

**October 25, 1996**

**P.S. Protest No. 96-16**

## **ROCKWELL INTERNATIONAL CORPORATION**

**Ordering Agreement No. 102590-96-H-H001**

### **DIGEST**

Protest against noncompetitive issuance of ordering agreement for automatic call distribution systems is sustained; "unusual and compelling urgency" cited in justification is not demonstrated, and price advantage obtained by incorporating pricing from vendor's larger contract with another agency does not establish that purchase is in the interest of the Postal Service where other sources exist, but their technical or price alternatives were not investigated or evaluated.

### **DECISION**

Rockwell International Corporation protests the June 26, 1996, noncompetitive issuance to Aspect Telecommunications of an ordering agreement for six to eight automatic call distribution systems (ACDS or ACD system) by Information Technology Purchasing (ITP) at Postal Service Headquarters.

An ACDS is comprised of hardware and software designed to receive incoming telephone calls and direct them to telephone agents. Such systems are typically used to handle large volumes of customer calls at centralized locations. The Postal Service plans to use the ACD systems to implement its Corporate Call Management (CCM) initiative, in which calls from postal customers are redirected from local post offices to National Service Centers (NSCs). Eventually a national "800 number" will be promoted for such calls.<sup>8</sup>

<sup>8</sup> This description and chronology are taken from the contracting officer's statement and its supplements.

The Postal Service's CCM initiative is a project of Customer Service Management (previously also known as Corporate Call Management), under the purview of the Vice President, Marketing (also referred to as the Chief Marketing Officer or CMO). The CCM initiative began in February, 1995. In April of that year, a three-phase plan for research and development, establishment of a prototype, and deployment and implementation was adopted. In that plan, a decision analysis report (DAR) was to be presented to the Postal Service Board of Governors (BOG) in May, 1996, and the first NSC was to be activated in September, 1996. In late March, the presentation to the Board of Governors was postponed from May to June and the implementation of the first NSC was postponed from September to October.

In the fall of 1995, representatives of the Postal Service's National Network Service Center (NNSC), Raleigh, NC, involved with the CCM were approached by Rockwell International about the possibility that the Postal Service might acquire and upgrade two Internal Revenue Service Rockwell ACDS systems which had become surplus because IRS was replacing them with Aspect ACDS systems. Although Rockwell submitted such a proposal, the Postal Service did not pursue the matter.

In January, 1996, Marketing, which had prepared a draft statement of work (SOW) for the ACDS, contacted ITP to discuss acquisition strategy and the preparation of a procurement plan. In the words of the contracting officer, "[i]nitial consideration was focused on five suppliers that were prequalified as the primary best-of-breed/volume suppliers in the ACDS market." On February 26, these suppliers, including Aspect, Rockwell, and Lucent Technologies, an interested party in this protest, were furnished a draft ACDS SOW for comment. Their comments were received on March 16.

ITP's initial schedule for the ACDS purchase contemplated a competitive purchase which included the following milestone dates:

Procurement plan completed	March 15
Issue solicitation	April 10
Offers due	May 10
Request for BAFOs	May 24
Award Contract	June 28

The contracting officer describes this schedule as "fast paced," taking 88 fewer days than a "traditional" purchasing schedule.

The CCM research and development phase included the establishment of two National Learning Centers in Phoenix, AZ, and Tampa, FL. At the Board of Governors' April meeting in Phoenix, the Governors toured the Learning Center there. In connection with that visit, the Postal Service issued various press releases about its plans to establish national service centers, the first of which "may open by the end of the year."

On April 23, because "additional requirements in the SOW resulted in required changes to the procurement plan and to the Solicitation [contract line item number] structure and the evaluation criteria," the schedule for the ACDS purchase was revised to reflect the following milestone dates:

Procurement plan completed	April 23
Issue solicitation	May 28
Offers due	June 28
Award Contract	August 23

The contracting officer describes this as "an extremely aggressive schedule that [left] no room for deviation and shortfall . . . [which was] a force fit into a dictated operational date of October, 1996." He states that there was "high risk" that award would not occur by the end of August, and further that there was "high risk that installation, training and network operations discussions could not have been conducted in 60 days."

The initial and revised milestone schedules were both incorporated into an Individual Procurement Plan for the ACD system. By May 21, that plan had obtained the concurrence of the Manager and Project Manager for CCM, the Project Coordinator in Information Technology, and the NNSC Project Manager. However, the contracting officer did not adopt that procurement plan.

