

DECISION

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

Mr Kuprechik
PLT
31177

FILE: B-217184; B-218039 **DATE:** May 8, 1985

MATTER OF: Excel Services, Inc.

DIGEST:

1. Air Force decision as to whether to exercise contract renewal option is generally a matter of contract administration which is not for review under GAO's bid protest function.
2. Whether or not Air Force should provide for itself commercial and industrial products which can be provided under contract by private enterprise is a matter of executive policy, not subject to review by GAO.
3. Where protester challenges Air Force specifications as failing to state the government's minimum needs but does not show Air Force clearly acted unreasonably in determining them, protester has not met burden of proof.
4. Where conflicting statements of protester and contracting agency constitute only evidence of discussion during which inside information was allegedly disclosed, protester has failed to meet burden of affirmatively proving its case.
5. It is not reasonable to accept protester's contention that it was placed at a competitive disadvantage by agency's disclosure as to solicitation requirements, where solicitation generally provides that oral information will not be binding as to its terms, and agency officials explicitly instructed protester that solicitation requirements were unchanged.
6. There is no absolute right to inspect bids after opening and agency may temporarily

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delay inspection in order to prepare bid abstract under Federal Acquisition Regulation (FAR). 48 C.F.R. § 14.402-1(c) (1984).

7. Fact that bid bond document was discovered in bid package after bid opening does not in itself evidence failure to follow proper procedures.
8. Mailgrams containing acknowledgements to solicitation amendments are proper for consideration where time-date stamps indicate they were delivered to the agency installation in sufficient time prior to bid opening to have been timely delivered to designated place of receipt and government mishandling resulted in their absence at bid opening.
9. Failure to place bid documents in secured bid box prior to bid opening is contrary to FAR, 48 C.F.R. § 14.401 (1984); however, documents may be considered where there is no evidence of tampering or improper disclosure.

Excel Services, Inc. (Excel), protests the procurement of audiovisual and graphics services by Lowry Air Force Base, Colorado. Excel has filed two separate protests. In the first protest (B-217184), Excel challenges the Air Force's decision not to exercise an option provision under the protester's current contract No. F05600-83-C0011 and the requirements contained in the new solicitation, invitation for bids (IFB) No. F05600-84-B0037. In a second protest under the new solicitation (B-218039), Excel contends that it received "inside information" from contracting officials, contrary to the Federal Acquisition Regulation (FAR), which jeopardizes its eligibility for award under the IFB. Excel also alleges that irregularities attendant to bid opening violated applicable regulations. Excel requests that the requirements be resolicited, if the option is not exercised.

Excel's protests are dismissed in part and denied in part.

Excel was originally awarded its current contract for fiscal year 1983, with two 1-year options. The Air Force exercised the option for fiscal year 1984, but issued the instant solicitation for fiscal year 1985 and two option years. Eight amendments to the solicitation were subsequently issued.

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Excel requests that we recommend the Air Force exercise the second year option clause contained in its current contract. However, the Air Force points out, and we agree, that an agency's decision as to whether to exercise a renewal option is generally a matter of contract administration, which is not for review under GAO's bid protest function. National Office Moving Company; Keahey Moving and Storage, B-203304, B-203304.2, Jan 4, 1982, 82-1 CPD ¶ 4. We therefore dismiss this portion of Excel's protest.

Excel protests that the Air Force, in the IFB, misstated its actual minimum needs by:

- (1) choosing to discontinue the use of several items of equipment for which the contractor, not the government, will have to furnish replacements;
- (2) establishing "new levels of priority response" times, in excess of historical requirements, which necessitate additional equipment;
- (3) requiring that a contractor-employee be stationed at Lowry's Accounting and Finance Center to provide advice and "visualization" services resulting in a duplication of services already available;
- (4) violating Air Force policy in regard to the percentages allotted to various tasks in the IFB:
 - (a) maintenance and management has been reduced from 12 percent to 1/2 percent of the contract price;
 - (b) establishing estimates for certain tasks which the contractor must comply

with that unfairly increase contractor risk;

(5) misrepresenting the work to be done under the contract to the extent the Air Force claims a reduction in audiovisual requirements.

The Air Force has provided a point-by-point rebuttal, as follows:

(1) Several items of government-owned equipment were reported by Excel itself as in need of replacement; additionally, bidders could reflect the cost of contractor-supplied equipment in their bids;

(2) Priority response times were revised to reflect user needs, based on user surveys, and only 10 percent of the requirements are estimated to be "priority";

(3) Stationing a contractor-employee at Lowry's Accounting and Finance Center is part of an effort to make better use of agency personnel and to centralize, not duplicate, audiovisual services; a cost savings is expected;

(4) Air Force policy does not set the percentages allotted to the tasks in the IFB; the percentage allotted to management and maintenance, as well as other tasks, reflects the agency's best estimate for the particular job; bidders are aware of the risks involved and may adjust their bids accordingly;

(5) Although the reduction in work to be done under the IFB was partly the result of a change in the counting procedure, it was primarily the result of an actual decrease in requirements based on historical data.

