

DOCUMENT RESUME

06925 - [B2147175]

[Allegations concerning INS Microfilming Contract]. GGD-78-83; B-188550. July 28, 1978. Released August 28, 1978. 4 pp. + 3 enclosures (20 pp.).

Report to Sen. Charles McC. Mathias, Jr.; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).
Contact: General Government Div.
Budget Function: Law Enforcement and Justice: Federal Law Enforcement and Prosecution (751).
Organization Concerned: Department of Justice; Immigration and Naturalization Service; National Educational Consultants, Inc.; Automatic Informational Retrieval Systems, Inc.
Congressional Relevance: Sen. Charles McC. Mathias, Jr.
Authority: 54 Comp. Gen. 60. 50 Comp. Gen. 110. 53 Comp. Gen. 382. 55 Comp. Gen. 1315. 54 Comp. Gen. 612. B-186846 (1977).
=4 C.F.R. 20.

A review of the Immigration and Naturalization Service (INS) contract with National Educational Consultants, Inc. for microfilming services focused on allegations and questions by the president of Automated Informational Retrieval Systems, Inc., an unsuccessful offeror. The allegations and responses to them are as follows: (1) The contract had been awarded to the highest bidder, whereas it should have been awarded to the lowest. The contract was awarded to neither the highest nor the lowest offeror, and there was no legal requirement to award it to the lowest bidder. (2) INS had changed contract specifications following the award. INS changed four of the specifications--one before award, one at the time of award, and two after the award. Clarification will be furnished on one of the changes. (3) The contractor had not completed the work on time. This was true; INS extended the performance period twice, and the work is still ongoing. (4) INS had not declared the contractor in default for its low production rate. INS has not terminated the contract for default but may obtain compensation for damages. (5) The contractor had violated a Federal wage determination. The Department of Labor is investigating allegations of wage law violations. (Author/HTW)



7175

Released Date

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

B-188550

July 28, 1978

8-28-78

RESTRICTED — Not to be released outside the General Accounting Office except on the basis of specific approval by the Office of Congressional Relations.

The Honorable Charles McC. Mathias, Jr.
United States Senate

Dear Senator Mathias:

In response to your March 7, 1978, request, we reviewed the Department of Justice's Immigration and Naturalization Service (INS) contract with National Educational Consultants, Inc. (NEC), Hyattsville, Maryland, for microfilming services. Our review focused primarily on the allegations and questions contained in a February 6, 1978, letter (attached to your request) from the president of Automated Informational Retrieval Systems, Inc. (AIRS)--an unsuccessful offeror.

This report presents our findings and views concerning these matters. Our comments are based on discussions with contractor and agency personnel and on an analysis of contract records.

The following is a summary of the allegations and our findings:

Allegation 1: The contract had been awarded to the highest bidder, whereas it should have been awarded to the lowest.

Finding: The contract was awarded to neither the highest nor the lowest offeror, nor was there any legal requirement to award it to the lowest.

Allegation 2: INS had changed contract specifications following the award.

Finding: INS changed four contract specifications--one before award, one at the time of award, and two after the award. We have asked INS to clarify one of these changes. We will furnish you the results of that inquiry.

GGD-78-83

(18349)

Allegation 3: The contractor had not completed the work on time.

Finding: The contractor did not complete the work on time. INS extended the performance period twice and the work is still ongoing.

Allegation 4: INS had not declared the contractor in default for its low production rate.

Finding: INS has not taken action to terminate the contract for default, but may obtain some compensation for damage caused by late performance.

Allegation 5: The contractor had violated a Federal wage determination.

Finding: The Department of Labor is investigating allegations of Federal wage law violations by the contractor. The Department has agreed to furnish you its results.

Our observations on each of the allegations are discussed in enclosure I.

HISTORY AND BACKGROUND
OF CONTRACT

In September 1976, INS terminated a contract with the Bruning Microfilm Corporation for the microfilming of an estimated 48 million documents. Termination resulted from Bruning's failure to meet the production schedule. At termination, an estimated 32 million documents remained to be microfilmed.

On February 24, 1977, following a competitive proposal process, ^{1/} NEC was awarded the contract (CO-14-77) to complete the work. Microfilming was to be completed by December 23, 1977 (43 weeks later). The contract was a firm fixed-price-per-document contract. At about one and one-third cents per document,

^{1/} A selection process in which offerors' proposals are evaluated and ranked with regard to established selection criteria.

the estimated cost of the contract was about \$429,000.

