

April 17, 1998

P.S. Protests No. 97-26; 29

**ATLANTA REGIONAL DISTRIBUTION CENTER, ET AL;
RIVER CITY DISTRIBUTION CENTER**

Request for Prequalification

DIGEST

Protest against various aspects of request for prequalification statements for mail transportation equipment service centers is denied. No protester has standing to challenge CBD notice's financial responsibility standard and grouping of centers into clusters, reservation of largest cluster for noncompetitive award to experienced incumbent contractor, and refusal to extend time for the submission of statements were reasonable.

Decision

Four small businesses¹ which have mail transport equipment ("MTE") warehousing contracts with the Postal Service who are represented by common counsel and another such contractor, River City Distribution Center, Memphis, TN, (River City) separately protest various aspects of the Postal Service's prequalification of offerors to provide services at a national network of Mail Transport Equipment Service Centers ("MTESCs").

¹ In alphabetical order: Atlanta Regional Distribution Center, Stone Mountain, GA; Imeson Distribution Center, Jacksonville, FL; RAM III Distribution, Nashville, TN; and Southshore Enterprises, St. Joseph, MO. Terminal Warehouse, Eagan, MN, a fifth member of the group, withdrew in the course of the protest. Counsel's later submissions in the course of the protest refer to the group as "the coalition," and we adopt that term.

MTE includes items such as mail bags, trays, pallets, and containers (larger devices which can hold mail bags, trays, or larger pieces of mail). A MTE SC is a contractor-run facility at which MTE is inspected, repaired as needed, and warehoused for delivery on request. A pilot MTE SC was established in Greensboro, NC, in 1992 when a contract was awarded to New Breed Leasing Corporation ("New Breed") following a competition. New Breed received continues to provide service at Greensboro under a contract expiring in 1999.

In 1996, the Postal Service sought sources to be qualified to operate a network of MTE SCs. The May 28, 1996, CBD notice announcing the prequalification included the following:

The Postal Service has . . . come to the conclusion that separate facilities need to be established and a network formed to ensure that adequate, timely, and high quality MTE is available to USPS Processing and Distribution Centers, Bulk Mail Centers, and their customers. . . . A total of 22 sites will form the network. The facilities, plant equipment, replacement parts, and transportation will be provided by the Postal Service. . . . Contractors will be required to staff and efficiently operate the MTE SCs in accordance with the requirements of the Postal Service. . . .

Companies seeking to be pre-qualified must have sufficient experience and financial capability to operate three (3) MTE SCs located in different geographical areas of the United States. . . . Companies must have performed similar work continuously for the past five years. In addition, companies must have the financial capability to support \$25-\$30 million annual revenues to be considered for pre-qualification. . . .

The Postal Service is pre-qualifying suppliers so that only an adequate number of the best qualified suppliers are available to compete for future contract(s).

(Paragraphing added.)

A 24-page Pre-Qualification Request Document provided further information about the proposed network and directed the content of the pre-qualification requests. An attachment identified the 21 sites in addition to Greensboro and assigned them to clusters of three as follows:

Cluster 1 Springfield, MA
Philadelphia, PA
Long Island, NY

Cluster 2 Pittsburgh, PA
Washington, DC
Detroit, MI

Cluster 3 Cincinnati, OH
Atlanta, GA
Jacksonville, FL

Cluster 6 Seattle, WA
Minneapolis, MN
San Francisco, CA

Cluster 4 Denver, CO
Kansas City, MO
St. Louis, MO

Cluster 7 Los Angeles, CA
Chicago, IL
Secaucus, NJ

Cluster 5 Dallas, TX
Des Moines, IA
Memphis, TN

Cluster 7's total anticipated staffing is approximately 1.5 times larger than that of the next largest cluster, and about 1.8 times larger than the average staffing of the remaining six clusters. Cluster 7 also differs from the other clusters in that each center in that cluster would repair mailbags; the centers in the other clusters would inspect mailbags and dispatch those needing repair to a cluster 7 center. Cluster 7 was to be the first cluster activated, in November, 1996 (New Jersey); January 1997 (Los Angeles); and February, 1997 (Chicago). Chicago, Los Angeles, and Secaucus are the largest, third largest, and fifth largest centers, respectively, measured in terms of anticipated staffing.