It appears from the record that Excel concedes, with respect to allegation (1) that several items of Lowry's audiovisual equipment must be replaced. Excel's allegation that Air Force policy requires that the government pay for and assume ownership of the

equipment is not appropriate for resolution under the bid protest jurisdiction of this Office. We have traditionally regarded the question of whether or not the government should provide for itself commercial and industrial products and services which can be provided under contract by private enterprise as a matter of executive policy. This policy is set forth in Office and Management and Budget Circular A-76, the provisions of which do not establish legal rights and responsibilities subject to review by this Office. 53 Comp. Gen. 86 (1973); National Association of Government Employees, Local R14-89, B-211903, July 11, 1983, 83-2 CPD ¶ 77. Accordingly, we dismiss the protest to the extent Excel questions the Air Force's decision to have private contractors furnish the audiovisual equipment.

Excel's remaining allegations essentially question the accuracy of the Air Force specifications. This Office will consider a protest of IFB specifications in order to assure that a contracting agency has not unduly restricted competition by overstating its minimum needs. However, in order to prevail, the protester must meet a heavy burden of proof. The contracting agency has broad discretion in determining its minimum needs and the best method of accommodating those needs. Potomac Industrial Trucks, Inc., B-204648, Jan. 27, 1982, 82-1 CPD ¶ 61. Where, as here, a protester challenges a specification as failing to state the government's actual minimum needs, the initial burden is on the contracting agency to establish prima facie support for its position that the requirement is necessary. Gerber Scientific Instrument Co., B-197265, Apr. 8, 1980, 80-1 CPD ¶ 263. In our review of the issues, we examine the reasonableness of the agency's determination of its minimum needs. Philadelphia Biologics Center, B-209660, June 1, 1983, 83-1 CPD ¶ 589. Once the agency establishes prima facie support for its specification, the burden shifts to the protester to show that the specification is clearly unreasonable. Walter Kidde, Division of Kidde, Inc., B-204734, June 7, 1982, 82-1 CPD ¶ 539.

The Air Force has established a prima facie case to rebut each of Excel's allegations.

Regarding Excel's contentions that the Air Force has overstated priority response times (2), misrepresented the work to be done under the contract in order to show a reduction in audiovisual requirements (5), and incorrectly allotted percentages to tasks in the IFB (4), the record

supports the Air Force position that its estimates of work requirements are based on user surveys, historical data and its own judgment. The record contains correspondence and survey results to support the stated requirements. For example, although one requirement did decrease through a change in the counting procedure, the reduced requirements reflect an actual reduction in need in light of historical data for fiscal years 1982 through 1984. Also, Lowry officials estimate a savings in management and maintenance expenditures as a result of the replacement of obsolete equipment.

Finally, regarding Excel's allegation that requiring the contractor to furnish an employee at Lowry's Accounting and Finance Center (3) is unnecessary, the Air Force explains that the requirement will eliminate the need to continue to contract independently for graphic services.

Excel has failed to meet the burden of showing that any of the above-mentioned agency determinations were clearly unreasonable. While alleging that the Air Force's estimates are incorrect, Excel offers no evidence to prove this or to show that the Air Force clearly acted unreasonably in making its determination. Accordingly, this portion of Excel's protest is denied.

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Excel contends that prior to bid opening, it received "vital information" from a Lowry contracting official that was not made available to other bidders and that jeopardizes its eligibility for award. Allegedly, the president of Excel met with the chief of the Lowry contracting division prior to bid opening. The Excel official reportedly learned that computer terminals installed at Lowry have the capability to produce color slides and graphics if equipped with an additional component which would reduce the need for contractor-produced graphics under this IFB. Excel maintains that the chief revealed a plan whereby the base would acquire the additional components within approximately 1 year. Excel believes the information to be vital to a bidder's estimation of contract longevity, return on investment and financial security, and views the exclusive disclosure of the information to it as contrary to federal procurement

regulations. In a letter delivered on the morning of bid opening, Excel requested the Air Force to delay the bid opening in order to inform the other bidders of the planned acquisition. The Air Force declined.

The Air Force admits that the meeting took place and that the capability of the existing computers to produce color slides and graphics was discussed. However, the contracting division chief denies mentioning a plan to acquire any components which would affect the requirements contained in the solicitation. Instead, the Air Force emphasizes that the Excel official was subsequently instructed, prior to bid opening, to bid only on the solicitation as written, and that no changes in the requirements were contemplated. The record contains no extrinsic evidence to resolve the dispute about the meeting. Where conflicting statements of the protester and the contracting agency constitute the only available evidence, we have held that the protester has failed to meet the burden of affirmatively proving its case. Arsco International, B-202607, July 17, 1981, 81-1 CPD ¶ 46.

Moreover, regardless of what the contracting division chief may have initially told Excel, we cannot conclude that Excel was placed at a competitive disadvantage. The solicitation incorporates by reference a FAR provision which states that oral explanations or instructions given before the award of a contract will not be binding. 48 C.F.R. § 52.214-06 (1984). Furthermore, after learning of Excel's concern, the Air Force contracting officer explicitly instructed Excel that the solicitation requirements had not been changed. Under these circumstances, we do not think it is reasonable to accept Excel's contention that it was placed at a competitive disadvantage.

