M.J. Boyle, Pl-1

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DECISION

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

FILE: B-190203 DATE: August 2, 1978

MATTER OF: Department of Commerce; International Computaprint Corporation

DIGEST:

1. Procuring agency filed timely request that GAO reconsider prior decision but did not timely file required detailed statement concerning factual or legal basis to modify or overturn prior decision. Since detailed statement was not timely filed as required by section 20.9 of Bid Protest Procedures, GAO declines to reconsider earlier decision.

2. Procuring agency untimely filed additional basis upon which reconsideration of merits of earlier decision is requested. Since additional basis was not filed timely as required by section 20.9 of Bid Protest Procedures, GAO declines to reconsider that aspect of earlier decision.

3. Interested party timely requested that GAO reconsider earlier decision and, before expiration of time for filing reconsideration request, such party was expressly granted extension to file required detailed statement. Although Bid Protest Procedures do not permit waiver of section 20.9's time limit for filing reconsideration, in circumstances GAO will consider merits of reconsideration request. For future, reconsideration requests must be filed within prescribed time limit and there will be no exceptions.

4. Contention that "final" determinations and decisions made by procuring agencies pursuant to 41 U.S.C. chapter 4 (1970) are not subject to review by courts or GAO is witnout merit because similar language in other final determination statutes has been interpreted to limit only scope of review. Such determinations will not be questioned where reasonable basis exists.

5. Statement and contentions raised in support of position that agency's determination to negotiate was proper do not constitute submission of facts or legal arguments demonstrating that earlier decision was erroneous; accordingly, GAO declines to reconsider this aspect of earlier decision.

6. GAO rendering decisions on bid protests does not violate separation of powers doctrine.

7. Prior decision--with regard to recommendation that startup period be extended--is affirmed, since interested party failed to present any facts or legal arguments which were not thoroughly considered in earlier decision.

The Department of Commerce and International Computaprint Corporation (ICC) request reconsideration of two portions of our decision in the matter of Informatics, Inc., B-190203, March 20. 1978, 78-1 CPD 215. Involved in the March 20, 1978, decision were 10 bases of protest raised by Informatics; all but two bases of protest--the subject of this decision--were resolved in favor of Commerce's position. The March 20, 1978, decision concluded in pertinent part that: (1) since the procurement was essentially being conducted as an advertised procurement, the solicitation should be so designated; and (2) since Commerce failed to establish a reasonable basis for the 2-month startup time limitation, the requirement is unduly restrictive of competition in the circumstances.

After receipt of the reconsideration requests, there was uncertainty as to the precise basis advanced by the parties and to clarify the matter in an expeditious manner, before the receipt of ICC's detailed statement, an informal conference was arranged and attended by all the parties. Comments based on issues clarified in the conference were submitted thereafter by all interested parties.

Before consideration of the substantive matters, consideration of the timeliness of Commerce's and ICC's reconsideration requests is necessary.

Timeliness of Commerce's Request For Reconsideration

On April 4, 1978--9 working days after Commerce received a copy of the decision--Commerce filed a request for reconsideration on the ground that formal advertising would be incompatible with the degree of specificity of the specifications and would inhibit competition. Commerce noted that details of the request for reconsideration would be forwarded later. On April 10, 1978, a complete statement of Commerce's grounds for reconsideration with regard to the formal advertising recommendation was filed. In addition, on April 10, Commerce--for the first time--requested reconsideration of our conclusion that the 2-month startup time limitation was unduly restrictive.

Requests for reconsideration are governed by the provisions of our Bid Protest Procedures at 4 C.F.R. § 20.9 (1977), which provides as follows:

> "(a) Reconsideration of a decision of the Comptroller General may be requested by the protester, any interested party who submitted comments during consideration of the protest, and any agency involved in the protest. The request for reconsideration shall contain a detailed statement of the factual and legal grounds upon which reversal or modification is deemed warranted, specifying any errors of law made or information not previously considered.
>
> "(b) Request for reconsideration of a decision of the Comptroller General shall be filed not later than 10 days after the basis for reconsideration is known or should have been known, whichever is earlier. The term 'filed' as used in this section means receipt in the General Accounting Office."

