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**DECISION**



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

10,524

FILE B-193931

DATE: June 19, 1979

MATTER OF Automated Informational Retrieval  
Systems, Inc.

CNG 01566

DIGEST:

*[Protest Alleging Firm Was Unfairly Precluded From Bidding on IFB]*

1. This Office will not question agency determination of procurement urgency to support limited 14-day (rather than 20-day) bidding time and contract start-up requirement of 2 weeks where such determination is reasonably supported by record, there is no showing of deliberate attempt by agency to exclude bidder, and adequate competition and reasonable bid prices were obtained. Fact that protester (was apparently unable or unwilling to make preaward investment necessary for start-up is not sufficient to warrant conclusion that <sup>the</sup> specification is improper.)
2. Where disagreement exists concerning technical specification, we will question agency's technical judgment only upon clear showing of unreasonableness, which is not present here where agency's position is supported by current regulatory requirements and justifications for specification.
3. IFB's 1-year contract term has not been shown to be unreasonable where allegation concerning potential competitive advantage of incumbent in future procurements is based on mere speculation.
4. ~~Where,~~ well before bid opening <sup>the</sup> protester has <sup>would</sup> verbal notice that certain solicitation terms will not be changed, <sup>before the</sup> agency's failure to provide formal written response prior to <sup>the</sup> opening has no effect on <sup>the</sup> validity of contract award.
5. This Office will not conduct investigations to establish whether protester's speculative statement that contract is not being performed in accordance with specifications is valid. Protester's general contention which serves only to question ability

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of prospective bidders to perform under specifications and challenges agency's eventual determination of responsibility will not be considered as this Office will not review affirmative determinations of responsibility absent circumstances not present here. Similarly, matters of contract administration are function and responsibility of procuring activity and are not for resolution under Bid Protest Procedures.

Automated Informational Retrieval Systems, Inc. (AIRS), protests the award of a contract under invitation for bids (IFB) No. DE-FB05-79OR10598, issued by the Oak Ridge Operations Office (ORO), Department of Energy (DOE). The solicitation is a reprourement for the production and sale of microfiche and eye - legible hard copy of research and development reports which are sold by the contractor to DOE, DOE contractors, other Government contractors, other Government agencies and other concerns for DOE Headquarter's Technical Information Center (TIC). The previous contract covering this activity was terminated for default by ORO on December 18, 1978.

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#### BACKGROUND

A synopsis of this reprourement was published in the Commerce Business Daily (CBD) on December 22, 1978. In conjunction with the CBD notice, ORO mailed the IFB to all potential bidders on the ORO mailing list. Approximately 14 inquires were received. At the time of the CBD notice it had not been determined that the procurement would be set aside for small business. As a result, some of the inquiries were from large business firms. At least four known small business firms responded to the CBD synopsis in addition to the known small businesses already on the ORO bidders mailing list.

The IFB was issued as a small business set-aside on January 3, 1979, with bid opening set for January 17, 1979. Due to the limited 14-day bidding time, the IFB was mailed by Express Mail or Air Freight to assure prompt delivery to those potential bidders on the

ORO bidders mailing list and those firms which had responded to the CBD synopsis. On January 11, 1979, amendment No. 001 to the IFB was issued, which clarified one specification and relaxed [reduced] another specified requirement. On January 17, 1979, four bids were opened. There were no exceptions taken to the specifications, terms, and conditions of the IFB by any of the bidders. The contract award was made to the second low bidder following a determination by the Small Business Administration that the low bidder was other than a small business concern, and was therefore not eligible for the contract award.

#### The AIRS Protest

AIRS seeks to have the contract award set aside and the requirement resolicited because it was unfairly precluded from bidding on the IFB, which itself was overly restrictive and illegal. AIRS has alleged that: (1) the 14-day bidding time "prohibited any small business from a rational or professional presentation," (2) the contract start-up time of 2 weeks is totally impossible in terms of achieving a "quality operation," ~~and almost~~ shows a form of favoritism in the award of the contract, (3) the specifications as related to density requirements "are not an achievable result for quality," (4) the contract term of 1-year "would give a potential new bidder an extreme advantage in any further procurement action," and (5) DOE did not formally respond in a timely fashion to questions raised by the protester prior to bid opening.

