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DECISION

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

FILE: B-194322 DATE: August 28, 1979

MATTER OF: Informatics, Inc. CWG 00803

DIGEST:

1. Protest, initially filed with procuring agency, resulted in protester receiving notice of initial adverse agency action more than 10 working days before closing date for receipt of initial proposals--day that protest was filed with GAO. Section 20.2(a) of Bid Protest Procedures could reasonably be interpreted as permitting protest to be considered timely filed here so GAO will consider merits of protest. For future, to be considered timely, protest must be filed with GAO within 10 working days of initial adverse agency action even when initial closing date is more than 10 working days from such action.

2. GAO will not object to contracting officer's determination to negotiate on basis that it is impracticable to secure competition by advertising where, as here, reasonable basis exists. Here, procuring agency has shown that it must evaluate technical acceptability of proposals because, despite detailed RFP specifications incorporating even more detailed references, all output situations have not, and cannot, be specified and offeror's technical flexibility to satisfy inevitable changes arising during contract must be ascertained.

3. Protester contends that RFP's disclosed evaluation criteria failed to explain whether procurement was intended to achieve minimum standard at lowest price or whether price was secondary to quality. Contention is without merit where: (1) RFP states that award will be made to responsible offeror whose offer conforms to solicitation and is most advantageous to Government price and other factors considered; and (2) "price and other factors" is further

[Protest Against Any Award]

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defined as (a) extended unit prices, (b) prompt-payment discounts, and (c) net total annual price. RFP reasonably notified offerors that award would be made to responsible offeror who submitted low-priced, technically acceptable offer.

4. RFP requires that successful offeror be prepared for full production 90 days after award. Protester, who is unwilling to make preaward investment required for it to meet 90-day startup time, contends that requirement is unduly restrictive of competition. Agency believes that (1) time is reasonable for nonincumbent contractor and (2) Government will realize ultimate monetary savings by not extending time. Since GAO has recognized that agency can properly express its minimum needs in terms of reduced costs, and since there is nothing in record to show that agency's belief is incorrect, GAO has no basis to question startup time limit.

5. Protester contends that RFP's suspense file requirement is in excess of agency's minimum needs, too costly and anticompetitive. Contention is without merit where (1) requirement does not prohibit protester from competing, (2) agency has shown that suspense file is frequently used, and (3) incumbent contractor has shown that file's effect on price is minimal.

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Informatics, Inc., protests any award under request for proposals (RFP) No. PT-79-SA-C-00458 issued by the Department of Commerce for data processing services for the preparation of a full-text patent data base and related computer tapes. Basically, the data base constitutes a machine-format archive of patents issued during the contract term; the associated tapes are used to drive an automated typesetting machine, which produces camera-ready copy for published patents and the Official Gazette.

This contractual requirement has existed since 1970. Since that time, there has been only one contractor--the present incumbent. Informatics believes that because of the nature of the RFP, which is overly restrictive of competition, it is likely that the incumbent will retain this contract. Informatics notes that the predecessors of the RFP have been the subject of frequent--and usually successful--protests to our Office.

In essence, Informatics raises four bases of protest:

1. The solicitation was issued as a negotiated procurement; however, given the statutory preference accorded to advertised procurements, the solicitation should have been issued under the procedures for formal advertising.

2. In the alternative, if the issuance of a negotiated solicitation was proper here, it must then address the evaluation criteria provided in the RFP; those criteria are inordinately vague and fatally defective.

3. The RFP requires a startup period of 90 days; this is too short; the startup time should be at least 120 days.

4. The RFP contains a suspense file requirement, which is onerous, noncompetitive and confusing; it should be eliminated.

In response, Commerce explains its procurement choices and requests that our Office rule on the timeliness of the Informatics' protest.

A. TIMELINESS

Commerce reports that Informatics first complained to the contracting activity on January 25, 1979, requesting the relief outlined above. Commerce responded to the complaint on January 26, 1979, denying Informatics' request for relief.

Commerce cites § 20.2 of our Bid Protest Procedures, which provides that, if a protest has been filed initially with the contracting agency, any subsequent protest to the GAO shall be filed within ten (10) days of the informal notification or constructive knowledge of the initial adverse agency action.

