DECISION

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

28455

FILE: B-211464 **DATE:** June 7, 1984

MATTER OF: CPT Corporation

DIGEST:

1. Agency's use of standardization policy to justify continued sole-source acquisition of incumbent's word processing and related equipment raises significant issue which GAO will consider regardless of timeliness of protest.

2. Modification of existing requirements contract that (1) increased the period for ordering new word processing and related equipment from 3 to 6 years; (2) made substantial changes to the types of equipment that could be ordered, and (3) altered the contract by greatly expanding the facilities for which equipment could be ordered under it and by altering the prices that would be incurred, amounted to a new procurement that should have been competed unless the agency's needs could only be met by the incumbent.

3. Civilian agency's decision to standardize word processing and related equipment around incumbent's products, which restricted follow-on contract to that firm, is improper where the record does not establish that standardization was required by any unusual or abnormal agency-wide condition or situation, as envisioned by statutory provision authorizing standardization.

CPT Corporation protests the Department of State's continued acquisition of word and data processing equipment under contract 0000-920047, awarded to Wang Laboratories, Inc. on September 29, 1979. According to CPT, State has

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improperly modified the contract through a series of amendments which are outside the scope of the 1979 procurement. CPT contends that State should have conducted a new competition to meet the needs reflected in the modification. We agree and sustain the protest.

The Wang contract was awarded following a competitive procurement under request for proposals (RFP) No. ST-0000-920047 to provide standard commercial quality word processing equipment for use at overseas Foreign Service posts. The contract took the form of a fixed-price requirements contract to provide specific models of equipment for a base period with annual renewal options that (1) permitted equipment to be ordered for lease or purchase through September 30, 1982, and (2) allowed the government to order maintenance for purchased equipment for up to 4 years thereafter.

The contract as modified, however, is not limited to orders for specific equipment models, or for equipment to meet overseas Foreign Service needs, but rather, permits any State Department activity to obtain any products Wang markets or may market in the future at new prices which are for the most part determined as a percentage of Wang's commercial list prices. The contract permits State to order Tempest certified equipment (equipment satisfying electronic emissions standards established by the National Security Agency (NSA)) as well as standard quality equipment. It allows equipment to be ordered through December 31, 1985.

The present contract is the product of a number of State Department actions. In the first 2 years following award, the original contract was amended to enhance the usefulness of the equipment for data processing applications and to provide for equipment installations at domestic as well as overseas locations. On August 5, 1981, the Assistant Secretary for Administration signed a Determinations and Findings (D & F) which concluded that standardization of all State Department word processing equipment was in the public interest. At about the same time, State modified the contract to include Tempest equipment, initially for installation at domestic locations but eventually for overseas installation as well. Finally, an amendment issued January 6, 1983, extended the contract from October 1, 1982 through December 1985.

According to State, its action was properly within the scope of the original Wang contract. Alternatively, State says a sole-source award to Wang was justified because only Wang equipment meets its needs as defined in the Assistant Secretary's D & F concerning standardization, and because only Wang could adequately provide and support that equipment. State asserts numerous reasons in support of the decision to standardize, reflecting the fact that:

> "a substantial portion of the benefits to the Department of acquiring a word processing system are realizable only if that system is used for its full useful life (i.e., six years)."

CPT, on the other hand, contends that the D & F is not valid and, as applied, unduly and improperly restricts award to Wang.

We will consider CPT's protest on the merits notwithstanding a contention raised by State and Wang that the protest is untimely. Section 21.2(c) of our Bid Protest Procedures provides for consideration of an untimely protest that raises an issue significant to procurement practice or procedure. 4 C.F.R. § 21.2(c) (1984). Although, as State and Wang point out, section 21.2(c) is invoked sparingly (see Kemp Industries, Inc., B-206653, March 19, 1982, 82-1 CPD ¶ 262), we think the agency's attempt to meet its continuing needs under a contract awarded in 1979 on standardization grounds raises a significant issue. We therefore conclude that the exception should be invoked in this instance.

