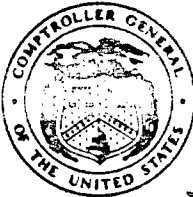


DECISION



13703 ^{PL-1} *Petit*
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

[Protest of D.C. Government Award of Purchase Order]

FILE: B-194549

DATE: May 9, 1980

MATTER OF: Storage Technology Corporation

DIGEST:

- CNG 01533
1. Protest against issuance of purchase order to competitor under Federal Supply Schedule (FSS) contract, filed with GAO more than 10 working days after meeting with procuring activity personnel during which protester was orally advised of agency's decision to issue order to competitor, is untimely filed and not for consideration on merits.
 2. Protest against lease-purchase conversion action, initially raised in protester's comments filed within 10 working days of receipt of agency report which first advised that agency was evaluating competitor's offer for purchase conversion, is considered timely.
 3. GAO will not object to agency's decision to exercise purchase option based on determination that only contractor met essential requirements of agency's needs, and purchase-option credits and trade-in allowances which accrued to agency under contract were proper factors for consideration in deciding to exercise purchase options.

CNG 00052
CNG 01209
Storage Technology Corporation (STC) protests the District of Columbia Government's award of purchase order No. BC/51256 for rental of tape drives and related equipment for the period of April 15, 1979 to September 30, 1979, to Memorex Corporation (Memorex) under its Federal Supply Schedule (FSS) contract and subsequent negotiation with Memorex of a lease-purchase agreement for the equipment.

The protest is dismissed as untimely filed as to the purchase order award and denied with regard to the lease-purchase conversion contract.

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STC asserts that the D.C. Government failed to obtain competition, contravened the requirements of the Buy American Act, 41 U.S.C. § 10a-d (1976), and conducted an illegal auction in awarding the purchase order to Memorex. The protester contends that the award to Memorex was based on an invalid sole-source justification because comparable equipment was available under STC's FSS contract at lower prices and STC offered a higher trade-in credit than Memorex. Finally, STC objects to the purchase conversion action during the course of the protest on the grounds that conversion based upon purchase-option credits and trade-in allowances does not justify a sole-source award without competition and that STC was thereby excluded from competition for the agency's requirements.

Prior to awarding the purchase order, the D.C. Government's Share Computer Center (Center) personnel talked with FSS contractors' sales representatives. Memorex and STC submitted proposals offering lease-ownership plans. In affidavits submitted in support of the protest, STC avers that discussions with Center personnel culminated in a meeting on March 19, 1979, at which STC was told that it would receive award for the tape drive systems and should perform a cable survey and floor layout for the equipment at the Center on March 21, 1979. STC understood that an award for disk drive systems was intended for Memorex. On March 22, 1979, however, the Director of the Center called STC and said that he had decided to buy both the tape and disk drive systems from Memorex; he reiterated his decision at a meeting with STC later that day, explaining that on March 20, 1979, Memorex told him that the firm would increase its disk drive prices if it was not awarded both systems. STC learned on the following day that the Center was preparing a justification for the tape drive award to Memorex, and the Chief of the Procurement Branch confirmed that fact during a March 27 telephone conversation with STC. Memorex was awarded the purchase order on April 3, 1979, STC learned of the award on April 5, 1979, and we received STC's April 5 protest letter on April 6, 1979.

The D.C. Government and Memorex contend that STC's protest is untimely filed because STC knew the basis of its protest on March 22, 1979, when the Director of the

Center told the firm of his decision to award both systems to Memorex, but did not file its protest within 10 working days of that date. 4 C.F.R. § 20.2(b)(2) (1980). STC takes the position that statements concerning the proposed award to Memorex made by agency personnel other than the contracting officer were not effective notice of award, did not constitute the complete basis of its protest, and were sufficient at most to raise a suspicion which did not amount to the specific knowledge requisite to filing a protest, citing our decisions in System Development Corporation, 58 Comp. Gen. 475, 479-480 (1979), 79-1 CPD 303; Systems Analysis and Research Corporation, B-187397, February 4, 1977, 77-1 CPD 90, and VAST, Inc., B-182844, January 31, 1975, 75-1 CPD 71. The protester therefore insists that it did not receive notice of the award until April 5, 1979, that it did not learn the complete basis of its protest until May 5, 1979, when it received the agency's report in response to the protest pursuant to 4 C.F.R. § 20.3(c) (1980), and concludes that its April 6 protest was timely filed.