#### Bidding Time and Contract Start-Up Time

The report provided by ORO states that:

"The bidding time of 14 days and the contract start-up time of (2) two weeks was necessary because of the urgent requirement for a contract to be placed in view of the termination for default of the previous Contractor. The previous contract was terminated on December 18, 1978, but essentially production of new microfiche had ceased since the latter part of November.

\* \* \* The IFB allowed a bidding time of

14 days which is less than the 20 day bidding time generally prescribed in FPR § 1-2.202-1(c). However, FPR § 1-2.201-1(c) stated that 'This rule need not be observed in special circumstances or where the urgency of the need for the supplies or services do not permit such delay.' \* \* \* there was adequate response from the synopsis that indicated that there would be a sufficient number of small business firms who were interested in the procurement, who knew of the shortened start-up time, i.e., adequate small business competition was anticipated. It is recognized that the contract start-up time requires that firms who submitted bids have resources (equipment, personnel, financing, etc.) available to meet DOE's requirements, but there was no favoritism nor is it demonstrated when sufficient competition is generated on a valid Government requirement. In summary, the contract bidding time and start-up time was necessary due to a valid, urgent requirement of the DOE Technical Information Center."

In view of the termination for default by the previous contractor which brought production of the required materials to a complete halt and the consequential back-ordering of new requests, we believe that the contracting officer's decision to limit bid preparation time due to urgency was reasonable under the circumstances. Further, where, as in the present case, the method of solicitation in fact provided adequate competition and reasonable bid prices, we have held that the failure to solicit a particular bidder, or the failure to solicit him in time for him to submit a timely bid, does not, absent a showing of a deliberate intent to exclude the bidder--not present here--afford a sufficient basis to cancel the solicitation or question an otherwise proper award. See, Multi-Service Maintenance Corporation, B-187372, B-188030, May 20, 1977, 77-1 CPD 353; Robert Yarnall Richie Productions, B-192261, September 18, 1978, 78-2 CPD 207. AIRS has presented no tangible evidence rebutting these considerations and has not sustained the burden on it of affirmatively proving its case.

Reliable Maintenance Service, Inc.--request for reconsideration, B-185103, May 24, 1976, 76-1 CPD 337.

Similar considerations justify the reasonableness of the 2-week contract start-up time. While the protester was apparently unwilling or unable to make the type of preaward investment it felt would be required to meet the 2-week start-up specification, that alone does not establish that the requirement is improper. Evaluation of the requirement for contract start-up necessarily involves a certain risk which attends all bidders and which they can estimate and provide for in arriving at bid prices. In this regard, we have upheld the propriety of requiring bidders to estimate the cost of contract compliance and to bear the risks which accompany such compliance. Ronald Campbell Company, B-190837, April 24, 1978, 78-1 CPD 313; The Ellis Company, B-189390, B-189937, January 27, 1978, 78-1 CPD 70. Compare this result with our decision in Informatics, Inc., B-190203, March 20, 1978, 78-1 CPD 215, where we held a 2-month start-up time limitation unduly restrictive in part because there was no need to have the next contractor begin immediately at full production and some overlap between the new contractor and the incumbent was necessary.

We find that the protester's contentions concerning bid preparation time and contract start-up time are without merit.

#### Density Requirements

The agency report states as follows:

"The density requirement specified in Paragraph 6.a.10 and the fourth line of Paragraph 6.b., Page 22, of the IFB were stated as 'Line density shall be  $.1 \pm 0.01$  and background density shall be  $1.8 \pm 5$ .' Amendment Number 001 to the solicitation changed the density requirements to 'Line density shall be no greater than 0.12 and background density shall be  $1.8 \pm 0.5$ .' The change in the line density was made at the request of the DOE-TIC when it was realized after

