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Mr. Siegel

DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548*[Protest of Photocopier Equipment Lease Award]*FILE: B-196820; B-196820.3; DATE: January 6, 1981
B-196820.5; B-196820.6
MATTER OF: Copylease Corporation of America

DLG 05737

DIGEST:

1. Lease of photocopier equipment from Federal Supply Schedule supplies at price higher than the listed lower delivered price of another supplier is proper where agency determines that when total costs, including administrative expenses, are considered, it would be less expensive to remain with incumbent lessee. 1
2. Where agency has ongoing study to reassess usage of copying machines and needs to lease machines on a month-to-month basis until completion of study rather than under 12 or 24 month lease offered by protester, fact that protester's equipment is available at lower annual cost is irrelevant since agency's needs cannot be met by protester. 4
3. Protest of issuance of purchase order is timely if filed with GAO within 10 days of when protester learned of issuance of purchase order. 3
4. Where agency does not submit evidence of compliance with FPMR § 101-26.408-2, which provides that purchases at other than lowest delivered price shall be fully justified, nor rebut protester's statement that Government would have saved money by leasing from other than incumbent during indefinite "study" period, protest is sustained. 2
5. Protest is sustained where agency admits it was in error in not awarding delivery order for lease of photocopier machine to protester, 5

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but alleges since matter was before GAO it could take no corrective action. Agency may take corrective action when appropriate even if protest is under consideration by CAO.

Copylease Corporation of America has protested the issuance, by various Government agencies, of purchase orders to Xerox Corporation for the lease of Xerox model 2400, 3600-I and 7000 photocopiers listed in the General Services Administration's (GSA) Federal Supply Schedule (FSS) Price List FSC Group 36, Part IV. Copylease contends that since its listed schedule price for each of these copiers was less than the listed Xerox price, the issuance of purchase orders to Xerox violates Federal Property Management Regulations (FPMR) § 101-26.408-2. This regulation provides that each purchase of more than \$500 for line items made from Federal Supply Schedule contracts shall be made at the lowest delivered price available under the schedule unless the agency fully justifies the purchase of a higher priced item.

Copylease is a third party supplier of photocopier equipment, i.e., it leases certain model Xerox machines to the Government at rates generally below that for which Xerox will lease the same model. Copylease also furnishes the same maintenance of the machines as Xerox. Both Xerox and Copylease have entered into contracts with GSA agreeing to supply listed equipment at the rates set forth in published schedules issued about October of each year.

While Copylease had the lower individual machine lease price, Xerox offered a "tandem plan" which resulted in a lower overall price than Copylease's. The "tandem plan" offered two machines connected by not more than 75 feet of cable for approximately the cost of one. Although Copylease questions the efficient utilization of the capacity of the photocopiers under this plan, for those machines for which purchase orders were issued under the "tandem plan", it has withdrawn its protests. The remaining protests are discussed below.

Naval Ordnance Station (NOS), Louisville, Kentucky

(NOS, although an existing prior purchase order with Xerox ran through September 30, 1979, placed a purchase order on August 24, 1979, for the model 3600 copier, with attachments, for the period August 31, 1979 through September 30, 1980.)

Apparently NOS did this to take advantage of the Xerox provision for retaining the same monthly lease rate if the lease is extended for an additional year before the expiration of the original lease. However, that Xerox monthly rate is still higher than Copylease's.

NOS states that Copylease's GSA agreement provides that time of delivery of ordered machines is 30-120 days. Thus, in making its price comparison as required by the FPMR, NOS assumed a Copylease delivery date of 120 days. Notwithstanding the stated delivery period, Copylease states that no order from the Navy has taken Copylease longer than 30 days to fulfill from receipt of the order to machine installation. However, NOS was justified in using the 120 day period since Copylease, in accordance with its agreement with GSA, could have taken the full 120 days.

In its comparison, NOS computed the cost of staying with Xerox as of August 31, 1979, as \$12,332.70. The computed cost to temporarily stay with Xerox (on a month-to-month basis) with a switch to Copylease after the 120 day delivery would result in a surface savings of \$45.65, computed on the basis of remaining with Xerox for 3 months then leasing from Copylease for the remaining 9 months and adding the Xerox removal charge plus a placement charge by Copylease. However, the Navy states, when one considers the administrative costs of issuing the delivery orders required to cancel Xerox service and start Copylease service, the Copylease advantage disappears. 1

Consistent with FPMR § 101-26.408-2, Defense Acquisition Regulation § 5-106 permits agencies to make acquisitions from the Federal Supply Schedule at other than the lowest price when justified by considerations such as administrative expense. We believe NOS has adequately justified its decision to lease from Xerox and the protest is therefore denied.

