6579

DECISION

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

FILE: B-190505 DATE: June 1, 1978

MATTER OF:

B.B. Saxon Company, Inc.

DIGEST:

1. Where Department of Labor (DOL) notifies agency that it has determined Service Contract Act (SCA) is applicable to proposed contract, agency must comply with regulations implementing SCA unless DOL's view is clearly contrary to law. Since determination that SCA applies to contract for overhaul of aircraft engines is not clearly contrary to law, solicitation which does not include required SCA provisions is defective and should be canceled. Contention that applicability of SCA should be determined by Office of Federal Procurement Policy (OFPP) does not justify agency's failure to comply with SCA under circumstances where OFPP has not taken substantive position on issue.

2. Use of estimated needs instead of precise actual needs is not objectionable where solicitation is for multi-year requirements contract and agency states it cannot determine its needs with precision but has based its estimates on best available information.

3. Even though small business set-aside procurement is technically a negotiated procurement, where contract is to be awarded solely on price, mere fact that negotiations are desirable to enhance offeror understanding of complex procurement does not provide legal basis for use of negotiation procedures in lieu

of small business restricted advertising, since record does not support agency assertion that specifications are not sufficiently definite to permit formal advertising.

4. Agency is not required to adjust cancellation ceiling in multi-year requirements contract after first year's estimated quantities are reduced even though such adjustments might result in lower overall prices.

5. Agency is not required to furnish production equipment to prospective offerors to overcome competitive advantage of incumbent which already owns necessary equipment, since Government does not own such equipment and incumbent's competitive advantage results from its prior contracting activity and not through any action of the Government.

6. Responsibility provisions in RFP which require contractor to have certain personnel "on board" by time of award but also provide for contractor commitment to obtain personnel for contract performance do not conflict since latter provision refers to personnel other than those required to be "on board."

7. Agency is not required to furnish cost estimate of spare parts in RFP where such parts are to be principally furnished by the Government and contractor will be reimbursed for contractor acquired parts on a normal billing cycle so that contractor investment is minimal. However, it is suggested that consideration be given to including such estimates in future solicitations.

8. Use of evaluation factor to reflect cost of changing contractors is not improper even though such factor may penalize every offeror except the incumbent since Government may legitimately take into account all tangible costs of making particular award.

B.B. Saxon (Saxon) protests request for proposals (RFP) F41608-77-R-8635 issued by the Department of the Air Force, Kelly Air Force Base, Texas. The solicitation is for a multi-year requirements contract for the repair, overhaul and modification of aircraft engines and repairable parts. Saxon asserts the following solicitation deficiencies as its bases for protest:

1. The exclusion of this procurement from the coverage of the Service Contract Act;

2. The use of best estimated quantities (BEQ) instead of specified quantities for anticipated annual requirements;

3. The use of a negotiated procurement rather than a formally advertised procurement;

4. The failure to adjust the "cancellation ceiling" after the BEQ for the first year was reduced;

5. The failure of the Government to furnish production equipment to assure that meaningful competition is obtained;

6. A conflict in the responsibility criteria relative to equipment and personnel;

7. The absence of a cost estimate for spare parts;

8. An evaluation method which is unfair to all offerors except the incumbent.

For the reasons set forth below, the protest is sustained on issues 1 and 3 and denied as to issues 2, 4, 5, 6, 7 and 8.

1. Service Contract Act

The RFP incorporated Walsh-Healey Public Contracts Act provisions; it did not include Service Contract Act (SCA), 41 U.S.C. 351 et seq. (1970 and Supp. V 1975) provisions or an SCA wage determination, although it did include a clause entitled "Potential Application of the Service Contract Act (Fixed Price)." Saxon argues that there is no justification for this procurement to be outside the scope of the SCA, while the Air Force maintains that the Walsh-Healey Act, 41 U.S.C. 35 (1970), dealing with supplies, and not the SCA, applies to this procurement, because the contract is to be one for materials, supplies or equipment (overhauled aircraft engines) and not one for services. The Department of Labor (DOL), however, has informed the Air Force "that this type of contract has as its principal purpose the furnishing of services through the use of service employees, and as such, is clearly subject to the Service Contract Act."

The Air Force and DOL have previously disagreed over the applicability of the SCA to various Air Force contracts. For example, in 53 Comp. Gen. 412 (1973), we considered a case where the Air Force contracting officer believed the SCA was not applicable to a procurement for aircraft modification and depot maintenance, but DOL subsequently determined that the SCA was applicable. A similar situation, involving an Air Force procurement for aircraft engine overhaul and maintenance, was considered in Curtiss-Wright Corporation v. McLucas, 381 F. Supp. 657 (D.N.J. 1974).

