

18828

Boyle

DECISION



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

FILE: B-195945.4, B-198276 DATE: July 15, 1981

MATTER OF: U.S. Financial Services, Inc.

DIGEST:

Where General Services Administration awarded mandatory requirements-type contract for disk storage equipment before procuring agency completed competitive procurement actions for same equipment, GAO has no basis to object to procuring agency's determination to cancel competitive procurement actions and order under mandatory contract since there is no showing that agency's determination that mandatory contract provisions would satisfy its needs was incorrect or unreasonable. Further, assertion that Government could save money in particular procurements by breaching mandatory requirements contract is not valid basis to sustain protest.

This decision concerns two protests filed by U.S. Financial Services, Inc. (USFS), against the Defense Logistics Agency's (DLA) determinations in two instances to satisfy its requirements for disk storage equipment under General Services Administration's (GSA) contract No. GS-00C-50376 with Memorex Corporation instead of conducting competitive procurements. In both instances, DLA terminated competitive procurement actions when it learned that GSA awarded the contract to Memorex because DLA believed that it was required to satisfy its disk storage needs under that contract. USFS contends that DLA improperly determined the contract was mandatory in both instances and that the Government could have realized substantial savings through competitive procurements. GSA and Memorex have provided their views, supporting DLA's determinations.

One of USFS's protests was the subject of our decision in U.S. Financial Services, Inc., B-195495.3, April 28, 1980, 80-1 CPD 300, in which we concluded

Protests of Requirements-type Contract Award
~~017593~~ **115829**

that the protest was untimely. USFS requests that we reconsider that decision and decide the merits of its contention. There is no need to reconsider the prior decision, since USFS's contentions in both protests are essentially the same and we do decide the merits of USFS's timely protest.

We conclude that USFS's contentions are without merit.

GSA, pursuant to the Brooks Act, 40 U.S.C. § 759 (1976), has authority to coordinate and provide for the economic purchase, lease, and maintenance of automatic data processing equipment, including disk storage equipment, by Federal agencies, including DLA. GSA fulfills its responsibility under the Brooks Act in various ways, including arranging for requirements-type contracts, schedule contracts, and granting procurement authority to agencies. Here, in one instance, GSA granted DLA authority to competitively procure disk storage equipment if DLA made award before GSA selected a contractor for a requirements-type contract for the subject equipment; in the other instance, DLA intended to make award under a vendor's schedule contract (1) if no other offeror indicated the capability to satisfy DLA's requirement after notice in the Commerce Business Daily and (2) award could be made before GSA selected a contractor for a disk storage equipment requirements-type contract.

GSA awarded the requirements-type contract to Memorex before DLA made either award, so DLA canceled both procurement actions and placed orders under the Memorex contract.

In two notices released after the date of the Memorex contract, GSA advised Federal agencies that the Memorex contract was a mandatory requirements-type contract except where the contract's terms and conditions did not meet a procuring agency's needs. The contract stated that "[t]his contract is the mandatory supply, except as otherwise provided below, when it meets agencies' requirements * * *." The contract also stated that "[d]uring the period of this contract * * * the Government is obligated, except in exigencies or

as may be otherwise provided herein, to procure hereunder such quantities as may be needed from time to time to fill any requirement * * *." The contract identified instances when the Memorex contract would not be the mandatory source of supply including (1) when agencies could share installed equipment or use excess Government capacity, (2) when an agency has urgent requirements, or (3) when an agency is acquiring the subject equipment as a part of a larger procurement for an entire system.

DLA reports that its needs could be met under the Memorex contract.

We note that USFS agrees with DLA that DLA's requirements could not be met by sharing or use of excess Government capacity. Regarding urgency, USFS questions whether the delivery terms of the Memorex contract will meet DLA's needs but USFS offers no evidence to dispute DLA's determination that the "delivery date under the Memorex contract will not adversely affect [DLA's] mission requirements." Thus, the essence of USFS's protest is that, in its view, citing four sections of the Memorex contract, the contract is not mandatory and that DLA, with GSA's approval, should have conducted competitive procurements. USFS states that the open market price for the subject equipment is half the price under the Memorex contract.

To support its interpretation that the Memorex contract is not mandatory, USFS first cites section E.2.3.1, which provides that the contract applies to equipment in place or on order at the time of award except when it is more economical to satisfy the requirement under the old contract. We do not believe that this provision is applicable because the instant situations do not concern orders under existing contracts.

Second, USFS cites section E.2.3.4, which provides that, in an upgrading situation, unless the overall economics are in favor of the use of the Memorex contract, it is not a mandatory source of supply. In our view, section E.2.3.4 is triggered by section E.2.3.2, which addresses situations where a competitive procurement is for an entire system or a substantial portion

of an entire system. Thus, in our view, where an agency is not upgrading by adding an entire system, but is upgrading by adding only more listed disk storage equipment, the Memorex contract is the mandatory source of supply. Accordingly, we do not believe that USFS's argument on this point is meritorious.

Third, USFS cites section E.2.3.6, which provides that an agency must obtain authority from GSA whenever the Memorex contract will not satisfy its needs. In our view, this provision provides no support for USFS's contention because it addresses the opposite situation; if DLA had determined that the Memorex contract would not meet its needs, then DLA would have needed GSA's approval to procure the desired equipment.

Finally, USFS cites section E.2.3.10, which provides that where an agency has different contracts for the same equipment, it shall select equipment on the most economical basis. In our view, this provision does not support USFS's position since DLA has no other existing contract.

In considering similar protests, we have stated that there is no question that requirements contracts are valid under the theory that where one party agrees to let another party fill its actual requirements for a particular item or service during a certain period, and the other party agrees to fill such requirements, these promises constitute valid consideration. See Brawley v. United States, 96 U.S. 168 (1877); Michael O'Conner, Inc., B-185502, April 5, 1976, 76-1 CPD 224. The assertion--that the Government could save money in a particular procurement by, in effect, breaching its mandatory requirements contract with Memorex--is not a valid basis to sustain USFS's protest.

Protest denied.



Acting Comptroller General
of the United States