However, we note that this situation arose because NOS did not consider relative costs until the lease was about to expire. We believe that when, as here, there could be a 120-day lead time for delivery, the agency should make its price comparison sufficiently in advance so as to get delivery by the time the old lease would expire. Otherwise, an agency obviously could lose the benefit of lower cost items available on the FSS. We are so informing the Secretary of the Navy.

Department of Labor (DOL)

Copylease protests the leasing in fiscal year (FY) 1980 of Xerox photocopiers by DOL. DOL states that it leases eleven photocopiers which come within the purview of the Copylease protest. Four of the copiers are leased under the "tandem plan". Although Copylease questions the efficient utilization of machines under this plan, it does not protest their leasing.

(Copylease has furnished this Office copies of a proposal it made to DOL in February 1979 (long before the expiration of the Xerox leases). (It appears that if that proposal were accepted, a substantial saving would have been realized by switching to Copylease. However, no action was taken on the Copylease proposal.)

DOL has not provided any analysis concerning the cost of leasing from Copylease versus Xerox. It merely states that of the seven machines still under protest, one was to be discontinued at the end of the year. However, it does not state why it would not have been proper to switch this machine to Copylease during the year it was used. As for the other six machines, DOL simply states that their use was "under study". (It does not rebut Copylease's contention that it would have been less expensive to lease from it rather than Xerox during the "study" period.) 2

(DOL has not shown that the lease of Copylease equipment would not involve a cost saving as compared to Xerox equipment, and it has not provided justification for procuring the photocopiers at other than the lowest delivered price available.) Therefore, it does not appear that DOL has complied with FPMR § 101-26.408-2. The protest is sustained.

Internal Revenue Service (IRS), Austin Service Center

(On November 13, 1979, IRS exercised its option with Xerox for the leasing of three copiers. Copylease contends in its protest that the provisions of FPMR § 101-26.408-2 were not complied with since these machines were available from Copylease through the FSS at a lower price.)

(IRS contends that Copylease's protest to this Office is untimely since the purchase order was issued November 13, 1979, and Copylease did not file its protest until December 26, long after the time allowed by our Bid Protest Procedures. These procedures provide, in relevant part, that 3

bid protests shall be filed not later than 10 days after the basis of protest is known or should have been known, whichever is earlier. 4 C.F.R. § 20.2(b)(2) (1980). IRS contends that Copylease should have known that IRS would be obtaining its copier services effective October 1, and when Copylease did not receive a purchase order at that time, it should have protested then.

We do not agree. While in many procurement situations one can identify a definite date upon which the protester can be held to have been on notice of the basis for the protest, here we do not believe Copylease could know when IRS would issue its purchase order. This is evident from the fact that although the purchase order could have been issued on October 1, in fact it was not issued until November 13. Copylease could not have been aware of that happening until it was told by IRS. Copylease contends, and IRS does not deny, that repeated attempts to ascertain the status of the FY 80 leasing arrangements were unsuccessful. When Copylease did learn that IRS had issued a purchase order to Xerox for FY 80 it immediately protested to this Office.

With regard to the merits of the protest, IRS states that it utilizes in its Austin Service Center 12 photocopiers including four Xerox copiers (one of which is owned by IRS). A task force made recommendations concerning the Service Center operations, one of which was that there be a thorough analysis of the Service Center's copier requirements. A preliminary analysis was made in July through December 1979; however, the in-depth analysis was postponed until the period February through April 1980, a period more representative of copier use. IRS continued to lease the equipment from Xerox.

The study commenced in February 1980 and was completed on April 25. The study team recommended that the IRS-owned Xerox machine be moved to another location and the other three leased machines be returned to Xerox and replaced with certain IBM copiers and one Xerox copier which Copylease does not furnish under the FSS. We have been advised that these recommendations have been implemented and the machines returned to Xerox.

IRS contends that, inasmuch as a study was to be made which could change its requirements, it saw no advantage in switching from Xerox to Copylease. It further states that Copylease leases its machines on a 12 or 24 month basis, while Xerox has a month-to-month plan.

As a general proposition there is no argument that Copylease normally would be cheaper than Xerox. However, where the Center's needs were being reassessed and there was a possibility (which later became a reality) that different machines would be chosen, we cannot criticize IRS for continuing the status quo on a monthly basis instead of committing itself to an annual lease with Copylease. To have made such a commitment would, when the study results were implemented, have resulted in unnecessary cancellation, removal, installation and administrative costs. Since the agency's needs in this situation could not be met under the Copylease schedule, that firm's lower annual price is irrelevant. 4

(We find IRS's actions under the circumstances to have been reasonable. The protest is denied.)