A. Modifications Amounted to a New Procurement:

We agree with CPT that the Wang contract modifications are so substantial as to amount to a new procurement. In this respect, we normally will not review a protest concerning a contract modification, since we do not consider contract administration questions. We will consider such a protest, however, where it is alleged that the modification

is outside the scope of the original competition and should have been the subject of a new procurement. Webcraft Packaging, Division of Beatrice Foods Co., B-194087, Aug. 14, 1979, 79-2 CPD ¶ 120. Whether a modification is outside the scope of the original procurement is determined on the facts of each case, taking into account the circumstances attending the procurement that was conducted and whether the changes accomplished by the modification are of a nature which would be reasonably anticipated under the changes clause in the original contract. American Air Filter Company--DLA request for reconsideration, 57 Comp. Gen. 567 (1978), 78-1 CPD ¶ 443.

On the record before us it is clear that the modifications made to the Wang contract were outside the scope of the original procurement in three specific respects, and thus amounted to a new procurement: (1) State improperly extended the period of performance; (2) it significantly expanded the scope of work by adding new equipment, including Tempest equipment, which was not procured originally; (3) State significantly altered the conditions under which the work was to be performed by including domestic as well as overseas installations, by assuming a multi-year rather than a year-to-year contractual obligation, and by modifying the basis on which price is determined.

First, concerning the period of performance, we point out that there is a significant difference between those situations where a contractor is given additional time to perform a contractual obligation, and those where time is used in a contract to define the extent of an obligation. Cf. Kent Watkins & Associates, Inc., B-191078, May 17, 1978, 78-1 CPD ¶ 377 (distinguishing between one-time and ongoing requirements). Requirements or indefinite quantities contracts generally concern on-going needs. Extension of the performance period under those kinds of contracts involves new requirements that should be competed. Intermem Corporation, B-187607, April 15, 1977, 77-1 CPD ¶ 263. The Wang contract was of the requirements type, and we think the extension of the term of the contract was on its face a new procurement of an additional 3-year term.

Second, the contract modification permits State to order any products Wang now markets, or may market in the future, and has been used to acquire Tempest-approved equipment. This obviously goes significantly beyond the terms of the original contract. With respect to Tempest

equipment, State argues that the addition of that equipment was not outside the scope of the original procurement because the procurement was for word processing equipment, whether Tempest-approved or not. The record shows, however, that State held a quite different view in 1979 when it decided to exclude Tempest equipment from the procurement. In a 1979 letter to CPT, State observed that:

> "With regards to TEMPEST, we did make a conscious decision, through the Department's Word Processing Management Group, to distinguish between TEMPEST and non-TEMPEST equipment . . . . We felt that issuing a requirement for a TEMPEST approved machine in July would have unduly restricted the competition for the RFP on the one hand, yet to delay issuing the procurement [for non-Tempest requirements] would have continued a pattern of proliferation of non-standard word processors worldwide. I agree that there is a substantial TEMPEST requirement and that we will be moving to TEMPEST word processing overseas. When and how is not yet clear."

State's current view thus is not consistent with its 1979 position. We think the 1979 letter makes it clear that the addition of Tempest equipment alone to Wang's contract amounted to a new procurement. See Webcraft Packaging, Division of Beatrice Foods Co., supra; W.H. Mullins, B-207200, Feb. 16, 1983, 83-1 CPD ¶ 158.

Third, the changes to the terms of performance (which added domestic installations) and to the term and price structure of the contract (which included adoption of the multi-year obligation and price changes), fall within the purview of our decisions in Tymshare, Inc., 60 Comp. Gen. 268 (1981), 81-1 CPD ¶ 118, and Memorex Corporation, 61 Comp. Gen. 42 (1981), 81-2 CPD ¶ 334, as explained on reconsideration, B-200722.2, April 16, 1982, 82-1 CPD ¶ 349, which indicate that such changes are not properly the subject of contract modifications.

In Tymshare, we held that the Department of Health and Human Services (HHS) improperly ordered teleprocessing services for HHS's Health Care Financing Administration under a contract, awarded after a separate competitive procurement, that only procured services for the Office of the Secretary of Health and Human Services. As explained in National Data Corporation, B-207340, Sept. 13, 1982, 82-2 CPD ¶ 222, it was significant to our decision in Tymshare that HHS's solicitation did not communicate to potential offerors the agency's intent to add the additional disputed work.