Commerce concludes that since Informatics' protest to our Office was not filed until March 9, 1979, is based on the actual notice of adverse action provided on January 26, 1979, by the contracting agency, the protest is not timely.

In response, Informatics contends that Commerce's argument ignores clear and explicit portions of the Bid Protest Procedures such as:

"§ 20.2 Time for filing.

> "(a) * * * If a protest has been filed initially with the contracting agency, any subsequent protest to the General Accounting Office filed within 10 days of formal notification of or actual or constructive knowledge of initial adverse agency action will be considered provided the initial protest to the agency was filed in accordance with the time limits prescribed in paragraph (b) of this section * * *. In any case, a protest will be considered if filed with the General Accounting Office within the time limits prescribed in paragraph (b).

> "(b)(1) Protests based upon alleged improprieties in any type of solicitation which are apparent prior to * * * the closing date for receipt of initial proposals shall be filed prior to * * * the closing date for receipt of initial proposals * * *."

Informatics states that this regulation prescribes rules which define a timely bid protest; untimely protests are determined solely by inference, i.e., as those protests which are not timely.

In the case of protests "filed initially with the contracting agency," Informatics argues that § 20.2(a) sets forth two independent methods of achieving timeliness: (1) the first method--protests filed within 10 days of notice of initial adverse agency action--is one route to timeliness; and (2) the final sentence of § 20.2(a) provides the second route--protests filed within the limits of paragraph (b), i.e., within the normal time limits for a protest filed directly with GAO. Informatics contends that the use of the words "[i]n any case" make clear that this second route to timeliness is a freely available alternative.

Informatics notes that there is no dispute here that the protest was timely filed under the provisions of § 20.2(b). Informatics states that Commerce's argument is not persuasive because (1) it overlooks the location of the last sentence of paragraph (a); (2) it entirely ignores the beginning phrase "[i]n any case;" and (3) it converts the sentence into a mere surplusage, which adds nothing to the remaining text of paragraphs (a) or (b). Informatics contends that its protest is timely since Commerce's position violates the customary canons of legal construction and does violence to the words and phrasing of the procedures.

In reply, Commerce states that Informatics delayed a full month and waited until the closing date for the receipt of proposal to protest to GAO. Commerce argues that since a protest had been initially filed by Informatics before the contracting officer, the provisions of § 20.2(a) govern; to hold that § 20.2(b) is

applicable would place a premium on delay tactics frustrating essential Government objectives, especially in this procurement, where Commerce is carrying out constitutional requirements--"To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." Commerce concludes that aside from the Bid Protest Procedures, common rules of fairness to all parties required a timely and expeditious filing of the Informatics protest with GAO.

GAO Analysis

We believe that reference to the predecessor to our Bid Protest Procedures, the "Interim Bid Protest Procedures and Standards," lends some insight to the matter. There, in § 20.2(a), it was stated:

> "Protestors are urged to seek resolution of their complaints initially with the contracting agency. * * * If a protest has been filed initially with the contracting agency, any subsequent protest to [GAO] filed within 5 days of notification of adverse agency action will be considered provided the initial protest to the agency was made timely. * * *"

That language and our cases interpreting it (see, e.g., 52 Comp. Gen. 20 (1972)) clearly provided that a protester had 5 days after initial adverse agency action to protest here. Under the old rules, Informatics' protest would be clearly untimely.

When the "Bid Protest Procedures" were promulgated, however, we revised the language used in § 20.2(a), as quoted above. We can see that the addition of the last sentence of that section ("In any case * * *.") could reasonably lead to the belief that we intended to relax the timeliness requirement in the circumstances of this case. That was not our intention; our intention was expressly stated in the opening sentence of part 20--"the expeditious handling of bid protests is indispensable to the orderly process of Government procurement and to the protection of protesters and

other parties." (Emphasis added.) Accordingly, for the future, Commerce's view--that complaints initially resolved adversely to the protester must be filed here within 10 working days of actual or constructive knowledge of that action to be considered timely--will be the rule followed by our Office; however, fundamental fairness requires that we consider the merits of Informatics' protest under the circumstances.