On April 10, representatives of ITP approached the IRS about allowing the Postal Service to order against its ACDS contract with Aspect. IRS' initial response was favorable, as was a subsequent contact with the Treasury Department. The process of obtaining formal IRS approval was subsequently characterized as "bureaucratic" and "lengthy." As an alternative, ITP considered "creating our own contract with Aspect, using the same general terms, conditions and pricing as the IRS contract. The IRS contract was competed at a much higher volume than our requirement . . . , which one could conclude would result in significantly lower prices." The contracting officer's thinking was memorialized in a noncompetitive justification which is set out below.<sup>9</sup>

<sup>9</sup> NOTICE OF INTENTION TO PROCURE FROM ANOTHER GOVERNMENT CONTRACT  
AND/OR  
REQUEST FOR NONCOMPETITIVE PROCUREMENT

I. REQUIRING ORGANIZATION: Operations/Marketing/Information Systems

II. SUPPLIER: Aspect Systems

III. ESTIMATED VALUE OF PROCUREMENT: \$20,000,000

IV. DESCRIPTION :

A. Background:

The United States Postal Service intends to significantly improve its customer service performance for customer telephone call handling and to take advantage of the strategic opportunity these calls represent to improve operational service performance. The Corporate Call Management (CCM) project is a part of a larger vision for enabling customers to choose the method by which they conduct business with the Postal Service, the time or place, e.g., a retail window, a self-service machine, telephone, or computer. Regardless of the method chosen, the customer must be able to obtain a consistent and robust set of services. To initiate this project,

National Service Centers (NSCs) will be developed and implemented. These NSCs will be supported by a centralized call management infrastructure which will standardize the customer interface for all small business, small not-for-profit, and residential Postal Service customer inquiries using the telephone. Corporate Call Management is part of a larger customer contact vision that will make postal services available to customers, regardless of how they decide to do business with the Postal Service, whether by phone, computer, or in person. CCM will offer customers a single point of contact for all services. Long term marketing strategy reflects the need to build a minimum of six call centers to handle projected annual call volumes of 200 million. Two learning centers may need to be transitioned for compatibility reasons.

#### B. Acquisition Strategy:

[ITP] recently started an accelerated procurement process to procure 6 to 8 Automatic Call Distribution Systems (ACDS) for the Corporate Call Management Program. Simultaneously we started pursuing other strategies that could put the ACDS in place sooner than the procurement process. The urgency of the installation of the ACDS is related to commitments by the SVP Marketing and the PMG. Initial contact with the IRS (which had contracted for 76 ACDS in 1992) led us to believe that they would consider approving a Postal buy off their contract. Recent conversation between the Manager of [ITP] and the Director of the Office of Information Resources Management, US Treasury[,] indicated that the prospect of using the IRS contract (with Aspect Systems) was very good. This action would be an exception to the normal noncompetitive process as it is an order placed against a government source, IAW Management Instruction AS-710-95-7. The IRS contract was awarded competitively.

The purpose of this NC Request is to inform management of this strategy as well as request approval to procure the ACDS noncompetitively through another strategy that [ITP] has used successfully before. The second strategy, which would require NC approval, would be to create our own contract with Aspect, with the same general terms and conditions as the IRS contract. The IRS contract was competed at a much higher volume than ours (76 systems vs 6 to 8). This strategy was taken with Intermec Corporation in 1994 when we incorporated their US Army contract for Automatic Identification Technology equipment, software and services into a Postal Ordering Agreement.

#### V. FUTURE COMPETITION:

Although the customers do not plan to procure more than 8 ACDS, installing one make will establish a standard that will require the same ACD be acquired if more are needed in the future. Software interfaces are available to patch various makes however this reduces the effectiveness of the operation.

#### VI. RISK OF PROTEST:

Initially five vendors were prequalified and have reviewed the SOW for comments. The SOW has been rewritten and the Solicitation is complete. If the SOL is not released, the risk of protest would not exist since Postal ordered off another agency contract that was competed. If the SOL were released prior to a decision based on either strategy above (VI.B.), there may be some risk of protest from at least one of the five vendors (Rockwell). Rockwell is the other true ACD vendor, the other three are PBX (switch) vendors that do not possess the real time reporting capability. In a competition these PBX vendors would have received a lower technical score.

On June 4, the Manager, Customer Service Management, presented the DAR for the CCM Prototype to the Board of Governors. The DAR included a request for \$21 million in capital investment funds for the first NSC, in addition to other funds. The presentation stated that the first center would be located in Denver, CO, and would open on October 21, 1996. The Board of Governors approved the request.<sup>10</sup>

#### VII. RECOMMENDATION:

It is recommended that approval for noncompetitive procurement action be authorized for this procurement under PM 4.4.2.a.6., "When competitive purchasing would not be in the best business interest of the Postal Service". Justification for noncompetitive award is based on the fact that creating our own contract with Aspect, with the same general terms and conditions as the IRS contract would result in a magnitude of business benefits to Postal. Aspect Systems has agreed to sell to us at the IRS discounted price, which was competed at a much higher volume than our requirement (78 systems vs 6 to 8). This avenue would allow the Postal Service to take full advantage of the enormous volume discount given the IRS, most likely not available to the Postal Service under other circumstances, and is in keeping with the spirit of the Economy Act. This strategy will also save significant overhead costs and time required to process the ACDS competitively. Contract administration would also be reduced significantly since the IRS has previously modified the contract with Aspect to insert various state-of-the-art improvements such as Computer Telephone Integration Products and Network/IVR Management.

