DECISION

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

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FILE: B-213430.2 **DATE:** October 23, 1984

MATTER OF: Memorex Corporation

DIGEST:

1. Decision not to recommend contract termination where a protest was sustained is affirmed. Termination would not be in the best interests of the government because it would be costly and potentially disruptive to the agency's mission, and the prejudice to potential offerors or the integrity of the competitive system is not so egregious that it outweighs the negative effects on the government of termination.

2. An improperly awarded contract is not void where the deviation from the procurement regulations is neither egregious nor obvious to the awardee.

Memorex Corporation requests reconsideration of our decision in Memorex Corp., B-213430, July 9, 1984, 84-2 CPD ¶ 22. We sustained Memorex's protest that request for proposals (RFP) No. 6916, issued by the Department of the Interior for data access storage devices, contained specifications which unduly restricted competition. We did not recommend corrective action, however, because the contract had been awarded to Amdahl Corporation 5 months earlier and the equipment already had been installed. We affirm our decision.

Memorex argues that corrective action should have been recommended because nothing in the record suggested that contract award in fact had been made to Amdahl or that title to the equipment passed at the time of delivery. Memorex argues that we should require that the agency resolicit both the basic and option quantities contained in the RFP.

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At the outset we note that shortly after we issued our decision, Interior notified us that it had decided not to exercise the option for increased quantity contained in the awarded contract. Instead, the agency intends to resolicit that quantity with a specification revised according to our decision. Therefore, Memorex's request for reconsideration is moot insofar as it concerns the option quantity.

Although Memorex contends that nothing in the record showed that contract award actually had been made to Amdahl, Amdahl's written comments on the protest conference held at GAO specifically state that contract award was made to it on December 23, 1983. These comments are, of course, part of the protest record. Moreover, the cover letter to the comments shows that a copy with enclosure was sent to Memorex.

Contract award in this case was made on a lease-to-ownership basis. The agency estimates that over the time which would be required to resolicit with revised specifications and to complete delivery, installation, testing, and acceptance of the new equipment, it would have paid approximately 50 percent of the purchase price of the existing equipment. In addition, Interior states that there is a significant question regarding its ability to install new equipment in the available conditioned space for testing and acceptance while continuing to operate the existing equipment. Interior adds that it is not feasible to take the existing equipment out of operation because that would have a severe adverse impact on the agency's mission.

The decision whether to recommend termination of a contract as a form of corrective action involves consideration of the cost of termination, the extent of performance, the degree of prejudice to other offerors or to the competitive procurement process, and the impact of termination on the procuring agency's mission. Orvedahl Construction, Inc.--Reconsideration, B-213408.2, June 28, 1984, 84-1 CPD ¶ 687. Any one of these factors may be controlling with respect to whether corrective action is appropriate. System Development Corp. and Cray Research, Inc.--Request for Reconsideration, 63 Comp. Gen. 275 (1984), 84-1 CPD ¶ 368.

Despite Memorex's arguments to the contrary, we remain unpersuaded that termination of the contract would be in the best interests of the government. It is apparent that termination would be costly and potentially disruptive to the agency's mission. In addition, we do not view the prejudice to potential offerors or the integrity of the competitive system here as so egregious to outweigh the negative effects on the government of a termination. We also cannot overlook the fact that the agency has in fact taken corrective action by deciding not to exercise the option for increased quantity. Under these circumstances, we do not consider contract termination an appropriate remedy and we therefore affirm our prior decision in that respect.

Memorex complains of Interior's delay in forwarding it a copy of the letter the agency sent to GAO, after Memorex filed its request for reconsideration, which discussed the estimated costs and the effect on agency operations of contract termination. Memorex asserts that because it was not immediately furnished a copy of the letter, it is an ex parte communication and should be disregarded. Memorex also argues that the letter should be considered untimely because the information it contains was known to Interior prior to our initial decision. We disagree.

While Memorex is correct that Interior should have promptly forwarded a copy of the letter to Memorex, the fact remains that the protester did eventually receive a copy and has had an opportunity to respond. Further, the information in the letter does not relate to the merits of Memorex's protest, but instead to one of the remedies available where a protest is sustained. We do not require that an agency routinely submit such information as part of the protest record but instead request it from the agency when we consider it necessary. The letter in question here was sent in response to such a request. Accordingly, we find no basis to disregard the letter.

Memorex also argues that the awarded contract should be declared void because Interior violated the statutory and regulatory requirements for obtaining maximum feasible competition and because Interior disregarded the applicable regulations concerning the award of a contract in

the face of a protest. We find no merit to this contention.

The Court of Claims and our Office have taken the view that once a contract comes into existence, it should not be canceled (i.e., treated as void), even if improperly awarded, unless the illegality of the award is plain or palpable. John Reiner & Co. v. United States, 325 F. 2d 438 (Ct. Cl. 1963), cert. denied, 377 U.S. 931 (1964); Computer Election Systems, Inc., B-195595, Dec. 18, 1979, 79-2 CPD ¶ 413. Thus, where the contracting officer's deviation from the applicable statutes and regulations was neither egregious nor obvious to the awardee, the contract award has not been treated as void. See Trilon Educational Corp. v. United States, 578 F.2d 1356 (Ct. Cl. 1978).

In our initial decision, we found that two of the specifications in the RFP unduly restricted competition. In one instance, we concluded that a specification for new equipment did not reflect the agency's actual minimum need. In the other instance, we found that a benchmark, which the agency used to support a specification requiring single density drives, did not in fact support that restriction. We do not, however, view the presence of these defects as such a substantial deviation from the procurement statutes and regulations as to require a conclusion that the contract is void.

In this case, it appears that the contracting officer relied upon the advice of technical personnel in formulating the contract specifications. Although some of these specifications were later found unduly restrictive, there is no evidence that the contracting officer did not reasonably consider the specifications to be proper at the time of contract award.

There is also nothing in the record which would support a finding that Amdahl was on direct notice that the specifications were inconsistent with any statutory or regulatory requirements. We therefore find no merit to Memorex's argument that the solicitation defects in this case rendered the subsequent contract award void.

Concerning the agency's failure to comply with the regulations concerning contract award while a protest is

pending, we have consistently held that this is merely a procedural defect which does not affect the validity of an otherwise proper award. E.g., E.S. Edwards & Son, Inc.; Koch Corp., B-212304, et al., June 18, 1984, 84-1 CPD ¶ 631.[1]/

Our prior decision is affirmed.

Milton J. Socolar

Acting Comptroller General
of the United STates

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[1]/ Memorex questions whether this standard remains valid after the ruling in Derecktor v. Goldschmidt, 506 F. Supp. 1059 (D.R.I. 1980). We have indicated that it does. See Sierra Pacific Airlines, B-205439, July 19, 1982, 82-2 CPD ¶ 54.