The NEC contract was part of a larger INS project of microfilming and automating its Master Index File, which is primarily an index showing the current location of existing alien files. In this regard, it serves as a locator file. In some cases, however, the index contains a document which is itself a complete file.

INS considered time of the essence in performance of the NEC contract. NEC's progress directly affected the progress of two companion contracts. As NEC (and earlier its predecessor, Bruning) microfilmed the original documents, INS selected about 8 million of the more current ones to send to a second contractor--the Appalachian Computer Services, Inc. Appalachian transferred data from the paper documents onto computer tape. This operation enlarged the data base in INS' automated Master Index System. According to INS, this system, still being developed, enables its Headquarters to respond to inquiries from field offices and other Federal agencies within hours, as compared to days under the manual system.

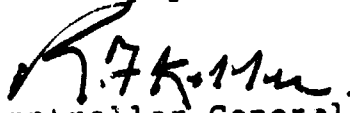
Also, as NEC returned the documents from microfilming, INS selected a third contractor for still another microfilming of about 9 million older documents. Microtek/Microfilm Techniques was under contract to microfilm these documents in a manner that would enable their retrieval by identification number.

Under our Bid Protest Procedures, AIRS, one of the seven losing offerors, protested the award of the microfilming contract to NEC. We concluded that AIRS' objections to certain specifications and other alleged deficiencies in the solicitation were not timely submitted under Bid Protest Procedures; thus, we did not resolve its allegations in our decision. Further, we concluded from the record presented that the INS evaluation of AIRS' proposal had a rational basis. Enclosure II is a copy of our August 4, 1977, decision.

In order to expedite this report, we did not obtain formal, written agency or contractor comments. However, we furnished a copy of the draft report to INS officials and considered their comments in preparing this report.

As arranged with your office, unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days from the date of the report. At that time we will send copies to interested parties and make copies available to others upon request.

Sincerely yours,


DEPUTY Comptroller General
of the United States

Enclosures - 3

DISCUSSION OF ALLEGATIONSALLEGATION: CONTRACT WAS AWARDED
TO HIGHEST BIDDER, NOT TO LOWEST

It was alleged that "the bidder whose proposal was almost double that of any other was awarded the contract * * *." This statement is in error. Of the eight firms responding to INS' request for revised proposals, seven presented firm fixed-price-per-document proposals as requested in the Request for Proposals (RFP). One firm, AIRS, proposed a fixed price per document plus other remuneration in the event documents were incorrectly filed or had to be refilmed because of defects in Government-furnished supplies. Of the seven firm fixed-price-per-document proposals, three were higher than NEC's proposed price. Of the three proposals that INS considered technically acceptable and that were in final contention for the award, NEC's price was in the middle. Because AIRS' price was subject to adjustments for contingencies, it was not all inclusive, and therefore could not be reasonably compared with the prices proposed by the other offerors.

In the letter it was asked, "If a criteria for awarding of government contracts is that it go to the lowest responsive bidder, how is it possible that a contract can be awarded to the highest bidder?" Federal Procurement Regulations provide that a negotiated contract need not be awarded to the offeror with the lowest price.

"While the lowest price or lowest cost to the Government is properly the deciding factor in source selection in many instances award of a contract properly may be influenced by the proposal which promises the greatest value to the Government in terms of possible performance, ultimate producibility, growth potential, and other factors as may be the case, * * *."

As provided in the RFP, the proposals were evaluated on the basis of offeror's experience, resources available, technical approach, and cost or price. Using a set of criteria such as these is a common proposal evaluation procedure.

As we stated in our protest decision, a technically unacceptable or inferior proposal need not be accepted solely because its price is low. AIRS' proposal was rejected as technically unacceptable.

ALLEGATION: INS CHANGED CONTRACT SPECIFICATIONS AFTER THE AWARD

The letter stated that although AIRS was faulted for pointing out problems with the specifications, the specifications were, in fact, changed following award of the contract to align with the comments AIRS had made in its proposal.

The statement is partially correct; some specifications were changed. We found documented evidence of three changes in specifications and undocumented indications of a fourth, as discussed below. However, not all of the changes were made following the award.

Frequency of payments was changed

INS' RFP specified that the contractor would be paid monthly. AIRS' proposal requested weekly payments, stating that AIRS could not accept a monthly billing program. In its selection deliberations, INS considered this request an indication of weak financial resources. About 3 months after the contract award, INS, at NEC's request, issued a modification providing for payments to NEC every 2 weeks rather than monthly.