Additional justification is provided under PM 4.4.2.a.3., "Unusual and compelling urgency, when delay would seriously harm the Postal Service". Justification for noncompetitive award is based on the fact that commitments have been made by [the CMO] to [the PMG] and the Board of Governors that the first NSC for CCM will open this October. During the April 1 BOG meeting in Phoenix press announcements were made at the Phoenix National Learning Center by [the CMO] regarding the scope and timeliness for the CCM program. The NSC can not function without the ACD, and our ability to deliver on corporate commitments will be compromised if we can not provision the ACD as scheduled. As you know we have made extensive use of our existing provisioning vehicle for ACDs with Nortel in our Learning Cen[t]ers and have found their functionality to be inadequate.

PREPARED BY: David Beckman

CONTRACTING OFFICER: Craig R. Goral

#### APPROVALS:

[signed]  
Phil Baldwin                      Date: 5/23/96  
Manager, Information Systems Purchasing

[signed]  
Frank Hansen                      Date: 5/24/96  
Manager, Headquarters Purchasing

[signed]  
A. Keith Strange                      Date: 5/24/96  
Vice President, Purchasing and Materials

<sup>10</sup> The Board's minutes reflect the presentation and the following action:

On a motion duly made and seconded, and following a detailed discussion regarding future

On June 20, Aspect submitted a letter to the contracting officer making "the terms and conditions of the [IRS] contract available to the Postal Service" and providing "General Pricing Notes" for the Denver NSC site and three others. On June 26, the Postal Service entered into a five-year ordering agreement with Aspect which incorporated the terms of the IRS contract, provided a maximum order limitation of \$20,000,000, placed an initial order for four sites, and provided an initial amount of operational funding.

Rockwell's protest, dated July 17 and received on that date, recites that it learned of the award to Aspect on July 2. The protest contends that the noncompetitive justification is seriously flawed because "no urgent and compelling circumstances exist for the sole-source award . . . to Aspect" since "Rockwell can provide USPS with six to 8 ADCSs . . . for a price lower than \$20 million," and can do so "timely . . . so as to meet USPS' schedule and preclude any delay to the CCM Program."

Rockwell notes that it competed with Aspect for the IRS contract in 1992, and contends that while "[t]he Aspect ACD is based on 1980's technology . . . , Rockwell [subsequently] fielded an advanced and technologically more sophisticated ACDS. . . ." Rockwell received a GSA multiple award schedule contract for its ACDS, but is prepared to provide it to the Postal Service at a substantial discount from its schedule price.<sup>11</sup>

Describing its participation in commenting on the February 26 draft SOW, and subsequent conversations with ITP personnel about the progress of the procurement, Rockwell states that it was advised on April 19, May 9, and June 9 "that the SOW was undergoing revision and that the solicitation would be released shortly" and complains that it was deliberately misled by the last such communication given the May 28 completion of the noncompetitive justification.

According to Rockwell, Procurement Manual (PM) 4.2.1 a. and 4.4.1 b. mandate "adequate price competition for all . . . procurements" unless one or more of a limited number of exceptional conditions exist.<sup>12</sup> Rockwell disputes the conclusion of the noncompetitive

capital and expense funding for the project, the Board unanimously approved \$28.8 million.

<sup>11</sup> Elsewhere in its initial protest, Rockwell portrays its GSA contract as an "expeditious alternative" to the selection of Aspect. However, in a supplemental submission of July 30, Rockwell states that its GSA contract expired on April 30, 1996. According to Rockwell, had the Postal Service been interested in using the GSA contract after that date, Rockwell and GSA could have expedited the negotiation of a follow-on schedule contract.

<sup>12</sup> PM 4.2.1 a. provides as follows:

4.2.1.a Policy. Purchases must be made on the basis of adequate competition whenever feasible (see 1.7.2).

PM 4.4., Noncompetitive Purchasing, provides in relevant part as follows:

**4.4.1 General**

4.4.1.a Definition. A noncompetitive purchase is any purchase of supplies or services from one

justification that "competitive purchasing would not be in the interest of the Postal Service," because it fails to take into account "the technical superiority of the Rockwell ACDS over the Aspect equipment," and its conclusion that the "Aspect product would result in substantial cost savings," because "Rockwell can provide the USPS with a more advanced ACDS at a lower cost.

Rockwell also contends that the Postal Service cannot rely on urgent and compelling circumstances to justify the noncompetitive award, citing decisions for the proposition that urgency resulting from lack of advance planning cannot justify such awards, and asserting, in any event, that Rockwell could propose and perform on an expedited schedule which would allow activation of the NSC by October, 1996.

Finally, Rockwell contends that the manner in which the Postal Service reached its decision to award to Aspect was unreasonable because the Postal Service misled prospective offerors about its intentions and "selected a solution before considering alternatives."

source without competition.

4.4.1.b Limitations on Use. Noncompetitive purchasing methods may be used only when competitive purchasing is not feasible or appropriate.