Firms seeking prequalification were advised: "You may express interest in a maximum of two clusters. However, in the event that a solicitation is issued, you will not be limited to those sites you have selected to satisfy this request."

The prequalification package was sent to 105 firms, including respondents to the CBD announcement and additional firms identified by the Postal Service. None of the protesters received the package. Twenty-four firms submitted prequalification statements.

The following notice appeared in the Commerce Business Daily for July 3, 1996:

M - NONCOMPETITIVE CONTRACT FOR LOGISTICAL SUPPORT AND OPERATION AND MANAGEMENT OF THREE NEWLY ESTABLISHED POSTAL SERVICE FACILITIES WHICH WILL BE USED FOR THE PURPOSE OF PROCESSING MAIL TRANSPORT EQUIPMENT

The Postal Service anticipates negotiating with New Breed Leasing of Greensboro, NC, for the operation of three (3) Mail Transport Equipment Service Centers (MTESC) and logistical support for all operations sites. The operation of eighteen (18) of these additional sites will be procured competitively. . . . The Postal Service is currently conducting a Sources

Sought Supplier Prequalification process for the operation and management of the 18 [MTECs] which will not be awarded to New Breed. See CPD notice under classification M, May 24, 1996. . . .^[2]

No documentation supporting a noncompetitive award existed when the CBD notice was published. Recommendations for noncompetitive procurement were subsequently prepared on August 30, 1996 (approved September 11, 1996), and on April 16, 1997 (approved May 1, 1997). Both provided justifications based on Pub. 41 4.4.2.a. 1 (the existence of only one source capable of meeting postal requirements) and 4.4.2.a. 6 (competitive purchasing not in the interest of the Postal Service).

Sixteen firms had been found technically qualified by September, 1996; they were asked to submit additional information about their financial capability. Eventually, all sixteen firms were prequalified. They were so advised by letters in December; a CBD notice identifying the firms was published on January 31, 1997.

Despite the prequalification document's advice that awards would commence in November, 1996, no awards had occurred when, in connection with a July 30,

² Following publication of the July, 1996, notice, DDD Company, a participant in the 1996 prequalification, protested to the contracting officer "the noncompetitive award of three Mail Transport Equipment Service Centers to New Breed Leasing."

The contracting officer's reply stated, in part:

The Commerce Business Daily provided that the Postal Service[] anticipates negotiating with New Breed. However, no contract has been awarded and therefore your protest is premature. If a contract is awarded, you will be notified.

* * *

Your protest is considered to be without merit and is therefore denied.

DDD Company did not submit a further protest for the General Counsel's consideration as the protest regulation allowed.

In 1996, protests were governed by section 4.6 of the Procurement Manual (Pub. 41); 4.6.4 e. provided:

If a protest has been filed initially with the contracting officer, any subsequent protest to the General Counsel received within ten working days of the protester's [notice of] initial adverse action by the contracting officer will be considered [if the initial protest was timely].

(Protests are now governed by section 3.6 of the Purchasing Manual (Purch. Man.).)

DDD did not submit a subsequent protest.

1997, meeting with group of incumbent MTE warehouse contractors which included all of the protesters here, the Postal Service announced its intention to conduct a second round of prequalification.