In both Curtiss-Wright and 53 Comp. Gen. supra, the Air Force acted in the belief that the procurements were subject to the provisions of the Walsh Healey Act rather than the SCA. As a consequence, it did not submit a Notice of Intention To Make a Service Contract (Standard

Form (SF) 98) to DOL. Under applicable regulations, contracting officers were required to file an SF 98 with DOL at least 30 days prior to the issuance of a solicitation leading to the award of a contract "which may be subject to the Act." 29 CFR 4.4-4.6 (1976); Armed Services Procurement Regulation (ASPR) 12.1004, 12.1005 (1976 ed.). In response, DOL was to notify the agency of any minimum wage rate determination applicable to the contract, which thereafter was to be included in the solicitation and any resulting contract. ASPR 12-1005.3. It was concluded in both cases that the Air Force's failure to submit the SF 98 did not invalidate the contract because the Air Force had acted in good faith.

In the case before this Office, we found that the regulations required the initial decision as to the applicability of the SCA to be made by the contracting agency, not DOL. Thus we stated:

> "If the agency does not believe a contract may be subject to the act * * * there is no duty on its part to submit anything to DOL or to include a Service Contract Act clause in the solicitation. Accordingly we think the only issue that must be determined is whether or not the Air Force Contracting Officer had a reasonable basis for believing that his procurement was not one that 'may be subject to the Act.'" 53 Comp. Gen. at 416.

We found that the Air Force, relying on what it regarded as a "significant amount of rebuilding or replacement of aircraft components called for by the contract specification, ha[d] traditionally treated this type of contract, both before and after the enactment of the SCA, as subject to the Walsh-Healey Act." We also found that the record reasonably supported the Air Force's assertions that it relied on several "judicial and DOL decisions, which appear to treat reasonably similar type of work as subject to the Walsh-Healey Act," as a basis for its failure to include SCA coverage in the solicitation and resulting contract.

We concluded that the contracting officer had acted in good faith, that there had not been "a deliberate, arbitrary attempt to circumvent any statutory or regulatory provision," and that the contract had not been awarded illegally since "the validity of a service contract was not affected by the absence therefrom of a DOL wage determination when the absence was not due to 'any misfeasance or nonfeasance on the part of the contracting agency.'" We suggested, however, that consideration be given to the promulgation of a contract clause which would protect the workers concerned without disrupting the procurement process in circumstances where DOL, after contract award, disagrees with the contracting agency determination of non-applicability of the SCA to the particular procurement. (The "Potential Application of the Service Contract Act" clause, set forth in Defense Procurement Circular 76-1 (Item XXII), and incorporated in the solicitation in this case, is a result of our suggestion.)

Similarly, in Curtiss-Wright, the court held that the contract under consideration in that case was not void, but could be amended to include the SCA provisions and wage rate determinations under the "Christian doctrine." This holding followed the court's finding that the Air Force had acted in good faith because of its understanding of prior DOL policy and its lack of notice from DOL to revise its contract policies until after the award of the contract. 381 F. Supp. at 664-666.

Subsequently, in Hewes Engineering Company, Incorporated, B-179501, February 28, 1974, 74-1 CPD 112, we considered a situation where the Air Force initially determined that the procurement (for technical data in the form of reproducible copy) was not subject to the SCA, but before the closing date for receipt of proposals was placed on notice that DOL had ruled in a similar Army procurement that the SCA was applicable. Distinguishing that situation from the one in 53 Comp. Gen. 412, we pointed out that while the initial Air Force determination was not subject to question, the contracting officer was now on notice that DOL "may regard this procurement as subject to the Act," and that under those circumstances

the regulatory scheme contemplated submission of an SF 98. We further stated:

> "[T]he Secretary of Labor is responsible for administering the Act and for promulgating rules and regulations under the Act. [citations omitted] Thus in determining whether or not Service Contract Act provisions are applicable to a given procurement, we think it is reasonably clear that contracting agencies must take into account the views of the Department of Labor unless those views are clearly contrary to law."

We concluded that under the circumstances the Air Force could not properly view the DOL position as contrary to law, and pending the enactment of clarifying legislation, had to give "due regard" to DOL's position by submitting the SF 98.

