LOP 15K see PL-II

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

FILE: B-216998 **DATE:** July 1, 1985

MATTER OF: American Management Systems, Inc.

DIGEST:

Agency acts improperly where CBD announcement is used to justify award to nonmandatory ADP schedule vendor, but order placed with that vendor deviates materially from the terms of its schedule contract. Federal Information Resources Management Regulation § 32.206, concerning the use of nonmandatory schedule contracts, authorizes award only where the order conforms to the terms of an existing schedule contract.

American Management Systems, Inc. (AMS), protests the award of a purchase order to Cullinet Software, Inc., under General Services Administration (GSA) Automatic Data Processing Schedule Contract GS00K-84-01-S557. While the protester raises several issues, our decision principally concerns a portion of the protest in which AMS complains that the Department of Health and Human Services (HHS) has improperly awarded a purchase order to Cullinet because the order exceeds the scope of the Cullinet schedule contract. We sustain the protest.

AMS makes several related arguments in support of its contention that HHS improperly placed an order outside the scope of the Cullinet schedule contract. According to the protester, HHS is not in fact acquiring existing Cullinet software as anticipated by the schedule contract but using the schedule as a device to order the development of substantially new software that is not on the schedule. AMS also asserts that HHS has imposed, and Cullinet has accepted, significant changes in other provisions of the schedule contract and is circumventing the maximum ordering limitation in the contract. In these circumstances, AMS contends, the agency has acted outside the terms of its blanket delegation of procurement authority issued by GSA, making the Cullinet award illegal.

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As the protester points out, HHS' purchase order purports to add a variety of conditions to the Cullinet contract. These include:

1. A description of the work to be performed, which is described as "Cullinet's Development Responsibility" and which includes a list of 48 functional requirements that Cullinet's modified software is to meet.

2. An agreement by Cullinet that it will maintain the products it is developing until such time as it provides maintenance for them as standard products.

3. An agreement by Cullinet that it will complete the modifications within 12 months.

4. Provisions defining the parties' rights should Cullinet fail to complete the modifications in 12 months, which includes a provision for recision of the entire agreement by the government.

5. A provision allowing HHS to place future orders for this software at 25 percent off the then prevailing commercial or GSA schedule price, whichever is less, and a provision limiting future increases in maintenance, renewal and update fees.

6. A provision granting HHS a 7-year extension of the current GSA schedule contract to coincide with what the purchase order describes as an anticipated 7-year life of this order, including its option periods.

Additionally, HHS agreed to provide on-site office space, telephone, computer terminal and normal office support for two Cullinet employees.

These terms differ significantly from the provisions of Cullinet's schedule contract, the protester says. The schedule contract does not provide for software development, requires delivery of software within 30 days of receipt of a purchase order and makes no provision for "option periods." Moreover, AMS contends, the schedule contract provides fixed fees for continued use of software

after the end of the fiscal year in which an order is placed. It makes no provision for placing additional orders after that time or for maintaining such software.

On the other hand, while HHS and Cullinet do not deny that the supplemental agreement contains the disputed provisions, they argue that the order was proper. Both point out that the order was placed against specific schedule contract line items. The contracting officer says that Cullinet's agreement to modify its current products to comply with HHS' stated functional requirements was anticipated in a Commerce Business Daily (CBD) announcement of HHS' intent to acquire Cullinet software, which called for software modules "capable of being modified." Such modifications are allowed, he says, under the terms of Cullinet's schedule contract since that contract provides, in part, that:

> "Any written commitments by Cullinet within the scope of this contract shall be binding upon Cullinet whether or not incorporated into a purchase order. Failure of Cullinet to fulfill any such commitment shall render Cullinet liable for liquidated or other damages due to the Government under the terms of this contract."

Moreover, the contracting officer insists, this language includes supplemental agreements concerning options and additional purchases because elsewhere the schedule contract provides:

> "For the purpose of this contract, a commitment by Cullinet includes . . . prices and options committed to remain in force over a specified period(s) of time provided that in any fiscal year covered by the commitment the Government may, at its option, order software programs under Cullinet's . . . Schedule contract for that fiscal year . . . ."

Finally, HHS states that its use of the schedule contract in lieu of procuring customized software competitively is discretionary under Federal Information Resources Management Regulation (FIRMR) § 32.206(a)(3)

(iii)[1]/ and that GSA has upheld the legality of HHS' order against the Cullinet schedule contract.