A CBD notice dated August 4, an Invitation to Prequalify dated August 1 with an accompanying "Prequalification Request/Criteria," and a July 30 Statement of Work were similar to the documents used in the first prequalification in that they required \$25 - \$35 million in annual revenues, required prospective sources to be able to operate at least 3 MTEsCs, and limited expressions of interest to two clusters without limiting subsequent responses to individual solicitations. The documents differed from those of the first prequalification in no longer stating that the Postal Service would supply facilities and plant equipment, which became the contractor's responsibility, and in providing a longer time for facility activation after award. While the documents included information concerning each of the 22 existing or proposed centers, including Greensboro, Los Angeles, Chicago, and Secaucus, the listing of clusters for which suppliers were to indicate their interest included only clusters 1 through 6, and not cluster 7. Prequalification statements were requested by August 25.

By letter dated August 6, counsel for the coalition protested to the contracting officer the terms of the second prequalification document, contending that the clusters were arbitrarily designated;³ that the clusters constitute "unnecessary bundling"; that their purpose could be met by less restrictive means and that the requirement unnecessarily increases postal costs; and that the prohibition of single-site bidding and the \$25 - \$35 million financial requirement unnecessarily restricts small business participation and overstates the Postal Service's needs. By letter dated August 20, the contracting officer denied the coalition's protest as obviously without merit.

By letter dated August 5, received on August 12, River City also protested to the contracting officer. Its protest raised two points: First, it objected to the limited time provided for the submission of prequalification information, noting that more time had been provided in the first request for prequalification. Second, like the coalition's protest, it objected to the clustering of sites. By letter dated August 21, the contracting officer denied River City's protest as obviously without merit.

On August 14, River City wrote the contracting officer to request an extension of unspecified length in the time to respond to the prequalification request, noting both the limited time initially provided and the work imposed on it by the United

³ In making this contention, counsel focuses on cluster 7, although the protest states "[I]t is not clear whether . . . Cluster 7 is still available for competitive award and/or whether [it] has previously been awarded via some unannounced sole source procurement."

Parcel Service strike.⁴ The contracting officer denied the request in an August 18 letter.

The coalition's protest to this office, dated August 25, was received on that date. River City's protest to this office, dated September 2, was received on September 3. The substance of the protests is set out after the following discussion of related events.

River City and the members of the coalition other than Imeson submitted prequalification information by the established deadline. In early November the coalition members which submitted prequalification information were added to the prequalified list. River City was not prequalified. The record does not contain a full explanation why Imeson chose not to submit prequalification information or why River City was found not entitled to prequalification. However, it appears that any perceived inability to meet the CBD notice's financial capability requirement was not the basis for Imeson's choice,⁵ and that River City was excluded on substantive grounds unrelated to any deficiency which might have been improved or corrected had River City had more time to make its submission and unrelated to the financial capability requirement of the CBD notice.

By memorandum dated December 24, this office was notified that a contract had been awarded to New Breed for the three sites in cluster 7.⁶

The coalition's protest restated out the six "interrelated" grounds contained in its previous protest to the contracting officer and on additional ground. The protest raised the following specific concerns:

- The \$25-\$30 million financial capability threshold is unduly restrictive.⁷

⁴ A strike against United Parcel Service by the International Brotherhood of Teamsters had begun on August 4. It continued until August 20.

⁵ Specifically, the coalition's counsel argued in a submission in the course of the protest that the financial requirement in the CBD notice might have dissuaded a prospective offeror from seeking prequalification, but did not represent that any member of the coalition was so dissuaded.

⁶ Purch. Man. 3.6.5.a. provides that when a timely protest has been received before award, "award may not be made until the matter has been resolved, unless the [Vice President, Purchasing and Materials] . . . determines that urgent and compelling circumstances which significantly affect interests of the United States Postal Service will not permit waiting for the decision." When such an award is made, the contracting officer is to notify the protester, all interested parties, and this office.

⁷ Replying to the protest, the contracting officer asserts that the \$25 - \$35 million financial capability figure was inadvertently included in the second CBD announcement; and no offeror was

— The specific clusters are arbitrarily designed as to their number (e.g., as opposed to clusters of smaller size) and as to their composition (e.g., as to the identities of the facilities comprising particular clusters).

