

DECISION



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

FILE: B-220087; B-220087.2 **DATE:** January 30, 1986

MATTER OF: Plus Pendetur Corporation; Network Systems Corporation

DIGEST:

An acquisition of materials, supplies and installation of a local area network (LAN) to be used to transmit information between computers is an acquisition of automatic data processing equipment within the meaning of the Federal Information Resources Management Regulation, 41 C.F.R. § 201-2.001 (1985) and the Brooks Act, 40 U.S.C. § 759 (1982). Where the General Services Administration has not issued a delegation of procurement authority, actions taken by an agency seeking to acquire materials, supplies and installation of an LAN are unauthorized.

Plus Pendetur Corporation and Network Systems Corporation protest the Navy's procurement of a local area network (LAN) under invitation for bids (IFB) No. N00024-85-B-6408. The basic portion of the solicitation is for the design of a broad-band cable system linking various data processing equipment belonging to the Naval Sea Systems Command (NAVSEA) and the Naval Air Systems Command (NAVAIR) at their Arlington, Virginia, Crystal City building complex. The solicitation also includes option items for materials and supplies for the installation of the system. The protesters raise various objections to the Navy's handling of the procurement. We need to reach only one of these complaints, an allegation asserted by Network Systems that the Navy does not have contracting authority. We sustain the Network Systems' protest and dismiss Plus Pendetur's protest as premature.

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The Brooks Act, 40 U.S.C. § 759 (1982), gives the General Services Administration (GSA) exclusive federal purchasing authority for all commercially-available general purpose automatic data processing equipment (ADPE). 40 U.S.C. § 759(b)(2); 47 Comp. Gen. 275, 277, 278 (1967). GSA may delegate this authority. 40 U.S.C. § 759(b)(2). GSA has implemented its authority by publishing regulations defining ADPE, which grant blanket delegations of procurement authority in certain circumstances, but which otherwise require that an agency seeking to purchase ADPE submit a documented Agency Procurement Request to GSA requesting a specific Delegation of Procurement Authority (DPA). Federal Information Resources Management Regulation (FIRMR), 41 C.F.R. § 201-2.001 and Part 201-23 (1985). Absent a GSA-approved DPA, an agency lacks authority to acquire ADPE. PRC Computer Center, Inc., et al., 55 Comp. Gen. 60, 67 (1975), 75-2 CPD ¶ 35.

In its initial report to our Office, the Navy asserts that no DPA is required because it is not buying ADPE. According to the Navy, it is merely acquiring a cable telecommunications system.^{1/} It admits it will use the system to link various computers and peripheral computer equipment. It argues, however, that ADPE embraces only general purpose, commercially-available, mass-produced automated processing devices, and does not encompass equipment such as telephones, telegraph, facsimile and similar items. In the Navy's view, a LAN is clearly not ADPE because it does not store, retrieve, collate or interpret data. Rather, according to the agency, it is a telecommunications facility, consisting of a network of cable and connectors as well as a control center monitoring system.

Network Systems strongly disagrees. It contends that ADPE as defined in the FIRMR includes not only commercially-available computers as such, but auxiliary equipment, as well as devices to control and transfer data or instructions to computers and data transmission and batch terminals. It points out that LANs are designated as ADPE for federal supply classification purposes (FSC Group 70). Moreover, the protester contends, the LAN includes network interface units, which do store, retrieve, interpret and manipulate data being transferred between equipment served by the LAN.

^{1/} The apparent awardee, American Television Systems (ATS), joins in this view.

GSA, in a report filed at our request, supports Network Systems' position. In GSA's view, the items relating to the materials, supplies and installation of the LAN are within the purview of its exclusive authority under the Brooks Act and a DPA is required if the estimated value of the procurement exceeds the blanket DPA thresholds it has established. GSA asserts that the Navy's requirement is governed by the FIRMR, Part 201-2. It notes that the Navy's technical specifications include microcomputer systems and observes that data transmission and communications equipment, sensors and other devices designed for use with a configuration of ADPE are excluded from FSC Group 58, which relates to telecommunications equipment. Moreover, GSA says the Navy has previously requested and received DPAs for other LAN acquisitions. It cites two recent examples (GSA case numbers KMA-84-0036 and KMA-85-0349) involving the acquisition of broadband cable communications systems for the Navy Medical Treatment Facilities and the acquisition of a LAN for the Naval Military Personnel Command.