In this case, the Air Force states its position as follows:

> "For a number of years the Department of Labor considered these [overhaul contracts] supply contracts to which the Walsh-Healey Act would apply. This position was apparently based on the fact that we receive an end item (rebuilt or overhauled equipment). We are aware of nothing in the SCA which changes the character of these * * * contracts. Nonetheless, on occasion, we have been informed by the Department of Labor that specific overhaul * * * contracts should have contained the SCA provisions. Moreover, on at least one occasion, DOL requested we include the SCA in all such [illegible]. Finally, on 2 December 1977, the Department of Labor corresponded with us regarding this specific solicitation, re-

> questing that we include the SCA. * * * It * * * continues to be our position that these are supply contracts subject to the Walsh-Healey Act rather than SCA." (Emphasis supplied)

The Air Force further points out that its policy is consistent with that of the Department of Defense (DOD), that the "Potential Application of the Service Contract Act" clause was included in the RFP to protect the contractor's employees "in the event appropriate authority determines SCA applies," and that it considers the "appropriate authority" to be the Office of Federal Procurement Policy (OFPP). In recognition of the foregoing it is the Air Force position that OFPP and not DOL has "final authority to determine whether and how the Service Contract Act applies to certain types of contracts when such application could have serious and direct impact on the Federal Procurement Process" (Emphasis supplied) and "that the OFPP is the appropriate office to decide this procurement policy question." (Emphasis supplied)

OFPP concurs with the Air Force view. In comments filed with this Office, OFPP states that: "Public Law 93-400, 41 U.S.C. 401 et seq. (Supp. V 1975), clearly establishes OFPP's authority to formulate policies for the executive agencies with regard to the procurement of services and property"; that this authority extends to the procurement aspects of regulations issued by the social and economic agencies such as the Department of Labor; that any other agency authority to prescribe policy is subject to that of OFPP; and that "OFPP has a clear role as the final arbiter of procurement matters for the Federal agencies." OFPP states that it is "presently planning to begin work with the Department of Labor and other agencies to review existing labor statutes that impact on procurement policy. We will then undertake to exercise our authority in this area and deal with the procurement aspects of these laws as well as the issues arising under them."

The extent of OFPP authority is not an issue in this protest. At present, OFPP is only "planning to

begin work with the Department of Labor and other agencies to review labor statutes"; it has taken no action concerning the current application and interpretation of the SCA and implementing regulations. Thus,we need not and do not decide the extent of OFPP authority in this area, and under the circumstances the only issue for resolution is whether the Air Force has complied with existing requirements concerning the SCA.

As we have previously indicated, under those existing requirements the Secretary of Labor has been regarded as having the primary responsibility for administering and interpreting the SCA, so that to the extent there is a disagreement between DOL and a contracting agency over the application of the SCA to a particular contract or class of contracts, DOL's views must prevail, "unless they are clearly contrary to law." Hewes Engineering, supra. The Air Force has previously recognized the appropriateness of adhering to DOL's position in matters concerning the SCA, even though the Air Force did not agree with that position. See Central Data Processing Inc., 55 Comp. Gen. 675 (1976), 76-1 CPD 67. See also Curtiss-Wright Corporation v. McLucas, supra, where the court suggested that the Secretary of Labor's determinations under the SCA were final and binding.

We note that the term "services" as used in the SCA is not defined in the Act, and that resort to the legislative history of the Act is not helpful. Therefore it appears that the determination of whether the "principal purpose" of a contract is to furnish "services" through the use of "service employees" is a matter within the reasonable discretion of the Secretary of Labor. We do not believe that a determination that an aircraft engine overhaul contract is one which has for its principal purpose the "furnishing of services" (overhauling and repair of Government property) may be considered "clearly contrary to law" since there is nothing in the Act which prohibits that determination. Cf., 53 Comp. Gen. 370 (1973). Accordingly, since the Air Force is on notice that DOL has determined that the SCA applies to this procurement, the mere inclusion of the "Potential Application of the Service Contract Act" clause in the RFP does not comply with applicable requirements, which under the circumstances mandate that the Air Force submit an SF 98 to DOL and include in its solicitation whatever wage determination DOL finds to be applicable.

2. Best Estimated Quantities

Protester takes issue with the use of estimates for the contract requirements, instead of firm figures, claiming that 12 years of historical data should enable the Air Force to quantify its requirements with "pinpoint accuracy." It particularly objects to portions of Exhibit "B" of the RFP (repairable overhaul support items) where 12 of 14 items of repairable engine part have a BEQ of zero. Protester implies that the Air Force managers "know precisely what these estimates are," but for some reason have not revealed them, with the consequence that unfair competition is engendered because the incumbent has that knowledge by virtue of its own experience.