Clustering restricts competition by precluding the participation of small businesses such as the protesters, precluding the Postal Service from the benefits of these business's lower prices and better service.

Any need met by the clusters could be accomplished in less restrictive ways, such as limitations on awards of contiguous sites to the same offeror, other remedies for perceived issues such as "hoarding," and provision for a cost evaluation factor relating to multiple awards.

Clustering unnecessarily restricts the participation of small, minority-owned, and woman-owned businesses.⁸

— The protest also objected to the Postal Service's decision not to award cluster 7 competitively.

eliminated in either round because of a lack of financial capability. As discussed above, no protester has been affected by this error. Since a protester may protest only on its own behalf and lacks standing as an interested party to protest generally for on behalf of another (See, e.g., *C & M Data Management Corporation - Reconsideration*, Comp. Gen. Dec. B-253245.3, September 16, 1993, 93-2 CPD ¶ 172), any issue raised by these protesters concerning this issue is moot and need not be further addressed. *Pitney Bowes, Inc.*, P.S. Protest No. 89-22, July 7, 1989.

⁸ The status of any of the coalition protesters as minority- or woman-owned is not shown on this record.

River City's protest raises three grounds, two of which overlap with the coalition's protest:

- The financial capability requirement is unfair to small and minority businesses.⁹
- The requirement for clusters is also unfair to these entities and unduly favors larger entities; there is no operational need for clustering, and little, if any, burden would arise from the award of single-site contracts.
- River City's request for a time extension should have been granted.

The contracting officer's statement, her response to this office's request for further information, and a subsequent clarification responded to the protesters' contentions as follows:

- The protest of the decision to award cluster 7 noncompetitively is untimely raised since the CBD notice of the intended award was published in July, 1996.¹⁰
- The contracting officer is afforded discretion in the determination when to make a noncompetitive award; such a determination will be upheld if it has a reasonable or rational basis (citing cases).

The noncompetitive award is justified by New Breed's exclusive experience in the operation of a MTEC. New Breed is the only qualified source and because award to New Breed is otherwise in the best interest of the Postal Service.¹¹

- The time allowed for the submission of prequalification information was sufficient. Only River City, of the fifty-seven companies which received the second prequalification solicitation, requested a time extension. Twenty-two prequalification packages were received. Had River City submitted a

⁹ River City is a small minority-owned business.

¹⁰ Although the contracting officer states that "the sites of [the] New Breed noncompetitive award [were] known," she does not state and the record does not otherwise indicate when or how this information was disclosed.

¹¹ "New Breed will be excluded from the initial competition for the six . . . competitive clusters."

late proposal, it would have been considered in accordance with Pub. 41 4.2.3.d.¹²

— The decision to establish the clusters was reasoned. A contracting agency may consolidate its requirements for service, rather than procure them site-by-site (citing cases).

The Postal Service decided to locate its MTESCs where its 20 Bulk Mail Centers were, with an additional center in Long Island. This meant there would be 21 centers in addition to Greensboro. Awarding multiple contracts instead of a single contract reduced risk, while awarding more than one center per contractor would provide economy of scale benefits and reduce contract administration costs. Since clusters of uniform size were desired,¹³ consideration was limited to clusters of 3 or 7 (the available factors of 21); in a trade-off between the effect on competition and ease of contract administration, clusters of three were seen to offer “the maximum potential for participation and distribution of risk.”

The six clusters’ configurations were determined “by an iterative process.” “Geographic dispersal” avoids grouping clusters in the same area to reduce local impact if a cluster operator were to fail. However, an attempt was made to reduce distance between sites “to reduce [contractors’] anticipated travel expenses.” “Most initial benefit” was determined based on factors including cost, existing processing capability, existing leases, and other factors. Clusters were grouped so that at least two Postal Service areas were represented in each cluster.¹⁴

Noncompetitive cluster 7 was designed differently. Its sites with large volumes of MTE would serve as a “test bed” to provide “real-

¹² That section provides, in relevant part, that “[i]t is normally in the interest of the Postal Service to consider a late proposal when doing so would not cause a delay in the evaluation process . . . or the proposal offers a significant . . . benefit.”