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#### 4.4.2 Justification

4.4.2.a Circumstances. Circumstances under which noncompetitive purchasing may be appropriate and justified include:

\* \* \*

3. Unusual and compelling urgency, when delay would seriously harm the Postal Service;

\* \* \*

and

6. When competitive purchasing would not be in the interest of the Postal Service.

4.4.2.b Reference. Every noncompetitive purchase must be justified in writing and approved in accordance with Management Instruction AS-710-95-7, Noncompetitive Purchases.

Management Instruction AS-710-95-7 prescribes the form for justification of a noncompetitive purchase, and provides for its approval. The instruction contemplates that justifications are to be prepared by the requiring organization, and, when the request exceeds \$100,000, be endorsed by the requiring organization's vice president. Requests over \$100,000 are approved by the vice president, Purchasing and Materials.

Although the noncompetitive justification here (footnote 2, *supra*,) includes the approval of the vice president, Purchasing and Materials, it lacks the endorsement of the vice president, Marketing, (apparently because it was prepared in Purchasing, rather than in the requiring organization) and it does not follow the structure and address all the topics prescribed for the justification.

Citing *Peoples Gas, Light, and Coke Co. v. U. S. Postal Service*, 658 F.2d 1182, 1191-92 (7th Cir., 1981), for the proposition that "[t]he manner in which the USPS acts is often as important as the result [it] reaches," it complains that the Postal Service chose its course of action without considering alternatives, and disregarded information which did not agree with its selected approach. The protester seeks the termination of Aspect's contract and the resolicitation of the requirement.

Lucent submitted a request to participate in the protest which stated that the contracting officer had advised it in April that "the RFP was not yet ready for release and that the USPS was investigating alternative procurement methods," and that Lucent had advised him of the availability of its GSA Schedule 58 contract as such a vehicle.

Responding to the protest, the contracting officer's statement of August 2 defends the noncompetitive procurement as "driven by the unusual and compelling time urgency of the CCM Project," which was the result of the scheduled activation of the first NSC only four months after the approval of project funding. Further, the Aspect award had the benefit of taking advantage of the "enormous volume discount" which Aspect had given the IRS.

The contracting officer acknowledges that noncompetitive purchases are not favored, but notes that they are allowed when they are supported by a rational basis, and that the burden of proving a noncompetitive determination unreasonable rests on the protester, who must demonstrate its conclusion with "probative evidence." He describes this purchase as "a near-textbook example of a situation in which noncompetitive purchasing methods are appropriate." He characterizes Rockwell's protest as contending that award "was a bad business decision because Rockwell was prepared to offer us a better deal," a disagreement with the grounds of the Postal Service's conclusions which does not demonstrate its unreasonableness.

The contracting officer notes that Rockwell's protest demonstrates that its GSA schedule ACDS has a cost per telephone line significantly higher than Aspect's cost, and contends, in the absence of a specific price proposal, that its representations that it would discount those prices are "sales patter." He gives no weight to Rockwell's claims for the technical superiority of its ACDS, and questions Rockwell's ability to meet the accelerated proposal and delivery schedules which it has proposed.

The contracting officer disputes Rockwell's suggestion that proper planning did not occur, contending that the program was developed and refined from the latter half of 1995 through early 1996 before it was presented to the Board of Governors, and that ITP "moved very promptly to fill the ACDS requirement . . . [noncompetitively] in order to meet the October deadline . . . [which] simply did not allow time for a competitive procurement process."

The contracting officer asserts that because a noncompetitive justification was completed in accordance with Management Instruction AS-710-95-7, the requirements of the *Peoples Gas* decision, which he states as to the effect that once the Postal Service adopts procurement procedures by regulation, it must follow them, were met.

The contracting officer's statement concludes with the following:



It bears repeating that the contracting officer did not receive authorization to proceed with the ACDS procurement until June, at which time senior management set the implementation for October. Neither the contracting officer nor his management believed that the Postal Service could conduct a competitive procurement and receive delivery of an operational ACDS within that time frame. So the rational decision was made to proceed noncompetitively with Aspect under the terms and prices that IRS obtained when it negotiated for a buy of 76 units. Perhaps Rockwell would ultimately have come through with better terms on an order of six units; perhaps not. Such speculation is not for resolution in the protest process.

Aspect, which had intervened as an interested party contending that the noncompetitive selection was appropriate, submitted its initial comments contemporaneously with the contracting officer's statement. Those comments rebut Rockwell's claims of the superiority of its ACDS system with respect to both its technical features and its market share. Aspect contends that the award was properly justified by the price advantage available under the terms of the IRS contract and the reduced contract administration which would result from following it.

Further, while Aspect contends that Rockwell's misstatement of the availability of its GSA contract taints its entire protest, and urges that it be dismissed on that basis, it further contends that the systems offered under its IRS contract provide more functionality and lower prices than Rockwell's GSA schedule products.

The contracting officer's statement was accompanied by little documentation other than the ordering agreement and the noncompetitive justification. Accordingly, this office asked the contracting officer to provide additional documentation and to respond to specific inquiries. The contracting officer provided this information in submissions of September 3 and 5.

