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DECISION

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

82-1 cpd 349

FILE: B-200722.2 DATE: April 16, 1982

MATTER OF: Memorex Corporation - Reconsideration

DIGEST:

1. A request for reconsideration is timely when filed on the tenth working day after the requesting party received our decision.

2. The award of a contract on a specific pricing and delivery basis from among several included in the competition clearly implies that the selected pricing and delivery plan is the most advantageous to the Government within the scope of the competition which was conducted. The modification of an option, changing it from the purchase plan determined to be most favorable to the Government in the competition to another plan determined to be less advantageous in the competition, is, in effect, the award of a sole-source contract on a basis different from that on which the contract was competed.

3. The modification of an option for the acquisition of disk drives, changing it from an outright purchase with no contractual right or interest in continued performance to a 5-year lease-to-ownership plan, with guaranteed performance measured by stringent standards over the full 5-year term of the lease, is a substantial change in the nature of the thing procured.

The Department of Health and Human Services (HHS) has requested reconsideration of our decision in Memorex Corporation, 61 Comp. Gen. ___ (B-200722, October 23, 1981), 81-2 CPD 334, in which we sustained a protest by the Memorex Corporation (Memorex) against a contract modification issued by the Social Security Administration (SSA). We found that the modification went beyond the scope of the original contract and resulted in a new contract for which a competition should have been held.

We recommended that SSA initiate such a competition. HHS asserts that our prior decision was based on errors of both fact and law. After considering the views of all of the parties, including Memorex and Storage Technology Corporation (STC), the incumbent contractor, we affirm our prior decision.

Our decision was based on a record which showed that, on January 18, 1978, after a competition in which several alternative methods of acquisition, including purchase and lease-to-ownership were considered, SSA awarded a contract to STC for the outright purchase of a substantial quantity of STC 8800 disk drives with an option for the purchase of an additional quantity of drives. SSA exercised the option for the additional STC 8800 drives in October 1978, but postponed, and eventually refused, delivery because it was experiencing difficulties with the already installed initial quantity of disk drives. SSA determined that it could not establish STC's responsibility or liability under the purchase contract for the problems with the 8800 drives. STC contended that SSA's refusal of delivery was a breach of the contract. SSA and STC resolved their differences in September 1980 by negotiating contract modification number 10, which substituted newer STC 8650 disk drives for the option quantity STC 8800's, converted the option from an outright purchase to a 5-year "lease to ownership," and established stringent performance requirements for the disk drives over the full life of the lease.

We found that the changes incorporated by the SSA-STC modification so substantially altered the nature of the original contract that SSA should have conducted a new competition. HHS and STC contend that our decision was both legally and factually in error.

While Memorex has challenged the timeliness of HHS's request for reconsideration under section 21.9 of our Bid Protest Procedures (4 C.F.R. part 21 (1981)), we find the request was filed on the tenth working day after HHS received our decision and is timely and for consideration. In any event, we believe our prior decision requires some clarification.

HHS and STC contend that our decision is legally in error because we used the wrong test to measure the competitive impact of this modification. HHS and STC assert that the correct test, as articulated in Webcraft Packaging, Division of Beatrice Foods Co., B-194086, August 14, 1979, 79-2 CPD 120 (hereafter Webcraft), and American Air Filter Company, Inc., B-188408, February 16, 1978, 78-1 CPD 126, reconsidered, June 19, 1978, 78-1 CPD 443 (hereinafter American Air Filter), is whether the modification is within the scope of the original competition. The parties argue that measured by this standard, the modification is proper because "lease to ownership" was one of the four pricing alternatives to which all offerors were required to respond under the original request for proposals. We disagree.

Where bidders or offerors are required to submit pricing and delivery plans on several different bases, as they were here, the award of the contract carries with it the clear implication that the selected plan is the most advantageous to the Government within the scope of the competition which was conducted. To ignore the results of the competition would produce the anomalous result that the Government, having determined that one particular plan was of the greatest benefit to the Government, could later switch to another plan determined to be less desirable in the course of the competition, in effect, resulting in the award of a sole-source contract on a basis different from that on which the award was made. We remain convinced that measured by this standard, the SSA-STC modification was improper.

HHS also contends our decision was factually in error because the replacement of the "outdated" STC 8800 disk drives with the newer model 8650 drives was in keeping with the purpose of the original contract to provide SSA with reliable and maintainable disk storage equipment and in no way altered the "nature of the thing" procured. HHS also argues that the change from an outright purchase to a lease-to-ownership plan is an insignificant change since it only affects the method and timing of payment and the passing of title and suggests that the performance required of STC is the same under the modified option as it was under the purchase contract.

As we noted in our prior decision, under the original SSA-STC contract, SSA had no contract interest or right whatsoever in the continued performance of the disk drives beyond an initial brief acceptance period. Under the modification, however, SSA has acquired an enforceable right to continued satisfactory performance, measured by stringent standards, over the full 5-year term of the lease. In effect, SSA has gone from the outright purchase of bare machines to the acquisition of guaranteed service. Despite HHS's suggestions to the contrary, we remain convinced that this is a significant change in the nature of the thing procured.

Our decision is affirmed.

HHS has also requested that, in the event we affirm our prior decision, we reconsider our recommendation that this requirement for disk storage be recompeted. HHS points out that SSA is presently in the process of consolidating and relocating its computer activities and suggests that the added burden and risk of a new competition might well jeopardize this effort and disrupt SSA's service to the public. Against these assertions, we must weigh the nature and extent of the competitive harm, the relative difficulty of substituting one disk drive for another, and the relative complexity and risk of a competitive procurement. We also are aware, as acknowledged by the acting director of the SSA Office of System's Operations in the industry press, that there are an abundance of vendors in the disk areas and a further indication that SSA presently is considering the purchase of additional disks. On balance, we do not think that the SSA-STC contract should be continued nor are we changing our recommendation.

Milton J. Socolar

for Comptroller General
of the United States