¹³ A uniform cluster size was adopted to “best provide the network with the ability to absorb the loss of capacity if a cluster or site were to become non-functional.” “The workload of each cluster was a separate but related issue.”

¹⁴ Specific staffing information concerning individual clusters was provided for *in camera* review, since prospective offerors could use that information “to calculate the expected pricing.” Five of the six competitive clusters are within 75% of the size of the largest competitive cluster; the smallest cluster is about 50% of the size of that largest cluster.

time validation" of the network concept; their locations offer "wide-area coverage" at startup and will provide backup to the other centers as they come on line. Having this cluster perform all mailbag repair will "homogenize" the remainder of the network and reduce their different types of work.

— The MTECs will not replace all MTE warehouses, so that small business warehouse operators will still have business opportunities; small businesses were initially included among the prequalified sources, and one which was has taken exception to the protester's claims.

The coalition and New Breed submitted comments on the contracting officer's and each others' submissions and participated in protest conferences. Their submissions, restating previous assertions and making additional points. The following summary is taken from these parties' various submissions:

New Breed:

— The members of the coalition which have been prequalified lack standing to protest on their own behalf, and cannot protest on behalf of a third party. To the extent that these protesters are objecting to the terms of the future MTEC solicitations, their protests are premature.

— The protest of the clustering of the centers is untimely since that cluster was disclosed in the May, 1996, CBD notice for the first prequalification request.

— The coalition's objections to the manner in which the clusters were established fail to show that the decision to establish them was an abuse of the contracting officer's reasoned discretion. Its objections are mere disagreement with the contracting officer's determinations, insufficient to overcome them. The number of offerors obtained through the two rounds of prequalification is ample to obtain the "adequate competition" required by postal procurement regulations.

— The protester's assumption that because they are currently operating MTE warehouses they necessarily can operate MTECs more economically than other offerors is flawed and unsupported. Contrary to the coalition's impressions, operation of an MTEC differs from the operation of an MTE warehouse; they differ substantially in staffing (an MTEC requires more workers, and different skills); physical plant (an MTEC requires more loading docks to accommodate greater truck volumes); and equipment

(supporting the MTESC repair operation). "Thus, contrary to protester's suggestions, the [two types of] facilities are not interchangeable"

— The protest of the noncompetitive award is untimely for the reason cited by the contracting officer, since DDD's protest shows that it could have been raised within ten days of the 1996 CBD notice. PM 3.6.4.d.

— That the CBD notice was phrased in terms of the Postal Service's "anticipation" of a noncompetitive award did not preclude protest; CBD notices are frequently expressed in terms of intent,¹⁵ but such notices are sufficient to place offerors on notice of a noncompetitive award, citing *Southeastern Technologies, Inc.*, Comp. Gen. Dec. B-275636, March 10, 1997, 97-1 CPD ¶ 96.

— Alternatively, timeliness should have been measured from the receipt of the July 31 prequalification package, when the protesters had reason to know that cluster 7 had been removed from consideration for competitive award. The matter was not presented in the protests to the contracting officer. Instead, the protesters delayed raising the issue until their protests to the General Counsel, neither of which was filed within ten days after the basis of the protest was known. (Purch. Man. 3.6.4.d.)

— New Breed is uniquely qualified to operate cluster 7 by reason of its operation of the Greensboro MTESC and its performance of "the host of unique functions identified for MTESC contractors." Accordingly, "the Postal Service reasonably and rationally determined that only New Breed [could execute] the rapid start-up . . . demanded [for cluster 7]."

