

DECISION

95347
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

50543

FILE: B-181956

DATE: February 13, 1975

MATTER OF: Comdisco, Inc.

DIGEST:

Refusal of General Services Administration (GSA) to award Automatic Data Processing (ADP) Schedule contract to third party supplier of ADP equipment is not improper, since GSA has determined, pursuant to its broad authority to establish policies and methods of procurements and to procure ADP equipment for executive agencies, that it is not in Government's best interests to award Schedule contracts to third party suppliers, and since protester offered to furnish only used equipment where solicitation required unused equipment.

Comdisco, Inc. has protested the refusal of the Automated Data and Telecommunication Service, General Services Administration (GSA), to award it an Automatic Data Processing (ADP) Schedule contract for general purpose ADP equipment and software. It has further protested the award of the Schedule contract to International Business Machines Corporation (IBM).

Solicitation No. CDPS-003-N-3-9-74, calling for offers for the rental, purchase, maintenance and repair of ADP equipment, was issued on February 9, 1974. By letter of June 28, 1974, GSA notified Comdisco that it did "not believe that it would be proper or in the best interest of the Government to negotiate a schedule contract with COMDISCO or with any other third party supplier of equipment." Comdisco then protested to this Office. While the protest was pending, negotiations were conducted with IBM, which culminated in the award of a Schedule contract to IBM on October 18, 1974. Comdisco formally protested any award to IBM on the same date.

Comdisco claims that it offered to furnish ADP equipment at prices substantially lower than IBM's current Schedule prices, and that GSA's failure to negotiate a contract with it was improper and not in the best interests of the Government. On the other hand, GSA contends that under its current ADP procurement policies, which are designed to maximize competition in this area, there is no reason to award third party suppliers such as Comdisco an ADP Schedule contract and that it is in the Government's best interest to award such a contract only to an original equipment manufacturer (OEM) such as IBM.

The Brooks Act, Public Law 89-306, 79 Stat. 1127, 40 U.S.C. 759, authorizes the Administrator of General Services to provide ADP equipment to Federal agencies by "purchase, lease, * * * or otherwise." GSA's resulting ADP equipment procurement program involves the use of ADP schedules, requirements contracts, and a Master Terms and Conditions arrangement. These are described by GSA as follows:

ADP Schedule

"* * * The schedule method of contracting is primarily concerned with simplifying the acquisition process for commonly supplied items. In the case of ADPE, the annual schedule negotiations provide a means of confronting the ADPE manufacturers with a united government-wide negotiation position while at the same time they create a common ground for the Government and the suppliers to discuss complex product situations of mutual interest. The resultant ADP Schedules are useful procurement tools for the agencies because they provide for some degree of standardization of terms and conditions in the lease, purchase and maintenance of ADPE. In addition, the ADP Schedules provide numerous support services for existing leased and government-owned ADPE which was previously procured and for which there may not be any other source of supply e.g., overseas maintenance, training, technical manuals, spare parts, etc.

* * * * *

"* * * ADP Schedule contracts differ from most Federal Supply Schedule contracts negotiated by the Federal Supply Service (FSS) of GSA in that the latter are generally mandatory sources of supply, whereas the former represent the starting point of negotiations by the user agencies and are not intended to be utilized in lieu of competition. * * *"

Requirements Contracts

"In addition to the ADP Schedule contracts, GSA negotiates various ADPE requirements type contracts where the ADPE involved is clearly both interchangeable and price comparable. These requirements type contracts are negotiated on a competitive basis and once

awarded, they become mandatory sources of supply for user agencies. Such contracts have included the supply of memory units, tape drives, disc drives and disk packs, which are plug-to-plug compatible with identifiable host systems like the IBM System 360 * * *"

Master Terms and Conditions

"GSA also has an ongoing procurement program concerned with the economic replacement of installed leased ADPE. While this program has been frequently referred to as the 'third party replacement program', awards under this program have included all types of ADPE suppliers, including OEM's. The following is a brief description of the mechanics of the replacement program:

"1. Under FPMR §101-32.404 agencies are required to secure procurement authority from GSA prior to the contemplated procurement of ADPE.