In our view, State's intent to order equipment for domestic installation was no more clearly expressed in this instance than was HHS's intent in Tymshare. State's basis for insisting that domestic installations were included in the 1979 procurement is a telegraphic amendment to the RFP that advised offerors to consider North American and Greenland posts as falling within what was called "Option Area II," which concerned Foreign Service facilities within the jurisdiction of State's Inter-American Bureau. (The RFP divided State's overseas facilities into three service or "Option" areas and set out anticipated requirements for each area.) The facilities, however, were all outside the United States, and the RFP clearly stated that the intent of the procurement was to provide word processing to meet the requirements of overseas foreign service posts. While it would seem reasonable in view of the amendment to construe "overseas" as including neighboring foreign countries, we cannot see how offerors could have been expected to characterize State's Washington, D.C. offices as either foreign or overseas. Nor did the RFP contain any estimated requirements for domestic installations. We think, therefore, that the effect of the amendment was merely to include countries such as Canada and Mexico in the Inter-American area. That certainly is no indication to offerors that more than 40 percent of the equipment ordered during the original 3-year contract life would be installed within the United States.

Concerning other contract terms and price structure, the original Wang contract established fixed prices for the acquisition of specific equipment on an annual option basis. The modifications have produced a multi-year contract with new pricing provisions which convey a right to acquire additional new equipment (for domestic installation as well as overseas sites). The situation presented is in this respect similar to that encountered in Memorex, where

we concluded that a change in the form of a contract for disk drives from purchase to a 5-year lease-to-ownership plan, with stringent performance requirements over the lease term, created a new ongoing agreement to support the equipment and was a significant change which should have been competed.

In the circumstances, therefore, we conclude that the modifications made to Wang's contract amounted to a new procurement.

B. Authority to Standardize:

State contends that if the modifications are viewed as sole-source awards, the selection of Wang was justified because State had adopted the Wang product line as an agency standard. What we must first consider, then, is the extent to which State as a civilian agency has authority to standardize.[1]

According to State, the agency derives its authority to standardize from section 302(c)(13) of the Federal Property and Administrative Services Act of 1949, 41 U.S.C. § 252(c)(13) (1982), as implemented in the Federal Procurement Regulations (FPR), 41 C.F.R. § 1-3.213 (1983) and augmented by State's own regulations, 41 C.F.R. § 6-3.213. (41 C.F.R. § 6-3.213 merely reiterates section 1-3.213. Since section 1-3.213 is controlling, we focus only on section 1-3.213 in our decision.)

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[1] Defining needs ordinarily involves determining the attributes that items being acquired must have to perform the specific function for which they are to be bought. The D & F State prepared in this instance, which seeks to standardize equipment on an agency-wide basis, is a statement of need only in a broader sense. It imposes a limitation on all State Department procurements for the type of equipment in question, without regard to whether the grounds cited as justifying standardization actually apply in every individual procurement affected by it.

Section 252(c)(13) of title 41 of the United States Code deals with agencies' authority to negotiate contracts in lieu of using formal advertising when the contracts are:

> "for equipment which the agency head determines to be technical equipment, and as to which he determines that the procurement thereof without advertising is necessary in special situations or in particular localities in order to assure standardization of equipment and interchangeability of parts and that such standardization and interchangeability is necessary in the public interest . . . ."

The section's legislative history reveals that this authority to standardize was viewed as limited to special situations or in particular localities and was to be exercised only under extraordinary circumstances. The conference report expresses congressional understanding that the provision should be read as intended to:

> "protect in every way possible the principles of competition and antimonopoly consistent with the occasional need for such standardization." H.R. Rep. No. 670, 81st Cong., 1st Sess. 12, reprinted in 1949 U.S. Code Cong. & Ad. News 1475, 1497-1498 (emphasis added).

Likewise, the implementation of section 252(c)(13) by FPR § 1-3.213 narrowly interprets the authority granted. "Special situations" are defined as precluding application of the authority merely because standardization is viewed as desirable, in generally prevailing or generalized conditions, and as distinguished from unusual or abnormal conditions. FPR § 1-3.213(c). "Particular localities," the regulation states, refers to locations which are both physically remote and remote from available stocks or replacement parts and related services. FPR § 1-3.213(c)(3). For example, the regulation states:

> " . . . it is not enough to conclude that standardization is required of a motor vehicle in Alaska because of remote location if in fact replacement parts of various vehicle makes are readily available. It must be shown expressly, and not by inference, (i) that the location involved is inaccessible because of stated conditions, such as the absence of a connected road system, or (ii) that there are not available within stated reasonable distances, adequate stocks of replacement parts or personnel and facilities necessary to perform required services, and that there are circumstances which make it impractical to maintain at the location such stocks and furnish such service for more than a particular number of makes of vehicles. 41 C.F.R. § 1-3.213(e)(2).

