110321 11367 P2-1

DECISION

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

FILE: B-190632 DATE: September 11, 1979

MATTER OF: General Electric Company--Reconsideration

DIGEST:

1. As request for reconsideration does not demonstrate errors of law in prior decision, decision is affirmed.

2. Where request for reconsideration does not demonstrate errors of law in prior decision, GAO decides matter without requesting report from contracting agency. Also, request for conference in connection with request for reconsideration will be granted only where, unlike present case, matter cannot be promptly resolved without conference.

By letter dated August 20, 1979, the General Electric Company (GE) requested reconsideration of our decision in the matter of Computer Sciences Corporation, B-190632, August 9, 1979. GE alleges errors of law in the decision.

This is our third decision involving the same procurement. GE, Computer Sciences Corporation (CSC), and other companies hold Multiple Award Schedule Contracts (MASC's) under the General Services Administration's (GSA's) Teleprocessing Services Program. In 1977, GE was selected to receive an order under its fiscal year (FY) 1978 MASC for the work involved in this procurement. In Computer Sciences Corporation, 57 Comp. Gen. 627 (1978), 78-2 CPD 85, we sustained a protest by CSC concerning this selection and recommended essentially that GSA either make an award to CSC or reopen negotiations. GSA chose to reopen negotiations. CSC then filed another protest. CSC argued that it was improper for GSA, in the reopening of negotiations, to evaluate the incumbent contractor's (GE's) FY 1978 MASC with CSC's and the other competitors' FY 1979 MASC's.

Our August 9, 1979, decision sustained CSC's second protest and recommended that in connection with the reopening of negotiations--

> "* * * GSA limit its evaluation to each of the involved contractors' (including GE's) FY 1979 MASC's, and make its selection on that basis. If deemed necessary to implement our recommendation, the negotiations may be reopened. In the event GE is selected, GSA should continue with the existing order rather than issuing a new order based on GE's FY 1979 MASC."

The main argument advanced in GE's request for reconsideration involves what GE perceives as an inconsistency in our recommendation. The requester notes that we recommended that GSA conduct its evaluation on the basis of all vendors' FY 1979 MASC's and also that in the event GE is selected, GSA continue with the existing order based on GE's FY 1978 MASC. GE further notes that the MASC price reduction provision (section D.19) refers to actual sales, not to offers of sale.

From this, GE concludes that, under our recommendation, it will be free to offer a substantial price reduction under its FY 1979 MASC without having to be concerned whether this reduction will ever become effective as to other Government users, since our recommendation stated that if GE is selected based on its FY 1979 MASC GSA should continue with the existing FY 1978 order. The requester contends essentially that under our recommendation, GSA is faced with a dilemma. If GSA accepts an offer based on GE's FY 1979 MASC, it will not be acting in accordance with our recommendation that it continue with the FY 1978 order in the event GE is selected. On the other hand, if GSA proposes to hold GE, if selected, to the existing FY 1978 order, GE will thereby be exempted from the effect of the price reduction clause in its FY 1979 MASC, and will be free to offer whatever price reduction it chooses in the recompetition in this procurement.

In our view, GE's contentions do not demonstrate any errors of law in our decision. GE makes no showing that our decision was in error in sustaining CSC's protest. Rather, the requester's argument amounts to speculation that GSA will not be able to properly implement our decision's recommendation. As pointed out in our August 9 decision, the details of implementation of a recommendation for corrective action are left to the sound judgment and discretion of the contracting agency. GE's hypothesis that GSA will be unable to implement our recommendation is based essentially on GE's failure to read our decision as a whole.

Initially, it is necessary to consider the effect, under our recommendation, of a GE FY 1979 price reduction which reduces its prices to a level below the prices of its FY 1978 order. In this regard, our recommendation that GSA evaluate the contractors' FY 1979 MASC's and hold GE, if selected, to its FY 1978 order relates back to the protester's suggestion that this evaluation and selection method would be appropriate and to GE's argument (page 9 of our August 9 decision) that "* * * it would be unreasonable and unfair for GSA to have required GE to compete in a reopening of negotiations on the basis of its FY 1979 MASC yet to hold GE (if selected) to the prices in its existing FY 1978 order." Our response, in part (page 10 of our August 9 decision), was that--

> "In our view, GE has no cause to complain of a remedial procedure which gives it the opportunity to retain an order it received improperly in the first place. However, we see no reason why this remedial procedure should give GE, the beneficiary of an improper award, a further windfall in the form of higher 1979 contract prices in the event it is selected in the reopening of negotiations." (Emphasis supplied.)