Informatics argues, citing Data Pathing, Inc.,--Reconsideration, B-188234, July 11, 1977, 77-2 CPD 14, that the April 4, 1978, letter does not contain the required detailed statement of the factual and legal grounds upon which reversal or modification is deemed warranted and, therefore, we should decline to reconsider the advertising portion of the decision. Informatics also argues that Commerce's reconsideration request regarding the start-up portion of the decision is untimely and not eligible for consideration because it was first raised on April 10, 1978--more than 10 working days after the basis for reconsideration was known. For the same reason, Informatics contends that the detailed statement regarding the advertising recommendation was also filed untimely and, therefore, is not eligible for consideration. Although Commerce had an opportunity to respond to Informatics' contentions, it did not do so.

Protests against the award of a Government contract are very serious matters, which deserve the immediate and timely attention of the protester, interested parties, and the contracting agency. Our Bid Protest Procedures establish an orderly process to insure equitable and prompt resolution of protests. Therefore, timeliness standards for the filing of protests and requests for reconsideration must be and are strictly construed by our Office. See, e.g., Cessna Aircraft Company, 54 Comp. Gen. 97, 111 (1974), 74-2 CPD 91; Department of Commerce - Request for Reconsideration, B-186939, July 14, 1977, 77-2 CPD 23; American Air Filter Co.--DLA, Request for Reconsideration, B-188408, June 19, 1978. Timeliness standards for the filing of requests for reconsideration are purposefully more inflexible than those for filing protests or meeting intermediate case development or processing deadlines and, under our Procedures, there is no provision for waiving the time requirements applicable to requests for reconsideration. Department of Commerce - Request for Reconsideration; supra; American Air Filter Co.--DLA, supra. Moreover,

we are unaware of any prior case since the adoption of our Procedures where the time limit applicable to reconsideration requests has been waived. Id.

Obviously, the requirement for a "detailed statement" of the factual and legal grounds for reversal or modification is the sum and substance of a request for reconsideration. Without the detailed statement, our Office has no basis upon which to reconsider the decision. For example, in Data Pathing, Inc.--Reconsideration, the protester believed that our conclusion "was not supported by a full examination of the facts." We held that such statements do not constitute the submission of facts or legal arguments demonstrating that our earlier decision was erroneous; accordingly, we declined to reconsider our decision.

When a protester, an interested party or a contracting agency timely files a short note indicating general disagreement with an earlier decision and subsequently provides the required detailed statement after the expiration of the reconsideration period, an attempt to extend the time for filing the reconsideration request is evident. We cannot condone such action because to do so would open the door to potential protracted delays possibly resulting in circumstances negating recommended remedial action in the earlier decision.

In the instant situation, Commerce's timely request for reconsideration (filed April 4, 1978) states: "The Department of Commerce is hereby filing a motion for reconsideration in your decision that the data base requirement should be formally advertised, which method would, in our opinion, be incompatible with the degree of specificity of the specifications and would inhibit competition." Such request does not advance facts or legal arguments which show that our earlier decision was erroneous; therefore, we must decline to reconsider our March 20, 1978, decision on the merits at Commerce's request. See Data Pathing, Inc.--Reconsideration, supra. Moreover, Commerce's proper request for reconsideration

including the detailed statement, filed April 10, 1978, is untimely and will not be considered. See Department of Commerce - Request for Reconsideration, supra; American Air Filter Co.--DLA, supra.

There have been situations where we have declined to reconsider the merits of an earlier decision but at the agency's request we have reconsidered the recommendation for remedial action. See, e.g., Environmental Protection Agency--request for modification of GAO recommendation, 55 Comp. Gen. 1281 (1976), 76-2 CPD 50. That type of situation is not the case here because Commerce does not contend that the recommendations of the March 20, 1978, decision cannot or should not be executed. Instead, Commerce contends that the basis of the recommendations should be overturned as erroneous.