In addressing these issues, we first point out that, contrary to HHS assertion, GSA has not upheld its position. The most that might be said is that, because ADP procurement authority flows through GSA, that agency has acquiesed in HHS' exercise of contracting authority. In this regard, GSA, after receiving submissions from HHS and Cullinet concerning this matter, advised HHS that:

> "We . . . believe the issuance of the order was inappropriate under the GSA Schedule contract in question. Since it is our understanding that the software has been delivered to and accepted by HHS, we do not believe it would be in the Government's best interest to [take formal exception to HHS' action]. This forbearance should not be construed as an approval of HHS' utilization of GSA's Schedule contract. GSA's Schedule contracts are not for the development or significant modification of software provided thereunder." (Emphasis added.)

Moreover, it is irrelevant, in our view, that the HHS purchase order calls out specific schedule contract line items. Those line items do not describe schedule contract items if the parties have also agreed that the products to be delivered will differ significantly from the products described in the schedule contract.

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[1]/ The text is found in Federal Procurement Regulations (FPR) Temporary Reg. 71, 41 C.F.R. subpart 1-4.11 and 41 C.F.R. Ch. 1 App. (1984). FPR Temp. Reg. 71 was redesignated as FIRMR Temp. Reg. 71 and given new chapter designators (ch. 201) in 49 Fed. Reg. 20,994, 21,001 (1984). The provisions have been largely reissued in FIRMR Temp. Reg. 6, 50 Fed. Reg. 4,411 § (1985) and will be codified at 41 C.F.R. ch. 201. Throughout, citations to the FIRMR are to the section number within chapter 201.

Concerning the substance of HHS' actions, the record indicates that HHS selected Cullinet following an internal review process. First, HHS identified functional requirements for each of the applications to be installed as part of a financial and administrative integrated management system and furnished a statement of these requirements to several preselected vendors. Based on a briefing by each of the preselected firms, HHS chose Cullinet software products as best fitting its needs. AMS was not one of the preselected firms.

The record also shows that following Cullinet's selection, but prior to release of the CBD announcement, HHS, concerned with how the Cullinet software would function in the agency, visited Cullinet's facility in Westwood, Massachusetts. At that time, HHS discovered that the Cullinet application software would require significant modifications before it could meet HHS' needs. Recognizing this, Cullinet offered verbally to modify its application software products to meet the agency's needs and to incorporate the modifications into a subsequent product release. Based on this commitment, the notice was published. As indicated, the notice expresses HHS' intent to acquire software under Cullinet's schedule contract; the notice did not indicate that Cullinet had offered to modify the software for HHS.

It is clear from the record, therefore, that the agency knew before issuing the CBD announcement that the Cullinet schedule contract items would not meet its needs. It is also clear that HHS believed it was essential that Cullinet agree in writing to deliver something other than its schedule contract software. On September 24, 1984, the HHS project manager stated in a memorandum to the Assistant Secretary for Management and Budget that:

> "It is essential . . . that the scope of the requested modifications be completely understood by the contractor and that those deficiencies that impact on "core" Departmental requirements must be developed by Cullinet as a part of their propriety release. This will require technical working cooperation with DHHS to define the specifications for the required modifications. It is not known at this time whether Cullinet will honor a contractual arrangement to modify their application products to meet DHHS needs. This should be ascertained by negotiating directly with Cullinet before any final decisions, on the systems are made."

HHS subsequently prepared the additional terms and conditions mentioned above, which were appended to the purchase order and submitted to Cullinet for its approval.

We do not think that HHS' award to Cullinet conforms to the requirements of FIRMR § 32.206 concerning the use of ADP Schedule contracts.

First, we reject HHS' interpretation of FIRMR § 32.206(a)(3)(iii). It construes that regulation as according it discretion to determine whether to use a schedule contract in lieu of conducting a competitive procurement. Section 32.206(a) identifies some of the factors that agencies should consider in deciding how to proceed in acquiring ADP equipment. The regulation points out that, although competitive procurement may consume time and resources, a fully competitive procurement may be in the government's best interest (where, for example, existing schedule contracts cannot satisfy the agency's needs), and in section 32.206(a)(3) reminds agencies that they are required to seek maximum practicable competition. See also FIRMR § 32.206(a)(2) indicating that the provisions of FIRMR § 32.206 are to be applied with the understanding that the requirement for maximum practicable competition is not waived. Nothing in these provisions authorizes an agency to use a schedule contract in lieu of conducting a competitive procurement where the agency's need cannot be met by adhering to the terms of a schedule contract.

