

Protests of	)	Date: March 13, 1987
	)	
ACTION ENTERPRISES, INC.	)	
	)	
and	)	P.S. Protest Nos.
	)	87-14, 87-15
AMERICAN VENDING, INC.	)	
	)	
Solicitation No. 072358-87-A-0109	)	

DECISION

Action Enterprises, Inc., (Action) and American Vending, Inc., (American) timely protest certain terms of Solicitation No. 072358-87-A-0109 for food vending services at twenty-four locations in the Denver, CO, metropolitan area.

Invitation For Bids (IFB) No. 072358-87-A-0109 was issued by the Denver, CO, Support Services Procurement Office on January 13, 1987, with an offer due date of February 13. Among the solicitations provisions were the following:

General Provisions

\* \* \*

**Period of Performance.** The agreement will be for a 36-month term subject to the rights of termination specified herein subsequent to the official date of said agreement. The USPS additionally reserves the right to extend the agreement for two additional one-year periods, provided the USPS exercises such option 60 days prior to said expiration date(s) by written notice to the vendor, and the vendor does not decline within 45 days prior to said expiration date(s).

**Termination.** This agreement may be terminated in part or in toto by either party upon 30 days written notice. In the event of such termination, neither party shall be liable for any additional costs for the terminated portion, except for payment in accordance with the payment provisions of the contract for the actual services rendered prior to the effective date of the termination.

\* \* \*

### Special Requirements

\* \* \*

13. All vending machines should be equipped with counters.

Action and American protested, prior to bid opening, against terms apparent on the face of the solicitation. The contracting officer has extended the bid opening pending resolution of the protest.

The protesters state that Section 13 of the Special Requirements of the solicitation requires all vending machines to have counters, which they view as making the cost of providing vending equipment at most of the locations prohibitive. They also take exception to the provision whereby either party may terminate the contract on thirty days notice. They believe that this causes the contract to be a mere 30-day contract, an insufficient period to recover necessary capital expenditures.<sup>1/</sup>

American's protest mentions three additional concerns. It notes that four locations which currently run "coffee clubs" are slated to have coffee machines located at their facilities. American finds this to be duplicative and wasteful. American claims that six of the locations have unreasonable equipment requests for the estimated amount of vending services and that these locations should be deleted from the solicitation. Finally, American wishes the Denver Federal Center to be added as a location.

The contracting officer has responded to most of the issues raised by the protesters.<sup>1/</sup> As to the provision of coin counters, he interprets the word "should" as permissive rather than imperative; that is, while he would like all machines to have counters, contractors are not required to furnish machines with

<sup>1/</sup> The solicitation also required that each month the successful contractor pay the Postal Service one-and-one-half percent of the previous month's net vended sales to cover the costs of space, utilities and maintenance. Both protesters also indicate that they will include the one-and-one-half percent net sales fee in their bids. We do not consider this to be an issue in their protests.

<sup>2/</sup> He has not addressed the usage of the "Termination" clause, describing this as a legal matter upon which he has no response.

counters. He agrees that locations with coffee clubs should not have coffee machines and states that the solicitation will be amended to delete coffee machines from those locations. The contracting officer has reaffirmed with the Human Resources Branch that the six locations said by American Vending to have unreasonable machine requirements have sufficient demand to support the requested machines. Finally, he notes that the Denver Federal Center is still under construction and that it appears that, when completed, vending services for that location will be provided by a vendor pursuant to the Randolph-Sheppard Act.

Our standard of review of challenges to the terms of a solicitation is as follows:

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.

Portion-Pac Chemical Corp., P.S. Protest No. 84-49, August 1, 1984, quoting Amray, Inc., Comp. Gen. Dec. B-208308, January 17, 1983, 83-1 CPD & 43.

On this standard of review, the protesters' allegations fail, as the solicitation's provisions are supported and the protesters have not proven that the restrictions are unreasonable. The 30-day termination provision is a condition common to Postal Service vending service contracts. See Handbook AS-702, Contracting for Food Services, Sections 523.11, 523.12. It is up to the prospective contractors to assess the likelihood of early termination in the course of submitting their offers. The requirement for counters is, as the contracting officer correctly notes, not mandatory, and therefore is not a hindrance to the submission of offers. (We note, however, that there is little point in including "desirable" or "permissive" features in specifications of formally advertised solicitations, since offerors have no incentive to provide them.) The determination of which locations should be included in the solicitation and the equipment to be

located at each location is for the contracting officer, who has responded reasonably to the points raised by the protesters.

The protests are denied.

William J. Jones  
Associate General Counsel  
Office of Contracts and Property Law

**[Compared to original 2/23/93 WJJ]**