DECISION

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

e1118

FILE: B-183942 DATE: July 12, 1976

97945

MATTER OF: Sorbus Inc.

DIGEST:

1. Assertion that procurement of maintenance services for automatic data processing (ADP) services should be through negotiation because it is too complex for formal advertising is without merit.

2. Claim that solicitation did not request sufficient information to allow contracting officer to make determination of responsibility provides no basis for conclusion that solicitation is defective since extent of information necessary to determine bidder responsibility is within broad discretion of contracting officer. Also, information bearing on responsibility may be sought and obtained subsequent to bid opening.

3. Invitation clause, apparently designed to prevent unbalanced bidding, which provided that rates charged under contract will not exceed contractor's published list prices or rate charged to any other Federal agency is inappropriate, since in regular competitive procurement Government is entitled only to lowest price that competition produces and not to guarantee that price will not be lower for other agencies or under other circumstances. Rather, provision similar to that set forth in FPMR clause should be used to prevent unbalanced bidding.

4. Protest against various solicitation provisions as being too vague or establishing requirements in excess of Government's minimum needs is denied since record shows agency's stated needs are not excessive and that, while certain terms could have been defined more explicitly, solicitation reasonably indicates what is meant by provisions. However, record also shows that one provision can be interpreted more broadly than intended by agency; such provision should be revised to clearly indicate agency intentions.

5. There is no requirement that solicitation identify contracting officer, although record shows that contracting officer was identified in covering letter attached to solicitation and in each of three solicitation amendments.

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Sorbus Inc. (Sorbus) has protested several aspects of invitation for bids (IFB) No. 533 issued by the Securities and Exchange Commission (SEC) for the maintenance of SEC-owned or leased automatic data processing equipment (ADP). Sorbus alleges that (1) the SEC should have negotiated rather than formally advertised the procurement; (2) the IFB did not request "adequate data for SEC to use in making a determination of vendor responsibility"; (3) certain IFB provisions are too vague, define requirements which exceed the minimum needs of the Government, or are otherwise improper; and (4) it was improper for the IFB not to identify the contracting officer. Award of a contract to the Raytheon Service Company was made while this protest was pending.

Sorbus' contention that the procurement should have been negotiated is based on its belief that requirements for ADP services are too complex for a formally advertised procurement. According to Sorbus, bidders who are unable to discuss with the Government "stringent terms" of an IFB for such services will offer increased prices to cover the risk of inaccurately assessing what is required by those terms, thereby resulting in a higher price to the Government.

We do not agree. Contracting agencies are required to utilize formal advertising in all cases in which the use of such method is feasible and practicable. 41 U.S.C. 252(c) (1970); Federal Procurement Regulations (FPR) § 1-1.301-2 (1964 ed.); Bob Milner & Associates Co., B-181637, January 22, 1975, 75-1 CPD 41; Social Systems Training and Research, Inc., B-182361, May 14, 1975, 75-1 CPD 294. Although we have suggested that formal advertising might be inappropriate when "a very technical specification that * * * could not be * * * stated with sufficient clarity to insure the same understanding among all interested bidders" was being used, B-175585, November 8, 1972, we see nothing in the requirements of this IFB that can be regarded as overly technical. The fact that Sorbus found some of the IFB provisions to be unclear does not mean that formal advertising was improper or that Sorbus was precluded from seeking clarification of the provisions it found to be vague. In fact, the record shows that Sorbus did contact the SEC a few days before bid opening, but declined to submit anything in writing as requested by SEC; instead, Sorbus met with an official of the General Services Administration (GSA) and then filed a protest directly with this Office.

Sorbus' next contention concerns the information used by SEC to determine bidder responsibility. The IFB stated that a bidder, to be considered responsible, must be regularly engaged in ADP maintenance and repair and must have "adequate financial responsibility" to perform the contract. The IFB further required bidders to submit certain information bearing on responsibility, such as number of years engaged in ADP maintenance, a description of facilities, and a listing of installations "currently being maintained by bidder." In making its responsibility determination, SEC utilized an "IFB 533 Response Evaluation" form on which were various questions, to be asked of the installations identified by each bidder, concerning the adequacy of the service rendered by the bidder. Sorbus claims that this does not provide an adequate basis for making a responsibility determination because the evaluation form solicits only "extreme amounts of judgment" and because the IFB did not ask questions relative to what parts will be stored on site, where additional parts will be obtained, what backup arrangements have been made, and what training facilities are being utilized by the bidder for its service personnel.