B. USE OF NEGOTIATED PROCUREMENT

Informatics states that a substantially identical RFP was issued in 1977 by Commerce for the same basic patent data base preparation services. Informatics protested asserting as one ground that the RFP should properly have been issued as an IFB. Commerce believed that its action was justified under the exception for advertising described in 41 U.S.C. § 252(c)(10) (1976)--the procurement of property or services for which it is impracticable to obtain competition by formal advertising. Informatics also states, in our consideration of that protest (Informatics, Inc., B-190203, March 20, 1978, 78-1 CPD 215, affirmed on reconsideration, 57 Comp. Gen. 615 (1978), 78-2 CPD 84), we examined each of the justifications offered by Commerce and rejected each. First, the decision held that:

> "* * * 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."

Next, regarding the issues of price comparability and compatibility with the existing data base, we found that the desired objective could be achieved under formal advertising and that the use of negotiation would "add nothing." Also, the opinion stated that the desire to conduct discussions in order to insure that offerors understand the specifications or to ascertain their responsibility "cannot, in our opinion, authorize a negotiated procurement."

Finally, miscellaneous points, such as the alleged absence of prejudice and the failure of past IFB's to result in a valid contract were dismissed. In conclusion, our Office held that "negotiation is improper and the RFP should be cancelled."

Informatics contends that nothing has happened since our decision to change this result; the instant RFP is identical to the old RFP and no circumstances, specifications or requirements have changed since that time in a way which would warrant a different conclusion. Competition under formal advertising is as practical under the subject RFP as it was under the former RFP. Therefore, Informatics concludes that our Office should again sustain the protest on this ground.

In response, Commerce reports that it is the contracting officer's determination that use of a negotiated procurement is proper in this instance because the Government is seeking proposals which will reveal the greatest value in terms of performance, timely delivery, desired product quality, utilization of the latest state-of-the-art technology and other factors advanced by offerors which could enhance performance and ultimately furnish superior products at no extra cost to the Government. Further, negotiation would permit the Government not only to point out areas of the technical proposal that fail to meet the minimum needs of the Government but also to point out areas which unnecessarily exceed such minimum requirements. Both conditions are most likely to occur when the specifications are not sufficiently precise for use in formal advertising. Award would not be made without regard to price merely because a prospective contractor proposes to furnish more desirable supplies or services provided a lower priced offer met the minimum needs of the Government.

Commerce also reports that the solicitation and technical references are only guides to what is required and are not specific instructions on how to do the work, since it is not possible to set out in detail, every specific process of production and precise quantities of codes. For example:

1. Quantities vary over the life of the contract and no firm estimate can be made. Offerors were required to study and analyze typical patent application files to determine the level of expertise required. Although the number of patent application files could remain constant from week to week, the level of complexities and number of codes can vary.

2. The solicitation requires submission of technical proposals "which shall describe in comprehensive detail the technical approach including intermediate processing steps which are intended to be used to furnish all of the production items required under the contract * * *." The Government required proposals on each offeror's plan to accomplish the work. Indeed, the solicitation states, "The magnetic tape format * * * must be designed by the Contractor, and approved by the COTR * * *." It has been the Government's desire to solicit the best method and alternatives for establishing and implementing this requirement.

3. Other factors which cannot be adequately defined because the methods used to accomplish these tasks will vary from offeror to offeror, and include, but are not limited to:

a. Establishing methods and control for implementing procedural changes, which history has shown, will be required for the life of the contract.

b. Full and detailed proposals for implementing "new data items," i.e., capture of new data necessitated by changing requirements of the U.S. Patent System.

c. Timely delivery of all deliverable products.

d. Provision for modification of the Weekly Issue size.

e. Processing of "excluded matter" for the Data Base File(s).

f. Specifics concerning offeror's proposed Inspection System for controlling production operations.

g. Incorporating corrections to deliverable items prior to delivery.

h. Security procedures for safeguarding patent application files and related computer operations.

i. Proposed plan for controlling overall production operations.

j. Processing of "Query" patent applications, i.e., patent applications returned to the Patent and Trademark Office for clarification of incomplete or ambiguous data.

k. Reworking of rejected issues (weekly work).

l. Complex Work Units (CWU's), counting of billable codes.

4. The solicitation requires submission of detailed plans for the methodology and approach which would be utilized by offerors; especially significant is the requirement that offerors show how they propose to incorporate changes in systems and procedures which are unique to each offeror.