With regard to Commerce's untimely filed additional basis--startup time--upon which reconsideration is requested, since the matter was untimely filed, we must decline to reconsider it.

Accordingly, we decline to reconsider the recommendations in the earlier decision upon Commerce's request.

Timeliness of ICC's Request for Reconsideration

On April 3 and 4, 1978, after a conversation with a member of GAO's Office of General Counsel, counsel for ICC filed letters requesting reconsideration on behalf of ICC and explained that because he was recently retained by ICC for such purpose he needed more time to furnish the required detailed statement. Counsel stated that the detailed statement or withdrawal of the request would be furnished by April 18, 1978. Subsequently, ICC's counsel contacted another member of the Office of General Counsel at GAO and requested additional time. The detailed statement was finally filed on April 25, 1978, a date in excess of the 10 working days prescribed in section 20.9 of our Bid Protest Procedures.

Informatics argues that the request for reconsideration filed by ICC is also untimely because neither letter indicated what holdings of the March 20, 1978, decision would be contested or asserted any ground for the request whatsoever, and neither letter conformed to the requirements of section 20.9. Informatics also argues that by allowing ICC more than the time set forth in the Procedures would permit incumbent contractors (and Government agencies) to extend interminably the reconsideration process by the simple expedient of changing counsel. Finally, Informatics notes that ICC's requested extensions were granted by GAO before Informatics had an opportunity to learn of and oppose the extension request. Consequently, Informatics maintains that ICC's request for reconsideration is untimely and should be dismissed.

While ICC had an opportunity to reply to Informatics' contentions, it elected not to do so.

The instant case is similar to a situation which arose in Lemmon Pharmacal Company, Inc., B-186124, December 3, 1976, 76-2 CPD 461, where the protester's corporate counsel communicated orally with the responsible attorney in this Office within the 10-day time limitation of section 20.9. The protester contended that the informal and cooperative attitude led to the belief that its informal, oral discussion of the initial decision did not require an immediate filing of a formal request for reconsideration. Two months later the protester filed its reconsideration request, which we did not consider because it was not timely filed. The rationale for that conclusion was in part as follows:

> "* * * Even if Lemmon was inadvertently lulled into believing that a formal written request for reconsideration could be delayed, we neither gave express prior approval of nor does sufficient justification exist for the 2-month delay in filing its request for reconsideration. * * *"

A reasonable, but incorrect, interpretation of the above language may have led others to believe that, with express prior approval, reconsideration requests could be filed beyond the 10-day time limit. For the future, reconsideration requests must be filed within the time limit of section 20.9 and there will be no exceptions. In the circumstances of this case, however, fundamental fairness requires that we consider the merits of ICC's reconsideration request.

Substance of ICC's Reconsideration Request

1. Finality of a Procuring Agency's Determination to Negotiate

ICC contends--for the first time on reconsideration--that Commerce's determination to use the negotiation method rather than the formal advertising method to satisfy its needs is final and not subject to review by this Office or the courts. ICC refers to 41 U.S.C. § 257(a) (1970), which provides that:

> "The determinations and decisions provided in this chapter to be made by the Administrator or other agency head may be made with respect to individual purchases and contracts or with respect to classes of purchases or contracts, and shall be final. * * *"

ICC adds that House of Representatives and Senate reports forming the legislative history of that section stated:

> "The determinations and decisions so made will not be made subject to invalidation or challenge by the Comptroller General or the courts. * * *"

ICC concludes, therefore, that this Office is not entitled to review Commerce's determination to negotiate rather than to advertise.