Contract period was extended twice

The RFP required that no less than 825,000 documents be successfully filmed each week and that all work be completed within 43 weeks. Though AIRS agreed to complete work within 43 weeks (in fact, estimating about 30 weeks), it objected to a weekly rate of 825,000 documents being considered a rigid requirement. It said this rate should be only a goal. It contended that making accurate weekly predictions was impossible because of the great variance in nature and composition between batches of documents. INS found this exception to the RFP unacceptable.

NEC, on the other hand, agreed to both of the above RFP specifications. However, INS has twice modified the contract to extend the performance period because of NEC's failure to meet the weekly production schedule and final delivery dates. Contractor performance is discussed later in this report. (See pp. 6 to 8 .)

Density specification was changed

The RFP specified that "densities[^{1/}] shall be between 1.0 and 1.2; * * *." In its proposal, AIRS stated that this density was undesirable and unreasonable for the type of documents to be microfilmed and requested a density of 0.8 to 1.0. INS records show that AIRS' exception to the density prescribed in the RFP may have been a factor in rejecting its proposal.

NEC proposed to do the work at a density of 0.9 to 1.2, a change from the RFP, though not as different from the RFP as that proposed by AIRS. A clause in the contract provided that if inconsistencies occurred between the RFP and the contractor's technical proposal, the proposal would take precedence. As a result of this provision, the 0.9 to 1.2 density proposed by NEC became effective.

The INS project officer for the microfilming contract confirmed that the change in density specifications was made intentionally as a result of INS officials' discussions among themselves and with various offerors (AIRS included) who had recommended a change prior to the contract award.

The INS contracting officer did not comply with the Federal Procurement Regulations (FPRs) requirement that when, during negotiations, a decision is made to substantially modify a Government requirement, such modification shall be made in writing as an amendment and a copy furnished to each prospective contractor. Microfilming experts at the National Archives and Records Service and the National Micrographics Association stated that the specification change was signifi-

1/

According to a National Archives and Records Service official, "Density is a technical specification referring to the degree of image darkness. The degree of image darkness affects the legibility of the image on film."

cant and might affect a contractor's costs, risks, and production rate. Through INS' failure to amend the RFP, offerors were denied the opportunity to revise their offers based on the changed specification. It is not possible to determine on an after-the-fact basis whether they would have done so.

In view of the potential implications of this discrepancy on the protest decision we rendered earlier, our General Counsel has sent a letter (see enc. III) to the Commissioner, INS, requesting additional information on the award of this contract. We will provide you the results of that inquiry.

Sequence-of-documents specification
was changed orally

Another specification change, though undocumented, came to light during our review. The RFP provided that, when turned over to one contractor for microfilming, the documents would be "in Russell Soundex Code sequential order, a system of phonetically alphabetizing names." This meant that each individual document would be filed in its proper place. No mention was made of possible INS filing errors. An INS technical official said, however, that prior to submitting proposals, prospective offerors were individually and orally advised that Soundex code groups of documents were guaranteed to be in proper sequence, but that within these groups many individual documents might be out of sequence. However, they were also advised not to be concerned about correcting the filing errors, but to microfilm the documents in the order in which they were received. Because technical officials did not consider this oral amendment particularly important, they did not inform the contracting officer. Consequently, the change was not reduced to a written RFP modification.

Experience with this contract has shown that misfiling of documents can be a significant problem to a contractor. When the contractor's inspectors identify unsatisfactory images that must be refilmed, camera operators can quickly locate the documents for refilming if they are properly filed, whereas misfiled documents take longer to find and slow down the refilming operation. INS and NEC opinions differ, however, regarding the extent of misfiling, who was to blame, and its effect on NEC's production rate.

We cannot speculate on whether all offerors considered the oral amendment in preparing their proposals or on whether it would have had an impact on the final award had it been reduced to a written amendment to the RFP. However, failure to issue a written amendment may have violated the fundamental principle of competitive procurement that the written solicitation must reflect accurately the needs of the Government. Written amendments reduce the chances for misunderstandings and the possibilities of charges of fraud or favoritism. Because prospective offerors were advised of the change orally, and individually rather than as a group, the possibilities for misunderstandings and differences in interpretation were greater.