The Air Force claims that its overhaul requirements are not definite, that the usage of the engines in question cannot be predicted absolutely accurately, and that its estimates are the "best" available under the circumstances. It claims that it does not expect any requirements for those items where the estimates are shown as zero, but requested prices in case such requirements materialize. The Air Force notes that the zero estimates for these items do not affect the price evaluation, and that if the prices received for the zero estimate items are excessive, it will either negotiate the prices to those which are fair and reasonable, or will negotiate those items out of the contract so that its needs, should they arise, could be satisfied elsewhere.

In view of the Air Force's statements, we are unable to accept the protester's contentions. Although the Air Force presumably has data regarding its past requirements, the protester has not established that the Air Force is incorrect when it states that its future needs can, in fact, only be estimated and cannot be stated with precision. It is true that "when the Government solicits bids on the basis of estimated quantities to be utilized over a given period, those quantities must be compiled from the best information available." Union Carbide Corporation, B-188426, September 20, 1977, 77-2 CPD 204. However, taking the record in its entirety, we find no basis for concluding that the Air Force has not done so.

3. Legal Justification for Negotiation

Saxon asserts that there "is no legal justification for this procurement being in the form of a negotiated procurement instead of a formally advertised procurement as required by law." Saxon notes that there is nothing extraordinary about an overhaul program, and states that formal advertising is the most common way of handling overhaul programs and that "it usually results in a much lower price to the Government."

It is the Air Force's position that negotiation is appropriate for the instant procurement because the contract is a small business set-aside, and pursuant to ASPR 3-201, it is mandatory that "we cite 10 U.S.C. 2304(a)(1) as 'our negotiation authority.'" The agency also claims that if the procurement had not been set aside for small business, it would have negotiated the contract pursuant to ASPR 3-210.1(ix) which contemplates procurements involving construction, maintenance, repairs, alterations or inspection, "in connection with any one of which the exact nature or amount of the work to be done is not known," because "the procedures contemplated in the specifications of this solicitation are not finite, as in any overhaul program, and discussion with any or all prospective offerors may be necessary for clarification of the overall program." The Air Force further explains its position as follows:

> "The exact amount or nature of this repair work is not known. For example, the number of engines to be repaired can only be estimated. The timing of when engines will require repair is only an estimate. The amount of repair on each engine can vary depending on the amount of repair or replacement required for accessories. The contractors must provide their own procedures on how to determine when to repair or when to replace parts * * *. Negotiated prices are necessary for those engines in which the BEQ is 0 to prevent unbalanced bids.

> The number of over and above hours are estimates. These considerations clearly show that formal advertising is impractical."

The Air Force also notes that no Determination and Findings exist to support the negotiation, because it is not required for a small business set-aside negotiated pursuant to ASPR 3-201 ("exception 1").

An examination of the RFP reveals that the contract is to be awarded solely on the basis of price, e.g., no technical proposal is required in this RFP. Under the provisions of the RFP, offerors are requested to propose fixed unit prices for the "repair, overhaul, modification, testing, preparation for storage and shipment" of the aircraft engines listed in items 1-5 of the RFP and for the repair of certain components, and fixed hourly rates for "over and above work" to be accomplished by the contractor at the direction of the contracting officer. The RFP sets forth 54,164 manhours as the estimate of the "over and above" work to be accomplished during the contract, and provides for evaluation of the contractor's offer for these items on the basis of the proposed hourly rates multiplied by the estimated hours. The RFP also provides an additional evaluation factor of $37,112.00 (plus transportation) which is to be added to all offers, save that of the incumbent's, as the estimated cost for the removal of Government furnished property from the incumbent contractor's facility to the facility of any new contractor. In addition, paragraph 10(g), Standard Form 33A, incorporated into the solicitation by reference, cautions bidders that the Government may award a contract on the basis of initial offers received, without discussion, so that offers should be submitted on the most favorable terms.

Also, although the agency claims that the specifications are not "finite," there is no hint in the RFP that those specifications which are detailed and require adherence to the provisions set forth in more detailed Technical Orders, are not complete or are otherwise inadequate so that "discussions with any or all" offerors

might be required. Also, although the Air Force claims that as a result of face-to-face negotiations with the four offerors submitting "responsive proposals," changes were made to the specifications and "[M]any questions of clarification were answered," we have not been furnished with any documents reflecting specification changes.

ASPR 1-706.5(b) provides in pertinent part that:

> "Contracts for total small business set-asides may be entered into by conventional negotiation or by * * * 'Small Business Restricted Advertising.' The latter method shall be used wherever possible." (Emphasis added.)