International Computaprint Corporation (ICC), the incumbent, argues that the specifications are not complete and, moreover, never can be; no better proof exists for that than Informatics' failure, after three

attempts, to meet the requirements of the Pilot Patent Production Demonstration (PPPD) in the 1975 procurement. ICC states that Informatics made innumerable queries about processing situations which Informatics' system was unable to handle without additional guides and then the specifications were substantially similar to the instant ones. ICC cannot understand how these specifications (woefully inadequate--according to Informatics in 1974) became complete and accurate in 1978.

Further, ICC states that the specifications are subject to new conditions in the data and in Commerce's rules for the data so that it is impossible to draft adequate specifications anytime because of the thousands of possible conditions which exist in patents. ICC also states that the RFP contains 30 individual pricing items, each with its own peculiar format, but the only complete set of specifications would contain an annotated copy of most of the 600,000 patents produced since 1970, an insurmountable task requiring negotiation. ICC contends that Commerce must evaluate whether each offeror's system is flexible enough to meet the unforeseen circumstances thus averting disruption of the Government's work flow.

ICC argues that Informatics' contention that the specifications are complete show its failure to grasp the complexity of the patent processing; that Commerce can only determine the offerors' knowledge, understanding and capability by a technical review and Commerce must negotiate with an offeror, in areas of concern, possible deficiency and alternate processing means capable of meeting new variations in patent data.

In conclusion, ICC points to the following statement in International Computaprint Corporation, 58 Comp. Gen. 395 (1979), 79-1 CPD 248:

> "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."

ICC stresses that Commerce's highly complex and intricate requirements--more so than the NASA procurement--must be procured by negotiation and our Office should not substitute our opinion for Commerce's.

In rebuttal, Informatics argues that a dispassionate examination of the International Computaprint decision and of the NASA procurement it concerned demonstrates that it has no relevance to the instant RFP. The International Computaprint decision set forth four factors which were considered the crux of the decision in Informatics, Inc., B-190203, supra:

1. The RFP set forth complete input and output specifications for the contract deliverables.

2. No technical evaluation factors were identified in the solicitation; the sole factor identified in the RFP was total evaluated price.

3. Prior solicitations for similar services had been formally advertised.

4. Commerce wanted to conduct a technical evaluation as part of a responsibility determination and not as part of a comparative evaluation of proposals.

Informatics contends that all four factors have equal viability in the context of this protest and the instant solicitation: (1) the input and output specifications, described as "complete," are largely the same; if anything, they are now even more complete; (2) in the subject RFP and the RFP protested in B-190203, the technical evaluation factors were

excluded; (3) history has not changed--the record still shows that Commerce issued several formally advertised solicitations for this requirement; and (4) the technical evaluation still takes place solely in order to determine the offeror's responsibility.

Informatics also argues that a review of the NASA procurement shows that it is wholly distinguishable from the instant case. Informatics believes that the intent of the Commerce contract is to provide two types of deliverables: (1) computer tapes used to prepare camera-ready copy for the printing of published patents and the Official Gazette, and (2) computer tapes to be used as a machine-readable archive of published patents; the format of the finished tapes is controlled, in every respect, by explicit and detailed specifications.

In contrast, Informatics states that the NASA procurement involved contractor operation of a Government-owned facility, the Scientific and Technical Information Facility (STIF). This program is an integral part of an ongoing NASA effort to disseminate the results of its researches and experiments. In effect, the contractor staffs a facility which is a working part of the agency. The contractor-agency interface is extensive; about 32 NASA employees monitor performance on a day-to-day basis. On the other hand, Commerce has a single onsite inspector and an administrative assistant devoted to day-to-day contract administration.

Informatics also states that NASA needed to procure using negotiation rather than formal advertising because it was unable to define its ongoing and dynamic needs. The NASA contractor's tasks were:

1. Performing minor modifications, planning and estimating minor systems improvements, and implementing reliability enhancements.

