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

B-177750

May 31, 1973

Computer Time Corporation
3835 Elm Street
Denver, Colorado 80207

Attention: Mr. Sheldon B. Sheftel
Vice President

Gentlemen:

Reference is made to your letters of February 26, 1973, and prior correspondence, protesting award to any other bidder under invitation for bids (IFB) NBS 10-73 issued by the National Bureau of Standards (NBS) Contracting Office, Boulder, Colorado.

The IFB, issued October 4, 1972, called for an estimated 7 months of time-sharing computer services. Six bids were opened on November 22, 1972. After evaluation of bids, it was determined that the Computer Sharing Services, Inc. (CSS), total evaluated price of $2,319.38 was the lowest received, and the Computer Time Corporation (CTC) bid evaluated at $2,600.36 was the second lowest. By letter dated December 4, 1972, CTC protested to NBS on the basis that the bid evaluation factor prescribed in paragraph 1.6.2 of the specifications was unreasonable. Paragraph 1.6.2 provided:

> Program duplication and the time required to check out the programs after transfer will be an added expense to the Government and the cost thereof will be a factor in the evaluation of bids. Accordingly, and for evaluation purposes only, the amount of $1,000.00 will be added to each bid which requires program duplication and check out after transfer.

CTC contended that this provision unduly penalized all potential suppliers except CSS, the current contractor.

By letter of December 22, 1972, NBS denied the protest, stating "that the evaluation factor represents an accurate depiction of the costs that the Government will incur if a change in vendors is required." NBS also stated that the protest was untimely, since CTC had 49 days before bid opening to protest the

PUBLISHED DECISION
52 Comp. Gen. _____

[Protest Alleging Unreasonable Evaluation Criteria]
~~741361~~ 091893

evaluation factor but did not do so. As to the timeliness of the protest, we agree with NBS that your protest fails to meet the standard set forth in paragraph 20.2(a) of our Interim Bid Protest Procedures and Standards that protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening shall be filed prior to bid opening. Nevertheless, since the protest raises issues significant to the procurement practices and procedures utilized by NBS, it will be considered on its merits. Paragraph 20.2(b) Interim Bid Protest Procedures and Standards.

Your contention concerning paragraph 1.6.2 is that the $1,000 evaluation factor is fallacious since it is based upon an archaic method of transfer of computer information--the preparation of a paper tape containing the computer program which will be supplied to the new contractor. You state that the actual method used will be the standard industry practice--that is, transfer of the program from the current vendor's disk to a magnetic tape (unloading) and thence from the tape to the new vendor's disk (reloading). Also, you state that CSS conducts this unloading and reloading procedure on its own machines daily and NBS does not find it necessary to conduct any checkout after these transfers. Furthermore, since CSS and CTC have identical equipment, transfer to CTC would be identical to the daily unloading-reloading procedure and no checkout would be necessary. Moreover, you maintain that since the Government owns the computer programs involved and that the CSS bid provides for charges for magnetic tape file transfers, it is clear that the Government has a legal right to force CSS to make the magnetic tapes available to another firm. Finally, you dispute the NBS figure used to support the checkout of the program after transfer to a new vendor.

We note that the specifications do not call for transfer to a new vendor by what you describe as the standard industry practice. Instead, paragraph 1.6.1 provides:

> The programs being used by the Government are currently stored in a computer being used by the Government on a "time share" basis under a FY1972 contract. If transfer of these programs to a new system is required, the Government will provide the successful bidder with copies of the programs to be transferred and he shall transfer the programs to his system without charge and within 10 days from the date of his receipt of the program copies. Changeover to a new system will require the transfer of

> approximately 130,000 characters of data. After program transfer has been accomplished, the Government will conduct such tests as may be necessary to satisfy using personnel that the programs have been transferred without error. If an error is detected, it shall be corrected by the bidder/contractor within 24 hours after receipt of notice of error. Connect time for checkout of program transfer shall be without charge to the Government.