Thus, even though a set-aside procurement is technically a negotiated procurement because competition was restricted to one class of bidders under "exception 1" negotiation authority, the procurement should otherwise be conducted under the rules of formal advertising unless there are other reasons permitting the use of negotiation procedures. See Nationwide Building Maintenance, Inc., 56 Comp. Gen. 556 (1977), 77-1 CPD 281, where we concluded that the award of a small business set-aside pursuant to negotiation procedures had not been justified under any of the statutory exceptions to formal advertising but was not subject to legal objection solely because the agency had been granted a waiver from the requirement to use small business restricted advertising procedures.

In this case, we do not find persuasive the Air Force's basis for claiming it would have negotiated the contract under the "exception 10" negotiating authority because the specifications are not "finite." In that regard, we have previously considered a case which, while involving a sole source negotiation under "exception 10", sets forth principles that we believe are equally applicable here. In that case, the Navy attempted to award a contract for the renovation of midshipmen's quarters at the Naval Academy on a noncompetitive basis to a contractor which

was performing other construction work at the construction site, and which was asserted to have been familiar with the building to be renovated. Detailed plans and specifications had been prepared for the project, but the Navy was nonetheless concerned that among other things, (1) the plans and specifications, although "fairly complete," did not fully delineate all areas or obviate all uncertainties, and that it was impossible for the specifications to do so; (2) a satisfactory bid could not be obtained by formal advertising because a bidder, without "special knowledge of the site might include in his bid * * * significant contingency factors to protect himself" from hidden conditions, thus increasing the cost to the Government; and (3) a low bidder under formal advertising procedures, lacking such "special knowledge," might bid too low and thus operate at a loss which could result in delay or which it might attempt to recoup through inferior workmanship. Considering all of those factors, we stated:

> "There is no requirement that competitive bidding be based upon plans and specifications which state the work requirements in such detail as to eliminate all possibility that the successful bidder will encounter conditions or be required to perform work other than that specified in detail in the plans and specifications. Such perfection, while desirable, is manifestly impracticable in some advertised procurements * * *. Whether provision is made in an advertised invitation and resulting contract for the cost of additional work resulting from unknown conditions to be borne by the Government by change order to the contract, or whether bids are solicited and contracts awarded on a basis which will require the bidder to perform all work at the bid price regardless of the conditions

encountered, is within the discretion of the contracting agency. However, where the plans and specifications are sufficiently complete to permit bidding on an equal competitive basis, a possibility that hidden or unknown conditions may exist and prove such plans and specifications to be incomplete does not in itself justify a failure to obtain for the Government the benefits of full and free competition by submitting such plans and specifications to competitive bidding.

"Where competitive bids are solicited under conditions by which the contracting agency either expressly or impliedly warrants the completeness and accuracy of the plans and specifications, or provides for adjustment in the contract price for additional work resulting from changed or unknown conditions, and thus assumes liability to pay an amount over and above the bid and contract price for any work not specified in or contemplated by the plans and specifications, the problem of inflated bid prices resulting from the addition of amounts to cover contingencies, as well as the possibility of inadequate bid prices resulting from failure to include amounts to cover contingencies, would appear to be, for all practical purposes, nonexistent. * * *

"In the absence of either a warranty as to the accuracy and completeness of the plans and specifications or express provision for adjustment in the contract price for additional work resulting from changed or unknown conditions, the possibility of receiving both inflated and inadequate bid prices is always

present. However, we are aware of no sound basis upon which it may be contended that the possibility of receiving some bid prices containing contingency allowances which may later prove to be excessive, and other bid prices containing contingency allowances which may later prove to be inadequate, constitutes a justification for failing to submit the procurement to competitive bidding. In the event all bids are considered excessive they may, of course, be rejected, in which event specific and adequate authority exists under 10 U.S.C. 2304(a)(15) to negotiate a fair price to the Government. [ASPR 3-201.3 provides for dissolution of the small business set-aside in this instance]. Conversely, in the event a bid is received from a responsible bidder in an amount which the contracting agency considers improvident, it would appear to be incumbent upon the contracting agency to verify the bid price and, in the absence of such error as would justify its rejection, to accept such bid and to protect the interests of the Government by vigilant inspection and supervision of the work to assure that the quality of both materials and workmanship is in accord with the contract requirements." 41 Comp. Gen. 484, 488-9 (1962).