We believe that the protester's reliance on the above-cited decisions is misplaced. As STC suggests, we have held that a protester may reasonably withhold filing a protest until it has had a debriefing from the procuring activity explaining the reasons why the protester's proposal was rejected, Systems Analysis and Research Corporation, *supra*, or until the protester is put on notice that a particular firm has actually submitted an offer and is being considered for award, System Development Corporation, *supra*; VAST, Inc., *supra*. STC did not, however, request a debriefing from the D.C. Government; the protester was aware that Memorex was competing by at least March 19 and that the firm had been selected for award by March 22, 1979. Consequently, we find the cases to which the protester refers inapposite to the facts of this procurement.

We cannot agree with STC's characterization of the information provided by the agency during their March 22 meeting. We have held that a protester is charged with

knowledge of a basis of protest if 1) the protester's interests are being directly threatened under a then-relevant factual scheme and 2) the agency conveys to the protester its intent on a position adverse to the protester's interest. Under these circumstances, the "intended" nature of the protested action does not otherwise permit the protester to defer filing its protest until the agency has actually taken the proposed action. Brandon Applied Systems, Inc., B-188738, December 21, 1977, 77-2 CPD 486; see Propserv Incorporated, B-192154, February 28, 1979, 79-1 CPD 138. We believe that the D.C. Government specifically informed STC at the March 22 meeting of its intent to award both systems to Memorex, contrary to STC's interest in receiving the disk system award, in the manner which was later made the subject of STC's April 6 protest to our Office. Moreover, the protester's affidavits state that during the meeting STC personnel advised the Director of the Center that his "action [decision to award both systems to Memorex] left STC with no alternative but to make a formal protest." Because STC's protest against the issuance of the purchase order was filed with our Office more than 10 working days after the March 22 meeting, this ground of the protest is untimely and will not be considered on the merits. Lanier Business Products, Inc., B-193516, June 8, 1979, 79-1 CPD 407.

Contrary to the agency's assertion, we believe that STC timely raised its objection to the proposed conversion action in its comments in response to the D.C. Government's report on the protest in which the agency first indicated that it was evaluating Memorex's offer for purchase conversion. Holmes and Narver Inc., B-196832, February 14, 1980, 80-1 CPD 134; see 4 C.F.R. §§ 20.3 and 20.2(b)(2) (1980). STC contends that the D.C. Government's purchase conversion is a procurement action which must be preceded by a formal solicitation because the purchase order issued to Memorex did not provide for purchase conversion and there was ample time to conduct a competitive procurement for the agency's subsequent tape drive system requirements prior to expiration of the lease on September 30, 1979. The protester therefore concludes that it was improperly excluded from the competition by the agency's conversion action.

While we do not review contract administration matters pursuant to our Bid Protest Procedures, we will consider protests which allege that the exercise of contract options is contrary to applicable regulatory provisions and protests which assert that modification or extension of a contract violates the statutory requirement for competitive procurements and deprives the protester of its right to compete for the Government's business. KET, Incorporated, 58 Comp. Gen. 38, 41-42 (1978), 78-2 CPD 305; Intermem Corporation, B-187607, April 15, 1977, 77-1 CPD 263.

The issuance of a purchase order pursuant to an FSS contract generally gives rise to a legal and binding contract incorporating both the FSS contract provisions and the specific terms of the purchase order. Lanier Business Products, B-187969, May 11, 1977, 77-1 CPD 336. In this regard, paragraphs 19 and 21(g), "Terms and Conditions Applicable to Rental of Automatic Data Processing Equipment, Special Item 132-1," of Memorex's FSS contract give the Government an option to purchase rented equipment and the D.C. Government's purchase order provides that the order is contingent on receiving a minimum of \$100,000 trade-in allowance on specified IBM equipment.