Informatics argues, citing Electric Company v. United States, 189 Ct. Cl. 1.6, 416 F.2d 1320 (1969), that this contention is raised too late to be a proper basis for reconsideration of a prior decision and that ICC ignores the longstanding practices and procedures of this Office. Informatics states that our Office, in the proper exercise of its power to resolve bid protests, has reviewed agency decisions to negotiate and has declared such decisions to be violative of the statutory preference for advertising when they lack a reasonable basis. In support, Informatics cites these decisions: Nationwide Building Maintenance, Inc., 55 Comp. Gen. 693 (1976), 76-1 CPD 71; Sorbus, Inc., B-183942, July 12, 1976, 76-2 CPD 31; Cincinnati Electronics Corporation., 55 Comp. Gen. 1479 (1976), 76-2 CPD 286.

In Informatics' view, the "finality" language of 41 U.S.C. § 257(a) affects only the scope of review of the agency decision and our Office has already taken this statutory language into account by limiting its review to the question of whether the determination to negotiate due to the impracticability of securing competition is supported by a reasonable ground. Informatics concludes, citing Estep v. United States, 327 U.S. 114 (1946), that the above test is appropriate when the applicable statute describes an administrative decision as "final."

ICC is essentially raising a new argument on reconsideration for the first time and generally we would not consider it since it does not show a legal error in the earlier decision. However, since the argument is basically an attack on GAO's authority to review the subject matter of the case, we believe that it is proper to consider this matter even though it could have been and should have been raised during consideration of the earlier decision. Cf. Wright & Miller, 5 Federal Practice and Procedure § 1209 at 107 (1969 ed.).

While ICC has presented no court cases specifically interpreting the 41 U.S.C. § 257(a)

"finality" and we are aware of none, we note that there are other statutes which established "final" administrative determinations. Those statutes have been interpreted as restricting only the scope of review. For example, in Estep v. United States, the Supreme Court held that the "final" decisions of local boards under the provisions of § 11 of the Selective Training and Service Act were not subject to the customary scope of judicial review which obtains under other statutes; local board decisions were to be overturned only if there was no reasonable basis for them. Similarly, that is the scope of judicial review in deportation cases where Congress made the orders of deportation "final." Chin Yow v. United States, 208 U.S. 8 (1908).

At least since 1962, we have concluded that the "final" determinations made pursuant to the current 10 U.S.C. § 2304 (1970)--which is identical in all pertinent respects to 41 U.S.C. § 257(a) with regard to finality--were subject to limited review for the purpose of ascertaining whether any reasonable basis exists to support it. 41 Comp. Gen. 484 (1962). As Informatics notes, the scope of review used by our Office--the reasonable basis test--is the same test which would be applied by the courts.

We believe that ICC's contention must fail for the above reasons and because the logical extension of ICC's argument is that no Federal civilian agency's procurement determinations made under 41 U.S.C. chapter 4--and virtually all are made under such authority--would be subject to judicial review. There is currently no judicial precedent supporting ICC's contention. In fact, the opposite conclusion is clearly the current view of the courts. See, e.g., Scanwell Laboratories v. United States, 424 F.2d 859 (D.C. Cir. 1970); Meriam v. Kunzig, 476 F.2d 1233 (3rd Cir. 1973), cert. denied, 414 U.S. 911 (1973).

2. Commerce's Basis to Negotiate

ICC notes that Commerce decided to negotiate this procurement based on the exception to the general rule of contracting for property and services by advertising when it is impracticable to secure competition by formal advertising. In ICC's view, specifications for an IFB could not be drawn so as to insure "full and free competition" because (1) specifications which would be certain to secure Commerce's procurement objectives would be so decisively slanted toward detailing the practices and procedures of the incumbent contractor that another contractor would have no practical chance of winning any resulting competition with the incumbent contractor, thus nullifying the legitimacy of the advertised procurement; and (2) on the other hand, if the specifications were loosened in such a way so as not to favor the incumbent contractor, the interests of the procuring agency would thereby be inordinately depreciated.