The contracting officer has offered the following explanation of the rationale behind the method of transfer and the need for checkout:

> Mr. Shoftel is also incorrect in his contention that the only work involved in changing to a new vendor is a simple exchange of magnetic tapes between vendors. The Government neither owns the required magnetic tapes nor has any legal right to force the current vendor, Computer Sharing Services, Inc., to supply the magnetic tapes to another firm. There is no reason to assume that Computer Sharing Services, Inc., or any other vendor, would relinquish its property to benefit a competitor. Therefore, the Government must provide for the preparation of paper tape for each file to be transferred. Computer Time Corporation, or any successful offeror other than the present vendor, would be supplied a typed copy of the programs rather than magnetic tape.
>
> The requiring activity has repeatedly determined that it must perform a thorough check-out of all work processed through a new vendor. The majority of the programs that would be transferred are for the preparation of calibration and other reports which are supplied to private contractors and other government agencies. The accuracy of the program transfer must be confirmed by NBS, since the end users of the reports have no method of determining the accuracy of the reports and, thus, must take them at face value. * * *

It is the well-established policy of our Office that an agency's determination of its needs will not be questioned in the absence of demonstrated fraud or clearly capricious action. 49 Comp. Gen. 857 (1970). On the present record, we see no basis to question the judgment of NBS regarding the need for the transfer and

checkout procedures specified in paragraph 1.6.1. The fact that the standard business practice may be different does not supersede or alter the clear and unambiguous terms of the IFB, B-167993, October 28, 1969. Further, although you have questioned the $20 man-hour rate upon which the evaluation factor was based on the ground that it is more than a Government employee earns an hour, the contracting agency has explained that it was derived from the hourly salary rate, plus leave and employee benefits and overhead for a Government employee involved in the program duplication and checkout.

Also, you have contended that the $1,000 evaluation factor is unjustified no matter how it is calculated or derived since it prevents effective competition in a procurement of this size. You point out that where the evaluation factor equals nearly 50 percent of the evaluated price, although competition from other bidders may force the current contractor to lower its prices, it is unlikely that a competitor could underbid the incumbent vendor. In this regard, we note that your second low bid would have been $3,600.36 had not CTC offered a $1,000 usage credit to offset program transfer costs. Moreover, the other four bids were so high that the contracting officer did not develop their total evaluated prices. The prices offered by the four high bidders for the first item alone—50 hours per month of terminal time--were in excess of the total evaluated prices of CSS and CTC for terminal time, storage, central processor runs and special charges. We cannot say that the contracting officer should have cancelled the IFB because the substantial difference in bid prices indicated that competition had been inadequate to insure a reasonable price. However, we are suggesting by letter of today, copy enclosed, that the Department seek a procedure which will enable bidders to compete more effectively against the incumbent and to negotiate to insure price reasonableness where effective competition cannot be obtained.

An additional objection raised in your February 26, 1973, letter concerns the bid evaluation criteria set forth in paragraph 9.1 of the IFB. Paragraph 9.1 provided:

> During the evaluation of bids, and for evaluation purposes only, the following assumptions will be made:
>
> a) 50 hours of terminal time, including data entry, will be used each month;

b) 150,000 characters of data will be stored each month;

c) The equivalent of 370 separate runs of the program "TEST" #2 will be made each month (to evaluate cost of CPU);

d) Of the required service, 90% will be required during prime time and 10% during non-prime time; (For the purposes of this solicitation/contract, "prime time" is hereby defined as those hours between 7:30 A.M. and 4:30 P.M. local time and "non-prime time" is hereby defined as those hours not included in prime time.) and

e) The number of users will be increased to a total of 20 during the term of the contract.

You state that if the CSS price under the current contract is applied to these assumptions, the estimated monthly charges would total $674.13. However, your review of the actual monthly charges for the 14 months prior to the issuance of the IFB reveals an average amount of $1,473 and from October 1972 through January 1973 an average amount of $1,093.70 showing that more work is involved than the factors in paragraph 9.1 would indicate. You conclude that these evaluation factors misled all the bidders except CSS and that the solicitation was defective in this respect.

It appears that the effect of these criteria on the bid prices was determinable by each bidder at the time the bid was being prepared; that is, they consisted of "objectively determinable factors from which the bidder may estimate within reasonable limits the effect of the application of such evaluation factor on his bid in relation to other possible bids." 36 Comp. Gen. 330, 335 (1956). While it may be that CSS had an advantage because of its prior work experience and knowledge that the actual work required might exceed the amount indicated by paragraph 9.1, this circumstance does not compel the conclusion that the criteria were not based on valid estimates of the agency's expected usage during the contract period. Our Office has recognized the administrative difficulties inherent in arriving at reasonable estimates of the quantum of services required in situations of this nature. 44 Comp. Gen. 392, 395 (1965). Further, it is not improper for an agency to base its estimates on current expectations instead of historical usage. B-175928, August 2, 1972.

In view of the foregoing, the protest is denied.

Sincerely yours,

PAUL G. DEMBLING
Acting Comptroller General
of the United States