The D.C. Government states that Memorex was selected for the lease award on the bases of satisfactory experience with the vendor's equipment, Memorex's tape maintenance monitoring feature and completely integrated tape and disk equipment configuration, and the fact that service would not have to be interrupted or discontinuance penalties and transportation-out charges incurred because the vendor's equipment was already installed at the Center. The agency explains that the rationale for the conversion action is identical to that for the lease and that the lease-purchase contract was awarded prior to resolution of the protest in order to preserve a \$232,000 trade-in allowance and to mitigate the \$1,500 daily rental expense.

STC, however, states that it can provide the required equipment, including the monitoring feature, and stands ready to demonstrate its ability to meet the

D.C. Government's requirements. The protester asserts that neither the agency's desire to avoid multiple vendors for peripheral equipment or discontinuance penalties for termination of installed equipment justifies failure to obtain competition because the former is a matter of administrative convenience and the latter are illegal, citing our decisions in Kent Watkins & Associates, Inc., B-191078, May 17, 1978, 78-1 CPD 377, and Federal Data Corporation, B-190659, October 23, 1978, 78-2 CPD 380. Finally, the mere existence of Memorex's purchase/conversion proposal involving trade-in of used equipment does not, in STC's opinion, obviate the agency's need to seek proper competition, particularly in light of STC's ability and willingness to meet the requirements, and the conversion action merely perpetuates Memorex's allegedly unjustified sole-source position.

Our Office will not object to an agency's determination to exercise an option unless we find that the applicable regulations were not followed or that the determination itself was unreasonable. Oscar Holmes & Sons, Inc., et al., B-183897, November 21, 1975, 75-2 CPD 339; Fraser-Volpe Corporation, B-193192, January 29, 1979, 79-1 CPD 60. Although the reasonableness of option prices should be determined at the time the option is to be exercised, KET, Incorporated, supra, we have held that an agency is not necessarily required to solicit prices from other sources to ascertain whether to exercise the option, provided it can fairly determine without doing so that no other firm could meet one or more of its essential requirements. Consolidated Airborne Systems, Incorporated, B-177758, July 10, 1974, 74-2 CPD 15.

The D.C. Government states that only Memorex offered the tape monitoring feature and equipment compatibility requisite to the agency's needs. Memorex's FSS contract enumerates, among others, the following standard feature of the 3220 Magnetic Tape Subsystem:

"Tape Maintenance Monitor (TMM)

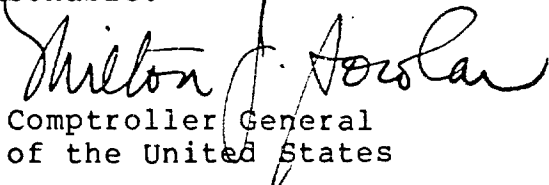
"A data Integrity alert which will provide your tape librarian with a signal that the condition of the

media contained on the particular reel has deteriorated to the point of high error rates, allowing time to transfer the data to a new reel before the data has become unusable."

However, in reviewing STC's FSS contract for the same period and STC's requirements contract with the General Services Administration, to which the protester refers in its affidavits, we find no comparable feature offered by STC. See Astronautics Corporation of America, B-192506, June 8, 1979, 79-1 CPD 429; Dictaphone Corporation, B-192318, January 25, 1979, 79-1 CPD 49. Despite STC's insistence to the contrary, we believe that the agency could rely upon equipment and pricing information available in the then-current FSS contracts in determining whether to exercise the Memorex purchase/conversion option and was not required to solicit prices from FSS vendors.

While it is true, as STC argues, that we have held that discontinuance or separate charges constitute a penalty and are therefore unenforceable, cf. Burroughs Corporation, 56 Comp. Gen 144, 157-158 (1976), 76-2 CPD 472, we note that the D.C. Government abandoned this justification during the course of the protest. We have, however, recognized that the procuring activity's need for continuity of operations is a factor which can be considered in determining whether to exercise an option. Fraser-Volpe Corporation, supra.

Finally, we believe that the purchase-option credits and trade-in allowances which accrued to the D.C. Government under the terms of the Memorex purchase order and FSS contract were proper factors for consideration in the agency's decision to exercise the purchase option. See Amdahl Corporation, B-192588, December 15, 1978, 78-2 CPD 417. From our review of the record, we find no basis to conclude that the D.C. Government's determination to exercise the option with Memorex was unreasonable.


For the Comptroller General
of the United States