Stated volume of work was
not INS' best estimate

Our inquiry into allegations that INS improperly made specification changes after contract award also revealed that INS failed to properly make a specification change before the award. The RFP stated that the total number of documents to be microfilmed was approximately 32 million (this figure was a rounding of the actual estimate of 31.75 million). During negotiations with offerors, however, INS employees completed microfilming about 1.25 million documents that had been in process when Bruning's contract was terminated. This in-house work reduced the number of documents to be microfilmed under the new contract to approximately 30.5 million.

The contracting officer was not informed of the 1.25 million reduction in documents to be microfilmed; consequently, he did not inform the offerors. The project officer said the failure to request the contracting officer to amend the RFP was an oversight.

To keep this procedural oversight in perspective it should be pointed out that:

- The RFP stressed that the 32 million figure was an estimate and not a guarantee.
- We cannot determine whether offerors would have considered a 1.5 million documents change in the RFP (from 32 million to 30.5 million) significant enough to revise their proposals.

A contracting agency's stated estimate of the volume of work to be available under a contract should, however, be its best estimate based on available information. The INS RFP was not amended to reflect INS' revised estimate, and therefore did not meet that criterion.

ALLEGATION: CONTRACTOR HAS
NOT COMPLETED WORK ON TIME

The letter alleged "The contract has not been completed on time although the completion date was to have been January, 1978."

The contractor did, in fact, fail to complete the job within the original 43 weeks. The contract was initially modified to extend the expiration date by 14 weeks, from December 23, 1977, to March 31, 1978. Later, it was modified to extend the performance period to September 30, 1978, more than 9 months behind the original schedule.

From the end of an agreed upon 60-day catch-up period to April 5, 1978, NEC produced a weekly average of about 489,000 usable documents--about 59 percent of the required weekly production. During this 49-week period, NEC met or exceeded the required weekly production rate only four times. INS and NEC officials attributed the low production rate to many difficulties. They attached great importance to some of these difficulties, but only minor importance to others, which they said could be expected in any similar contract.

INS officials believed the poor condition of the documents (some were more than 50 years old) was the biggest single cause of NEC's production delays. They said that, because of the documents' varying thickness and contrast, fading, tears, staples, and bent corners, microfilming was slow and difficult. Largely for this reason, they tended to be sympathetic about NEC's failure to meet production requirements. While acknowledging that NEC had examined many of the documents before submitting its proposal, they said that, because of the huge volume of documents, it would have been difficult to predict the real extent of the problem.

INS officials also said that (1) NEC failed to recognize early that it had allocated insufficient resources to the job and (2) NEC efforts to catch up by adding cameras and personnel proved inadequate.

An NEC official said that the three major reasons for NEC's production delays were:

- Inadequate space limited the number of cameras and personnel NEC could use on the job.
- Documents received from INS were out of sequence "beyond the scope of any condition which we could have reasonably expected or was detailed in the R.P." He said that difficulty in finding misfiled documents that required refilming slowed production.
- Some INS-furnished film had been (1) damaged by heat while in INS storage, causing extensive refilming and (2) furnished from mixed (that is, different) emulsion batches, thereby requiring extensive refilming to achieve consistent microfilm quality.

The NEC official acknowledged that the poor condition of the documents had slowed production. He said the documents' condition was worse than anticipated, despite officials' having examined as many of them as they wished before submitting a proposal. Curiously, however, he did not mention poor condition of documents as a major cause of delays, saying that he had generally determined their condition beforehand.

Other reasons NEC officials gave for slow production were that:

- NEC was delayed in starting work because a camera repair firm was delayed in rebuilding NEC's cameras.
- NEC had difficulty hiring, training, and keeping good camera operators.
- Some documents were water damaged while in INS custody, causing slowdowns in filming.
- A 2-week air conditioning failure slowed production.
- Heavy snows kept some workers from their jobs.
- NEC had camera breakdowns and processor (developer) problems.

--INS inspectors' viewing machines scratched microfilm produced by NEC, then INS rejected the microfilm as having been scratched by NEC.

Production slowdowns resulting from some of the above problems would appear to be clearly the responsibility of the contractor (for example, delays in camera rebuild, hiring and training problems, inadequate space, air conditioning failure, and camera breakdowns). INS acknowledged responsibility for water damage to some documents. Responsibility for other difficulties listed is unclear or unresolved (for example, the allegedly defective film, scratches on the film, and documents filed out of sequence). Interviews of INS and NEC officials indicated that personnel of both INS and NEC may have caused documents to be filed out of sequence.