The submissions include a memorandum with attachments from the Manager, Customer Services Management, which describes the business rationale for the CCM initiative and the consequences of delay in the program.<sup>13</sup>

<sup>13</sup> The memorandum includes the following points:

- CCM is important to the Postal Service's viability; while the Postal Service answers 80 million telephone calls a year, an equal number go unanswered. Other large companies, including postal competitors, have successfully used call centers for many years.
- The business environment requires that the Postal Service be able to make strategic plans and timely implement them. Senior management has committed to the rapid deployment of CCM, which involves numerous complex and interdependent tasks. All businesses, including the Postal Service, must be able "to create timelines and draw stakes in the ground for the implementation of projects" so as to meet their obligations.
- Delay to the CCM project will result in many unsatisfactory consequences, including continued competitive disadvantage and reduced customer satisfaction. Delay in purchasing the ACDS will impact call center staffing involving more than 1,000 call center agents, cost approximately \$5 million per month in operating expenses, and delay the utilization of \$20 million expended for capital

The protester and the interested parties submitted comments on the contracting officer's statement and its supplements and on the comments of the other parties. The comments include the following points.

Rockwell and Lucent:<sup>14</sup>

-- The October deadline was artificially imposed by the Vice President, Marketing, and cannot support the noncompetitive justification; there is no evidence that delay in implementing the CCM would harm the Postal Service. If senior managers can establish artificially short deadlines by withholding purchasing authority, "there will be no limitation on the use of noncompetitive acquisitions . . . . Such an extreme evisceration of the preference for competitive purchases cannot be the intent of Postal Service procurement policy."

-- Since the need for the ACDS was established well before June, the lack of time to conduct a competitive procurement arose from the contracting officer's improper lack of advance procurement planning. An SOW issued when the award was made to Aspect could have included a short proposal preparation time, since ACD systems are standard commercial items, and evaluation of offers could have been completed expeditiously, on a schedule even shorter than the "force fit" posited by the contracting officer, since the first (March - June) timetable was shorter than the second (April - August) timetable.

-- As previously asserted, Rockwell could have furnished the first ACDS in three weeks. The contracting officer's skepticism about that claim reflects a failure to investigate and understand the market.

-- Contrary to the justification, the noncompetitive procurement is irrational and not in the Postal Service's best interest. That it would avoid time and overhead costs associated with competition would be true of any such procurement. The claims of savings overlook changes to the ACDS market since the IRS award, and the likelihood that other vendors could offer similar price reductions and technical advantages. The contracting officer failed to conduct any inquiry to establish the availability of similar discounts from other vendors.

-- The Postal Service will have the same contract administration burdens whether it contracts on its own terms or on the terms of the IRS contract.

-- Contrary to Aspect's submissions, Rockwell is the technology leader in ACDS; Rockwell's system could be ordered through a contract based on the GSA schedule at a price less than Aspect's price; and, as previously noted, Aspect's devices offered under the IRS contract fail to meet mandatory requirements of the draft SOW.

and expense items such as equipment and training.

<sup>14</sup> These two parties' separate comments contain common elements which we combine for brevity.

- The CCM project manager's justification memorandum is insufficient to justify the noncompetitive purchase.
- A desire for standardization does not justify the noncompetitive award.
- The noncompetitive justification's discussion of the lack of "real time reporting capability" for the ACD vendors other than Rockwell is incorrect with respect to Lucent, which is currently providing that capability to the Postal Service under another contract.
- The appropriate remedy for the inappropriate noncompetitive award is to terminate Aspect's contract. The procurement irregularities are sufficiently serious to warrant that result; the Postal Service has not acted in good faith in this procurement because it placed orders for four ACD systems when its immediate need was for only one system; Aspect has overstated the costs associated with the termination; and there is little burden associated with the use of different vendors' ACD systems.

Aspect:

- The contracting officer's decision was rational and supported by substantial facts. The contracting officer's statement and its supplements set forth a "detailed factual analysis" which establishes the basis for his actions. That determination falls within the contracting officer's reasonable discretion and is entitled to substantial weight. It is the protester's burden to demonstrate that it lacks any reasonable basis.
- The October deadline dictated by the operational requirements and the Governor's June funding approval afforded only four months for award and performance, and the contracting officer reasonably concluded that competition could not be held within that time frame. The protester's claim to the contrary is "wildly unreasonable" as the contracting officer contends. Disagreement with the contracting officer's assessment is not sufficient to overcome the presumption of correctness which attaches to the contracting officer's conclusion. The contracting officer's estimates are optimistic since a competitive procurement might well include further delays associated with claims that the SOW was restrictive, questions about and further revisions of the SOW, and discussions necessitating multiple rounds of BAFOs.
- Rockwell's assertion of its ability to install a large ACDS quickly is misleading; it overlooks numerous critical events associated with such an effort.
- The noncompetitive determination was not the result of a lack of advance planning; changed conditions generally do not indicate such a lack.
- Any disruption of the Aspect contract now would incur substantial costs. Those include the costs associated with delay to the CCM project detailed by the project manager, as well as termination costs associated with the Aspect contract. Four of the systems contemplated by the ordering agreement have already been shipped.

