5332

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

FILE: B-189482 DATE: February 10, 1978

MATTER OF: KET, Inc.

DIGEST:

1. Contract provision permitting partial termination of up to 8 percent of total obligation under contract may be construed as permitting partial terminations of up to 8 percent of annual obligation under contract rather than 8 percent of total obligation under extended life of contract where contract is not multi-year obligation.

2. Where contract award for replacement equipment to other than incumbent contractor would result in increase in contract price for remaining equipment under termination for convenience clause, such increased cost to Government may be considered in evaluating economic feasibility of obtaining competition. No basis exists for questioning amount of increase anticipated which apparently was based upon increases evident in current Federal Supply Schedule prices.

3. Allegation that instant procurement perpetuates incumbent contractor's "de facto" sole source position for requirements beyond term of instant contract, is not persuasive reason for objecting to selection of incumbent based on other valid reasons.

This is a protest by KET, Inc., concerning the contract awarded by IRS for upgraded replacement disk drive devices and controllers for its Integrated Data Retrieval System, which is used to establish and maintain taxpayer data files. A non-competitive procurement was conducted with the systems contractor, Control Data Corporation (CDC), and KET has protested this procedure.

KET points out that in June 1976 it requested the General Services Administration to withdraw a delegation made to IRS of authority to procure this equipment from CDC. Shortly thereafter, GSA advised KET that IRS had decided to terminate the subject procurement action with CDC; would re-examine its requirements; and, if this re-examination so indicated, would

conduct an appropriate fully competitive procurement. However, in June 1977, KET learned of a proposed "selected source" procurement with CDC, through a notice published in the Commerce Business Daily. (By the time this notice was received by KET, award had been made.) Subsequently, KET filed a protest with this Office.

Initially, KET questioned the IRS's need to replace disk subsystems at all of its Service Centers but, on rebuttal, KET has stated that it does not challenge the technical determination regarding the need for replacement equipment. Nevertheless, the protester persists in its objections to the agency's failure to obtain competition particularly because of the impending expiration on November 1, 1978 of the existing Integrated Data Retrieval System contract with CDC. This interim replacement action with the systems contractor is perceived by KET as giving CDC an advantage for the anticipated procurement for IRS requirements beyond November 1, 1978.

IRS issued a determination and findings for its negotiated procurement with a "sole source" of supply which ultimately formed the basis for GSA's delegation of authority to IRS to acquire the equipment from CDC. This document provides, in pertinent part, as follows:

> "A market survey conducted by IRS Procurement during FY 76 [fiscal year 1976] indicates that there are compatible Disk devices available; however, the current contract with CDC (CS-00S-84580) contains language which would require the evaluation of approximately $400,000 against all competition. Further, CDC has a decided advantage in the on-site maintenance requirement, currently having nine (9) on-site maintenance personnel per site."

As to the $400,000 advantage given CDC, the contracting officer reports that this stems from the Government's interpretation of Article IX - Increase/Decrease Option clause contained in the incumbent's contract. This clause provides in part:

"Basic Quantity - The Government, by amendment to this contract, may * * * discontinue standard equipment items from rental provided that such discontinuances do not decrease the total obligation of the Government under this contract by more than eight percent (8%)."

A legal memorandum submitted with IRS's report dated September 30, 1977, states that this clause permits the discontinuance from rental of standard equipment items without termination costs so long as its actions do not decrease the total annual obligation of the Government under the contract by more than 8 percent. If, as in this case, the discontinued equipment exceeds 8 percent, IRS states that the contractor could seek to raise its prices on the remaining equipment under lease to the current prices for similar equipment specified in the CDC Federal Supply Schedule Contract. The contracting officer reports that CDC had indicated its intention to obtain such a settlement in this case. We understand that the $400,000 factor represents the approximate cost to the Government of such an adjustment to the prices for the remaining equipment.

KET's initial submission stated that IRS representatives had advised that a unilateral determination was made that no other contractor would bid lower prices because the incumbent systems contractor had service and repairmen at each site and because the lease period on the newly installed equipment would be for only 18 months. The protester objected to this rationale for the sole source determination because "IRS knew full well of KET's previous competitive position on the subsystems and the agreement reached [previously in 1976] between KET, IRS and GSA on such procurement."

On rebuttal KET questions whether the $400,000 evaluation factor is a reasonable interpretation of the above quoted option clause provided in CDC's contract. It objects to the contracting officer's statement that the Government would be in "breach" of the contract if terminations exceed eight percent of the total annual obligation, arguing that if terminations exceed 8 percent the contract would be partially terminated for which the contractor would be compensated under the termination for convenience clause. Furthermore, the protester argues that under

the above quoted option clause the Government should be able to discontinue, without penalty, up to 8 percent of the total obligation of the Government under the entire contract term as opposed to 8 percent of the Government's annual obligation under the contract. Moreover, the protester argues that IRS has not supported or justified an evaluation factor in an amount of $400,000.

IRS finds no merit in KET's argument that the 8 percent decrease provision refers to the cumulative obligation of the Government over the entire extended life of the contract rather than to the Government's annual obligation. The agency points out that the contract is not a multi-year obligation and that the obligation of the Government under the contract at any given time is the amount which it is legally obligated to pay the contractor during the fiscal year.

In our opinion the agency's interpretation of this contract provision as applying only to the annual percentage of the contract amount obligated is not unreasonable. It is clear that the discontinuances in this case exceeded 8 percent of the Government's annual obligation. In such circumstances we believe the contractor could have invoked, as it apparently intended to do if the replacement equipment were obtained elsewhere, the provision of the standard termination for convenience clause in its contract permitting an equitable adjustment in the contract prices for the remaining portion of the contract not terminated. Although the contracting officer fearfully has referred to a contract "breach" in the event the Government discontinues use of more than 8 percent of the system's equipment, the protester agrees that the contractor would be entitled to an adjustment under the termination for convenience clause. While KET also argues that IRS has failed to support an evaluation factor of $400,000, it has not shown that this amount is unfounded. We have no reason to question the contracting officer's finding that this amount, based upon increases evident in the contractor's current FSS prices, represents the projected charge the Government would incur under the contract with CLC if the replacement equipment were procured from another source.

Finally, the protester objects to the instant procurement because it will perpetuate CDC's "de facto" sole source position for the Government's requirements beyond the contract's 18 month term. However, that is not a persuasive reason for objecting to the selection of CDC for the requirements covered under the instant contract, which action was based on other valid reasons. In this connection we note that IRS has indicated that it is making "every reasonable effort" to minimize the competitive advantage which CDC may enjoy on the follow-on solicitation.

Accordingly, the protest is denied.

Deputy Comptroller General
of the United States