assurance.

"Formal advertising is neither feasible nor practicable for this procurement because it is impossible to describe in precise detail or by definite drawings and specifications the exact nature of the work to be performed. Information that will be obtained during some phases of this effort will be used to determine the depth of consideration to be given

to other phases. Through negotiations the Government is afforded an opportunity to evaluate in detail the contractor's technical capability, his understanding of the work to be performed, and other associated factors that are essential to the proposed procurement."

Based on these findings the contracting officer determined that the procurement was properly for the negotiated procurement method, as follows:

"On the basis of the above findings, I hereby determine that this proposed procurement is for services for which it is impracticable to secure competition by formal advertising. Specifically, it is impossible to draft adequate specifications or any other detailed description for the required services.

"Upon the basis of the Determination and Findings above, I hereby decide that this contract will be negotiated pursuant to 10 U.S.C. 2304(a)(10) ["exception 10" negotiating authority] and paragraph 3.210-2(xiii) of the NASA Procurement Regulations."

RFP

The tasks outlined in the above D&F were described in the "Statement of Work and Work Breakdown Structure" section of the RFP (pages 4-119 through 4-163). For example, at page 4-161 the RFP described requirements for the contractor to furnish "ADP support with Government-furnished equipment," as follows:

"The Contractor shall provide the tasks described below:

Computer Operations

The Contractor shall operate installed ADP equipment and associated hardware listed in the 'Facility Contract' on a 24-hour basis and, where necessary, shall provide installation and start-up and/or changeover support for such ADP equipment and for other equipment provided by NASA. The Contractor shall provide equipment maintenance for those items listed in Attachment Number 4, hereto. He shall provide all end products and services specified by the Scientific and Technical Information Branch and the Technology Utilization Branch under this contract. * * *

"This task shall include * * * (1) input processing control; (2) computer scheduling; (3) magnetic tape/disk library; and, (4) output processing control.

Data Entry

* * *

Operating System Programming

* * *

Discontinued and Off-Line Files

* * *"

The RFP also contained evaluation criteria under which proposals were to be "numerically weighted and scored." For example, with respect to the "ADP support" requirements described above, the evaluation criteria provided that proposals would be evaluated for:

"Demonstrated understanding and competence in the approach for (1) ADP support; (2) systems study; (3) systems support; and, (4) systems development. The approach must

show a high degree of familiarity with advanced computer applications, on-line systems, communications networks, remote data entry, computerized photocomposition, and hardware/software interfaces. The plan should also demonstrate an understanding of the special ADP problems associated with (1) maintaining high system reliability associated with extremely large files with interrelated indexes and hierarchical file structure * * * ("Mission Suitability Factors," Technical Operations Plan, page 3-10).

Propriety of Negotiation

ICC insists that the "product is clearly defined in the existing specifications submitted to each prospective bidder [and that] the approach actually consists of an offeror's ability to adequately staff and maintain existing NASA facilities and to provide technical manpower to carry forward the development of new programs." ICC further argues:

"Since the procurement document and accompanying specifications clearly define the products desired, and since the MISSION SUITABILITY FACTORS constitute an adequate means of determining an offeror's understanding of the work, the method of approach cannot be a valid basis for a negotiated procurement."

By contrast, NASA continues to insist its description of work tasks does not describe its needs with sufficient specificity to permit formal advertising. As stated by NASA:

"* * * the RFP does not give detailed step-by-step instructions for every task but rather requires offerors to present their own approach for accomplishing many of the tasks. Since no two offerors will be alike in their approach to performance of these tasks, there is no common basis sufficient to permit formal advertising. Moreover, in order for the SEB to discover and evaluate how each offeror pro-

poses to accomplish the tasks, written proposals and discussions with offerors in the competitive range are necessary.

"* * * The statement of Work is not a 'how to perform' instruction. The RFP here goes beyond the agency's use of negotiated procurement merely to determine an offeror's 'understanding' of the requirements. Rather, many parts of the Statement of Work require the offeror to present a plan as to what he will do in order to accomplish the tasks. The manning level and skill mix for most WBS areas will vary from offeror to offeror. * * *

"Throughout the RFP, in those sections devoted to proposal preparation and evaluation (pages 3-4 to 3-19), there are many areas, too numerous to reiterate here, where offerors are requested to provide a plan or approach as to how a certain portion of the work will be accomplished. We maintain that a reading of these sections clearly demonstrates the need for the SEB to evaluate the variety of different approaches submitted by the competitors. Moreover, we believe you will find reasonable our judgment that we could not describe our needs with sufficient specificity to permit formal advertising."

Analysis

Both ICC and NASA agree that the precedent established by Informatics, Inc., B-190203, March 20, 1978, 78-1 CPD 215, offers guidance in resolving this issue.

In that case--which also involved a protest against the use of the negotiated procurement method--we made certain observations about when "exception ten" negotiating authority may be properly employed. As we said in that case: "In general, the fact that a procurement is for 'complex' supplies or services

does not per se preclude the use of formal advertising. * * * the hope of minimizing * * * difficulties through negotiations does not authorize procurement by negotiation unless it is impossible to draft a specification adequate for advertising."