Before awarding a contract, Government contracting officers must affirmatively determine a prospective contractor to be responsible. FPR § 1-1.1204-1. This determination is to be based on information sufficient to satisfy the contracting officer that a prospective contractor will meet minimum standards of responsibility. FPR § 1-1.1205-1. However, determinations of responsibility are based primarily on the general business judgment of the contracting officer, and therefore the extent of the information necessary to make a responsibility determination and the determination itself are matters within the broad discretion of the contracting officer. See Central Metal Products, Inc., 54 Comp. Gen. 66 (1974), 74-2 CPD 64; Yardney Electric Corporation, 54 Comp. Gen. 509 (1974), 74-2 CPD 376. Furthermore, the contracting officer is not limited to the information solicited by an invitation when making a responsibility determination, since it is well settled that information bearing on responsibility may be requested and/or furnished after bid opening. 53 Comp. Gen. 36 (1973); 52 id. 647 (1973); FPR § 1-1.1205-2. (Here, the record shows that the contracting officer did not rely on the information obtained initially with respect to the responsibility of Raytheon, but instead sought and obtained additional information--albeit not the information Sorbus believes should have been obtained--after bid opening.) Accordingly, there is no basis for regarding the responsibility section of the IFB as defective.

Sorbus' objections to the other IFB provisions are directed to paragraphs 5(c), 10(a), 10(f), and 13 of the solicitation's special provisions.

Paragraph 5(c) requires the contractor to agree that rates charged under the contract will not exceed the contractor's published list price or the rate charged to any other Federal agency, whichever is lower, during the term of the contract. Sorbus believes that this clause is improper because it prohibits the contractor from contracting with other Federal agencies at a lower price even if the quantity of work and the terms and conditions are such that performance at a lower price is feasible.

Paragraph 5(c) was included under the general heading "5. FIXED PRICE OPTIONS." which provided for evaluation of bids on "the basis of lowest overall cost to the Government, all factors considered, including stated options." It appears to us that the paragraph was designed to prohibit bidders from submitting unbalanced bids. Paragraph 5(c), however, is similar to provisions used in Supply and ADP Schedule Contracts where contractors are given an advantageous if not monopolistic position and where the very basis for award is that the Government be given a discount from commercial prices and be assured that it is getting the lowest possible price. We are not aware of any such basis for the use of this type of clause in a regular competitive procurement where the basis for award is lowest (reasonable) price. In such situations, the Government is entitled only to the lowest price that the competition produces, and not to a guarantee that the price will not be lower for other agencies or under other circumstances. In our opinion, the inclusion of paragraph 5(c) in the IFB was inappropriate. Rather, in order to safeguard against unbalanced bids, we believe it would have been more appropriate to have included a provision similar to that included in the fixed price options clause set forth in FPMR 101-32.408-5 (a) (3).

Paragraph 10(a) as originally drafted provided:

> "The Contractor shall, during the term of the contract, be responsible for keeping all equipment in good operating condition at all times. The maintenance prices listed herein include the cost of labor, parts, factory overhaul, rehabilitation and transportation, as necessary to maintain this effectiveness level. An effective level of less than 95% uptime during any month on any item of equipment listed herein will not be considered acceptable."

The 95 percent figure was changed to 92 percent by IFB Amendment No. 1 which was issued on the same date as the invitation. Sorbus claims that this requirement exceeds SEC's minimum needs. In support of this assertion, Sorbus states that GSA's ADP Schedule contract with IBM contains only a 90 percent requirement for certain items and no specified uptime requirement for other items. Sorbus further objects to the terms "uptime" and "good operating condition" as too vague to be meaningful.

SEC reports that its prior contract contained a 90 percent uptime requirement, that it raised the requirement to 92 percent because "the recent addition of an on-line direct access system with terminals throughout the headquarters building which is in constant use * * * increases the urgency of a reliable ADP system," and that its prior contractor had been maintaining a 98 percent uptime rate. We have long recognized that the contracting agencies are responsible for determining their minimum needs. See, e.g., Manufacturing Data Systems Incorporated, B-180586, B-180608, January 6, 1975, 75-1 CPD 6. In light of SEC's explanation, we cannot conclude that it was unreasonable for SEC to require a 92 percent uptime merely because another contract does not contain that requirement.

With regard to the terms "uptime" and "good operating condition," we note that neither is explicitly defined in the IFB. However, the IFB does define "equipment failure" as a malfunction in the equipment (which itself is defined as referring to individual machines or complete data processing systems or subsystems) "which prevents the accomplishment of a job" and we understand that in the ADP field uptime generally refers to the entire system. Thus, while we think it would have been preferable for the IFB to specifically define "uptime," it appears that the IFB reasonably indicates that "uptime" refers to the time when an ADP system can accomplish its intended job. Similarly, we agree with SEC that a fair reading of paragraph 10(a) indicates that "good operating condition" refers to equipment that can sustain an uptime of 92 percent. Thus, we do not believe that these two terms are impermissibly vague.