"2. Frequently, these requests for procurement authority are accompanied by a justification supporting the negotiation for replacement or upgrade of installed ADPE within the same or new product line of the vendor supplying the existing equipment.

"3. When there is sufficient justification to support a sole make or model acquisition of ADPE, GSA may choose to effect the procurement under FPMR 101-32.405(a)(3).

"4. GSA has developed Master Terms and Conditions (MTC) which operate as Basic Agreements between GSA and ADPE suppliers who are interested in participating in the program * * *. The MTC is signed in advance of solicitation for requirements. Seventy-nine companies, including COMDISCO, have signed the MTC since the program was initiated in January 1972.

"5. GSA solicits price proposals from those firms who have signed the MTC.
* * * Award is made to the lowest overall cost offeror, price and other factors considered.

"* * * the majority of awards under this program have been to dealers of used ADPE, since in most instances their equipment is less costly than the OEM's."

According to GSA,

"* * * the ADP Schedule contracts with OEM suppliers provide many support services for existing leased and government-owned ADPE which was previously procured and for which there may not be any other source of supply. It should also be pointed out that while there may be more than one source of supply for brand name ADPE, quite frequently, the third party supplier cannot provide the complete complement of equipment required nor the necessary maintenance to keep the equipment running. In such cases, the Government must acquire the remaining needed equipment and the maintenance from the OEM. If there were no ADP Schedule contracts with the OEM's such maintenance and equipment would have to be acquired at the OEM's commercial rates."

Furthermore, GSA states, "the negotiation of ADP Schedule contracts with the myriad third party suppliers would be a duplication of administrative effort, inasmuch as a program designed to promote competition in used ADPE has already been instituted by GSA." This competition stems from the Master Terms and Conditions arrangement described above, buttressed by the statutory and regulatory mandate that "the existence of an ADP Schedule contract does not preclude or waive the requirement for full or complete competition in obtaining ADPE, software, or maintenance services," FPMR 101-32.407(c), and by the competitive requirements of FPMR Temporary Regulation E-32, which precludes the use of Schedule contracts for certain procurements.

Comdisco does not disagree with GSA's concept of providing for competition among third party suppliers of ADP equipment. It claims, however, that GSA has previously been unable to enforce competitive requirements in this area, that the Schedule supplier therefore could continue to expect to receive orders from Government agencies regardless of the provisions of FPMR Temporary Regulation E-32, and that therefore it, rather than IBM, should be the beneficiary of those orders under the Schedule because of its lower prices.

We believe that GSA's determination that ADP schedule contracting with third party suppliers is not in the Government's best interests is consistent with its statutory authority under the laws applicable to Government procurement. The Federal Property and Administrative Services Act, as amended, 63 Stat. 377, authorizes the Administrator of General Services "to the extent that he determines that so doing is advantageous to the Government in terms of economy, efficiency, or service," to "prescribe policies and methods of procurement" and to "procure and supply personal property and nonpersonal services for the use of executive agencies * * *." 40 U.S.C. 481. The Administrator's specific authority "to coordinate and provide for the economic and efficient purchase, lease, and maintenance" of ADP equipment was added by the Brooks Act, supra, 40 U.S.C. 759. We have held that these provisions vest in GSA broad authority over Government procurement of ADP equipment, 47 Comp. Gen. 275 (1967); 48 id. 462 (1969); 51 id. 457 (1972), and that in light of this authority, GSA could develop and implement policies regarding the award of Schedule contracts so long as the policies are not contrary to law or otherwise detrimental to the Government's interests. See B-163971, May 21, 1969. Here GSA has determined that, in instances where manufacturers can offer maintenance and repair services, it would be in the Government's best interests to maintain ADP Schedules only for those companies that will provide such services along with equipment for both purchase and/or rental. GSA has further determined that third party market suppliers such as Comdisco generally cannot and do not attempt to provide this full range of requirements, and that therefore Schedule contracting with the third party market would be inappropriate. Since Comdisco in its proposal offered only IBM equipment and not services, it appears that GSA's determination regarding the third party market is not unreasonable.