the solicitation was issued that the line density was unnecessarily severe because of the close tolerance and that the measurable density closest to 0.00 is the most desirable result. TIC contacted the National Micrographics Association (NMA), a generally recognized association for micrographic industry standards, who stated that the standard for background density in NMA standard 104-1972 was in the process of being changed to 1.3 - 1.5 from 1.1 - 0.1 as currently stated in the NMA standard. The NMA standard for the line density (called D-min in the NMA standard) is 'no greater than 0.10.' TIC also contacted personnel at DOE headquarters fully experienced in micrographics who stated that the base density (called line density in the IFB) stated as 'no greater than .12' produces acceptable results and that the background density should be 1.3 - 1.5. The revised IFB specification requirement of a line density of no greater than 0.12 is a relaxed requirement from that specified in the NMA standard. The background density of 1.8 + 0.5 (1.3 - 2.3) required by the IFB, exceeds the range recommended by the NMA and even though it represents a relaxed standard, produces acceptable results, as has been demonstrated by the previous microfiche contractor. The reasonableness of the specification was further substantiated by the fact that four (4) firms (experienced in micrographics) bid on the specifications as stated in the IFB and took no exceptions to them, thereby agreeing to produce microfiche at the given density requirements. \* \* \*

AIRS has attempted to rebut the agency based on disagreement with the sources of technical advice, alleging that one source was misquoted, and alluding generally to Government fault in the prior contractor's default.

We will not question an agency's determination of what its actual minimum needs are unless there is a clear showing that the determination has no reasonable basis.

See Moore Business Forms, Inc., B-191963, August 24, 1978, 78-2 CPD 142. Where, as here, there is disagreement between the protester and the procuring agency concerning a technical specification, we do not believe it is appropriate for this Office to question the agency's technical judgment unless there is a clear showing of unreasonableness.

The protester's comments on the agency's report stated that the density specification was "totally out of line" with controlling regulations citing the Federal Property Management Regulations (FPMR), part 101-11-Records Management, 44 Fed. Reg. 15,715 (1979) (to be codified in 41 C.F.R. § 101.11 et seq.). At the outset we point out that this regulation took effect on March 15, 1979, and is not applicable to the contract award in this case on January 17, 1979. However, we believe that the agency has complied with the regulatory requirement which lends substantial weight to its position.

In this regard, the "Supplementary Information" introducing the regulatory provisions at 44 Fed. Reg. 15,716 (1979) states that:

"The technical standards adopted are based on standards already in force in some agencies or on available industry standards which are within the capabilities of micrographics technology.

\* \* \* \* \*

"The density ranges specified in § 101-11.506-3(e)(2) have been changed from a requirement to a recommended density range. They provide guidelines for Federal agencies and are appropriate for the types of documents specified. The paragraph was changed to allow flexibility where peculiar document characteristics or systems considerations may require it."

As the specification with regard to density requirements established by the agency complies with the regulation, and insofar as the recommended ranges in the regulation are defined as guidelines and not compulsory conformance requirements, our review of this standard does not support the protester's allegation. On the basis of the written record, especially in view of the agency's analysis of the qualifying criteria used in establishing the specification in regard to density requirements, we find no evidence to support any allegation that the agency's evaluation and conclusion in establishing the specification was unreasonable.

#### The Contract Term

In response to AIRS' allegations of potential favoritism, and the specific contention that the contract term of 1 year "would give a potential new bidder an extreme advantage in any further procurement action," the ORO report states as follows:

"The previous contract term for this procurement was three (3) years (although shortened by the termination for default to fourteen (14) months), and was shortened to one year at the request of TIC to allow time for consideration of possible significant contract revisions in the next contract period such as use of diazo rather than silver duplicate microfiche which would probably increase the number of firms interested in competing for the contract plus several other less significant technical changes. \* \* \*"

-In our decision in Boston Pneumatics, Inc., B-188275, June 9, 1977, 77-1 CPD 416, we noted that:

"\* \* \* certain firms may enjoy a competitive advantage by virtue of their incumbency or their own particular circumstances. \* \* \* We know of no

requirement for equalizing competition by taking into consideration these types of advantages, nor do we know of any possible way in which such equalization could be effected. \* \* \* Rather, the test to be applied is whether the competitive advantage enjoyed by a particular firm would be the result of a preference or unfair action by the Government."