Paragraph 10(f) provides:

> "If, in the opinion of the installation supervisor at the location, it is necessary to obtain additional engineering assistance and/or the original equipment manufacturer's engineering assistance to correct a malfunction that has not been corrected within a maximum of four (4) hours after the time of arrival of the contractor's maintenance personnel, the contractor shall promptly provide such assistance at no additional charge. (Offerors willing to provide such assistance prior to the expiration of four hours should so state that number of hours in their response)."

Sorbus objects to this paragraph because Sorbus believes it permits the Government installation supervisor to call in another company to correct a malfunction over the contractor's objections and at the contractor's own expense if the contractor has not corrected the malfunction within four hours.

Sorbus is not correct. This provision does not authorize the Government to call in another company. Rather, it permits the Government to direct the contractor to provide "additional engineering assistance and/or the original equipment manufacturer's engineering assistance * * *." The SEC explains this provision as follows:

> "This section is clearly intended to protect the Commission against incompetent service by a poorly trained customer engineer. It provides us with the flexibility to ask the contractor to provide more expert customer engineer support, be it through them or through the OEM /original equipment manufacturer/, whichever is most appropriate for the problem at hand. We have always placed our calls for more expert assistance with the present contractor, who has always responded with one of their own top-level technicians; we have never had to demand that the OEM be called in. However, our contractor has, on his own initiative, called in OEM assistance."

Thus, it appears that SEC intends this provision to be directed primarily toward additional contractor personnel and secondarily toward OEM personnel if necessary.

We think the OEM aspect of the provision is reasonable in view of the nature of this procurement and that bidders must allow for that risk when formulating their bid prices. However, we can understand Sorbus' concern about the possible broad implications of the phrase "additional engineering assistance." Since SEC intends that phrase to refer only to additional personnel of the contractor and not to personnel of another company, we think paragraph 10(f) should be revised to clearly indicate that intention so that bidders will not have to contemplate possible greater risks than it is the intention of SEC to impose.

Paragraph 13 provides:

> "CHANGE IN MAINTENANCE SOURCE: Should the Government find it necessary to terminate this contract and make other maintenance arrangements, the equipment shall be subject to mutual inspection by the Contractor and

> the new maintenance source. If the equipment is not in good operating condition, labor and parts required to place the equipment in good operating condition shall be provided by the present maintenance contractor at no charge to the Government."

Sorbus objects to this provision on the grounds that it "allows a competing company at a later date to dictate to the Government repairs which must be made" at the expense of the terminated contractor and represents a risk which no bidder can measure. This paragraph, however, states only that the takeover company, along with the incumbent contractor, will inspect the equipment. It says nothing about the new company's right to determine what repairs the other company will have to make. Although the provision is silent on that point, presumably it will be the Government that decides whether the equipment is in good operating condition, and the contractor will have the right to invoke the contracts disputes procedure should the contractor disagree with the Government's decision.

Sorbus also suggests that if "good operating condition" is to be determined by uptime percentage, then the IFB/contract should "allow for waiver of all inspections when the contractor is changed when the current vendor is performing maintenance at the 92% uptime rate * * *." This suggestion overlooks the fact that what is to be determined is the condition of the equipment as it is turned over to the new maintenance contractor and not what the condition was during performance by the terminated contractor. In any event, this is a matter for the SEC rather than this Office.

Finally, Sorbus complains that a violation of "the very essence of the procurement process" occurred here because the IFB identified only "a technical employee who * * * has little knowledge of the procurement process," rather than the contracting officer, as the person to contact for information.

FPR § 1-2.201, which lists information to be included in an IFB, requires than an IFB contain the name and address of the issuing activity. Standard Form 33, "Solicitation, Offer, and Award", provides for the insertion of the name and telephone number of an individual who can be called for information. Neither requires that the contracting officer be identified in the solicitation. We note, however, that the IFB here was accompanied by a cover letter and by an amendment, both of which were signed by an individual identified as the contracting officer. Two subsequent

amendments also were signed by the contracting officer. Although Sorbus apparently did not receive these documents, it does appear that the name of the contracting officer was publicly available.

We have thoroughly reviewed Sorbus' various contentions. Although we believe that paragraph 5(c) of the special provisions was inappropriate for use in this procurement and that certain terms used in the IFB should have been explicitly defined, we find no basis for concluding that the procurement was legally defective. Therefore, the protest is denied.

For The Comptroller General
of the United States