Cancellation of the remaining systems would adversely affect the CCM project, since, as the contracting officer has noted, acquisition of mixed ACD systems would present technical problems and increased costs.

-- The October, 1996, ACDS implementation date was not arbitrary because it was an integral part of the program for activation of the NSC, the schedule for which had been confirmed by the Postal Service's public statements. Senior management directives which create urgent needs for goods may justify noncompetitive procurements; this is particularly relevant to the Postal Service, charged with operating in a "business-like" manner.

-- Rockwell's representations that it could provide a technically superior product at a lower price than Aspect's may be disregarded.

The contracting officer furnished a brief rebuttal explaining why four ACD systems, rather than one, were needed; he explains that the systems are to go to the Denver NSC, the two existing Learning Centers, and to support the Applications Development team. The contracting officer characterizes these different functions as "independent but linked legs of a stool," necessary to "increasing our knowledge and ability to successfully manage a telecommunications network servicing the National Service Center and National Learning Centers" and the millions of calls they are to receive.

## DISCUSSION

As the parties agree, "whether a noncompetitive purchase is justifiable depends on the circumstances and basis for its use. . . . While subject to close scrutiny, noncompetitive purchases will be upheld if there is a rational basis for them." *OSM Corporation*, P.S. Protest Nos. 91-59, -61, -67, December 27, 1991.

We begin with the proposition that [noncompetitive] awards are not favored. They will be scrutinized closely and upheld only if they have a reasonable basis.

\* \* \*

The contracting officer's determination that the Postal Service's minimum actual needs will only be met by a [noncompetitive] procurement will be given substantial weight, but it must be based on a factual predicate supporting the reasonableness of the decision. Once the contracting officer has enunciated a factual predicate for his determination, the burden shifts to the protester to prove that the determination is unreasonable; it must produce probative evidence or data to substantiate its assertions. Mere disagreement with the agency's grounds for the sole-source procurement is not a sufficient showing for this Office to find the agency's conclusions unreasonable.

*Wetler Corporation*, P.S. Protest No. 86-80, December 17, 1986 (applying standards of previous regulation, the Postal Contracting Manual; citations and internal quotation marks omitted). *Accord* under Procurement Manual, *U.S. Sprint Communications Company*, P.S.

Protest No. 91-27, July 15, 1991; *OSM Corporation, supra*.

The protest challenges the justification's conclusion that the circumstances of the CCM initiative warrant a noncompetitive purchase and the basis on which Aspect was selected to receive the purchase.<sup>15</sup> The contracting officer contends that the noncompetitive purchase is justified both due to "[u]nusual and compelling urgency, when delay would seriously harm the Postal Service," and further because "competitive purchasing would not be in the best business interest of the Postal Service." We agree with the protester that the determination was logically flawed and incomplete.

Because it appears from the contracting officer's statements that the conclusion that competitive purchasing would not be in the Postal Service's interest depends to some degree on the ground of unusual and compelling urgency (that is, the contracting officer does not appear to contend that the noncompetitive award would be justified in the absence of the timetable adopted for the purchase), we turn to the underlying basis first.

The circumstance which is said to have created the urgency, the limited amount of time between the approval of capital funding by the Board of Governors and the site implementation was present in the initial three-phase plan.

The Marketing schedule, which, contrary to regulation,<sup>16</sup> was developed without Purchasing

<sup>15</sup> Previous decisions of this office have quoted a formula with respect to noncompetitive awards set out in various 1970 - 1980 decisions of the General Accounting Office, such as the following:

[T]he Comptroller General has held, and we agree, that noncompetitive awards may be made where the minimum needs of an agency can be satisfied only by items or services which are unique; *where time is of the essence and only one known source can meet the agency's needs within the required time frame*; where data is unavailable for competitive procurement; or where only a single source can provide an item which must be compatible and interchangeable with existing equipment. In addition, noncompetitive awards may be made where the minimum needs of an agency can be satisfied by only one firm which reasonably could be expected to produce the required item within the required time frame without undue technical risk.

*Chase Econometrics/Interactive Data Corporation*, P.S. Protest No. 83-73, April 27, 1984 (citations omitted, emphasis added). The italicized portion of this formula seems to preclude any noncompetitive award when more than one source can meet the requirement, but time does not allow a competitive selection. Such a result is unduly restrictive. The availability of multiple capable sources need not preclude a noncompetitive award if urgency precludes the competition. *Compare* 41 U.S.C. ' 253, which generally requires "full and open competition" in procurements by executive agencies subject to its terms, but provides at (c)(2) for "procedures other than competitive procedures" where because of "unusual or compelling urgency . . . the Government would be seriously injured unless the executive agency is permitted to limit the number of sources from which it solicits bids or proposals" as long as the agency "request[s] offers from as many potential sources as is practicable under the circumstances" (' 253(e)).