The eighteen situations listed in ASPR 3-210.1 are apparently intended to be merely illustrative, and we do not interpret the paragraph as requiring invocation of negotiating authority in all similar situations, but only those where the underlying reason for the exception exists. Indeed, ASPR 3-101(a) requires that even when one of the negotiation exceptions could be invoked, formal advertising is still to be used when that method is feasible. See 51 Comp. Gen. 637, 639 (1972);

Washington Patrol Service, Inc., et al., B-188375, September 21, 1977, 77-2 CPD 209. The use of "exception 10," therefore is, dependent upon the existence of specified situations where it is not practicable to obtain competition by means of formal advertising. Thus, the pertinent criterion in this case is not the inability to predict the exact amount of the work to be done or the desirability of negotiating with offerors to enhance their understanding of the specifications requirements, but rather the impracticability of obtaining competition through formal advertising because of the impossibility of drafting a reasonably adequate specification of what is to be purchased or for some other valid reason. Negotiation is not authorized merely because a complex product or service is being procured and the agency desires only to insure the offerors' understanding of an admittedly detailed specification, see Informatics, Inc., B-190203, March 20, 1978, 78-1 CPD 215; Cincinnati Electronics Corporation, et al., 55 Comp. Gen. 1479 (1976), 76-2 CPD 286, or because of the possibility of unbalanced bidding, or because contractors have to provide their own procedures when such procedures are not an element of proposal evaluation. As indicated, the RFP contemplated only a price competition. See, e.g., 37 Comp. Gen. 72 (1957). We therefore conclude that no reasonable basis exists to conduct this procurement under negotiated procedures, and that the Air Force requirement should be recompeted under small business restricted advertising procedures.

4. The Cancellation Ceiling

Saxon complains that the original "cancellation ceiling" of 6.48% included in the RFP by Amendment 1 was not revised after the BEQ of engines for item 4AA for the first contract year was reduced by 626. That change in the BEQ reduces the total first year quantities by 37% (40% of the specific item involved). Saxon asserts that the failure to adjust the cancellation ceiling will result in unnecessarily higher prices to be paid by the Government because of the increased risk involved. Saxon also questions the source of the original cancellation ceiling figure, claiming that it suspects it was "pulled out of the air."

With respect to protester's latter contention, the RFP requests that offerors furnish the agency with their "estimated start-up non-recurring costs with supporting data" so that the contracting officer can evaluate the data and determine a "fair and reasonable percentage factor" for the cancellation ceiling. The RFP requires that such information be submitted by the 25th day after issuance of the RFP. Saxon did not submit its estimates, but claims the percentage was established by the contracting officer before it had a chance to respond. We note that the amendment to the RFP establishing the cancellation ceiling was issued 29 days after the date of the RFP, so that protester's contentions in this regard are without merit.

With respect to the protester's primary concern, we agree that the failure to increase the cancellation ceiling (which is expressed as a percentage of the contract price) after a reduction of the estimated quantities for the first year of the contract substantially increases offeror risk of being unable to recover non-recurring start-up costs in the event the contract is terminated prior to completion unless unit prices are increased to cover that contingency. In that case, if the contract proceeds to completion, the Government will pay a higher price than it might have had the cancellation ceiling been increased in proportion to the reduced quantities.

The ASPR provides essentially identical provisions for cancellation ceilings on multi-year supply and service contracts. See ASPR 1-322.2(d) and (e) (supply contracts) and ASPR 1-322.6(c) and (d) (service contracts). Those provisions in essence specify that the contracting officer is to develop reasonable nonrecurring costs for an "average" prime or subcontractor; that a "best estimate" of the total procurement cost is to be developed; that the "cancellation ceiling," expressed as a percentage of the total multi-year cost, be established by comparing the non-recurring cost estimate to the total multi-year cost estimate; and that the original cancellation ceilings may be revised from information received after the original ceilings were established which would indicate that the original ceilings are no longer realistic.

Some risk is inherent in most types of contracts and offerors are expected to allow for that risk in computing their offers. See Palmetto Enterprises, 57 Comp. Gen. 271 (1978), 78-1 CPD 116. Here, the cancellation ceilings do not guarantee that any particular offeror will escape all elements of risk in the event of termination, and consequently each offeror must consider the cost of such termination and adjust its prices as its own particular interests dictate. While the contracting officer, in anticipation of lower prices, could have increased the cancellation ceiling in a proportion related to the reduction of the first year's estimated quantities, we are not aware of any statutory or regulatory requirement that he do so. Thus, while prices offered might be higher as a result of the increased risk, we fail to see how the agency's action was improper or how Saxon could be prejudiced in any way since the failure to adjust the cancellation ceiling would impact on all offerors equally. Nonetheless, in view of our conclusions with respect to issues 1 and 3, we are suggesting that the Air Force consider revising the cancellation ceiling for use in its resolicitation.