2. Proposal of a plan for determining and analyzing the costs and benefits of NASA products and services.

3. Possible replacement of NASA's existing ADP software and hardware under an assumed increase in system users.

4. Proposal of a plan for more rapid document delivery, including the independent analysis of different online systems.

5. Presentation of a detailed approach of improved research system reliability.

Informatics further states that in addition to NASA's inability to define its needs, it obviously needed technical proposals to assess a prospective contractor's ability to undertake "level-of-effort" tasks of considerable sophistication, but of unspecified scope and extent; thus, the NASA RFP provided for a comparative evaluation of technical proposals based on detailed criteria, with numerical weights, to be used in point scoring.

Informatics concludes that the lessons of International Computaprint are not applicable here.

Reasonable Basis Test

All contracts for services are required by Federal procurement law to be made by formal advertising unless certain enumerated exceptions, permitting negotiation, are applicable; the tenth exception concerns services for which it is impracticable to secure competition. 41 U.S.C. § 252(c) (1976). Federal Procurement Regulations (FPR), implementing this provision, illustrate one circumstance in which it is impracticable to secure competition--when it is impossible to draft adequate specifications or any other adequately detailed description of the required services. FPR § 1-3.210(a)(13) (1964 ed. circ. 1). This is the primary basis for Commerce's determination to negotiate rather than using formal advertising. We will not object to a determination to negotiate on that basis where any reasonable ground for the determination exists. 41 Comp. Gen. 484, 492 (1962); Informatics, Inc., B-190203, supra.

Specifically, Commerce contends that its detailed RFP incorporating even more detailed references does not, and cannot, cover all the output situations that will arise; it must review proposed technical approaches

to determine whether an offeror is offering the flexibility to satisfy inevitable changes arising during the life of the contract. We note that Commerce's approach differs materially from that used last year (B-190203, supra)--there Commerce did not contend that it was necessary to evaluate an offeror's technical approach to ascertain the technical acceptability of its proposal and Commerce contemplated no discussions with offerors. All parties recognize the technical complexity involved and amount of discretion which must necessarily be exercised by procuring agencies in this type of procurement. Our Office is reluctant to substitute our opinion for the procuring agency in these matters (E.I. du Pont de Nemours & Company, et al., supra,)--even where procuring agencies may have opposing views on similar subject matter (see International Computaprint Corp., supra) or where, as here, the procuring agency switches from one approach to another from one procurement to the next.

Accordingly, we cannot conclude that the negotiation basis advanced by Commerce is unreasonable.

C. EVALUATION CRITERIA

Informatics states that our Office held in a landmark case:

> "[I]ntelligent competition requires, as a matter of sound procurement policy, that offerors be advised of the evaluation factors to be used and the relative importance of those factors. 49 Comp. Gen. 229 (1969). We believe that each offeror has a right to know whether the procurement is intended to achieve a minimum standard at the lowest cost or whether cost is secondary to quality. Competition is hardly served if offerors are not given any idea of the relative values of technical excellence and price." 52 Comp. Gen. 161, 164 (1972).

Judged by this standard, Informatics concludes that the solicitation is defective because: (1) it does not explain the relative importance of cost

factors when compared with technical factors; and (2) it fails to set forth what technical factors will be evaluated and their relative weights.

Commerce contends that the "crucial interrelationship between price and technical factors" is more than adequately provided for in the solicitation, which states that "[t]he technical proposals shall be void of any price information to permit independent technical evaluation." Thus, Commerce intended to evaluate proposals in the competitive range with a view toward negotiating specific items not fully meeting the requirements or items proposed enhancing the value of the proposal. Additionally, Commerce notes that the FPR does not require specific numerical scores for evaluation criteria.

In essence, Commerce contemplated award to the low-priced, technically acceptable, responsible offeror and Informatics argues that it could not reach that conclusion from reading the language of the RFP, which provided:

> "C. Contract Award
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> "* * * [A] single award will be made on one offer only * * * to the offeror determined to be a responsible prospective contractor for the purposes of this procurement * * * whose offer, conforming to the Solicitation, will be most advantageous to the Government, price and other factors considered. Evaluation of price and other factors are included in 'D' below.
>
> "D. Selection of Offeror for Negotiation and Award
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> "Proposals will be evaluated with a view to negotiation of a contract presenting the most favorable offer to the Government; therefore, proposals should be submitted initially on the most favorable terms, from a

price and technical standpoint, which the offeror can submit to the Government.