Although the relationship between INS and NEC has remained generally amicable, it has been marked by exchanges of allegations and denials regarding responsibility for the above difficulties. Initial determination of the extent of the contractor's responsibility for late performance, where responsibility is in dispute, is a function of the contracting officer, and ultimately may be resolved by a board of contract appeals or a court.

ALLEGATION: INS HAS NOT DECLARED
CONTRACTOR IN DEFAULT FOR ITS LOW
PRODUCTION RATE

The president of AIRS alleged in his letter that the INS contracting officer had said that (1) INS would not accept anything less than the prescribed production rate of a minimum of 825,000 documents a week and (2) if NEC did not meet this rate it would be in default, "no matter what."

The contracting officer, acknowledging the above statements, said he had made them early in the contract period before circumstances changed, that is, before numerous problems were encountered.

In an April 28, 1978, reply to a similar letter from AIRS, a Department of Justice official stated:

"The contract does include provisions for termination for default in the event of vendor noncompliance. By the contract terms exercise of the termination of default provision is permissive, not mandatory. Further, the Federal Procurement Regulations in providing guidance on contract termination proceedings permit the contracting officer to take alternative actions in lieu of termination for default when in the best interest of the Government."

According to the project officer, he and the contracting officer discussed terminating the contract for default but agreed that it would be in the Government's best interest to allow contract performance to continue. He gave several reasons:

- NEC was producing 400,000 to 500,000 good quality photos weekly and gave every indication of being able to finish the project.
- Termination would have resulted in a 5-to-6 month delay before another contract could be let.
- Termination would have delayed Appalachian's work on the companion contract.
- Big companies (for example, Kodak and 3M) had shown earlier that they were not interested in the contract.
- Based on his knowledge of microfilming firms, he doubted that any other company could have done better than NEC. He called this "a huge and complex job, the biggest of its kind ever undertaken."

INS officials acknowledged that the Government had suffered damage because of NEC's failure to meet the production schedule. These damages were in the form of added personnel and equipment costs, reduced efficiency, and delay in developing the computer data base for quick response to field office inquiries. Despite these damages, the contracting officer sought no monetary benefit from the contractor when he approved the initial contract modification extending the performance period. He explained this in an internal memorandum as follows:

"Some of the problems are, without question, due to the fault or negligence of the contractor; the responsibility for other delays are not so clear. Numerous allegations have been exchanged between NEC and INS * * *. In most instances NEC has denied responsibility for problems resulting in performance delays. The actual amount of contractor [caused] delay cannot, therefore, be determined."

Therefore, he concluded, the performance period would be extended to March 31, 1978, "at no change in the unit price." The subsequent extension to September 30, 1978, was also at no change in the contractor's unit price.

Near the completion of our review, two significant, related events occurred which may alter the above.

--In a June 15, 1978, letter, NEC presented a \$30,551 claim to INS for refilming costs allegedly incurred because of INS-furnished film that was (1) defective and (2) furnished in mixed emulsion batches. (See p. 7.)

--On June 16, 1978, the INS contracting officer issued modification 3, which INS and NEC officials had previously agreed on in discussions. It included a provision for an NEC payment of \$15,000 to the Government as consideration for contractor-caused delays prior to March 31, 1978. The provision was stated as follows:

"Modification No. 2 of the contract extended performance for an additional 14 weeks. In consideration for that portion of the extension covering any Contractor caused delays, it is mutually agreed by the parties hereto that the Contractor's claim against the Government will be reduced by the fixed amount of \$15,000.00, if and when such claim is adjudicated in favor of the Contractor."

Because of the possibility that this provision may be the subject of a dispute and ultimately a matter for adjudication, we consider it inappropriate for us to comment on it.

The contracting officer should have included a liquidated damages provision in the contract. Such a provision establishes

a predetermined amount of compensation for which the contractor will be liable to the Government for each calendar day of delay, where the delay was not the fault of the Government. Federal Procurement Regulations provide that such a contractual provision may be used where both (1) timely delivery or performance is so important to the Government that the Government may reasonably expect to suffer damage if the delivery or performance is delinquent and (2) the extent or amount of such damage would be difficult or impossible to ascertain or prove. Only when both of these conditions exist may the provision be used.