The questioned negotiated procurement in Informatics was for the preparation and extraction of patent data via a computerized information system. The procuring agency (the Department of Commerce) admitted: (1) complete specifications for the work products ("input" and "output") were set forth in the RFP; (2) no technical evaluation factors, or any other evaluation factors other than the total evaluated price, were identified in the solicitation; (3) prior solicitations for similar services had been formally advertised; and (4) the agency wanted to evaluate the offerors' "in-between proposed actions" (that is, the actual approach for ADP support) only as part of a responsibility evaluation and not as a part of a proposal evaluation leading to a judgment as to the comparative merits of the approach.

In rejecting Commerce's claim that it could properly invoke "exception ten" negotiating authority given the above admissions, we concluded:

"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."

ICC views the quoted statement as applying to NASA's procurement here. Specifically, ICC apparently believes that NASA should not be able to justify "exception ten" negotiating authority by pointing to--among other things--its proposed proposal evaluation of offerors' approaches for ADP support.

It must be remembered that our quoted remarks regarding the evaluation of "in-between technical approaches" for furnishing ADP support were said in a context where the procuring agency had determined that these approaches were not needed to determine the technical acceptability of a proposal or to assist the agency in defining its reasonable needs for the service. Moreover, they were said in a procurement (as was the case in Cincinnati Electronics Corporation, supra), where there was a history of formal advertising under prior solicitations for similar products and services. To the extent, however, that the quoted remarks may give the impression that the evaluation of proposed approaches for ADP support may never be used in proposal evaluation or in assisting an agency to define its reasonable needs for a product or service such that the proposed evaluation supports "exception 10" negotiating authority, the remarks are expressly modified.

Based on our analysis, it may well be that NASA and Commerce may have reached diametrically opposed technical judgments about the need for offerors to assist in the definition of reasonable needs for ADP support. Nevertheless, we will not substitute our opinion for that of a procuring agency in matters involving technical complexity and judgment even where other governmental units may advance differing technical judgments on similar matters so long as the particular agency judgment in question is reasonably founded. See E. I. du Pont de Nemours & Company, et al., B-190611, September 22, 1978, 78-2 CPD 218. Based on our review of the record, we cannot question NASA's stated rationale for reviewing--as a matter of proposal evaluation--the offerors' proposed approaches for--among other things--ADP support in an attempt to obtain offerors' assistance

in defining its reasonable needs for the service. Specifically, we cannot question NASA's technical judgment that the varying possible approaches for ADP support are so divergent that it is impossible to draft adequate specifications suitable for insuring fair and equal competition on a common basis under the advertised procedure.

"Phase-In Period"

ICC contends that the "two month phase-in period" for the contract is too short a period given the "contemplated" 62-month contract period* and that this short period necessarily gives the incumbent contractor for the services an unfair advantage--thereby resulting in increased costs to NASA and arbitrary restriction of competition.

NASA insists that a 60-day phase-in period provides sufficient time around which offerors can propose effective phase-in plans. NASA further argues:

- (1) Prior solicitations for similar services have included 60 days for phase-in and no prior complaint from industry has been received;
- (2) Six offerors in addition to the incumbent offeror have submitted proposals--therefore indicating that the stated phase-in period is not restricting competition;
- (3) No point scoring advantage accrues to the incumbent because the phase-in factor is only rated for acceptability, not points;
- (4) Increasing the phase-in period should tend to increase costs rather than decrease costs as ICC suggests.

*Actually, NASA only firmly committed itself in the RFP to a 12-month contract ending on July 31, 1980; performance past that date depended on NASA's exercise of option rights.

In reply to NASA's arguments, ICC still insists that it would be "far more costly to 'slap together' an organization to meet the 60 day start-up requirement [which] will lead to poor quality work, which then forces overstaffing to meet the requirements."

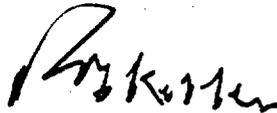
We have recognized that firms may enjoy a competitive advantage by virtue of their incumbency but that the advantage may be questioned only if the competitive advantage enjoyed results from unfair action by the Government. Amdahl Corporation, B-192588, December 15, 1978, 78-2 CPD 417, and cases cited in text. The competitive advantage accruing to an incumbent in this procurement is not the result of "unfair action" but simply results from the reasonable need of NASA to evaluate nonincumbent offerors' approaches to, and costs of, taking over an ongoing operation.

As to the length of the phase-in period, ICC has not questioned NASA's observations that a 2-month phase-in period has not been the subject of complaint under earlier similar contracts--thus indicating that historical experience supports the reasonableness of NASA's phase-in period. Although ICC does not dispute that a 60-day phase-in period is less costly than a longer period, it contends that it will result in increased costs during the performance of the contract as a consequence of a hastily arranged work organization. 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. Informatics, Inc., supra. Here the agency has determined its minimum needs in terms of reduced costs. ICC disagrees only as to the ultimate cost. However, it is speculative in this case that higher performance cost will necessarily follow from a short phase-in period. Nothing in the record of experience has been cited to support that view. Accordingly, we do not find the 60-day phase-in requirement in this case exceeds the Government's needs.

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Protest denied.



Deputy Comptroller General
of the United States