Further, the agency relies on section 32.206(g)(i) to justify award in the present case. That section refers to the placing of an order "against the synopsized schedule contract." An order cannot be fairly said to have been placed against the synopsized contract if that order differs materially from the schedule contract. Thus, we see no difference between the intent of this provision and section 32.206(g)(2), which states explicitly that the order is to conform to the terms and conditions of the schedule contract. (But compare B-171313, May 26, 1971, cited by the parties, where we recognized that de minimis differences in orders placed under Federal Supply Schedule contracts--in that instance a change in the type of plugs on oscilloscopes--were allowable.)

We recognize that, as Cullinet contends, commercially available software is routinely modified to meet the users needs. According to Cullinet, commercially available applications software can rarely if ever be purchased and used without some modification to meet the user's specific needs. Cullinet explains that it is for this reason that source code is provided to the user as part of the applications system. In Cullinet's view, we should treat the modifications as no different in scope and nature from those that are inevitably required whenever any customer acquires commercially available applications software.

We do not agree. By its own admission, Cullinet does not customarily undertake to make applications software changes for end users who are expected to use in-house personnel or retain outside consultants to perform this work. The record indicates that Cullinet agreed to make the modifications in this instance because Cullinet wished to include these changes in its future software releases. In other words, Cullinet accepted the contract because the modifications were not of a routine nature and because Cullinet believed there is a market for the product it plans to produce.

The task Cullinet has undertaken involves modifying commercially available accounting software to meet government accounting standards. Its scope is indicated by the fact that HHS imposed 48 functional requirements, that it extended the 30-day delivery requirement by a year so Cullinet could meet them, and that it provided that the government could rescind the contract without obligation if Cullinet failed to perform. The applications programs involved constitute approximately one-half of the dollar value of the product to be delivered and the record shows that HHS would not have awarded a contract to Cullinet had that firm declined to make the modifications.

In our view, it is clear that the contract awarded differs materially from the schedule contract on which it ostensibly was based and that HHS did not, therefore, comply with FIRMR § 32.206(a). This portion of the protest is sustained.

Nevertheless, HHS' Deputy Assistant Secretary asserts that any disruption due to termination of the Cullinet contract could delay HHS a year or more in obtaining the considerable savings that it expects to realize through

the implementation of a new financial management system. He states that HHS anticipates total 5-year savings from this project of $106 million and asserts that delay of 1 year would cost the taxpayers approximately $6.9 million. He also states that such delay would impair HHS' ability to comply with the Federal Managers' Financial Integrity Act.

HHS assumes it would lose a year or more if the requirement were competed. At the time the Cullinet order was placed, however, HHS had completed much of its preliminary procurement planning. Since its requirements have been identified, it should be able to move quickly to release a solicitation. Under the circumstances, there is no apparent reason why HHS could not develop a procurement schedule that would allow completion of a competitive procurement without compromising its delivery requirements. We note that the Cullinet modified software is not to be delivered until January 1986. According to Cullinet, the work being done fits into its software development plans and is being developed at its own expense. Presumably, therefore, Cullinet would continue to develop this software and would offer it in response to a competitive procurement.

We recognize that in conducting a competitive procurement, HHS will have to give consideration to concerns AMS has expressed in its protest regarding HHS' aim of acquiring an integrated database/applications program package. According to AMS, such a requirement is unsound and unduly restricts competition. On the other hand, HHS calls its objective "a fully integrated software approach" which it says is justified by an expected savings in life cycle system costs. HHS asserts that if one vendor does not supply both the DBMS and applications software, and the agency must assume the responsibility to make changes to the applications software using in-house personnel, it will encounter cost and delay whenever changes are made to the DBMS package. A fully integrated approach would place this responsibility on a single vendor.

While we appreciate HHS' concern, its assertions appear to be founded on a faulty premise. Software changes would occur if the DBMS vendor decides to make changes in its product and would be implemented at HHS only if HHS decided to acquire and install the new version. What HHS is saying is that it wants to be able to upgrade the DBMS by installing future software the

vendor may develop without having to rely on in-house programing to maintain the applications software. AMS, however, has indicated that it is willing to assume contractual responsibility for applications software changes that become necessary to accommodate future changes to any DBMS the agency may select. Moreover, whether a DBMS vendor will upgrade its software, or whether any such future software release would actually impact on HHS' system is uncertain. Given this uncertainty, it would seem that any difference between the HHS and AMS approaches is so speculative that it cannot support a rational basis for requiring one but excluding the other.

In the circumstances, HHS should complete the process required under FIRMR § 23.206(g) by conducting a competitive procurement. The existing contract with Cullinet should be terminated if following competition a contract can be awarded that is more favorable to the government.

The protest is sustained.

Milton J. Socolar

Acting Comptroller General
of the United States