5. Production Equipment

Saxon complains that no meaningful competition can be obtained in this procurement unless the Government furnishes the equipment necessary for the performance of the contract. Saxon contends that because of the "minimum input of items on a non-guaranteed basis" under the contract, no prospective contractor could afford the investment necessary to acquire the equipment needed for the performance of the contract. Saxon implies that because the incumbent now possesses the necessary equipment, prospective offerors (other than the incumbent) could not be expected to offer prices which are competitive with the incumbent's in view of the risks involved, and that as a result the incumbent is a "virtual sole source."

The Air Force reports that the Government does not have the required equipment or special tooling to supply to any contractor, and that the incumbent does own all the required equipment, "which he acquired with his own capital."

We believe that the contracting officer's statements that the Government lacks the equipment necessary to supply any potential contractor is dispositive of the matter. Although ASPR 13-308 authorizes the contracting officer to furnish Government Production and Research Property "AS IS," obviously such equipment must be in existence before it can be offered for use. Moreover, there is nothing improper about the competitive advantage that results from incumbency. We have long recognized that certain firms may enjoy a competitive advantage by virtue of their own incumbency or their own particular circumstances or as a result of Federal or other public programs. Houston Films, Inc., B-184402, December 22, 1975, 75-2 CPD 404; Aerospace Engineering Services Corporation, B-184850, March 9, 1976, 76-1 CPD 164. The fact that the incumbent, by virtue of its prior contracts, may have previously acquired and amortized the cost of the equipment necessary to perform the proposed contract is a legitimate competitive advantage which the Government is not required to equalize. See Aerospace Engineering Services Corporation, supra. As a consequence, where one firm may be able to offer a lower price than another firm because of the competitive advantages it has gained from its prior contracting activity the Government is not precluded from taking advantage of that offer. Cf. Braswell Shipyards, Inc., B-191457, March 24, 1978, 78-1 CPD 233. We do point out, however, that the RFP is structured to provide for contractor recovery of nonrecurring costs over the life of the contract, so that the competitive advantage complained of is equalized to some extent.

6. Responsibility Provisions

Saxon claims that the RFP provisions relating to offeror responsibility conflict because "[s]ection C-11(b) sets forth mandatory personnel and equipment requirements" and section C-11(c) indicates "that these personnel and equipment could merely be available instead of on board." Saxon suggests that the "procurement has been custom designed for * * * the incumbent," also complains that the master equipment list which an offeror must have available to demonstrate its responsibility "gives rise to the question as to whether this is an Air Force master equipment list or simply an asset list of the incumbent contractor.

Paragraph C-11 is set forth in pertinent part as follows:

"C-11. DEMONSTRATION OF RESPONSIBILITY:

* * *

(b) Demonstration of Ability to Perform. Prospective contractors must demonstrate affirmatively their capability * * * to perform all of the work called for in strict accordance with the specifications. * * * For this purpose prospective contractors must have available for Government review at any time after submission of the offer, documented evidence of their qualifications. This documentation will, as a minimum, include (i) qualifications of the management; * * * (iii) evidence of the assured availability of all necessary facilities and technical skill; * * * In addition to the above, it is mandatory that:

(1) The facility proposed for contract performance must have prior to award of contract:

(i) A full time facility manager with experience and training to qualify him for managing a complex program;

(ii) A property manager experienced in the administration of Government property under Defense Maintenance Contracts who has demonstrated an ability to effectively requisition, account for, and control material obtained from/for the U.S. Government.

(iii) Qualified contract administrator(s);

(iv) A production manager experienced in engine scheduling and maintenance work;

(v) A quality control manager experienced in implementing Quality Assurance and Inspection Procedures and Standards;

(vi) A safety manager experienced with government safety standards applicable to engine contracts.

* * *

(3) The offeror, as a company, has available for performance of proposed procurement any facilities and equipment set forth in Appendix "A", attached hereto and Master Equipment List available for review * * *.