As stated earlier (see letter, p. 3) timely performance was highly important because two companion contracts relied on NEC's timely output. In our view, the Government could have reasonably expected to suffer damages if NEC performance was delinquent. Further, we believe it could have been reasonably foreseen that the extent or amount of such damages would be difficult to ascertain in terms of dollars, particularly where damages were in the form of delays in improving the efficiency and responsiveness of the Master Index System.

While a liquidated damages provision may not have eliminated the issue as to whom the delays should be attributed to, it would have eliminated the amount of compensation for damages as a potential area of dispute and effectively stressed to the contractor the importance of timely delivery.

Whether the Government actually suffers damages and finds it necessary to claim compensation under the liquidated damages clause is immaterial. Good contracting practice would have called for its inclusion in this contract as a safeguard.

**ALLEGATION: THE CONTRACTOR VIOLATED
A FEDERAL WAGE DETERMINATION**

The president of AIRS stated that his firm had evidence "that the winning bidder has violated the \$3.62 Federal Wage Determination which was part of the original contract."

Under provisions of the Service Contract Act of 1965, the Department of Labor provides wage determinations to protect employees of contractors and subcontractors furnishing services to Federal agencies. Wage determinations set forth the minimum wages or fringe benefits established by the Department for specific occupations in a geographical area. These wages and benefits are based on those prevailing for service employees in the locality.

The INS-NEC contract provided for a minimum hourly wage of \$3.62 for photocopy machine operators. This wage reflected the Department of Labor determination for the District of Columbia.

The contracting officer stated he had received no complaints from NEC employees about wage rate violations. The Department of Labor, however, informed us that it had received an allegation of NEC noncompliance with the wage laws and was investigating the matter. Therefore, we did no work in this area. The Department of Labor agreed to inform you of the results of its investigation.

DECISION

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

FILE: B-188550

DATE: August 4, 1977

MATTER OF: Automatic Informational
Retrieval Systems, Inc.**DIGEST:**

1. Protest alleging specifications for microfilming were deficient because of unrealistic weekly production rate and certain other stated requirements is untimely under Bid Protest Procedures because it was not filed before closing date for receipt of initial proposals.
2. Where protester's proposal was impossible to evaluate because it did not offer a firm, all-inclusive price and did not accept weekly production rate as firm contract requirement, rejection of proposal was reasonable.
3. Where solicitation provides for evaluation of offeror's prior experience and requires submission of list of relevant projects performed by offeror, agency, in addition, may consider its own experience with offeror under prior subcontract for such services in evaluating offeror's proposal.

Automatic Informational Retrieval Systems, Inc. (AIRS) protests the award of a contract to National Educational Consultants, Inc. (NEC) under request for proposals (RFP) CO-14-17 issued by the Immigration and Naturalization Service (INS) of the Department of Justice. The RFP solicited offers to microfilm approximately 32 million documents within 43 weeks at a firm fixed-price per document. Prices were required to be all-inclusive with no additional charges for supplies, transportation or any other service necessary to perform the contract.

In support of its protest, AIRS points out that its proposed price of \$.00698 per document was substantially below the \$.01538 price proposed by NEC. It contends that AIRS's superior technical proposal was not properly evaluated because of INS's lack of technical competence and because some of the evaluators were not familiar with evaluation requirements of the RFP. Finally, AIRS contends that its previous experience with INS as subcontractor to a defaulted prime contractor improperly prejudiced INS against AIRS.

B-188550

The RFP required a technical proposal showing a thorough understanding of the problems and a specific plan for achieving the required microfilming rate of 825,000 documents per week. The plan had to indicate the number of work shifts, personnel and cameras and describe the production and maintenance schedules. It stated that the offeror should include in its proposal any terms and conditions it wanted incorporated in any resultant contract. The proposal evaluation plan was as follows:

"Proposals will be evaluated on the basis of four areas of consideration with a maximum number of earned points assigned to each area. The total number of points for each offeror will be obtained by summing all of the points earned in each of the four areas of consideration.