Norfolk Naval Shipyard (Norfolk)

Copylease also protests the leasing of Xerox copier equipment by the Norfolk Naval Shipyard, Portsmouth, Virginia. As a result of the protest, Norfolk decided to replace a model 2400 machine leased from Xerox with one supplied by Copylease. Norfolk has seven Xerox model 3600 machines. One is Government owned; the other six are leased from Xerox under the "tandem plan". Model 7000 machines are leased from Xerox under the "tandem plan" with the exception of one "stand alone" machine. The protest is limited to the "stand alone" model 7000.

(Norfolk concedes that it should have leased this machine from Copylease. However, by the time Norfolk came to this conclusion, several months after Copylease filed its protest, the cancellation and removal changes involved in changing suppliers outweighed the savings to be obtained.)

According to the contracting officer:

"If this protest had been filed directly with the Contracting Officer the oversight would have undoubtedly come to light and measures could have been taken to rectify the situation. However, since the protester chose to protest directly to the Comptroller General, the Contracting Officer was forestalled from making a determination at his level * * *."

We cannot agree that corrective action could not have been taken promptly. Immediately after receiving Copylease's protest we informed the Navy of the protest and requested that a documented report responsive to the protest be prepared. Thus, it is clear that the proper authorities were aware of the protest and could then have taken appropriate action. There is nothing in our Bid Protest Procedures which precludes an agency from taking corrective action after a protest has been filed with this Office. On this point, we note that Norfolk leased the Model 2400 machine from Copylease after the protest was filed. We believe the same action would have been appropriate with respect to the Model 7000 machine. The protest is sustained. 5

In summary, it appears that while NOS did make the determination required by FPMR § 101-26.408-2 and IRS had a reasonable basis for the reassessment of its photocopier needs which justified the continuation of the Xerox lease, no such justification appears for DOL and Norfolk.

While no meaningful remedial action can now be taken we are, by letter of today, bringing the deficiencies we have noted to the attention of the Secretary of Labor and the Secretary of the Navy.

Milton J. Aorolan

For The Comptroller General
of the United States



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

B-196820; B-196820.6

January 6, 1981

The Honorable Edward Hidalgo
The Secretary of the Navy

Dear Mr. Secretary:

Enclosed is a copy of our decision of today concerning protests by Copylease Corporation of America of purchase orders to Xerox Corporation for the lease of photocopier machines.

Copylease's protests include the issuance of purchase orders by two activities of the Naval Supply Systems Command: the Naval Ordnance Station, Louisville, Kentucky (NOS) and the Norfolk Naval Shipyard, Portsmouth, Virginia. NOS failed to document the contract file as to the administrative costs incident to changing suppliers, which formed the justification for remaining with Xerox. Although we upheld NOS's decision, we believe the better practice, and the intent of Defense Acquisition Regulation § 5-106(a), is that these items of expense be contemporaneously documented in the contract file when it is decided to place orders in excess of \$500 at other than the lowest price on a multiple source Federal Supply Schedule.

Additionally, we note that NOS did not make its June comparison sufficiently in advance to take advantage of the lower cost schedule item. Steps should be taken to assure that such a situation will not occur in the future.

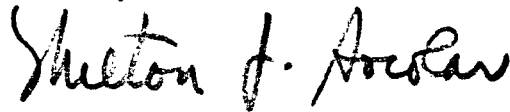
As for Norfolk Naval Shipyard, we agree with Norfolk that the protest is meritorious. In this respect, we were advised by the contracting officer in his supplemental report to our Office that if Copylease's meritorious protest had been filed directly with him:

"* * * measures could have been taken to rectify the situation. However, since the protester chose to protest directly to the Comptroller General, the Contracting Officer was forestalled from making a determination at his level. This was unfortunate because the Government could have realized a saving and the protester could have received an order some time ago. * * *"

B-196820; B-196820.6

As the decision indicates, we believe the Navy should have taken prompt corrective action once the protest was filed. We suggest that the appropriate Commands be notified that whenever a procurement action is determined to be erroneous, prompt corrective action should be taken whenever feasible, and that the existence of a pending protest should not be reviewed as a bar to such action.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "Shelton J. Arnold". The signature is written in a cursive, slightly slanted style.

For The Comptroller General
of the United States

Enclosure