

W. Adams

DECISION



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

FILE: B-219906 **DATE:** December 27, 1985
MATTER OF: Rampart Services, Inc.

DIGEST:

1. Options clause is not unduly restrictive of competition because of risk to bidders resulting from political and economic instability of countries in which weather data necessary for contract performance will be collected where agency establishes prima facie support that clause is reasonably related to its needs for continuous service on long-term basis and protester fails to demonstrate that use of options places undue risk on bidders.
2. Time period between award and commencement of performance is unduly restrictive of competition where agency has not provided prima facie support that 30-day startup period is reasonably related to its minimum needs and, in fact, acknowledges that longer startup period is required for bidders without established communication circuits necessary for contract performance.

Rampart Services, Inc., protests that the requirements for four 1-year options and a 30-day startup period in invitation for bids (IFB) No. F41613-85-R0041 unduly restrict competition.^{1/} The IFB, issued by Carswell Air Force Base, Texas, solicited bids to furnish South American weather data for dissemination by the Automated Weather Network, which supports the meteorological requirements of the Department of Defense and other federal agencies.

^{1/} Originally, Rampart also protested a requirement for performance and payment bonds. Amendment No. 0005, issued on August 27, 1985, deleted that requirement, and it therefore is no longer at issue.

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We deny the protest in part and sustain it in part.

Rampart first contends that the solicitation's inclusion of options violates the Federal Acquisition Regulation (FAR) prohibition against their use where the contractor will incur undue risks, citing FAR, 48 C.F.R. § 17.202(c)(2) (1984). Rampart maintains that the risks posed in gathering weather data from governmental or quasi-governmental sources in South America are considerable, due to political instabilities of the area, and alleges that those risks would be reflected in excessively high bid prices for contract periods beyond the initial year. The protester also submits statistics establishing that inflation rates in South American countries are highly variable, contending that as a result of currency fluctuations, South American officials are reluctant to enter into long-term contracts.

The protester also maintains that the time available to the low bidder to commence performance violates the FAR requirement that contracting officers ensure realistic delivery schedules that do not tend to restrict competition and cause resulting higher contract prices, citing FAR, 48 C.F.R. § 12.101(a). According to Rampart, international communications companies require 90 days to implement an international communications circuit for weather data collection, and they charge a significant cancellation fee if a circuit is ordered and then cancelled. The IFB required bids to be submitted by August 23 and performance to begin on October 1, 1985. The protester maintains that the approximately 30-day startup period limits competition to companies with established communication circuits throughout South America. The Air Force obtained a 90-day extension of the current contract after this protest was filed. Consequently, Rampart argues that there is no reason why the agency could not seek an extension sufficient to allow reasonable competition for the contract.

The Air Force responds that the use of options is appropriate here because the government anticipates the need for services beyond the current year and will avoid annual startup and tear-down costs. The Air Force believes that any risk of service loss due to political upheaval is speculative. The agency reports that the service has been performed by contractors for approximately the past 8 years without delays due to political instability. Also, according to the Air Force, inflation in the affected business has been predictable in the past, and the countrywide inflation

rates cited by Rampart are not necessarily reflective of the weather-collecting business. The agency maintains that both these factors can be incorporated into bids without undue risk.

Regarding the startup period, the Air Force has confirmed with an international communications company that 90 days are required to establish the network necessary to perform the contract. However, the agency offers two reasons why it is not required to provide this full period. First, the Air Force suggests that companies not already in the weather-data-gathering business are not responsible, and that it is reasonable for the government "to use a start-up date that would prevent irresponsible bidders from being eligible under the contract." In the past, only airline companies which have established communications networks encompassing major South American cities have provided this service to the Air Force. According to the agency, there are two bidders other than Rampart that have not questioned the reasonableness of a 30-day startup period. Second, the Air Force argues that a 3-month lapse in obtaining weather data would be unacceptable because of the importance of the service. The agency emphasizes that the weather data is critical to meet the requirements of the Department of Defense and other federal agencies.

Where a protester challenges specifications as unduly restrictive of competition and provides some support for that proposition, the procuring agency must establish prima facie support for its contention that the restrictions it imposes are reasonably related to its needs. Cleaver Brooks, B-213000, June 29, 1984, 84-2 CPD ¶ 1. If it does so, the burden shifts to the protester to show that the restrictions are clearly unreasonable. Id. This is so because contracting officials are familiar with the conditions under which supplies, equipment, or services have been used in the past and will be used in the future and, thus, are in the best position to know the government's actual needs.