<u>Category</u>	<u>Assigned Points</u>
<p>A. <u>Offeror's Experience:</u> The offeror's previous experience and demonstrated capabilities in micro-filing a large volume of documents in poor condition.</p> <p>The offeror should list projects in which relevant experience was gained, giving the title and brief description. Name and phone number should be given of the representative of the organization for whom the work was done.</p>	1-20
<p>B. <u>Resources Available:</u> The offeror should list all equipment and personnel needed to complete the work, and indicate what equipment and personnel are now available to the offeror and what would be acquired.</p>	1-20
<p>C. <u>Technical Approach:</u> Competence demonstrated in the technical narrative for performing the scope of work. (Proposals which do not meet a minimum score of 10 points in this category will be considered nonresponsive and will not be evaluated further.)</p>	1-25

B-188550

D. <u>Cost or Price:</u>	<u>1-35</u>
Total Maximum Points	100

Evaluation of the cost or price factor will be computed by multiplying the maximum point score (e. g., 35) by a fraction representing the ratio of the lowest responsive offer to the particular vendor's proposed cost or price as illustrated below:

$$\frac{\text{Price of Lowest Technical Acceptable Offer}}{\text{Vendor's Price}} \times 35 = \text{Vendor's Point Score}$$

The initial proposal submitted by AIRS stated that performance would be in accordance with all terms and conditions of the solicitation "except those to which specific exception has been made." It stated that although all work would be completed within approximately 43 weeks, the 825,000 documents per week rate should be considered a goal and not a "demanded criteria" and that AIRS would "request proper consideration when extremely poor documents are incurred." The proposal disclaimed any liability for records received in improper sequence prior to filming, and for defects in Government furnished film and cartridges. It stated that defects in such cartridges would be corrected by AIRS for \$4.00 per hour if the National Micrographics Association found that such defects were not the fault of AIRS. AIRS further stated that it was impossible to guarantee any definite diazo density and that clear and printable diazo copies should be the standard for acceptability. AIRS requested weekly billings and said that it could not accept monthly billings.

This proposal was rated as unacceptable by INS. AIRS was so informed by letter. Nevertheless, AIRS was requested to submit all information required by the solicitation which it previously had not submitted. Specific attention was called to two deficiencies. The first was that the proposal did not state a specific plan as to how the microfilming rate of 825,000 documents per week would be achieved and the second was that there was an apparent conflict in the proposal between the paragraph stating that all work would be accomplished within 43 weeks and a paragraph stating that the poor condition of the records "play havoc with the total completion ability and projected rate" of 825,000 documents per week which should be considered only as a goal. The INS letter stated that where the meaning of a proposal is clear and the evaluators can assess its validity, the contracting officer shall not disclose a

B-188530

weakness "which is inherent in the offeror's management or technical judgment or is the result of his own lack of competence or inventiveness in preparing his proposal." INS further stated that upon receipt of AIRS's response, its proposal would be further evaluated and that negotiations would be continued only if its proposal was rated technically acceptable and within the competitive range.

AIRS's response to the first point was, in essence, a claim that its proposal did in fact contain a specific production plan. With regard to the second deficiency, it stated it could find no apparent conflict and reiterated that the prescribed rate should be considered a goal rather than a rigid requirement. Again it made no firm commitment to the 825,000 per week rate except to say again that it would adhere to it but would request consideration wherever it encountered a series of defective records causing unusually slow progress in microfilming.

INS found the revised AIRS proposal to be technically unacceptable because of its failure to offer a firm inclusive price and to commit itself to a weekly production rate of 825,000 documents. AIRS was scored 11 for experience, 7 for resources, 12 for technical approach and 35 for price for a total of 65 points. NEC, the successful offeror, received 20 for experience, 17 for resources, 22 for technical approach and 15 for price for a total of 74 points.

AIRS takes sharp issue with the scoring of its proposal in comparison with NEC's winning proposal. It has submitted numerous arguments and articles from technical publications purporting to show that the specifications and the evaluations were deficient in almost every respect. However, to the extent that AIRS's protest is based on deficiencies apparent in the solicitation, including the specifications, it is untimely under our Bid Protest Procedures, 4 C.F.R. § 20.2(b)(1) (1976). Protests based upon such alleged improprieties must be filed prior to the closing date for receipt of initial proposals. We believe that AIRS's objections to the required 825,000 weekly production rate, the density range specified in the solicitation and all other requirements, including that for a firm all-inclusive price per document, to which AIRS took exception in its proposal, are untimely. Thus, they will not be resolved in this decision.