We further point out that neither the statute nor the regulation authorizes an agency to adopt a vendor's entire product line. The statute (41 U.S.C. § 252(c)(13)) refers to standardization in the context of parts interchangeability, and FPR § 1-3.213 speaks only of standardization regarding specific makes and models of equipment.

Thus, standardization is an exception to normal procurement practice with respect to specifically identified equipment. It is an exception which may be used only in situations that can be clearly documented as being truly unusual or abnormal. Standardization is not available merely because the contracting activity views standardization to be desirable, or because it would be convenient for administrative reasons to standardize.

C. Arguments Regarding State's Decision to Standardize:

While State in its reports to our Office appears to agree that standardization is authorized only in abnormal or unusual circumstances, the agency contends that this test is met. The D & F recites and State asserts that standardization was justified in this instance: (1) to avoid problems that might be encountered in order to connect other brands of equipment to State's high-speed telecommunications network; (2) to achieve substantial savings

by permitting cannibalization of unserviceable equipment by salvaging usable parts; and (3) to avoid personnel retraining costs.

State explains that it maintains more than 200 establishments abroad. It says these facilities must be able to communicate with each other as well as with Washington using State's telecommunications network. State also points out that to assure maintenance at some overseas facilities, it has trained a number of employees to maintain Wang equipment and has acquired a limited spare parts inventory. State contends that substantial savings accrue if it can avoid maintaining duplicate parts inventories and training maintenance personnel to service multiple types of equipment, and if it can use common equipment to permit cannibalization of unserviceable equipment by salvaging usable parts. The logistics of serving its posts requires that office equipment be compatible and readily replaceable, State says, and is complicated by the fact that Foreign Service officers and secretaries move on the average of once every 3 years and would have to be retrained in basic word processing skills unless the equipment at their new posts is familiar to them. State says that more than 4,000 employees have been trained.

Moreover, according to State, significant resources have been invested in developing software which is unique to the Wang equipment. With respect to Tempest equipment, State says it has developed certain security systems which take advantage of the attributes of Wang equipment and which would have to be reexamined and redesigned if other equipment were substituted.

D. GAO Analysis:

The result of State's standardization in this instance was to limit the procurement of word processing and related equipment to Wang for a total of 6 years. We will closely scrutinize any agency action that, by establishing restrictive needs, limits competition to a single source of supply. See, e.g., Jarrell-Ash Division of the Fisher Scientific Company, B-185582, Jan. 12, 1977, 77-1 CPD ¶ 19.

We do not believe State has justified its actions. For example, although the D & F states that difficulty might be encountered in connecting other brands of equipment to State's high speed telecommunications network, State has not shown that the difficulty anticipated is any greater than that which is normally encountered in establishing telecommunications data links, or that the risks involved cannot be handled as they normally are in such cases by establishing a communications protocol and equipment specifications. In fact, in a report to our Office, State concedes this could be done.

Nor is there any evidence that the availability of parts and service is anything more than an isolated problem at remote locations. There is no evidence that maintenance poses any problem at, for example, State's Washington, D.C. or European installations where, as CPT notes, on-call service could be provided by any multi-national company. Moreover, as stated earlier, FPR § 1-3.213 specifically requires a showing that it would be impractical to maintain duplicate parts and furnish services as necessary--there has been no such showing here.

Concerning the cannibalization of usable parts, we point out that there is no evidence that parts salvage is critical in maintaining equipment in operating condition. Actually, there is no evidence that State does cannibalize parts to keep equipment in service. The record shows that State does not rely on salvage to keep equipment operating, but has designed its installations so that sufficient equipment is available to assure that, in the event a unit fails, critical work can continue to be processed until the equipment that has failed can be repaired.

Also, concerning the economic value of using cannibalized parts, there is no evidence of record establishing the value of usable parts that could be saved by cannibalizing parts, or establishing the value of equipment that could be kept in service but which would otherwise be replaced if parts were not salvaged. There is no proof that it is less expensive for the government to salvage parts than to allow the vendor to refurbish salvageable parts.