* * * * *

"Procedure for determining the most advantageous offer, price and other factors considered:

"1. The unit prices offered * * * shall be used by the Government in making the calculations as indicated by the three price evaluation sheets * * *.

"2. The most favorable discount offered, if any, for prompt payment shall be applied to each contract year price evaluation * * *.

"3. * * * [T]he net total annual price for each 52-issue contract year is calculated as the 'Price Evaluation Total' for each responsive offer."

We have held that the "other factors" portion of the "price and other factors" phrase, as used in the above context, relates to technical acceptability. See Wismer and Becker Contracting Engineers and Synthetic Fuel Corporation of America, A Joint Venture, B-191756, March 6, 1979, 79-1 CPD 148; TM Systems, Inc., B-187367, January 26, 1977, 77-1 CPD 61. Moreover, Commerce expressly stated in the three subitems that they related to price only. Therefore, we must conclude that the RFP reasonably notified offerors that award would be made to the responsible offeror who submitted the low-priced, technically acceptable offer.

D. STARTUP TIME

This issue was also argued and adjudicated in B-190203, under the former RFP, where Commerce provided that a new contractor would have to gear up for full

performance in a period of 60 days. Informatics persuasively showed that the startup period was unreasonably short and, therefore, unduly restrictive of competition.

In the instant procurement, Commerce established a 90-day startup time. Commerce believes that it is not unduly restrictive of competition and represents a reasonable period of time to formulate and implement work planning. Commerce reports that:

> "Becoming fully operational and ready to take over full responsibilities in 90 days would be less costly than needlessly stretching the process to 120 days. * * * We have concluded that the 90 day start-up is within the capability of competing firms and does not unduly restrict any serious offer."

In Commerce's view, 60 days would be adequate time to recruit and train necessary personnel and acquire required facilities and equipment. Commerce states that, if training starts too early, an idle and nonproductive staff is on hand whose cost can only add to the overall costs, since, obviously, the salaries and benefits of this workforce will be factored into the officer's price. Further, Commerce states that the crucial activities are completed prior to contract award; other activities can be post-contract award, but must be completed prior to start of performance.

Thus, after carefully and deliberately considering the primary activities which prospective offerors are likely to encounter, Commerce concludes that the startup period clearly permits orderly and timely acquisition of resources and that earlier than needed acquisition of these resources will only serve to add "front-end loading costs," since such resources are necessarily nonproductive because the nature of this work is highly specialized and not readily transferable to other income-producing work.

ICC notes that the determination of reasonable startup time cannot be left to the offerors or the

Government may lose the ability to procure in a timely manner. ICC refers to the International Computaprint decision upholding the validity of a 60-day startup time:

> "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."

ICC states that Commerce's reasons for the 90-day startup time are sufficient, less costly and coinciding with the termination of the present contract.

Finally, ICC observes that, while the 1970 RFP required that the contractor begin with 100 patents a week and gradually build up to full volume, all the requirements, except full staffing, were achieved by ICC in 60 days despite the lack of any specifications. ICC reiterates that within 60 days in 1970 all facilities, all computers and auxilliary equipment, all software and peripheral procedures, all edit and quality assurance facilities had to be in place, whether the production load was 100 or 1200 for the first week. Thus, ICC disputes the conclusion in B-190203 that the original 1970 startup was not accomplished in 60 days.

In reply, Informatics first argues that the history of this procurement also shows that, when the difficult job of chemical formulas photocomposition was required, ICC, the incumbent contractor, could not add this task to its operations without significant disruption to contract performance, including: (1) rejection of 14 of the first 21 weekly patent issues; and (2) creation of a backlog of 2,200 unprocessed patents by May 1977. Informatics states that these problems took much longer than 90 days to resolve; indeed, they seem to have lasted for at least 5 months.

Secondly, Informatics argues that the International Computaprint decision involved a procurement that is not analogous. Informatics states that in the NASA contract the facility, computer, software and operations manual are all Government-furnished; experience has shown that 85 percent or more of the incumbent contractor's personnel will continue to work for a new

contractor; and although a new contractor must furnish little more than a five or six person management team, it is still given 60 days to accomplish that task. In contrast, the Commerce contractor must furnish all facilities, computers, software and procedures, and must be able to hire and train its own staff.