<sup>16</sup> "Procurement planning is the process by which the efforts of the requirements and purchasing organizations are coordinated and integrated in a comprehensive plan to fulfill needs of the Postal Service in a timely manner and at a reasonable cost." PM 2.1.1 a. "When developing purchasing plans,

input, included only minimal time in which to conduct a competitive procurement. Because it was self-contained and unrelated to an external event such as, e.g., the Christmas mailing season or an impending change in postage rates, the implementation schedule was "arbitrary" in that it was "based on or by determined by individual preference or convenience rather than by necessity or the intrinsic nature of something." (*Webster's Ninth New Collegiate Dictionary*, Merriam-Webster, 1984.)<sup>17</sup> Further, the fact that the implementation date was extended from September to October when the Board of Governor's presentation was postponed a month suggests that the date was more flexible than the contracting officer now asserts.<sup>18</sup>

The schedule's failings with respect to the time available for the purchase were exacerbated by delay in communicating the schedule to Purchasing, which learned of it only in January of this year. It is less clear than the contracting officer suggests that "authorization to proceed with the ACDS procurement" was not available before the capital funding had been obtained. While it is correct that contract *award* could not precede funding approval, with earlier notification to Purchasing, an SOW might have been developed, a solicitation issued, and offers received and evaluated before funding was received on a schedule which would have allowed competition among the identified capable vendors.

Accordingly, the urgency claimed for the purchase thus was the result of an arbitrary schedule and of less than satisfactory planning and coordination both before and after the schedule was adopted.<sup>19</sup>

requisitioners should involve purchasing personnel as early as possible. For procurements estimated over \$5,000,000, advance planning should begin early in the concept development phase. . . ." PM 2.1.3 b.

Among the benefits of procurement planning are "[p]roviding lead time to select customer-responsive contract types or to develop innovative contracting methods; . . . [p]roviding sufficient time to obtain required approvals before submission of requisitions; . . . [i]dentifying sources to ensure adequate competition; . . . [and] [p]reventing unrealistic delivery or performance schedules . . . ." PM 2.1.1 c. 3, 4, 7, and 9.

<sup>17</sup> The Postal Service's vague announcements about its plans for the establishment of NSCs (e.g., that they "may be open by the end of the year"), unlike announcements about rate changes, new ZIP Codes, or changes in mail preparation procedures, required no investment or change in behavior by the affected users of postal services. To conclude that they added to the project's urgency would mean that any procurement schedule could be justified by subsequent publicity about it, an untenable conclusion.

<sup>18</sup> Contrary to the project manager's contention, which the contracting officer had adopted, the Board of Governors did not approve the schedule for the CCM implementation. The Board's minutes, quoted above, demonstrate that they approved only the funding for the project, not its other aspects. While the Board's bylaws provide that "the expenditure of any funds in excess of the amount previously authorized" (39 CFR ' 3.3(e)) requires further approval of the Board, nothing in the bylaws suggests the Board's involvement with other changes which might occur in a project which has been funded. The Board's approval of funding thus fails to impart any additional urgency to the requirement.

<sup>19</sup> Rockwell and Lucent both cite Comptroller General decisions for the proposition that failure to perform

When a noncompetitive purchase is to be justified on the basis of the best interest of the Postal Service, the second basis here, the Attachment to MI AS-710-95-7 directs that various questions be considered, including "Are there other sources? Was the market tested for other sources? What were the results? Were there any attempts to compete the requirement?" These questions identify a field of inquiry which is omitted both from the noncompetitive justification and the contracting officer's defense of it.

The Postal Service knew that there were other vendors in the ACDS marketplace. It solicited four, in addition to Aspect, to comment on the draft SOW, and the determination concluded, presciently, that at least one of the four, Rockwell, was "a true ACDS vendor"<sup>20</sup> which might be sufficiently aggrieved by a noncompetitive purchase from Aspect to protest. But the noncompetitive justification fails to provide any technical basis for Aspect's selection over Rockwell, suggesting that the alternative systems were viewed as technically equivalent.<sup>21</sup>

The centerpiece of the contracting officer's determination is the price advantage which can be realized under the terms of the IRS contract, an advantage expressed exclusively in terms of a "volume discount" from Aspect's regular prices. In that regard his analysis discusses two scenarios -- orders placed against the IRS contract with IRS's permission and orders placed against a postal contract with Aspect which adopts the IRS prices -- without appearing to understand the differences which the two alternatives represent.

In the first case, if the terms of the Aspect/IRS contract allow the IRS to authorize other government agencies to order against it, a potential benefit of the Postal Service doing so was that it could take advantage of the contract's volume pricing without having to obtain

appropriate advance planning for a procurement can never justify a noncompetitive procurement. See, e.g., *Techno-Science, Inc.*, Comp. Gen. Dec. B-257686, October 31, 1994, 94-2 CPD & 164. Those decisions, however, are based on a flat statutory prohibition at 41 U.S.C. 253(f)(5)(A). ("In no case may an executive agency . . . [e]nter into a contract for property or services using procedures other than competitive procedures on the basis of the lack of advance planning . . . .") However, that prohibition does not apply to the Postal Service (39 U.S.C. ' 410(a)), and Postal Service regulations contain no similar provision.