In our view, GSA's policy of excluding the third party market from Schedule contracting does not contravene any legal or regulatory requirement, since applicable regulations provide that ADPE can only be procured competitively pursuant to the program described above in which third party market firms participate. Furthermore, we note that GSA's approach appears to be consistent with our recommendation that GSA enhance competition in the ADP field by reducing reliance on Schedule contracts. See Report B-115369, "More Competition Needed In The Federal Procurement Of Automated Data Processing Equipment," May 7, 1974. In addition, we have no basis for disagreeing with GSA that Schedule contracting with the third party market would involve burdensome administrative problems.

With regard to the instant solicitation, we cannot agree with Comdisco that it, as a third party supplier offeror, is entitled to a Schedule contract because GSA's competitive program has not been as effective as it might have been. We do not believe that GSA's policy can be regarded as inappropriate for this solicitation because of past abuses when that policy is a direct result of GSA's most recent good faith efforts to alleviate those abuses. We believe, however, that the solicitation should have indicated that award would not be made to firms that did not offer to furnish services as well as a full range of equipment.

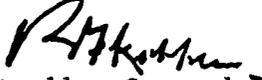
Nevertheless, it does not appear that Comdisco was unduly prejudiced by this omission since the record shows that Comdisco was not entitled to a Schedule contract in any event. Under the type of solicitation used here, GSA awards contracts to those offerors with which it negotiates terms and conditions, including discount prices, which it regards as sufficiently favorable to the Government. Both single and multiple awards are possible. However, the fact that one offeror's price is lower than another's for certain equipment does not automatically entitle the lower priced offeror to an award, when, as here, the lower priced offeror does not propose to furnish the complete complement of equipment desired by the Government. Moreover, here it is clear that Comdisco did not offer to furnish any of the Government's stated needs. On page 7 of the RFP, it is stated that "Contracts awarded hereunder for purchase of equipment shall cover only new, unused equipment. The purchase of used equipment is neither intended or authorized * * *." Comdisco's proposal, however, stated that its equipment "is acquired used" and that its discount pricing was "based on the rise and fall of the used market prices." Thus, Comdisco's proposal was not responsive to GSA's stated requirements, and therefore could not provide for the basis for an award. Accordingly, we cannot object to GSA's refusal to award an ADP Schedule contract to Comdisco.

Finally, Comdisco asserts that GSA awarded a contract to IBM without proper authority while the Comdisco protest was pending. Our Bid Protest Procedures and Standards envision that an agency will not make an award while a protest is pending at GAO in the absence of a finding by a high level agency official that award cannot be delayed until the protest is resolved. 4 C.F.R. 20.4. Further, the applicable regulations provide that when a protest has been lodged at GAO a determination to make an award must be approved by an agency official above the level of the contracting officer. FPR 1-2.407-8(a)(3)(1964 ed.). The file does not indicate that any such finding or determination was made. However, GSA points out that it regarded the Comdisco protest as going to GSA's refusal to award a contract to Comdisco and not to any

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award to IBM. Although Comdisco's protest letter of July 11, 1974, is somewhat ambiguous on this point, we note that GSA, in response to Comdisco's inquiry regarding a possible award to IBM, informed Comdisco by letter dated September 24, 1974, that it did not view the protest "as being an effort to have GSA discontinue awarding ADP Schedule contracts." Comdisco did not respond with its telegraphic protest against a Schedule contract award until October 18, and it is our understanding that award to IBM on that date had been made prior to GSA's receipt of that telegram. Under these circumstances, we cannot conclude that the award action was inconsistent with the applicable regulations.

For the foregoing reasons, the protest is denied.


Acting Comptroller General
of the United States