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DECISION



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

FILE: B-195315

DATE: February 20, 1981

MATTER OF: Tymshare, Inc.

*Protest Alleging Agency Action Constitutes An Unjustified
Sole-Source Procurement*

DIGEST:

1. Where (1) RFP primarily for support of one agency component did not adequately communicate to potential offerors agency's intent to award contract which would permit addition of similar teleprocessing services for another agency component, (2) projected funding was approximately at rate required to maintain existing support level for primary component, and (3) agency's conduct does not support its "intent" position as to scope of contract, GAO concludes that addition of work from another component to contract constitutes "procurement" within meaning of Federal Procurement Regulations.
2. Recommendation is made that specific, immediate corrective action be taken by agency which procured teleprocessing support services without delegation of authority from General Services Administration.

Tymshare, Inc., protests a determination made by the Department of Health and Human Services (HHS) to satisfy its need for certain teleprocessing services by adding this work to HHS contract No. HEW-100-79-0032 with ADP Network Services, Inc. (ADP). Until June 30, 1980, Tymshare performed those services (correspondence tracking, action document control, and regulation management) for the Health Care Financing Administration (HCFA) of HHS under a competitively awarded contract and a later noncompetitive order under Tymshare's Multiple Award Schedule Contract with the General Services Administration (GSA); the order expired on June 30, 1980. In February 1979, ADP was competitively

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awarded its contract for similar teleprocessing services in support of the Executive Secretariat of HHS. When HHS's order with Tymshare expired, HHS determined that it was in the Government's best interests to support HCFA under the ADP contract.

Tymshare contends that HHS's determination is improper because (1) support for HCFA is not within the scope of the ADP contract, (2) HHS's action constitutes an unjustified sole-source procurement, and (3) GSA did not authorize HHS to support HCFA under the ADP contract by issuing a delegation of procurement authority (DPA) as required by 40 U.S.C. § 759 (1976) and GSA's implementing regulations. GSA essentially concurs with Tymshare. HHS contends that its action is not a "procurement" and, therefore, was reasonable, proper, and in the Government's best interests. ADP concurs with HHS. Dialcom, an interested party, argues that a competitive procurement to support HCFA is the proper result.

We conclude that Tymshare's protest is meritorious and we recommend specific, immediate corrective action.

Our primary concern is whether HHS effectively communicated its intent in the solicitation (request for proposals (RFP) No. 129-79-HEW-OS) resulting in the ADP contract to support HCFA along with the Secretariat or whether HHS's action constitutes an unauthorized procurement, violative of the above statute and regulations.

The RFP's cover page read "Executive Secretariat, Office of the Secretary - Teleprocessing Services Requirement." The background section of the RFP's statement of work read as follows: "Whereas the computer support is generally for day-to-day functions of the Immediate Office of the Secretary, other department-wide applications will be maintained under this contract." (Emphasis added.) The purpose of the procurement section of the RFP's statement of work read as follows: "The purpose of this procurement is to provide the Office of the Secretary (OS), plus specified principal operating components (POC), DHEW [now HHS], with specified data processing service * * *" (Emphasis added.)

The record provides no indication that the support of HCFA constitutes a "department-wide application." Further, while the RFP "specified" what data processing service was required, no principal operating components were "specified" in the RFP. In our view, the RFP did not notify Tymshare and other potential offerors that the HCFA support was to be included in the work being procured. Our view is in accord with Dialcom's and GSA's; further, because of Tymshare's continuous interest in supporting HCFA, it seems that had Tymshare known that its work with HCFA was to be satisfied under that RFP, it would have competed for that award. In addition, we note that the projected funding level for the ADP contract was approximately at the rate required to maintain the level of support provided by the prior Secretariat-support contractor. We further note that the projected funding level was the amount contained in the request for procurement authority from GSA; thus, we believe that neither GSA nor potential offerors were aware that supporting HCFA--with its associated more than 100-percent funding level increase in projected costs--was HHS's intent by the RFP. Moreover, HHS's failure to transfer the HCFA work then being performed by Tymshare from the time of the ADP contract award in February 1979 until June 1980--even though substantial savings could have resulted--does not support HHS's position regarding its initial intent.

The final points for consideration here are ADP's argument that the benchmark mentioned HCFA and other HHS components and HHS representative's statement that the RFP was intended to be broad enough to permit support of components like HCFA. Weighing against this position is HHS's acknowledgement that the benchmark did not include HCFA's applications. We do not need to decide whether the mere mention of HCFA in the benchmark documents without including HCFA's applications in the actual benchmark was adequate notice to potential offerors of HHS's intent because the RFP--not the benchmark package--must notify potential offerors of the purpose and scope of the procurement. We must conclude here that the RFP did not adequately convey HHS's intent to procure support for HCFA.

Therefore, in our view, HHS's action in placing the support of HCFA under the ADP contract constituted a "procurement" within the meaning of the Federal Procurement Regulations (41 C.F.R. § 1-1.209 (1979)), for which, as GSA reports, HHS had no authority. Since we conclude that HHS had no authority for a competitive or a non-competitive procurement, we need not address whether its action constituted an unjustified sole-source procurement. Accordingly, Tymshare's protest is sustained.

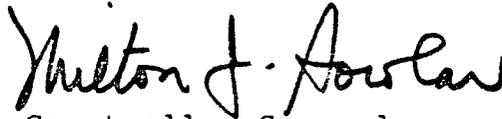
Our recommendation for corrective action must be made with an appreciation of the circumstances in which HHS's officials made the determination and the current needs of HHS. First, in April 1979, HHS issued an RFP to competitively procure support for HCFA but the RFP was canceled because (1) six of the nine proposed HCFA applications were to be supported in-house or became unnecessary, and (2) HCFA moved to acquire its own data center, which would begin providing support for the remaining three applications (now supported under the ADP contract). HHS reports that further attempts to support HCFA by a competitive procurement failed because its needs changed so frequently that there was insufficient time to conduct a competitive procurement. Second, after the failure of competitive procurement efforts, near the end of June 1980, HHS was faced with the requirement to support HCFA by extending Tymshare's sole-source contract or finding an alternative method. At that time, HHS and ADP agreed that HCFA could be supported under the ADP contract without modification to that contract. Third, HHS reports that supporting HCFA under the ADP contract resulted in significant savings (about 50 percent) as compared to HHS's costs under the Tymshare contract.

In view of these circumstances, we recommend that HHS immediately request an interim DPA from GSA to preserve the status quo for a period not to exceed 30 days from the date of this decision. During that period, (1) HHS should present to GSA its proposal to support HCFA through a competitive procurement until the long-term, data center solution is available; and (2) we recommend that HHS announce the precise terms of the current contract under which the HCFA services are being provided and invite all vendors to submit

proposals based on technically equal services. If a responsible vendor can perform the work at a better price, then HHS should make a new award immediately. If not, then no further action would be required regarding the ADP contract until called for by HHS's long-term solicitation.

Of course, if GSA denies the interim DPA, all teleprocessing support services for HCFA must be immediately terminated.

By letter of today, this recommendation for corrective action is being transmitted to the Secretary of HHS.

A handwritten signature in black ink, reading "Milton J. Fowler". The signature is written in a cursive style with a large initial "M".

For the Comptroller General
of the United States