A technically unacceptable or inferior proposal need not be accepted solely because its price is low. Austin Electronics, 54 Comp. Gen. 60 (1974) 74-2 CPD 61. This is true whether the contract is to be awarded on a fixed-price basis or on a cost reimbursement basis. See, e.g., 50 Comp. Gen. 110 (1970); 53 id. 382

B-188550

(1972). Moreover, it is not the function of this Office to evaluate proposals or to make independent judgments as to the precise numerical scores which should have been assigned to the proposals. Therefore, determinations by procuring agencies regarding the technical merits of proposals will be questioned by this Office only upon a clear showing of unreasonableness, abuse of discretion or a violation of the procurement statutes and regulations. Group Operations, Incorporated, 55 Comp. Gen. 1315 (1976), 76-2 CPD 79.

In the light of these principles, we have reviewed the report of INS and the proposals of NEC and AIRS. The agency report indicates that NEC's proposal was rated substantially higher in each evaluation category except for cost. In essence, AIRS's proposal reflected only a commitment to use its best efforts to resolve the anticipated problems. It placed responsibility upon INS for several contingencies which the RFP indicated should be assumed by the contractor. From our review of the proposals, it appears that the INS evaluators could rationally evaluate the proposals as they did. The fact that AIRS disagreed with the INS evaluations of its proposal and that of NEC, does not render the evaluations unreasonable. Metis Corporation, 54 Comp. Gen. 612 (1975), 75-1 CPD 44. The refusal of AIRS to offer a firm, all-inclusive price per document to be filmed, to accept the weekly production rate as a firm requirement rather a goal, and to agree to other RFP requirements, rendered its proposal and flexible price impossible to evaluate on the same basis as the proposals from the other offerors. Under these circumstances, the technical qualifications of the INS evaluators, which AIRS challenges, the adequacy of its production plan for reaching its "goal" and the validity of the agency's views concerning the technical merits of the successful offeror are of academic interest only. In our opinion, AIRS did not have a reasonable chance for award without substantial and basic changes to its approach. In addition, the fact that AIRS was permitted to revise its technically unacceptable proposal certainly did not prejudice AIRS.

Accordingly, we find that INS's proposal was properly rejected. The other matters raised by the protester, namely, the technical qualifications of the evaluators and the method of evaluating the proposals need not be considered. With regard to prejudice because of AIRS's prior performance as a subcontractor, INS states that it did not assure AIRS that its prior performance would not be considered. Rather, according to INS, AIRS was assured only that AIRS would not be held responsible for problems on the prior

B-188550

contract which it did not cause. We note that under the RFP evaluation criteria, prior experience was required to be evaluated. See Virgin Islands Business Association, Inc., B-136846, January 16, 1977, 77-1 CPD 114.

Therefore, the protest is denied.

A handwritten signature in black ink, appearing to read 'Robert K. ...', is positioned above the typed name.
Deputy Comptroller Gen
of the United States



UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

OFFICE OF GENERAL COUNSEL

B-188550

JUN 13 1978

The Honorable Leonel J. Castillo
Commissioner, Immigration and
Naturalization Service
Department of Justice

Dear Commissioner Castillo:

Information has been developed by our audit investigation performed pursuant to a Congressional request which causes us considerable concern as to the accuracy of the factual statement submitted by your agency concerning the bid protest by Automatic Informational Retrieval Systems, Inc.

The protest, which was denied on August 4, 1977, copy enclosed, concerned a procurement for microfilming approximately 32 million documents within a 43-week time-frame. The Request for Proposals (RFP), No. CO-14-17, specified, in pertinent part, a density of 1.0 to 1.2. The report of your Associate Commissioner, Management, dated April 21, 1977, advised that with regard to the solicitation requirement for image quality, the density of 1.0 to 1.2, as specified in the RFP, was the correct density for microfilming the required source documents. However, our investigation has brought to light that the contract which had been awarded to another firm on February 24, 1977, relaxed the density and that this change may be significant in view of the condition of the documents to be microfilmed. The protester's proposal was faulted for taking exception to this and other related specifications. Obviously, this change of position was highly relevant to the protest.

B-188550

We feel that the April 21 report was clearly misleading and caused us to conclude that your agency had adhered to and presumably was requiring compliance with the "correct" density. In view of these representations, we did not inquire into the provisions of the contract awarded and dismissed this and other related specification issues raised by the protester as untimely.

It is requested that a prompt and full review be made of the validity of your agency's procurement actions as well as the propriety of its participation in this protest and that you advise this Office of your conclusions and the corrective action deemed to be appropriate.

Sincerely yours,

PAUL G. DEMBLING

Paul G. Dembling
General Counsel

Enclosure