**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Eastman Kodak Company--Reconsideration

File: B-271009.2

Date: October 7, 1996

John A. Howell, Esq., Ross & Hardies, for the protester.
Terence W. Carlson, Esq., and Richard A. Lieber, Department of Transportation, for the agency.
Tania L. Calhoun, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for reconsideration is denied where protester has not shown that prior decision contains either errors of fact or law or presented information not previously considered that warrants reversal or modification of our decision.

DECISION

Eastman Kodak Company requests that we reconsider our decision in Eastman Kodak Co., B-271009, May 8, 1996, 96-1 CPD ¶ 215, in which we denied its protest of the cancellation of request for quotations (RFQ) No. DTOS59-96-Q-3030, issued by the Department of Transportation (DOT) for copier equipment.

We deny the request.

The RFQ requested quotations for copier equipment and maintenance under a multiple award Federal Supply Schedule (FSS) contract. Firms were to provide pricing for copier machines in accordance with various minimum specifications, as well as pricing for maintaining the copiers. Award would be made to the firm quoting the lowest overall price.

Kodak submitted the lowest-priced quotation meeting the RFQ's minimum specifications. The contracting officer prepared and signed a delivery order[1] to Kodak but, on that same day, DOT received a protest from another vendor complaining that certain specifications unduly restricted competition. The agency's director of acquisition services instructed the contracting officer not to make award

[1]While the protester notes that we erroneously characterized this delivery order as a purchase order, as discussed below, this fact does not alter our conclusion.

to Kodak and began reviewing the matter. He concluded that the specifications might be too restrictive; that the stated method of evaluating the copy usage cost was not in the government's best interest; and that the agency should have used a best value approach to the acquisition. After DOT canceled the solicitation, Kodak filed its protest.

In our decision, we concluded that the agency's bases for the cancellation were reasonable. Kodak's request for reconsideration is limited to its contention that we improperly used the standard of review for the cancellation of an RFQ. According to Kodak, we should have used the standard for determining the propriety of the cancellation of a contract. Kodak asserts that the contracting officer's signature on the delivery order gave rise to a binding contract, and that the agency could not cancel this contract because the illegality of the award was not plain or palpable.[2] Kodak believes that the agency is required to allow the firm to proceed with performance notwithstanding the impropriety of the award.

We are not persuaded that the contracting officer's signature on the delivery order rendered it "issued," creating a binding contract.[3] The clause at Federal Acquisition Regulation (FAR) § 52.216-18(c) suggests that a delivery order is "issued" when it leaves the control of the government ("[i]f mailed, a delivery order . . . is considered 'issued' when the government deposits the order in the mail").[4] Further, in the only case cited by Kodak in support of its position, Texas Instruments Inc. v. United States, 922 F.2d 810 (Fed. Cir. 1990), a price negotiation memorandum signed by the contracting officer was held to be binding because, among other things, the contracting officer's approval was communicated to the offeror. Neither of these circumstances is present here.

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[2]An awarded contract should not be canceled, 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); New England Tel. and Telegraph Co., 59 Comp. Gen. 746 (1980), 80-2 CPD ¶ 225. The illegality of an award is plain or palpable where it is made contrary to statute or regulation due to improper action by the contractor, or where the contractor was on direct notice that the procedures followed were violative of statutory or regulatory requirements. New England Tel. and Telegraph Co., supra.

[3]The issuance of a delivery order pursuant to an FSS contract generally gives rise to a legal and binding contract. Lanier Business Prods., B-187969, May 11, 1977, 77-1 CPD ¶ 336.

[4]We do not share Kodak's view that the absence of this clause from its contract means that a contracting officer's mere signature on a delivery order pursuant to this contract is sufficient to consider that delivery order issued.

In any event, even if the delivery order was issued, there is no evidence to suggest that DOT could not have terminated the delivery order for convenience. See FAR § 8.405-6. Termination of a contract and resolicition is proper when, after award, the contracting agency discovers that the solicitation did not properly describe the government's needs. Special Waste, Inc., 67 Comp. Gen. 429 (1988), 88-1 CPD ¶ 520. Since our conclusion that DOT reasonably determined that the solicitation did not meet its needs remains unchallenged, the agency was not required to allow Kodak to proceed with performance, but could have terminated the delivery order and resolicited. See Duramed Homecare, B-260047, May 24, 1995, 95-1 CPD ¶ 257.

Under our Bid Protest Regulations, to obtain reconsideration, the requesting party must show that our prior decision contains either errors of fact or law or present information not previously considered that warrants reversal or modification of our decision. 4 C.F.R. § 21.14(a) (1996); R.E. Scherrer, Inc.--Recon., B-231101.3, Sept. 21, 1988, 88-2 CPD ¶ 274. Kodak has not met that standard.

The request for reconsideration is denied.

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of the United States