— The contention that the decision to award cluster 7 noncompetitively to New Breed has become stale by the passage of time since the CBD notice was published is incorrect. The Postal Service has been proceeding deliberately to award contract to New Breed; delays have been due to events beyond the parties' control. New Breed has had substantive contacts with the Postal Service from January 1996 to the present, has helped develop MTESC statement of work, facility designs, and training requirements. Any delays in the process of the award since the notice of the intent to award noncompetitively do not affect the justifications for that decision or its validity.

The coalition:

¹⁵ Federal Acquisition Regulation (FAR) 5.207(c)(2)(xiv) and (e)(3) speak in terms of the "intended source" and "intended [sole source] award[]."

— The protest of the proposed noncompetitive award is timely, since the July, 1996, CBD notice was not a determination to make such an award, but only an anticipatory announcement of an award which had not yet occurred, and the contracting officer dismissed as “premature” a protest filed contemporaneously with the notice. The omission of cluster 7 from the prequalification package is not evidence that it was reserved for award to New Breed.

— The clustering scheme is irrational:

The operation of Greensboro as an independent site establishes that centers need not be clustered.

Clustering “discourages” small business participation in contradiction to Pub. 41 10.1.1 a and 10.1.2.1, and MIAS-710-89 -3;

Single centers can be less costly because current warehouse operators have existing resources; contrary to the contracting officer’s view, economies of scale will not result if geographically dispersed sites must be offered.

The contracting officer has not explained *why* uniform sizing of clusters is necessary, and clusters of uniform size do not enhance a contractor’s absorbing other nonfunctioning centers or clusters.

Because multiple awards are allowed, the same contractor might be operating the cluster adjacent to a nonfunctioning cluster.

The MTESC operating contractor has no say in the distribution of MTE, which is determined by the Postal Service, so there is no benefit in clusters spanning postal areas.

The contracting officer has not explained how staggered startup justifies clusters, since any scheme could have staggered starts.

— Offerors should have been allowed 30 days to respond to the request for prequalification. Offerors were given 40 days on the first prequalification; and Pub. 41 4.2.2. b. contemplates at least 30 days.

— The noncompetitive award to New Breed is unjustified:

Any R&D for the MTESC program has already been done under the Greensboro contract; it is obliged to make this expertise available to other MTESC operators; the contention that only New Breed can

operate cluster 7 proves too much, since if true, only New Breed could operate the other clusters, too.

The size of cluster 7 does not justify the award, since other centers in other clusters exceed cluster 7's centers in various respects.¹⁶

DISCUSSION

Although the protesters have presented their concerns at some length, only three issues require discussion here: the clustering of the MTECs, the reservation of cluster 7 for noncompetitive award, and the contracting officer's failure to extend the time available for submission of prequalification statements.

Contrary to the suggestions of the contracting officer and New Breed, the various aspects of these protests are timely raised. The initial protests to the contracting officer were protests against the terms of the request for prequalification; those protests were submitted to the contracting officer prior to the time that the prequalification statements were due, and thus were timely under Purch. Man. 3.6.4.b.¹⁷

The remaining issue is the challenge to the noncompetitive award of cluster 7 to New Breed. While the July 3, 1996, CBD notice disclosed the intention to award a cluster to New Breed, it failed to identify *which* cluster was intended for award. Accordingly, that notice did not provide the information on which a protest against the noncompetitive award of cluster 7 was "known or should have been known." The earliest that it appears from this record that the Postal Service did not intend to award cluster 7 competitively was upon the issuance of the second request for prequalification, in which that cluster was omitted from the list of clusters for which prequalification was available. That unexplained omission led the coalition's counsel to speculate on the cause. (See footnote 3, *supra*.) Although the contracting officer's response to the initial protest shed no light on the issue, it apparently occasioned counsel's further inquiry or assumption that a noncompetitive award was the cause. In the absence of any earlier expression of the Postal Service's intent to award cluster 7 to New Breed, we find that protest timely.