It seems clear that the alleged advantage, if a reality, would exist regardless of whether the contract term was 1 year or 3 years. In any event, we find nothing arbitrary or unreasonable in the agency's selection of the contract term, nor do we feel that the agency's action was designed to restrict competition in any way. On the contrary, the agency apparently is attempting to expand future competition. In the absence of any affirmative evidence, the protester's allegation is properly regarded as mere speculation.

#### Timely Notice

The agency report acknowledges that a formal written response to AIRS' questions prior to bid opening was not provided. However, the agency contends that AIRS received notice in regard to the disposition of its questions, and that this notice was as timely as possible under the circumstances. The ORO report states:

"\* \* \* Although a written reply was not made to \* \* \* [AIRS'] letter of January 8, 1979, it was orally informed [by the contracting officer] on January 5, 1979, that the time requirements in the contract could not be changed, and on January 17, 1979 (the day after he first mentioned the density requirements) that the specifications were considered reasonable as revised and that the time requirements were necessary to fulfill the Government's actual needs."

Where AIRS first raised the for density requirements issue by telephone 1 day before bid opening, it failed to comply with the provisions of paragraph (3) of the instructions and conditions contained of the solicitation, which required as follows:

"EXPLANATION TO OFFERORS. Any explanation desired by an offeror regarding the meaning or interpretation of the solicitation, drawings, specifications, etc., must be requested in writing and with sufficient time allowed for a reply to reach offerors before the submission of their offers.\* \* \*"

In view of these instructions, any challenge as to the fairness or form of the response is unfounded. Moreover, the agency's verbal response on the issue of density requirements on January 17, 1979, was reasonable under the circumstances.

AIRS' letter of January 8, 1979, appealed to the "better judgment" of the ORO, Director of Procurement as to the issues of bidding time, contract start-up time, and the contract term. However, AIRS had been informed by the contracting officer on January 5, 1979, that the reprocurement was urgent and that the terms and conditions would not be changed. AIRS was again notified of the determined necessity of the time requirements by telephone on January 17, 1979. AIRS' objection is directed to the form as opposed to the substance of that notice. We conclude that ORO's failure to provide a formal written response to AIRS' letter of January 8, 1979, had no effect the validity of the award.

#### Conclusion

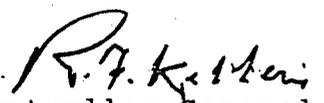
While the protest raised the above allegations individually, AIRS contends generally that any bidder which used the protested specifications without question (as four did) must not understand those specifications, and therefore could not perform the contract in accordance with these specifications. AIRS urges that an investigation into the awardee's performance would reveal that the specifications are not being achieved in compliance with the contract terms.

As we stated in Bowman Enterprises, Inc., B-194015, February 16, 1979, 79-1 CPD 121, it is not the practice of this Office to conduct investigations to establish whether a protester's speculative statements are valid. Rather, the protester has the affirmative burden to

prove its case. See M & H Mfg. Co., Inc., B-191950, August 18, 1978, 78-2 CPD 129. This general contention serves only to question the ability of prospective bidders to perform this contract and challenges the agency's eventual affirmative determination of responsibility. This will not be considered since this Office does not review affirmative determinations of responsibility unless there is an allegation of fraud on the part of procuring officials, or the solicitation contains definitive responsibility criteria which have not been applied. Columbia Loose-Leaf Corporation, B-193659, January 23, 1979, 79-1 CPD 45; Central Metal Products, Inc., 54 Comp. Gen. 66 (1974), 74-2 CPD 64. Neither exception is relevant in the present case.

Furthermore, whether the contract is being performed in accordance with the specifications is a matter of contract administration. Our policy is that contract administration is the function and responsibility of the procuring activity and matters relating thereto are not for resolution under our Bid Protest Procedures, 4 C.F.R. part 20 (1978). SMI (Watertown), Inc., B-188174, February 8, 1977, 77-1 CPD 98; Virginia-Maryland Associates, Inc., B-192031, July 19, 1978, 78-2 CPD 51.

The protest is denied.

  
Deputy Comptroller General  
of the United States