Thirdly, Informatics states that the argument--made in the International Computaprint decision that a longer startup period would be more costly to the Government--was plausible in the context of a cost-reimbursable contract; it has no relevance in a fixed-price contract; hence, this contention carries no weight in the instant case.

Finally, Informatics notes that seven firms competed for the NASA contract, while only one--the incumbent--submitted a proposal for the Commerce contract; this underscores the anticompetitive impact of provisions like the 90-day startup time and distinguishes this matter from International Computaprint.

GA0 Analysis

Since it is the procuring agency's primary responsibility to develop specifications which meet its reasonable minimum needs, we will not question such determination unless it is not reasonably based. Informatics, Inc., supra. Here the essence of Commerce's rationale for the 90 day startup is not only its belief that the time is reasonable for a non-incumbent offeror, but that the Government will realize ultimate monetary savings. There is nothing in the record to show that Commerce's position is erroneous and in the International Computaprint decision we recognized that an agency could express its minimum needs in terms of reduced costs. Accordingly, we have no basis to question Commerce's specification which is a good faith extension of the startup time by 30 days over the last RFP's time.

E. SUSPENSE FILE

Informatics states that the RFP, like the two preceding solicitations, requires that the contractor be prepared to establish and maintain a "suspense file"

consisting of an automated system capable of storing up to an estimated 20,000 patent applications. The requirement that a contractor maintain such a file, without additional compensation, was protested by Informatics in B-190203. Our Office stated that Informatics had presented a "very convincing and uncontested case" that the suspense file was unnecessary and we suggested that Commerce "reconsider" the views of Informatics "before resoliciting for its future needs." Informatics contends that Commerce can easily meet its minimum needs without a suspense file.

The suspense file consists of nonfee-paid patents which are given to the contractor for preliminary processing in order to smooth out the workload since the rate of fee payment is random and unpredictable. In preparing issues for each week's publication, Commerce's policy is to keyboard fee-paid patents not previously processed and to withdraw patents from the suspense file as soon as their fee is paid. Thus, Informatics states that it would expect the number of patents withdrawn from the suspense file to be random; instead, the accounting of recent suspense file activity shows that, for 30 of the 69 weeks during which patents were taken off the suspense file, the number of patents removed were divisible by 10, which does not indicate random activity.

Moreover, Informatics notes that no patents were deleted from the suspense file during a 72-week period and the fact that none have been strongly supports the thesis that the suspense file is being used as an expensive and anticompetitive device to achieve a backlog of fee-paid patents.

In response Commerce states that the flexibility to stabiblize the workload not only to the contractor performing the patent data base requirements, but also to the other publication subsystems, i.e., photocomposition and printing and distribution requirements, is necessary in order to minimize disruptions to these subsequent processes. Commerce reports that this requirement was more dramatically illustrated when recent budgetary limitations required the Government to drastically curtail its patent publishing program;

the suspense file currently contains over 7,000 patent application files and is expected to contain 9,000 by the end of the current fiscal year. Thus, Commerce concludes that Informatics' allegation "that the Suspense File can no longer be justified as a legitimate need of the Department" is without merit.

ICC demonstrates that the suspense file is not costly because its update system which processes the weekly issue file was duplicated to process the suspense file, resulting in almost no development costs for the suspense file subsystem. ICC states that the RFP does, and always has, provided for suspense file processing in the item 5 unit prices; further, the suspense file will be given to the new contractor in Version II format, the same format specified for item 1 and item 5 under the RFP. The offerors at their own discretion may maintain the suspense file in the Version II format or can convert the Version II format to another format of their choosing.

ICC concludes that in revealing its proprietary design methods, it has proven that either Informatics has raised the suspense file issue as a smoke screen to torpedo the procurement process or it really does not fully comprehend the requirements of the suspense file.

GAO Analysis

As we noted in B-190203, the suspense file requirement does not keep Informatics from competing in this procurement. Moreover, this year ICC and Commerce have rebutted Informatics' contentions that the suspense file is unnecessary and too costly. After reviewing the current record, we cannot conclude that the suspense file requirement is unduly restrictive of competition.

F. CONCLUSION

Protest denied.

Deputy Comptroller General
of the United States