ICC argues that past experience shows that formal advertising has failed to result in a contract for this service and that having already experienced the impracticability of contracting for the needed services through an IFB, Commerce's decision to rely on an RFP in the present procurement must be regarded as prudent procurement management. ICC concludes that all the facts of the case support the propriety of Commerce's proposed negotiation.

In our view, ICC's statements and contentions do not constitute the submission of facts or legal arguments demonstrating that our earlier decision was erroneous; since ICC's concerns were fully considered in our earlier decision, we must decline to reconsider our earlier decision with regard to this point. Data Pathing, Inc.--Reconsideration, supra.

3. "Separation of Powers"

ICC submits--for the first time on reconsideration--that the constitutional doctrine of separation of powers precludes an organization in the legislative branch, namely the GAO, from telling an agency in the executive branch how to conduct its business.

Informatics states, in reply, that ICC's attack on the jurisdiction of this Office to consider and decide bid protests is not raised in the proper forum to resolve that question, nor is a request for reconsideration of an unfavorable decision of the Comptroller General an appropriate time to initiate it.

The purpose of our reconsideration procedure is to permit interested parties, including the procuring agency, to present factual or legal grounds demonstrating that our earlier decision was erroneous. Reconsideration is not the time to present the "complete" facts or to present legal arguments known or available to the parties during the consideration of the earlier decision. See Decision Sciences Corp--Reconsideration, B-188454, December 21, 1977, 77-2 CPD 485. Here, ICC fully participated in every aspect of the earlier decision and ICC failed to raise this argument at that time. However, since it questions our jurisdiction, we will consider its contention. See 1. supra.

ICC's contention does not specifically state how our earlier decision or our bid protest resolving function violates the Constitution nor does ICC provide any support for its contention. With no more than ICC's unsupported charge, we may only respond generally by stating that, in our view, our rendering decisions on bid protests does not violate the separation of powers doctrine. In support, see "BID PROTESTS: ABA GROUP SEES 'SEPARATION OF POWERS' NO BAR TO GIVING GAO BINDING PROTEST AUTHORITY." Federal Contract Reporter, No. 696, p. A-1 (August 29, 1977).

4. StartUp

The earlier decision states in pertinent part as follows:

> "* * * Where (1) there is no need to have the next contractor begin immediately at full production capacity and some overlap of new contractor and incumbent is necessary and (2) where the history of a similar procurement shows that 2 months is not long enough to produce acceptable results, we must conclude that Commerce has failed to establish a reasonable basis (and we can perceive none) for the 2-month start-up time limitation and the requirement is unduly restrictive."

ICC contends that the first of two bases is nothing more than a gratuitous statement with a veneer of plausibility making it appear reasonable to someone who does not know the facts. ICC believes that our decision recommended splitting the work between two contractors and the thrust of its argument attacks that recommendation. It is sufficient to state the earlier decision made no such recommendation. The earlier decision is based on the uncontested facts. First, each issue takes 3 weeks to process. The work would proceed as follows:

Week	Commerce Action	Old Contractor	New Contractor
1	Transmits A	Works on A (and prior issues)	No work
2	Transmits B	Works on A & B (and prior issue)	No work
3	Transmits C	Works on A & B	Works on C
4	Transmits D	Works on B	Works on C & D
5	Transmits E	No work	Works on C, D & E

During weeks three and four, both contractors are working, but each on separate issues. It is also clear from this example that, during an orderly transfer of work, a new contractor does not work at full capacity until the third week of actual performance.

Second, under Commerce's contemplated award and production scheme, award is made 60 days prior to week 1 in the above example. The earlier decision simply recommends that the 60-day period be extended.

The last ground is based on our Office's alleged incorrect reading of the history of a similar procurement. In ICC's view, our Office overlooked the fact that protester's complaint was made in the context of its preference and erroneous assumption that exhibit (1) which was due at proposal submission time need not be computer produced, but could be manually produced. ICC states that under protester's misconception, it would be required to produce the necessary software within the 60 days' startup time, and the time schedule might be an excessive burden.