In rebuttal to the GSA report, the Navy reasserts its view that the LAN is a telecommunications system rather than ADPE. In the alternative, however, it argues that any DPA that is required need not be obtained until it is ready to exercise the options. The Navy cites no authority for this proposition, but maintains that it would not be appropriate to require otherwise because it could not estimate the value of the procurement, or, therefore, know whether the blanket delegation applies, until the design phase is completed.

In addressing the issues,^{2/} it is not necessary for us to decide whether, as the Navy suggests, the equipment to be acquired is capable of storing, retrieving, and collating data. We agree with Network Systems that the LAN is ADPE if it is being acquired as auxiliary, ancillary or other computer peripheral equipment. As Network Systems contends,

2/ We reject a threshold contention by the Navy and ATS that Network Systems is not an interested party because the procurement was set aside for small business and Network Systems does not meet the applicable size standards. The protester admits that it would not qualify as a small business under the present solicitation, but asserts that it would qualify under the appropriate standard if the requirement is procured as ADPE. This has not been rebutted and it thus appears that the protester has the requisite direct economic interest to assert that the requirement must be procured as ADPE.

GSA has interpreted the Brooks Act as applying to the acquisition of peripheral equipment. The FIRMR, 41 C.F.R. § 201-2.001, defines ADPE as consisting of general purpose, commercially-available, mass-produced automatic data processing devices (i.e., components and the equipment systems configured from them), including auxiliary equipment (such as plotters, data conversion equipment, source data acquisition devices), devices used to control and transfer data and/or instructions to and from central processing units (including data transmission terminals, batch terminals, display terminals, modems, sensors, multiplexors, and concentrators), as well as general purpose mini- or microcomputers used to control, monitor, measure or direct equipment.^{3/}

Moreover, our Office has concurred both in GSA's interpretation of ADPE as including peripheral equipment intended to support computer systems and in its classification of equipment such as modems as ADPE. Modem, an abbreviation for modulator/demodulator, describes equipment which converts digital signals into analog signals and vice versa, and is used, for example, to connect computers through switched telephone networks. In American Telephone and Telegraph Co., B-200989, Aug. 19, 1981, 81-2 CPD ¶ 157, we examined a complaint by AT&T that modems and associated diagnostics being acquired by the Social Security Administration were wrongly classified as ADPE. Notwithstanding an earlier GSA classification of modems as telecommunications

^{3/} In asserting its view that the LAN is a telecommunications facility, the Navy concedes that the FIRMR contains procedures for the acquisition of telecommunications facilities, but contends that these procedures do not apply, citing an exemption in FIRMR § 201-1.103(c)(3) that stems from the operation by GSA of public utility communications services under 40 U.S.C. § 295. We see no connection between the provisions cited and this case since we are not deciding whether the telecommunications provisions of the FIRMR apply, but rather, whether the ADP procurement provisions of the FIRMR apply to equipment of the type to be acquired.

equipment.^{4/} we agreed with GSA's later position that treatment of the procurement as an ADPE acquisition was appropriate.

Similarly, in Timeplex, Inc., et al., B-197346, et al., Apr. 13, 1981, 81-1 CPD ¶ 280, we considered an Army award of a contract for low speed time division multiplexer/demultiplexers (LSTDMS), equipment designed to combine low speed digital data from a number of sources and to retransmit that data as a single, higher bandwidth stream of digital data. The LSTDMS were being acquired to replace analog frequency division multiplexers. Like the Navy in this case, the Army argued that LSTDMS were not computer systems, central processing units, or auxiliary or other peripheral equipment. Nevertheless, we held that GSA, which classified LSTDMS as ADPE by placing them on the Federal Supply Schedule as FSC Group 70 equipment, had acted properly, and we stated that the Army would be required to obtain procurement authority to acquire the commercially-available equipment.^{5/} In reaching our conclusion, we observed that APDE, as defined in Federal Procurement Regulations § 103.1102-1 (now FIRMR § 202-2.00), appeared to broadly embrace computer support equipment.

Applying these views to the facts of this case, we find that the LAN being acquired is computer support equipment and is ADPE subject to the Brooks Act. The solicitation calls for the design (and in the optional provisions, the furnishing of materials, supplies and installation) of a

^{4/} GSA's reclassification, now reflected in the FIRMR definition of ADPE, was, as our decision indicates, the result of an internal GSA reexamination of the scope of the Brooks Act and was consistent, we concluded, with the intent of the Congress that the Act be applied liberally so that it would not be rendered obsolete by rapid technical development in fields such as telecommunications. American Telephone and Telegraph Co., supra, at p. 4.