We find that the Air Force has a reasonable basis for including options in the procurement, but the agency has not justified its 30-day startup period limitation.

The FAR provides that, subject to specified limitations, contracting officers may include options in contracts when such action is in the government's interest. FAR, 48 C.F.R. § 17.202(a). Here, the agency anticipates

the need for services beyond the current year and wishes to benefit from the price advantages of continuous service. The agency reports it has received uninterrupted service for the past 8 years. In light of this fact, we do not believe that Rampart's concern with political instability establishes that bidders assume an undue risk. With respect to varying inflation rates in certain South American countries, subcontract prices in United States currency or United States currency equivalents should be relatively stable and predictable irrespective of local currency fluctuations. The protester's bare statement that South American governments are hesitant to enter long-term contracts because of a sensitivity to monetary fluctuations does not make the option requirement unreasonable.

Agencies are not obligated to eliminate all risk from a procurement. Talley Support Services, Inc., B-209232, June 27, 1983, 83-2 CPD ¶ 22. Bidders are expected to exercise business judgment and take attendant risks into account when developing their bids. Mere disagreement with the agency's judgment that risks are reasonably calculable is not sufficient to carry the protester's burden of proof. See The Trane Co., B-216449, Mar. 13, 1985, 85-1 CPD ¶ 306. Here, Rampart has not shown that the requirements complained of are clearly unreasonable, and we deny the firm's protest on this basis.

We find, however, that the Air Force has failed to establish a reasonable basis for its approximately 30-day startup limitation, which apparently limits competition to two airline companies having established communication networks in South America. We find the requirement to be unduly restrictive. As noted above, the agency acknowledges that international communications companies require 90 days to establish communication circuits. The agency's only explanations for the necessity of lesser time here are that any interruption in service would be unacceptable and that the restriction keeps nonresponsible companies from bidding.

Agencies may restrict competition to the extent necessary to satisfy the minimum needs of the government. Informatics, Inc., B-190203, Mar. 20, 1978, 78-1 CPD ¶ 215, aff'd on reconsideration, 57 Comp. Gen. 615 (1978), 78-2 CPD ¶ 82 (2-month startup period found to be unreasonable); 10 U.S.C.A. § 2305(a)(1)(B)(ii) (West Supp. 1985). The Competition in Contracting Act of 1984 requires agencies to use "full and open" competitive procedures, and places

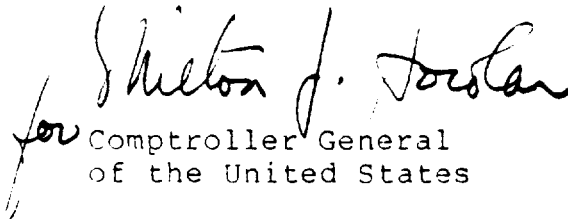
particular emphasis on the importance of using advanced procurement planning to open the procurement process to all capable contractors. 10 U.S.C.A. §§ 2301(a), 2305(a)(1)(A); H.R. Rep. No. 861, 98th Cong., 2d Sess. (1984). Agencies may not justify the use of noncompetitive procedures on the basis of a lack of advanced planning. 10 U.S.C.A. 2304(f)(5).

We have no reason to question the Air Force's statement that it needs a continuous supply of weather data. However, by entering into a 90-day contract extension with the incumbent, the agency established that an interruption would not have occurred if the solicitation had provided a longer startup period as requested by the protester. Moreover, such an extension would have been unnecessary if the procurement had been planned with the need for a 90-day period in mind.

With regard to possible nonresponsible bidders, we are aware of no authority, either in statute or regulation, that permits an agency to impose restrictive performance requirements in order to exclude firms believed to have insufficient financial capacity or business experience. These matters are properly addressed in the contracting officer's responsibility determination. FAR, 48 C.F.R. § 9.104-1.

We find the Air Force has failed to satisfy its threshold requirement of establishing that the approximately 30 days available to the low bidder before performance commencement is required by its minimum needs. We are recommending that the Air Force revise the IFB to permit bidding on the basis of a 90-day startup period.

The protest is sustained in part and denied in part.


for Comptroller General
of the United States