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DECISION

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

FILE: B-201176.2

DATE: September 16, 1981

MATTER OF: Panafax Corporation - Reconsideration

DIGEST:

1. Prior decision is affirmed where no error of law or fact is shown.
2. GAO recommended that contract to lease facsimile machines, which will expire September 30, 1981, be terminated and award made to only other offeror. Since it will take until October for new contractor to deliver its machines, GAO will not object to agency's implementation of recommendation by recent award of new contract with operations to begin on October 1, and simply allowing original awardee's contract to expire on September 30.
3. Request for conference on reconsideration is denied where matter can be resolved promptly without conference.

Rapicom, Inc. requests that we reconsider our decision in Panafax Corporation, B-201176, June 22, 1981, 81-1 CPD 515. We sustained Panafax's protest against the Internal Revenue Service's (IRS) award of a contract to Rapicom for the lease of 72 facsimile machines because IRS' report demonstrated that Panafax was prejudiced by improper disclosures made to Rapicom by agency personnel prior to the submission of best and final offers. We recommended that the contract with Rapicom be terminated and award made to Panafax, the only other offeror.

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Rapicom contends that our decision is both factually and legally erroneous. For the reasons set forth below, we find no merit to these contentions.

Rapicom argues that our decision is factually erroneous because the IRS report neither admitted prejudice to Panafax nor demonstrated that Rapicom gained an improper competitive edge due to the "alleged" disclosures. Rapicom points out that the Legal Memorandum in the IRS report contains a footnote stating only that "the evidence thus far does indicate that Rapicom may have secured a competitive advantage through an unauthorized disclosure."

Our decision, however, is supported by the following statements in the agency report:

"[T]he investigation referred to above has revealed facts and circumstances which do indicate that while no prices were disclosed, the identity of Panafax as an offeror and that it was offering a newly developed machine were revealed to Rapicom. * * * The investigation also indicates that this information enabled Rapicom to identify the machine model that Panafax was offering and determine an approximate offered price. Based on these circumstances, the IRS has determined that the competitive bidding system has been clouded by this procurement and some remedial action is warranted." IRS Legal Memorandum, p. 3.

"Due to this unauthorized disclosure which gave Rapicom an improper competitive edge, the Service has determined that the proper course of remedial action is not to renew the Rapicom contract which expires September 30, 1981." Contracting Officer's Statement, p. 3.

While there may appear to be an inconsistency between those statements and the footnote cited by Rapicom, IRS included the footnote merely to support its argument that the award to Rapicom was not palpably illegal. (IRS incorrectly believed that such a finding was a prerequisite to

a termination for convenience recommendation. See New England Telephone and Telegraph Company, B-197297, September 25, 1980, 80-2 CPD 225.) At no time did IRS deny that an impropriety had occurred in the award process. On the contrary, IRS of its own accord frankly revealed that an improper disclosure had been made to Rapicom, and the record is clear that the agency determined that the disclosure enabled Rapicom to identify the machine model that Panafax was offering and calculate an approximate offered price, and that some form of remedial relief therefore was necessary.

Accordingly, we believe that the IRS report made it clear that Rapicom gained a competitive edge to Panafax's prejudice. If, however, any cause for doubt concerning IRS' legal position should have arisen from the use of "may have" in a footnote, we point out that a supplemental IRS legal memorandum filed on March 4, 1981, in rebuttal to the protester's comments on the agency report, contains the following unequivocal statement:

"The IRS does not suggest that Panafax was not prejudiced by the disclosure made by its technical personnel which identified the protester as a bidder and the model on which it was bidding.
* * *"

We recognize that Rapicom maintains that no improper disclosure occurred. However, we do not find Rapicom's position sufficient to overcome IRS' frank advice of the results of its own thorough investigation. We can perceive of no reason why IRS would advise this Office that an improper and prejudicial disclosure had occurred if IRS had not in fact found one.

Rapicom argues that our decision is legally erroneous because our recommendation that its contract be terminated and award made to Panafax is improper even under the cited authority, Honeywell Information Systems, Inc., 56 Comp. Gen. 505 (1977), 77-1 CPD 256. Rapicom contends that Honeywell does not support award to a competitor but rather only a recompetition. Honeywell, however, was not cited as precedent for the specific remedial relief recommended in our decision. It was cited for the proposition that where we

find that an award was improper, we will recommend corrective action, including a termination for convenience, in order to protect the integrity of and confidence in the competitive procurement system despite an agency's claim that corrective action would be costly and would disrupt its operations. Further, the specific remedial relief recommended in this case is not without precedent. See, e.g., National Office Moving Co., B-196282, March 10, 1980, 80-1 CPD 185.

Rapicom also suggests that in arriving at our recommendation, we failed to take into account such factors as the seriousness of the procurement deficiency, the degree of prejudice to other offerors or 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 procurement and the impact on the user agency's mission. We believe, however, that it should be apparent from our decision that these types of factors indeed were considered, and that the seriousness of the procurement deficiency, the prejudice to Panafax, and the integrity of the competitive procurement system mandated a recommendation that Rapicom's contract be terminated.

Rapicom further argues that the remedy proposed will result in an improper noncompetitive award to Panafax, particularly in light of the manner in which IRS intends to implement our recommendation. IRS advises that it recently awarded a contract to Panafax, which has agreed to deliver 72 facsimile machines and have them operational in less than two months (Rapicom's contract called for a phased in delivery over 3-1/2 months). The operational date for the machines therefore will be set as October 1. Based on this time frame, IRS will not terminate Rapicom's contract since it will expire on September 30. Performance beyond September 30, 1981 will be based on the exercise of the renewal option in the Panafax contract.

As previously stated, our original recommendation was that Rapicom's contract be terminated and award made to Panafax. We do not believe that such an award can properly be characterized as noncompetitive since it would be based on the competition under the protested procurement. We do, however, have reservations regarding the approach actually

taken by IRS in this case, since the result, in effect, is two contracts until October 1 under the same solicitation for the identical need.

Nevertheless, we fail to see how Rapicom is prejudiced by that approach since it is being permitted to complete its one-year contract. Further, given the current procurement situation, the only effective alternative relief available is a recompetition, which we do believe provides sufficient remedial relief under the circumstances of this case. Consequently, we will not object to the action taken by IRS in response to our recommendation.

In so concluding, we recognize that before the renewal option in Panafax's contract properly can be exercised, the contracting officer must determine that it is the most advantageous method of fulfilling the Government's needs, price and certain other factors considered. Federal Procurement Regulations § 1-1.1507(c), 46 Fed. Reg. 7967 (1981). We note that such a determination would appear to be warranted under the circumstances of this case since one of the factors the contracting officer must consider is the Government's need for continuity of operations and the potential costs of disrupting operations.

As a final matter, Rapicom requests a conference on this matter. Our bid protest procedures do not explicitly provide for conferences in connection with reconsideration requests. 4 C.F.R. § 21.9 (1981). We believe a request for a conference on reconsideration should be granted only where the matter cannot be resolved without a conference. Biospherics, Inc.--Reconsideration, 60 Comp. Gen. 28 (1980), 80-2 CPD 272. In our judgment, this is not such a case.

Since Rapicom has not demonstrated an error of fact or law in the original decision, our decision is affirmed.


Acting Comptroller General
of the United States