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DECISION

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

FILE: B-194497.2 DATE: February 3, 1981

MATTER OF: Interscience Systems, Inc.--
[Request for Reconsideration]

DIGEST:

Prior decision is affirmed where request for reconsideration fails to advance factual or legal grounds upon which reversal would be warranted.

Interscience Systems, Inc. requests reconsideration of Interscience Systems, Inc., 59 Comp. Gen. 68 (1979), 79-2 CPD 306, in which we denied the firm's protest against the Environmental Protection Agency's (EPA) purchase of computer equipment through what we termed was the exercise of an option under an existing lease contract with Sperry-Univac Division of Sperry Rand Corporation (Univac).

Our prior decision is affirmed.

On March 15, 1979, Univac submitted to EPA a "special purchase offer" to sell certain computer equipment for use at the EPA National Computer Center. The offer was on an "all or none" basis and was contingent upon EPA acceptance no later than March 29. EPA evaluated the offer and determined that "approximately $4,000,000 could be saved, by purchase [acceptance of the offer], over the estimated 5-year life cycle of the equipment." As a result, EPA requested a Delegation of Procurement Authority (DPA) from the General Services Administration (GSA) to purchase the equipment. GSA orally granted a DPA on March 15, confirmed in writing by letter dated March 21. The DPA required EPA to solicit at least six specified firms in order to determined whether the Univac offer represented the lowest cost to the Government.

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In accordance with GSA's instructions, the six suggested firms plus one other firm were advised telephonically by EPA on March 15 of an impending request for quotations (RFQ), which then was issued on March 19. Although described as an RFQ, the solicitation was referred to in the cover letter as a request for proposals and included evaluation and award criteria. Two offers, one from Interscience and one from Amperif Corporation, were received in response. EPA's technical evaluation of both offers found the equipment proposed in each to be technically acceptable. Since neither Interscience nor Amperif bid on the entire list of equipment involved, their prices were adjusted for evaluation purposes. After additional adjustments, it was determined that Interscience had submitted a lower price than Amperif. As low offeror under the solicitation, Interscience's proposed price, as adjusted, was then compared with Univac's offer. As a result of this comparison, EPA determined the Univac offer to be lower in price by approximately $780,000, and awarded the contract to Univac on March 29, 1979.

Interscience raised, in a timely manner, several issues concerning alleged improprieties in the EPA evaluation process which ultimately resulted in award to Univac. In particular, Interscience contended that EPA improperly added to Interscience's offer a factor in excess of $1 million which had not been listed in the solicitation as an evaluation factor.

We denied the protest on all issues except the matter of the allegedly improper $1 million evaluation factor. We found it unnecessary to resolve that issue because the record indicated that EPA had a valid exercisable purchase option for the computer equipment under lease from Univac. In our view Univac's "special purchase offer" was only a reduction in its existing option prices under the lease, and as a result of a further reduction in the "special purchase offer" by Univac while Interscience's offer was being evaluated, Univac's final reduced option price was lower than Interscience's evaluated price even without the $1 million evaluation factor.

Interscience contends that no exercisable option existed in the lease/purchase contract which included all of the computer equipment purchased by EPA. (As indicated above, Univac's offered reduction was on an "all or none" basis regarding the equipment identified in that offer.) The instrument used to

purchase the protested equipment was Modification No. 33 to Univac Contract No. 68-01-1732, which stated:

> "This modification is entered into pursuant to the authority of Exhibit B, Terms and Conditions, Section A, paragraph 11, Purchase Option, and Section B, paragraph 5, Purchase of Installed Rental Equipment."

Interscience argues that the contract sections relied on in Modification No. 33 did not cover all of the Univac computer equipment purchased. Specifically, Interscience points out that Section A refers to "equipment to be purchased [which] must have been on continuous rental," and Section B provides that "installed equipment * * * may be purchased"; Interscience contends that some of the Univac equipment purchased was neither "installed" nor "on continuous rental" and therefore was not properly the subject of an exercisable purchase option.

Accordingly, Interscience argues that EPA in fact simply was conducting a competitive procurement which included what Interscience terms was an "unsolicited proposal" from Univac (i.e., the "special purchase offer" which we considered an option price reduction) to sell certain computer equipment. Consequently, Interscience argues that the reduction offered by Univac while Interscience's proposal was being evaluated was a late revision to Univac's initial offer which under the rules governing competitive procurements should not have been considered. (In contrast, an option price can be reduced at any time.) On that basis, Interscience argues that we should consider the issue regarding the allegedly improper evaluation factor.

The equipment in issue had been the subject of Modification No. 29 to Univac's contract which required the contractor to install certain listed equipment pursuant to a prescribed schedule. EPA secured a DPA to purchase the equipment covered by Modification No. 29 in August 1978; the March 1979 DPA issued by GSA in effect constituted an amendment to the August 1978 DPA.

We recognize that much of the equipment identified in Modification No. 29 may not have been installed when it was purchased through Modification No. 33. However, Modification No. 29 committed the contractor and the Government to the installation and lease of the equipment listed. Further,

the record shows that the contracting parties regarded the equipment as subject to the contract's purchase option. In view thereof, we cannot agree with Interscience's position on this matter and our prior decision is affirmed.

We point out that in our earlier decision we stated:

> "We recognize that, because Univac was not given the opportunity to participate in the market test and to meet whatever competition would result, Univac and those responding to the RFQ were not subject to the same rules. We think, to avoid even the appearance of impropriety, that it would be appropriate for the incumbent in this type of situation to be given the opportunity to respond to a market test solicitation so that all parties in competition are bound by the same procedures. We are therefore suggesting to GSA that it consider requiring agencies in similar situations to include the incumbent contractor as a participant whenever the market is to be tested through a solicitation."

GSA has advised us that it agrees with our suggestion and is taking corrective action. Also, EPA has issued Procurement Information Notice No. 80-4-1 to implement our decision.

We further point out that in this case we found no impropriety in the agency's consideration of Univac's special offer since Univac itself had not been given the opportunity to participate in the market test. Obviously, when the incumbent is included in the market test, it will necessarily be subject to the same rules and time limits as the other parties who respond to the solicitation. In such a situation, any price reduction or special offer the incumbent wishes to make will have to be made in response to the solicitation and not later than when other parties must submit their own proposals or quotations. It would be manifestly unfair to permit the incumbent to participate in the market test and then, after the "competition" has closed, to offer further price reductions in connection with the existing contract option. Consequently in that situation we would

view as improper an agency's willingness to accept a contractor's price reduction offer which is received after market test responses are received (unless the contractor's price is most favorable to the Government without the reduction) since that would give the contractor two opportunities to "win" and would undermine the integrity of the market test solicitation.

Milton J. Socolar

For the Comptroller General
of the United States