¹⁶ For example, Cincinnati will have more trays, containers, and container repairs than any cluster 7 site; San Francisco will have more pallets, and Memphis will have more mailbags than all but the Chicago.

¹⁷ Contrary to New Breed's suggestion, the fact that some of protested terms were the same as those of the first prequalification request is not relevant to the issue of timeliness. [cite ??]

Since the appropriateness of clustering of MTESCs into groups of three also affects the issue of the appropriateness of the noncompetitive award, it merits discussion next.

The coalition cites cases such as *Pacific Northwest Bell Telephone Company; Mountain States Telephone Company*, Comp. Gen. Dec. B-227850, October 21, 1997, 97-2 CPD ¶ 379, which are to the effect that agency solicitations which are restrictive of competition because they consolidate requirements (referred to as the total package approach) may not be justified unless they are necessary to satisfy the agency's minimum needs. Those decisions, however, arise under the 1984 Competition in Contracting Act (CICA, 41 U.S.C. § 253(a)(2)), under which government agency solicitations must permit "full and open competition." CICA does not apply to the solicitations of the U.S. Postal Service, *Pacific Bell*, P.S. Protest No. 90-51, December 21, 1990, and the Postal Service has adopted a different standard of "adequate competition" for its purchases. Pub. 41 1.7.2.a.¹⁸

The determination of the government's minimum needs, the method of accommodating them and the technical judgments upon which those determinations are based are primarily the responsibility of the contracting officials who are most familiar with the conditions under which the supplies and services have been used in the past and will be used in the future. Generally, when a specification has been challenged as unduly restrictive of competition, it is incumbent upon the procuring agency to establish *prima facie* support for its contention that the restrictions it imposes are reasonably related to its needs. But once the agency establishes this support, the burden is then on the protester to show that the requirements complained of are clearly unreasonable.

This office will not substitute its judgment for that of the technical personnel absent fraud, prejudice, or arbitrary and capricious action.

¹⁸ It states:

Purchases must be made on the basis of adequate competition whenever possible. Adequate competition means the solicitation and participation of a sufficient number of capable sources to ensure that the required quality and quantity of goods and services is obtained when needed, and that the prices is fair and reasonable.

That the protesters are small or minority businesses is not material to their contention that the clustering of the centers precludes adequate competition. "The policies set out in Section 10.1 of [Pub. 41] are meant to encourage the participation of small and minority-owned businesses, but they do not set forth enforceable requirements which compel postal procurement employees to take any particular procurement action." *COR, Inc.*, P.S. Protest No. 90-16, June 22, 1990. Management Instruction AS-710-89-3 is an internal directive based on Pub. 41 10.1. It establishes no additional enforceable requirements.

Pacific Bell, supra (citations, footnotes, and internal quotations omitted). *Accord, Chicago City-Wide College*, Comp. Gen. Dec. B-212274, January 4, 1984, 84-1 CPD ¶ 51 (applying “clearly unreasonable” standard to “total package” procurement in pre-CICA context).

When a protester alleges that a solicitation is unduly restrictive of competition . . . the protester must present an extremely high level of proof to show that those restrictions are clearly unreasonable.

[The protester] has argued strenuously that the Postal Service should prefer its products because they offer more desirable technology and features, or because the Postal Service really does not need every feature included in the specifications. By themselves, such challenges to the judgment of the agency's technical personnel do not prove that specifications are unduly restrictive because [the protester] has not proven that the Postal Service's preferences are unreasonable. The requiring agency has broad discretion to obtain what it prefers as long as there is sufficient competition.

Interleaf, Inc., P.S. Protest No. 94-15, August 4, 1994. (citations, interior quotations, and footnotes omitted). Here, the protesters, like Interleaf, have labored strenuously to establish that the decision to cluster the centers and the bases on which the clusters were established are clearly unreasonable, but they have not satisfied that burden of proof.