<sup>20</sup> And Lucent has taken exception to the basis on which it has been distinguished from Aspect and Rockwell in this regard.

<sup>21</sup> While we accept the contracting officer's representation that the Aspect ACDS meets the Postal Service's needs and the requirements of the final (unissued) version of the SOW (adopting the contracting officer's position in a factual dispute absent sufficient evidence to overcome the presumption of correctness which attaches to it, *Columbia Airline, Inc.*, P.S. Protest No. 87-118, April 13, 1988), the record does not allow resolution of the competing claims of the various parties concerning the technical advantages of their systems and the disadvantages of others.

The parties' disagreements concerning the capabilities of Aspect's ACDS arise in part from the fact that Rockwell is describing that equipment as of the 1992 inception of the IRS contract, while Aspect is referring to equipment offered pursuant to the IRS contract as subsequently modified.

Aspect's approval. Such an option might well be justified if that price advantage was not otherwise available.

The alternative scenario depends on Aspect's agreement that the Postal Service could have the benefit of the IRS prices for far fewer units than IRS bought. Although Aspect's readiness to accede to that request, which was associated with no obligation and which contradicts the justification's assertion that the "enormous volume discount" of the IRS contract was "most likely not available to the Postal Service under other circumstances," clearly suggests the existence of a competitive market in which other vendors might be prepared to offer similar price concessions, the contracting officer conducted no review of the marketplace in that respect. That failure to identify or consider the possibility of related price concessions from other vendors substantially weakens the justification's rational basis.

In sum, the urgency cited for the noncompetitive award is not obviously compelling or unusual. Further, even if urgency did give rise to a need for expedition, the basis on which Aspect was selected to receive the award lacked, in the words describing the standard of our review, "an adequate factual predicate." Rockwell has met its burden of proof.<sup>22</sup>

Where award has already occurred, so that contract termination may be necessary to afford relief, we also apply the following factors in determining the appropriateness of a remedy:

Whether to require termination action in a given case depends on consideration of such factors as the seriousness of the procurement deficiency, the degree of prejudice to unsuccessful offerors or to the integrity of the competitive procurement system, the good faith of the parties, the extent of performance, the cost to the Government, the urgency of the requirement, and the impact of termination on the accomplishment of the agency's mission.

*Neil Deterding*, P.S. Protest No. 94-53, February 21, 1995, *citing TPI International Airways, Inc.*, P.S. Protest No. 87-40, October 30, 1987.

<sup>22</sup> We deal briefly with two points raised by the contracting officer and the project manager:

-- A properly completed justification which fails to set out a rational basis for the desired result clearly cannot be sufficient to meet the burden imposed by the regulation establishing the requirement for the justification. Brief introspection should quickly establish that under the countervailing view, no determination could ever be overturned.

-- While there should be no dispute that the Postal Service, like other businesses or business-like entities, should have the capability to accomplish the objectives which it establishes to fulfill its mission, once it establishes procedures under which it is to proceed, those procedures must be followed, even if they are viewed as burdensome or unnecessary, unless they can be the subject of a waiver or exception. The fact that an exception may exist, however, does not mean that the procedures may be overlooked or ignored.



Here, we view the procurement deficiency and the effect on the Postal Service's competitive procurement system as serious, and there has been some prejudice to the unsolicited prospective offerors because they were not allowed to propose, although we cannot establish that, had a competition been conducted, either Rockwell or Lucent necessarily would have received award. "It is axiomatic that a protester must have suffered quantifiable harm in order to be the beneficiary of a directed remedy." *System Advantage, Inc.*, P.S. Protest No. 95-08, April 19, 1995. Although the good faith of some parties has been challenged, those challenges are not persuasive.<sup>23</sup>

As the discussion above indicates, the initial claim of compelling urgency was not adequately justified. Since that time, however, the coordinated development of the various elements in addition to the ACDS which are necessary to the establishment of the NSC has created a situation in which delay or postponement of ACDS would now adversely affect the CCM program. In addition, performance of the Aspect ACDS contract has been substantially performed. The extent of performance is sufficient, under our precedents, to preclude relief in the form of contract termination. See, e.g., *Cummins-Allison Corporation*, P.S. Protest No. 91-18 June 4, 1991 (delivery of 27% of purchased quantity); *AMR Distribution Systems*, P.S. Protest No. 92-36, October 2, 1992 (eight months elapsed on twelve month lease).

The protest is sustained to the extent indicated.

William J. Jones  
Senior Counsel  
Contract Protests and Policies

<sup>23</sup> There is no obligation on the contracting officer to disclose a prospective noncompetitive purchase before it occurs, and sound business reasons not to. The advice to Lucent and Rockwell in early June that work on the SOW continued appears to be accurate, since the record contains a revised SOW dated June 16, and that advice did not direct or encourage the parties to take any action to their detriment.

While Rockwell's GSA schedule contract, had it been extant, could have served as the vehicle which expedited a postal contract, it was not necessary to such a contract, since the parties could have adopted its terms whether it remained in effect at GSA or not.