Next ICC states that, in three previous solicitations, no firm which competed in the three procurements nor anyone else complained about the 60-day startup period and the differences between those procurements and the present procurement are meaningless insofar as the issue of the reasonableness of the startup time is concerned.

Finally, ICC concludes that Commerce's determination that the 60-day startup time is a reasonable requirement falls within the embrace of 41 U.S.C. § 257(a) and is not subject to review by this Office. With regard to the latter contention, we have concluded above that Commerce's determination is subject to review to ascertain whether there is a reasonable basis for it.

In response to ICC's remaining contentions, Informatics argues that ICC conveniently ignores the factors other than software development advanced by Informatics in demonstrating the unreasonable nature of the 2-month startup period. Informatics made a lengthy and detailed presentation, including a detailed chart summarizing the impractical nature of the 2-month startup, and software development was only one of the many production factors set forth on that chart.

Next, Informatics explains at length how the present procurement is substantially different from prior ones. In sum, Informatics states that (1) in the 1970 contract, the contractor was able to use composition software prepared by the Government Printing Office and the contractor was not required to process the difficult "complex work units," with the exception of single line mathematical and chemical expressions; and (2) the schedule required in the 1970 contract permitted a startup period of 38 weeks before full production was achieved. Further, Informatics notes that after the first 2 months of that period had elapsed, the contractor was required to process only 100 patents per week and that the solicitation gave offerors the opportunity to submit a shorter startup schedule, but ICC declined, stating:

> " * * * ICC has been mindful principally of the need to recruit and train extra staff for the project. A faster rate of recruitment might affect the accuracy of work in the early weeks, and especially in view of the stringent penalities attached, this is a risk which ICC would prefer not to take."

This contrasts with the current requirement of the protested RFP that offerors be able to achieve full production, i.e., 1,100-1,200 patents per week, in the same 2-month period. Informatics concludes that

although Commerce granted, and ICC benefited from, the past generous startup period, both parties now would deny prospective contractors the opportunity to compete under realistic startup requirements.

It is our view that all of the facts presented on reconsideration were thoroughly considered by our Office in arriving at the conclusion of the earlier decision and, therefore, we affirm the conclusion reached in that decision with regard to the startup time.

Conclusion

ICC, the incumbent contractor for over 7 consecutive years, and Commerce both vigorously contend that negotiation rather than formal advertising is the best method to maximize competition on this procurement. Although it is most unusual for an incumbent contractor, which desires the follow-on contract, to favor maximum competition, we concur with both parties' desire for increased competition. After comprehensive development of this matter (this is our fifth decision in the 7-year history of the requirement), we must conclude that Commerce's selection of negotiation is essentially based on its fear that under the formalities of advertising a bid may have to be rejected because of an inadvertent mistake, whereas in negotiation that mistake may be allowed to be corrected during discussions; and, since there are perhaps as few as two firms willing to compete for this work, one rejected bid may be most unfortunate.

Our response to Commerce's concerns is (1) such fears in and of themselves do not constitute a valid basis for negotiation, (2) in view of the specific and thorough requirements of the solicitation, a mistake in the bid of one or both of these experienced competitors seems remote, and (3) in the event of a mistake requiring rejection of a bid, the remaining bid need not be accepted if the bidder is not responsible or the price is unreasonable.

In the unlikely circumstance that formal advertising should fail, then negotiation may be appropriate.

We have difficulty in understanding why TCC and Commerce--both interested in increasing competition--would object to an extension of the 60-day startup period requested by Informatics--perhaps the only other competitor for a contract which may approach $15 million a year. Informatics felt so strongly about its inability to compete that it did not submit a response to the present solicitation. We expect that Commerce will reasonably extend the startup time in an effort to increase the competition which it desired to do by issuing the original RFP.

Accordingly, our earlier decision is affirmed.

Deputy Comptroller General
of the United States