(4) The foregoing information must in all cases be ready and available for presentation to the government no later than the date of commencement of the Pre-Award Survey conducted in accordance with ASPR 1-905.4

(c) Evidence submitted under paragraph (b) above and commitment made at the time of any Pre-Award Survey such as, but not limited to, acquiring facilities, equipment, additional personnel, etc., may be incorporated in any such resultant contract. * * *"

We see no conflict in the cited provision. Paragraph (b) sets forth requirements for documented evidence of responsibility which offerors must have available for review and lists specific personnel who must be employed ("on board") by the facility (not merely available) prior to award; paragraph (c) warns that the evidence submitted under paragraph (b), as well as any commitment made at the time of the pre-award survey relative to acquiring

additional personnel, may become a contract commitment. The fact that specific managers and other personnel are required to be "on board" prior to award is not inconsistent with the requirement that the offeror be prepared to commit itself that other skilled personnel (or other facilities) necessary or asserted to be available for contract performance in fact will be employed if the offeror is awarded a contract.

With regard to the Master Equipment List identified in paragraph (b)(3), the Air Force reports that it is not a list of the incumbent's equipment but rather a list of equipment used by the Air Force when it was performing the overhauling tasks "in-house."

7. Estimate for Spare Parts

The RFP schedule includes three line items covering parts and materials to be acquired by the contractor, and provides for reimbursement to the contractor either on the basis of vendor invoices or as negotiated by the contractor and contracting officer. Saxon claims that the agency's failure to disclose the cost estimate for spare parts which may be required over the initial three year term of the contract "leaves contractors in the dark as to their capital requirements for this item," and gives offerors "no basis for estimating personnel or automotive requirements" which Saxon claims could have a material effect on their offers.

The Air Force reports that spare parts are furnished by the Government in most cases, but that it is estimated that the contractor will have to provide some $1.5 million in spare parts over the 3-year contract period. In those cases where spare parts are not available from the Government, the contractor is reimbursed for its cost, as indicated in the RFP.

According to the Air Force, the only capital required is "that investment needed to cover the time period between when the contractor pays for a contractor acquired part and when the Air Force reimburses that purchase"; the period of the investment depends on the efficiency of

the contractor's billing process. An efficient billing process, the Air Force claims, could keep the capital investment for spares near zero. The Air Force further reports that while it did not include the $1.5 million estimate in the RFP, it planned to discuss the matter with competitive range offerors during negotiations.

We do not think the Air Force was required to include this information in this RFP. Nonetheless, since the Air Force does have an estimate, since that information appears to be of importance to at least one potential offeror, and in view of our conclusion that the use of negotiation procedures for this procurement is not justified, we are suggesting to the Secretary of the Air Force that consideration be given to including this information in future solicitations.

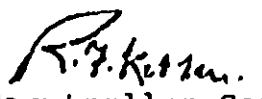
8. Evaluation Method

Saxon complains that the addition of a factor of $37,112 to all offers except the incumbent's, as the estimated cost to the Government for the packing and transportation of Government property necessary for the performance of the contract from the incumbent's facility to a new contractor's plant, results in an unfair competitive advantage. We reject this argument. We know of no requirement that the Government ignore costs associated with a change in contractor so that all competitors will be on an equal footing. Indeed, a proper price evaluation should reflect the true costs to the Government of making a particular award by taking into account those tangible factors relating to costs that the Government would have to bear. In this respect, ASPR 19-301.1(b) specifies that transportation costs be included as a cost factor in the evaluation of bids or proposals when Government property is to be furnished to a contractor. Moreover, this Office has recognized the validity of the cost of changing contractors as a legitimate evaluation factor, even though such factor may penalize every bidder or offeror except the incumbent. 52 Comp. Gen. 905 (1973). We therefore find no merit to the protester's assertions in this respect.

Conclusion

Although the protest is denied with respect to most issues, the protest is sustained with respect to the Service Contract Act issue and the negotiation issue. We therefore are recommending that the Air Force submit an SF 98 to DOL and incorporate into its solicitation the appropriate ASPR Service Contract Act provisions as well as any wage rate determination issued by the Department of Labor. We are further recommending that the RFP be canceled and that the requirement be resolicited in the form of small business restricted advertising. In addition, we are suggesting that the Air Force consider 1) including in subsequent solicitations its estimate of spare parts that a contractor will have to furnish under the contract, and 2) revising the cancellation ceiling to be specified in the resolicitation in view of the revised estimated quantity for item 4AA.

Because this decision contains a recommendation for corrective action to be taken, it is being transmitted by letter of today to the congressional committees named in section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. 1176 (1970), which requires the submission of written statements by the agency to the House Committee on Government Operations, the Senate Committee on Governmental Affairs and the House and Senate Committees on Appropriations concerning action taken with respect to our recommendation.



Deputy Comptroller General
of the United States