Moreover, regarding State's contention that standardization produces substantial savings, there is no evidence that savings flowing from standardization would not be offset by lower prices obtained through competition. An agency's belief that one firm would enjoy a price advantage if a competition were conducted does not alone justify selection of that firm without competition. Olivetti Corporation of America, B-187369, Feb. 28, 1977, 77-1 CPD ¶ 146.

The remaining grounds cited by State as reason to standardize are similarly unpersuasive. State says that through standardization the agency would avoid retraining personnel who have been trained in the use of Wang equipment. According to State's estimates, training requires from 2 days to a week, and results in an at least temporary loss of employee morale and efficiency. Also, State says it would achieve a greater return on the investment it has made in software that has been developed for use with the Wang equipment, or in the alternative, would avoid the cost of converting this software for use on other systems.

However, all government agencies have to retrain personnel and convert software whenever new equipment is procured. In initially awarding a contract that allowed it to purchase equipment for only 3 years, we think State should have anticipated that equipment ordered later might have to be obtained from another vendor.

F. Other Issues:

State contends that events since 1981 would justify continued sole-source procurement from Wang were we to hold, as we have, that standardization was improper. Wang equipment has now been installed throughout the State Department's facilities in Washington, D.C. and abroad. State insists that efficiencies in terms of supply, maintenance, and training all favor continuing to contract with Wang. State also says its present contract affords it very reasonable prices compared with what it would have to pay if it acquired software, maintenance and equipment from, for example, the Federal Supply Schedule, which State points out would not in any event cover overseas maintenance on government-owned Wang equipment.

State says it has determined that only a distributed system having sufficient capacity to permit many work stations to be operated from a central unit would meet its requirements for protecting the integrity of the classified data base at posts abroad and in most domestic offices. State questions whether CPT could meet this requirement, although it concedes that Wang is not the only source that could.

We do not find these contentions to be persuasive.

In part, we think State has misconstrued the intent of CPT's protest. CPT does not contend, nor would we require, that State cease contracting with Wang for services on equipment only Wang could provide. What CPT does object to is State's continued sole-source acquisition of equipment from Wang to meet needs that CPT believes it could fill were it given an opportunity to compete. Since a sole-source award is justified only if there is only one firm that can meet the government's needs (see, e.g., ROLM Corporation and Fisk Telephone Systems, Inc., B-202031, Aug. 26, 1981, 81-2 CPD ¶ 180) and since, as noted, State concedes that Wang is not the only firm that can meet its needs, it would appear that State has no legal basis for refusing to break out those of its requirements which could be procured competitively. Interscience Systems, Inc.; Cencom Systems, Inc., 59 Comp. Gen. 438 (1982), 80-1 CPD ¶ 332, aff'd 59 Comp. Gen. 658, 80-2 CPD ¶ 106.

State also suggests that CPT may be unable to meet the agency's needs. We point out, however, that since equipment specifications suitable for use in a competitive procurement have not been written, it is premature to decide whether CPT could or could not meet State's needs if they were competed.

C. Conclusion:

The protest is sustained.

In view of the scope of the needs filled under the Wang contract, we believe it is important in framing a recommendation for corrective action that we balance the need for effective remedial relief with State's short term need for continuity during any transition period. We believe State should immediately initiate a competitive procurement for word processing and related needs of the

type presently being filled under the Wang contract. That procurement should be completed as expeditiously as possible; when it is completed, the present Wang contract should be terminated for convenience. In no event, however, do we believe State should continue to acquire new equipment or software or continue to lease any equipment under the existing Wang contract after December 31, 1984 unless, with respect to each affected installation, the selection or continued use of Wang equipment is based on competition, or unless in each such instance Wang is clearly shown to be the only source of supply that can meet the specific need to be filled.

Since this decision contains a recommendation that corrective action be taken, we are furnishing copies to the Senate Committees on Governmental Affairs and Appropriations, and the House Committee on Government Operations and Appropriations in accordance with section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 720 (1982), which requires the submission of written statements by the agency to the Committees concerning the action taken with respect to our recommendations.

for Harry R. Van Cleve
Comptroller General
of the United States