In this light, we see no difficulty in GSA's coping with this alternative. If GE offers a FY 1979 price below the price of its existing FY 1978 order, GSA in our view could properly accept the FY 1979 price and issue an order on that basis. Such action would be consistent with the requirement that, to the extent possible, all offerors be afforded an opportunity to compete on an equal basis (the FY 1979 MASC's) and would also be consistent with our

decision's view that the remedial procedure should not result in GE obtaining a higher price than its existing order. We note that a similar remedial procedure was involved in Honeywell Information Systems, Inc., 56 Comp. Gen. 505, 506-507 (1977), 77-1 CPD 256, which we cited in our August 9 decision.

The second alternative which must be considered is the effect of a GE FY 1979 price reduction to a level just above the prices of its FY 1978 order. GE's argument is that this would create the same type of inequality in the competition which our August 9 decision was intended to remedy in that GE in this situation is exempted from the effect of the price reduction clause in its FY 1979 MASC. Again, we fail to see how this demonstrates errors of law in the decision. Assuming for the purposes of argument that our recommendation must be interpreted by GSA in the manner the requester states, the outcome GE describes merely illustrates that it is not always possible to assure complete equality of competition in a reopening of negotiations. GE's contention does not show that the result it posits fails to represent a greater degree of equality of competition than the evaluation procedure originally adopted by GSA and protested by CSC.

More to the point, we believe GE's argument is again based solely on the statement in our recommendation that "In the event GE is selected, GSA should continue with the existing order rather than issuing a new order based on GE's FY 1979 MASC." As discussed supra, the intent of this statement was to assure that GE, the beneficiary of an improper award, did not receive a further windfall in the form of higher 1979 contract prices. Therefore, we believe GSA would be within the intent of our recommendation if it conditioned GE's participation in the recompetition on a procedure whereby GSA would evaluate all vendors' FY 1979 MASC's and, in the event GE is successful at a 1979 price higher than its FY 1978 price, terminate the FY 1978 order and issue GE a new FY 1979 order at the same prices as the FY 1978 order.

GE also argues that it is unfair to ask it "* * * to incur the time and expense to compete for an award it cannot win." However, we see nothing in our recommendation which prevents GE from "winning" in a reopening

of negotiations and there is, of course, no requirement that GE participate in the recompetition.

GE also asserts that:

> "GAO, rather than clearly defining the rules to apply to the * * * re-selection, has gone far in the opposite direction in creating serious questions as to what those rules are to be. * * * Thus, the position taken by GAO must be viewed as arbitrary and capricious, and agency action based thereon must be deemed unlawful. M. Steinthal & Co. v. Seamans, 455 F.2d 1289,1298 (D.C. Cir. 1971), Henry Spen & Co. Inc. v. Laird, 354 F. Supp. 586, 588 (D.D.C. 1973)."

GE does not explain why the cited decisions support its contention and we are unable to see how these cases--neither of which involved a negotiated procurement--are relevant to the present matter.

GE also maintains that the serious questions about how the reopening of negotiations will be accomplished must be answered by our Office in an "open forum" subject to input by all interested vendors prior to GSA's proceeding with a re-selection. In this regard, we note that GSA has not requested reconsideration or clarification of our decision, and no vendor besides GE has requested reconsideration. In addition, where, as here, a request for reconsideration fails to demonstrate errors of law in a decision, we will decide the matter without requesting a report from the contracting agency. See Storage Technology Corporation--Reconsideration, 57 Comp. Gen. 395 (1978), 78-1 CPD 257.

In this connection, GE has also requested a conference. Our Bid Protest Procedures do not specifically provide for the holding of conferences on requests for reconsideration. See 4 C.F.R. § 20.9 (1979). We believe a conference should be granted in connection with a request for reconsideration only where the matter cannot be resolved without a conference. See Serv-Air, Inc.--Reconsideration, 58 Comp. Gen. 362, 372 (1979), 79-1 CPD 212. In our judgment, this is not such a case.

In view of the foregoing, our decision of August 9, 1979, is affirmed.

Deputy Comptroller General
of the United States