^{5/} Noting, however, that there was uncertainty as to whether the Army's requirements, which included data encryption and other special capabilities, could be filled without modifying equipment to such an extent that it would lose its character as general purpose commercially available equipment, we applied our decision prospectively and recommended that the Army resolve this matter with GSA. It is not asserted here that the LAN is to be modified so that it might lose its general purpose character.

LAN suitable for direct connection to approximately 2000 machines, including a variety of main-frame, mini- and microcomputers. In all, some 6000 pieces of computer equipment will be supported. Moreover, the IFB requires the use of specific access methods and support for certain Institute of Electrical and Electronics Engineers standards that define interface and protocol specifications for interconnection of computers.^{6/} Clearly, the LAN is being acquired as computer support equipment.

Further, we find that the Navy's contention that it is unable to determine whether the blanket DPA dollar limitations are exceeded, and that it will not have sufficient information to do so until the design phase is completed, is not well founded. Earlier, it asserted, in opposition to complaints by the protester, that the IFB was specific enough to permit bidders to bid on the option provisions. If there was sufficient information for offerors to bid intelligently, then surely there is enough information for the Navy to estimate the cost of its project. (Based on the bids received, the cost of exercising the options well exceeds the \$2.5 million limit established by GSA for a blanket DPA in the FIRMR, 41 C.F.R. § 201-23.104-1(c)(1).

Even if the information were not available, however, we would not share the Navy's view that it would be appropriate to wait until completion of the design phase of its project before determining whether to obtain a DPA. As we read the FIRMR, Part 201-23, a DPA is required unless it can be determined that the dollar amount involved will not exceed the blanket DPA limits. See 41 C.F.R. § 2-1-23.104-1. The FIRMR procedure is based on the assumption that the request for procurement authority will follow completion of a procurement planning process that, among other things, should produce the data required to complete the request including an estimate of system, contract, or item life cost. See 41 C.F.R. §§ 201-23.106-1(3), 201-23.106-2(b)(4). Armed with such information, an agency should know whether a blanket DPA applies. Alternatively, if an agency cannot determine that a blanket DPA applies, we think it must make a determination that a contemplated procurement is not subject to blanket coverage and initiate a request for procurement authority under 41 C.F.R. § 201-23.106.

^{6/} We note also that we have reviewed ATS' comments on the GSA report. We see nothing in the comments, which were received after the filing deadline, that would alter our finding that a DPA is required.

Further, we find no basis in the FIRMR or the Brooks Act for the Navy's view that by including ADPE as option line items in a solicitation, it may avoid applying for a DPA until it is ready to exercise the options. The FIRMR clearly states that agencies shall comply with all of its provisions that are applicable before "initiating procurement action on a requirement," 41 C.F.R. § 201-23.103(b)(1); this includes obtaining a DPA. In our view, the Navy violated this requirement when it issued the IFB containing the option line items because it thereby initiated a procurement action for an ADPE requirement. We so conclude because although the basic portion of the contract calls only for design work that by itself would not require a DPA, it is very clear from the solicitation that the Navy was intending to acquire ADPE under this contract and in accordance with the design provided by the contractor. In this connection, we note that the Navy evaluated the option prices, something it properly would do only if anticipated, prior to issuing the solicitation, that it would exercise the options and thereby acquire the equipment covered by the option items. See Federal Acquisition Regulation, 48 C.F.R. § 17.206 (1984). These option prices, we further point out, represent significantly more than 50 percent of the total price bid by the low responsive bidder. Clearly, the Navy cannot realistically assert that it was only buying design services here.

Since no DPA was obtained, we find that the Navy had no authority to conduct the procurement; it has no authority, therefore, to award the installation options. In the circumstances, we are recommending to the Navy that it now seek a DPA.

Since approval of a Navy application for procurement authority will require review of its proposed procurement action for compliance with the FIRMR, and since the Navy, which has not addressed the procurement planning and solicitation requirements set out in the FIRMR, may have to revise its solicitation before it can proceed, consideration of the remainder of the issues raised by both protesters appears to be premature. Plus Pendetur did not question the need for a DPA, and its protest is dismissed. Network Systems' protest is sustained.

By separate letter, we are bringing our recommendation
to the attention of the Secretary of the Navy.

for *Shelton J. Dowler*
Comptroller General
of the United States