B-207340 119427

DECISION

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

FILE: B-207340 DATE: September 13, 1982

MATTER OF: National Data Corporation

DIGEST:

1. Protest--contending that a contract modification at an alleged substantial price increase was tantamount to an unjustified sole-source procurement--is timely under 4 C.F.R. § 21.2(b)(2) (1982), since the protest was filed within 10 working days of when the protester first learned of the precise amount of the price increase.

2. GAO concludes that a contract modification adding about $5,000 per month to an existing teleprocessing services contract is not tantamount to a new procurement within the meaning of the Federal Procurement Regulations because, among other reasons, the added work is essentially the same work being done, the quantity of added work is not a significant increase, the agency had the contractual right to add the work, and the RFP resulting in the existing contract adequately warned offerors that this type of modification could occur.

National Data Corporation (NDC) protests the modification of contract No. ICC-DP-K-0001 between the Interstate Commerce Commission (ICC) and CompuServe Data Systems, Inc. (CompuServe). The modification increased the amount of teleprocessing services to be performed by CompuServe by about $5,000 per month. NDC contends that the ICC's action constitutes an unjustified sole-source procurement and that the ICC acted without a necessary delegation of procurement authority from the General Services Administration (GSA). We find that the protest is without merit.

The current CompuServe contract resulted from a 1978 ICC procurement of teleprocessing services. For that procurement, the ICC obtained a delegation of procurement authority from GSA explaining that it was the ICC's intent to competitively procure services prior to the end of fiscal year 1978 to be performed by two vendors. The planned system life was 5 years. The ICC also explained to GSA that the primary contractor would do interactive and large scale remote job entry and batch operations and the secondary contractor would provide statistical and analytical software support services.

In May 1978, the ICC issued a request for proposals (RFP) stating that the ICC would make two awards with the primary vendor getting approximately three times the amount of work that the secondary vendor would get. The RFP notified offerors that (1) no minimum workload was guaranteed to either contractor, (2) the application mix could change from what was then being done, and (3) the ICC was free to increase or decrease requirements of either contract, including shifting workload from one contractor to the other, when the reliability or performance requirements of the contract were not met. By amendment to the RFP, the ICC stated that the percentage of use between vendors is guaranteed as long as performance standards are met. In conformance with the RFP's announced selection plan, CompuServe, the offeror with the highest technical and cost rating, was awarded the primary contract and the second highest rated offeror, Call Data (subsequently acquired by NDC), was awarded the secondary contract. During the course of the contracts, the ICC maintained the guaranteed workload split between contractors.

In early 1982, the ICC experienced a reduced need for teleprocessing services and funding reductions which forced the ICC to look for ways to economize. The ICC decided to transfer all teleprocessing work done by NDC to CompuServe and terminate NDC's contract. Since CompuServe was the lower priced vendor, the ICC determined that it could realize savings by having the lower priced vendor do all the work instead of proportionately reducing the workload for both vendors.

By letter dated March 4, 1982, the ICC notified NDC that its contract was terminated for the convenience of the Government and that NDC should transfer listed Government property to CompuServe. NDC states that it was led to believe that the ICC's processing volume would be reduced so that CompuServe would absorb the work previously done by NDC with only a small increase in CompuServe's contract price.

On March 15, 1982, NDC representatives met with ICC officials who advised that ICC was reducing the use of teleprocessing services and that CompuServe could meet all the ICC's needs. NDC states that the ICC advised that there would be a small increase in CompuServe's contract price as a result of the work previously done by NDC; the ICC states that NDC was advised that CompuServe's contract price would be increased, but not substantially. In any event, NDC felt that CompuServe's contract price would have to be increased substantially and, in a letter dated April 2, 1982, NDC tried to convince the ICC that terminating NDC's contract would not result in the desired savings.

NDC's April 2, 1982, letter was based in part on NDC's estimate that CompuServe's contract price would increase by more than $9,000 per month. NDC states that it was not until April 16, 1982, when NDC received documents from the ICC in response to a Freedom of Information Act request, that NDC learned that the ICC had increased CompuServe's contract price by $5,000 per month. NDC states that sole-source awards over $50,000 per year require a delegation of procurement authority from GSA. Within 10 working days after April 16, 1982, NDC filed the protest here on April 30, 1982.

NDC contends, citing our decision in Tymshare, Inc., B-195315, February 20, 1981, 81-1 CPD 118, and other decisions, that the ICC's transfer of NDC's applications to CompuServe at an increase of $5,000 per month in CompuServe's contract price constitutes an unjustified sole-source procurement, conducted without a required delegation of procurement authority from GSA. In this regard, NDC cites a GSA regulation (41 C.F.R. § 1-4.1203(f)) published in the Federal Register on May 12, 1982 (effective October 1, 1981),

which provides that increased requirements beyond 25 percent of those specified in the contract (including options) require a new delegation of procurement authority from GSA.

