United States General Accounting Office
Washington, DC 20548

Comptroller General
of the United States

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Decision

Matter of: DRS Precision Echo, Inc.

File: B-284080; B-284080.2

Date: February 14, 2000

Kevin P. Connelly, Esq., Ronald L. Sigworth, Esq., John C. Lavorato, Esq., and Donald G. Featherstun, Esq., Seyfarth, Shaw, Fairweather & Geraldson, for the protester.
Ronald K. Henry, Esq., and Larry J. Gusman, Esq., Kaye, Scholer, Fierman, Hays & Handler, for TEAC America, Inc., an intervenor.
Stephen A. Elliott, Esq., for the Department of the Navy.
Roger D. Waldron, Esq., and Christine Irwin, Esq., for the General Services Administration.
Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency purchase order was, in effect, an improper sole-source award is sustained where the record shows that the Federal Supply Schedule contract against which the agency attempted to place its order had expired, and no replacement contract was in place at the time of the order.

DECISION

DRS Precision Echo, Inc. protests the issuance of a purchase order by the Department of the Navy, to TEAC America, Inc. for 238 cockpit video recorder systems for use on F/A-18 aircraft. DRS argues that the order is an improper sole-source award because TEAC did not have a Federal Supply Schedule (FSS) contract with the General Services Administration (GSA) in effect at the time the Navy ordered the recorder systems. DRS also argues that, even if TEAC had an active FSS contract, the Navy did not follow applicable regulations in issuing the order, and that the regulations themselves--particularly Federal Acquisition Regulation (FAR) § 8.404--are inconsistent with applicable procurement statutes.

We sustain the protest.

On September 23, 1999, the Navy issued purchase order No. N00383-99-F-6019 to TEAC for 238 recorder systems, for a total price of $2,021,096. The Navy purchase order referenced a GSA FSS contract with TEAC, No. GS-24F-9034H, and attempted to place an order against that contract. In an agency-level protest, dated October 4, and in a subsequent protest to our Office, DRS argued that GSA's FSS contract with TEAC had expired and thus was not available for use by the Navy. The Navy denied DRS's agency-level protest, and in its report to our Office in response to the instant protest, argued that the GSA schedule contract was in place at the time the Navy placed its purchase order.

On December 21, our Office received the protester's comments on the Navy's report, which further buttressed DRS's claims about TEAC's GSA schedule contract. One day later, by letter dated December 22, our Office sought a report on this matter from GSA. Our letter to GSA requesting a report explained that the record appeared to show that TEAC's FSS contract had expired before the Navy placed its purchase order. On January 19, our Office received GSA's report, which expressly conceded that when the Navy placed its order for recorder systems on September 23, there was no contract between the GSA and TEAC. GSA Report, Jan. 19, 2000, at 1.

GSA's report explains that TEAC's initial FSS contract extended from August 21, 1998, until July 31, 1999, with one option to continue performance for an additional 5-year period. Id. at 2, and attach. 2. To exercise the option, the contracting officer was required to provide TEAC with written notice 10 months before expiration of the contract. Id., attach. 2. GSA further explains that it sent TEAC a letter dated November 17, 1998 (approximately 8 months prior to the expiration of TEAC's contract), and appended to the letter an unsigned bilateral modification to TEAC's contract (modification 950), which exercised GSA's option to extend performance from August 1, 1999 through July 31, 2004. Id. at 2. Although TEAC signed the modification on July 9, 1999, GSA's contracting officer did not sign the modification until December 2. Id., attach. 3, at 4.

By letter dated February 1, 2000, the Navy also conceded that the GSA schedule contract had expired at the time it placed its order for video recorders. Without an FSS contract against which to place its order, the Navy, in effect, made an improper sole-source award. Anacomp, Inc., B-242029, Mar. 15, 1991, 91-1 CPD ¶ 291 at 2. Accordingly, we conclude that the Navy's actions here violated the Competition in Contracting Act (CICA), 10 U.S.C. § 2304(a)(1) (1994), which requires that agencies obtain "full and open" competition through the use of competitive procedures, and we sustain the protest on this basis.

With respect to DRS's remaining issues--i.e., that the Navy failed to follow the requirements of FAR 8.404, and that those requirements are inconsistent with CICA--both the Navy and GSA argue that our Office should not reach those arguments under the circumstances here. We agree. Ultimately, the record in this case shows that the Navy did not use the FSS program in this procurement. Thus, we do not think this is the appropriate case to opine about whether the Navy's actions were

consistent with the regulatory framework applicable to FSS procurements, or whether the regulatory framework itself is consistent with CICA.

Finally, we turn to the subject of an appropriate remedy for DRS. By letter dated December 27, the Navy advised our Office that delivery by TEAC, and acceptance by the Navy, of all 238 video recorders was completed on December 22. Thus, the Navy contends that there can be no meaningful relief for DRS. In addition, the Navy urges our Office not to recommend that DRS be reimbursed the cost of pursuing its protest because the Navy proceeded in good faith, and was misled by GSA representatives who indicated that TEAC's FSS contract remained in place.

We agree that since the cockpit video recorders have been delivered to the Navy, termination of the order is not a practicable remedy. Accordingly, we make no recommendation for corrective action in this case. We disagree, however, with the Navy's contention that DRS should not be reimbursed the cost of pursuing this protest.

We recognize that the Navy apparently acted in good faith when it placed its September purchase order. However, the Navy's responses to both DRS's agency-level protest and its protest here, were not as forthcoming as they might have been. Specifically, the record shows that as early as October 12--more than 2 weeks before the Navy denied DRS's agency-level protest--the Navy had a basis for suspecting that GSA had not extended TEAC's schedule contract before it expired, as DRS was alleging.[1] Given the allegations raised by DRS in its agency-level protest, and again in its protest to our Office, we think this information put the Navy on notice that DRS might be correct, and should have led the Navy, at a minimum, to further investigate the matter before continuing to take the position that a valid FSS contract was in effect. Instead, the Navy's inaction forced DRS to pursue its protest with our Office, complete with detailed comments on the agency report, before the record became clear on this issue, and the Navy conceded that the GSA schedule contract had expired. Thus, it appears that the agency's actions in defending the protest

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[1] For the record, the evidence referenced is a handwritten memorandum, prepared by a Navy contracting representative and dated October 12, describing a telephone call to GSA to inquire about why TEAC was not listed on GSA's website for this item. Among other things, the memorandum memorializing this conversation notes that the Navy requested a copy of the modification extending TEAC's schedule contract (which the Navy knew was slated to expire on July 31, 1999), and notes that the modification extending the contract had just been sent to the GSA contacting officer for signature. Protester's Comments, Dec. 21, 1999, attach. 1. The Navy failed to provide these notes in its agency report in response to DRS's protest; instead, DRS received them late in the protest process in response to a Freedom of Information Act request.

contributed to prolonging the dispute and significantly increasing the cost to the protester.

Under these circumstances, we recommend that the Navy, not DRS, bear the cost of filing and pursuing this protest, including attorneys' fees. 4 C.F.R. § 21.8(d)(1) (1999). In accordance with 4 C.F.R. § 21.8(f)(1), DRS's certified claim for such costs, detailing the time expended and the costs incurred, must be submitted directly to the agency within 60 days after receipt of this decision.

The protest is sustained.

Comptroller General
of the United States