As discussed above, the clusters were established to allow the Postal Service to administer fewer contracts than there were centers. Clusters of three centers were chosen as allowing reasonable competition. That the clusters could be grouped in quantities of three was, as the coalition notes, a fortuitous consequence of the fact that there were twenty-one clusters, it was not unreasonable for the Postal Service to take advantage of that consequence.

Much of the protester's disagreement with the concept of clustering rests on their assertion that the Postal Service would benefit from awarding an individual contract for each center because small businesses like the protesters could offer facilities based on their existing warehouses economically. That premise has been seriously challenged on this record by New Breed, which notes the substantial differences between the characteristics of MTEsCs and MTE warehouses. In view of that challenge, we cannot conclude that the protesters' contentions establish the unreasonableness of the decision to cluster the MTEsCs.

The assignment of centers to specific clusters was accomplished by the application of two different standards. One standard related to cluster 7, which was to be awarded on a different basis than the other six clusters, to which the second standard applied. It was not inherently unreasonable to treat three of the largest facilities differently from the remainder.¹⁹ where that cluster was to be first activated and operated. Similarly, it was not unreasonable to use factors relating to the geographic and other characteristics of the remaining centers in assigning them to clusters.

[W]hether 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.

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.

Rockwell International Corporation, P.S. Protest No. 96-16, October 25, 1996 (citations and internal quotations omitted).

The justification for the noncompetitive award recites New Breed's unique experience arising out of its development of methods and procedures in its operation of the Greensboro facility. While the protesters contend that they possess related experience arising out of their warehousing experience, as noted above the record reflects significant differences between the responsibilities

¹⁹ Similarly, it is not necessarily unreasonable that cluster 7 does not comprise the three largest centers in absolute terms. In terms of staffing four of the five largest centers are closely ranked in size, and the centers selected afford the geographic dispersal which the contracting officer has identified as important. Since the centers were measured in terms of overall staffing, that other centers may exceed the ones selected in terms of individual repair items, etc., is not significant.

associated with the operation of an MTE SC and an MTE warehouse. Those differences are sufficient to support the contracting officer's determination.²⁰

There remains the issue of the contracting officer's failure to extend the time for the submission of qualification statements when requested to do so. Pub. 41 offers no specific guidance on the timing of the submission of prequalification requests. While it provides generally at least 30 days for responses to solicitations (4.2.2.b), a request for prequalification should be less demanding to respond to than a solicitation. It involves only the expression of interest and the documentation of existing capability, and does not require the preparation of either a technical or a pricing proposal. Accordingly, the 25 days provided to respond to the prequalification request do not appear unreasonable in the first instance.²¹

Thereafter, River City requested additional time to make its submission because of the United Parcel Service strike. Whether to extend the time in which suppliers may make their submissions is a matter within the contracting officer's discretion. We review it from the Postal Service's view point, taking into account such factors as the adequacy of the competition and whether the record discloses any deliberate attempt to exclude a particular participant. *Earth Management Inc.*, P.S. Protest No. 95-45 December 22, 1995 (discussing comparable standard of General Accounting Office in non-CICA cases).

In the instant case, the contracting officer's decision was reasonable, since a substantial number of prospective offerors were able to make timely submissions, including River City itself.

We have considered all of the contentions raised by the protesters in support of their positions on the three issues which the protest presents. None of those contentions precludes the contracting officer's actions which are the subject of the protesters' complaints. The protests are denied.

William J. Jones
Senior Counsel
Contract Protests and Policies

²⁰ The coalition's assertion that New Breed's experience "proves too much," since it could be used to support a broader award than the contracting officer is chosen is not persuasive; rather, the record reflects the limitation of the noncompetitive selection so as to allow competitive selection of the remaining MTE SCs.

²¹ That the first prequalification request allowed slightly longer for response does not establish that a similar period was required here.