Both Excel and the Air Force agree that of the eight bids opened, only Excel appeared to have acknowledged all eight amendments and furnished a bid bond. However, after departing the bid opening site, Air Force officials report discovering a bid bond for the apparent low bidder, American Contract Services (ACS), contained in the original package submitted by ACS. Excel questions how the document could have been overlooked originally and suggests that contracting officials gave conflicting accounts as to how and when the document was first discovered. Excel also relates that it was temporarily delayed from inspecting the bid documents after opening.

We first note that there is no absolute right to inspect bids after opening. The FAR provides a right of inspection "if it does not interfere unduly with the conduct of government business." 48 C.F.R. § 14.402-1(c) (1984). In this case, Excel's inspection was justifiably delayed while the bid opening official prepared the bid abstract.

Secondly, the fact that ACS's bid bond was discovered approximately 10 minutes after bid opening does not in itself evidence a failure to follow proper procedures. Although Excel suggests the document was too distinctive to overlook inadvertently at bid opening, the suggestion is insufficient to rebut the agency's contention that such was indeed the case. While the FAR requires that bids be publicly opened and, if practical, read aloud, it does not require that the completeness of the submitted bid documents be determined and announced at the opening. 48 C.F.R. § 14.402-1(a) (1984). In the past, we have held that the failure to correctly note the terms and identify the contents of bids at the public bid opening is a deviation of form, not of substance, which does not affect the validity of an otherwise proper award. George C. Martin, Inc., 55 Comp. Gen. 100 (1975), 75-2 CPD ¶ 55; A. A. Beiro Construction Company, Inc., B-192664, Dec. 20, 1978, 78-2 CPD ¶ 425. Absent any evidence that Lowry officials improperly added the bid bond document to ACS's bid package after bid opening, Excel's suspicions do not rise to the level of evidence of impropriety.

Finally, Excel questions the acceptance of two mailgrams containing amendment acknowledgements from ACS and another bidder, Olympic Studios. The mailgrams were addressed to the office designated in the IFB for the receipt of bids, and each was time-date stamped by Lowry mailroom personnel, evidencing receipt at the installation approximately 30 minutes prior to bid opening. It is uncontested that the mailgrams were not secured in a locked bid box, as directed by the FAR. 48 C.F.R. § 14.401 (1984). Instead, a mailclerk placed the mailgrams on the contracting officer's desk in the designated office. The agency reports this was done because the key to the bid box was unavailable. The contracting officer did not find the mailgrams until after she returned from the bid opening.

We believe it was proper for the Air Force to consider the acknowledgements. The FAR provides that a bid received in the office designated for the receipt of

bids after the time set for bid opening is a "late bid." 48 C.F.R. § 14.304-1 (1984). Late mailed bids received before award are proper for consideration, however, where it can be determined that the late receipt was due solely to mishandling by the government after receipt at the government installation. 48 C.F.R. § 14.304-1(a)(2) (1984). In the present case, the time-date stamps establish that both mailgrams arrived at the base prior to the time for bid opening. In the past, our Office has construed the language of FAR § 14.304-1(a) (formerly Armed Services Procurement Regulation § 7-2002.2) as authorizing the consideration of a late bid which arrived at a government installation in sufficient time prior to bid opening to have been timely delivered to the place designated in the IFB. Hydro Fitting Manufacturing Corp., 54 Comp. Gen. 999 (1975), 75-1 CPD ¶ 331.

Here, the time-date stamp indicates the mailgrams arrived at the installation one-half hour prior to bid opening. Whether this allowed sufficient time for their timely delivery to the office designated in the IFB is a question of fact not clearly resolved from the record. The contracting officer asserts that the mailgrams were delivered to her office prior to bid opening, and the agency report implies that but for the fact that the key to the bid box was unavailable, the mailclerk would have timely deposited them there rather than on the contracting officer's desk. In effect, the agency is conceding its mishandling of the mailgrams resulted in their absence at the bid opening. Excel offers no evidence to refute this. Therefore, we conclude that the mailgrams arrived at the installation in sufficient time for delivery to the designated office and that their lateness was due to government mishandling. The mailgrams were thus proper for consideration. See Cost Brothers, Inc., and Lori Waterproofing, Inc., B-213257.2, B-213257.3, Apr. 24, 1984, 84-1 CPD 469.

Although the mailgrams were not secured in a locked bid box prior to bid opening, contrary to 48 C.F.R. § 14.401 (1984), we have not objected to the consideration of bids so long as they were in the hands of the government representatives authorized to receive bids at the scheduled times for bid opening even though the bids had not been deposited in a bid box. Hyster Company, 55 Comp. Gen. 267 (1975), 75-2 CPD ¶ 176. Here, the mailgrams were delivered to the designated office and, absent some evidence of tampering or improper disclosure,

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which Excel does not offer, we see no harm to the integrity of the competitive bidding system in considering these documents.

Excel's second protest is denied in its entirety.

for *Harry R. Van Cleve*
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