The ICC contends that NDC's protest is untimely because NDC knew its basis for protest by March 15, 1982, but waited until April 30, 1982, to file its protest. The ICC reports that on March 15, 1982, NDC was advised that there would be an increase in CompuServe's contract price and the ICC argues that NDC's April 2, 1982, letter is evidence that NDC knew of the planned increase and the amount of the increase much earlier than April 16, 1982. Further, the ICC argues the knowledge of the planned price increase in CompuServe's contract is irrelevant because NDC's protest is based on the transfer of work to CompuServe.

In reply, NDC explains that its April 2, 1982, letter was based on worst-case estimates made by NDC in an effort to convince the ICC to reverse the termination decision. NDC states that, at that point, NDC could only rely on the ICC's statements that the CompuServe contract price would not be increased substantially.

Regarding the timeliness of NDC's protest, in our view, NDC's protest is essentially that the ICC substantially increased CompuServe's contract price as a result of the modification and we conclude that NDC filed its protest within 10 working days of learning the precise magnitude of the increase in CompuServe's contract price. We recognize that the ICC told NDC that there would be a small increase but, here, NDC's protest is based on NDC's position that the increase was not small, but substantial. Further, contrary to the ICC's contention, we view NDC's protest as being based on the transfer of work to CompuServe, plus the alleged substantial increase in CompuServe's contract price. Accordingly, we find that NDC's protest is timely.

Regarding the merits of NDC's protest, the ICC reports that it had the contractual right to terminate NDC's contract and the contractual right to increase

the level of service under CompuServe's contract. The ICC contends, citing our decision in Webcraft Packaging, Division of Beatrice Foods Company, B-194087, August 14, 1979, 79-2 CPD 120, that the modification did not constitute a new procurement. The ICC also contends that its action was within the scope of the delegation of procurement authority granted by GSA.

We recognize that contract modifications are primarily the responsibility of the contracting agency; however, we have cautioned that the contracting parties may not change the terms of a contract to interfere with or defeat the purposes of competitive procurement. See, e.g., E. R. Hitchcock & Associates, B-182650, March 5, 1975, 75-1 CPD 133. We are concerned that improper contract modifications tantamount to unjustified sole-source awards, in lieu of competitive procurements, will adversely impact upon the integrity of the competitive procurement process. See American Air Filter Co.--DLA Request for Reconsideration, 57 Comp. Gen. 567 (1978), 78-1 CPD 443. In this regard, we have stated that if a contract, as modified, is materially different from the contract for which competition was held, the subject of the modification (the new requirement) should have been competitively procured (unless a sole-source procurement was otherwise justified). American Air Filter Co., Inc. 57 Comp. Gen. 285 (1978), 78-1 CPD 136; see 50 Comp. Gen. 540 (1971).

After carefully reviewing the circumstances of the modification to CompuServe's contract, we conclude that the ICC's action was not tantamount to conducting a new procurement within the meaning of the Federal Procurement Regulations (FPR). We base our conclusion on these facts. First, the additional work being added to the CompuServe contract was essentially the same type of work that CompuServe was already performing. Second, the quantity of additional work (less than a one-third increase) was not significant in relation to the amount of work that CompuServe was already performing. Third, the ICC had the contractual right to add the work to CompuServe's contract. Fourth, in the original RFP, resulting in both CompuServe's and NDC's contracts, the ICC warned offerors that the ICC could transfer all work to one vendor under specified

conditions. Fifth, the contract, as modified, is not materially different from the contract for which the competition was held. Sixth, the 5-year life cycle governing the initial award has only about a year to go until a new procurement must be held for work being accomplished under the CompuServe contract.

We do not find that the instant matter and the circumstances involved in Tymshare, Inc., supra, or the other decisions cited by NDC are sufficiently similar to support NDC's position. For example, in the Tymshare, Inc., decision, we held that the addition of work (previously performed by a contractor selected under a separate competitive procurement) to an existing contract constituted a procurement within the meaning of the FPR primarily because the RFP resulting in the existing contract did not adequately communicate to potential offerors the agency's intent to add the work involved to the resulting contract. Here, unlike the Tymshare, Inc., situation, we find that the RFP adequately notified offerors that work could be transferred from one vendor to another.

Thus, we conclude that the modification to CompuServe's contract did not constitute a sole-source procurement. Further, we have no basis to conclude that contract modification issued by the ICC violated the procurement authority delegated by GSA in 1978.

In this regard, we find no clear violation of 41 C.F.R. § 1-4.1203(f) since the work added to the CompuServe contract was authorized by the provision of the contract permitting the ICC to increase the quantity of services to be performed; thus, there was no increase in requirements beyond those specified in the contract.

Protest denied.

for Milton J. Socolar
Comptroller General
of the United States