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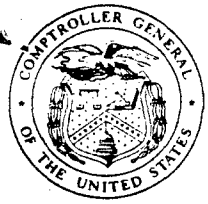
DECISION



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

FILE: B-198911.3 DATE: October 6, 1981

MATTER OF: Department of Health and Human Services - Reconsideration

DIGEST:

Purported options for contract renewals which contemplate negotiation of price, subject to a yet-to-be-determined price ceiling, for the acquisition of undefined equipment and/or services, to fulfill imprecisely defined needs, are little more than advance agreements to conduct negotiations on what is tantamount to a sole-source basis. Prior decision is affirmed. Provisions should be deleted from contract.

The Department of Health and Human Services (HHS) has requested reconsideration of that portion of our decision in Amdahl Corporation, B-198911.2, March 27, 1981, 81-1 CPD 231, in which we sustained Amdahl's protest against certain option provisions contained in a solicitation for data processing equipment and services. HHS has awarded the contract to the International Business Machines Corporation with the option provisions intact pending our review of this request for reconsideration. We find HHS's request to be without merit.

The solicitation was for the replacement and/or evolutionary upgrade of a major computer system at the National Institutes of Health (NIH) over a total 10-year contract period. The solicitation contained NIH's projections of system requirements for the first 5 of the contract years and an anticipated 10-percent annual growth rate for years 6 through 10. NIH did not project its detailed system requirements beyond the first 5 years of the contract in the belief that any such projection would be rendered obsolete by the rapid pace of technological change in the computer industry and because NIH could not accurately estimate

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its requirements beyond the initial 5-year period of the contract. Consequently, offerors were required to propose specific system configurations and prices only for the first 5 years. Prices for annual options for years 6 through 10 were negotiable, but were not to exceed the vendor's then-current schedule or commercial prices.

We objected to the options for years 6 through 10 (inadvertently cited in our decision as years 5 through 10) because they were indefinite with respect to equipment and technical requirements and were not based upon firm fixed prices as required under section 3-1.5401 of the HHS procurement regulations, 41 C.F.R. § 3-1.5401 (1980). HHS disagrees with this aspect of our decision and contends that automatic data processing equipment (ADPE) acquisitions are exempt from the coverage of subpart 3-1.54 of the HHS procurement regulations.

Our objection to these provisions was not based solely on subpart 3-1.54 of the HHS procurement regulations. It is our view that these provisions fail, not because subpart 3-1.54 applies, but because they are too indefinite to be "options."

As a general rule, an option should be clear and definite and should not require further negotiations to work out important and essential terms. We consider an option to be an unaccepted offer to sell upon agreed terms which may be unilaterally accepted by the Government. 1 Comp. Gen. 752 (1922). Subpart 3-1.54 of the HHS procurement regulations (whether it applies or not) describes the requirements for options as follows:

> "(b) An option must: (1) identify the supplies or services as a discrete option quantity in addition to the basic quantity of suppliers or services * * *; (2) establish a price or specify a method of calculation which will make the price certain; (3) be agreed to and accepted in the initial contract award; (4) permit the Government the right to exercise the option unilaterally."

The Defense Acquisition Regulation (DAR) contains similar requirements for options. See DAR §§ 1-1500, et seq. (Defense Procurement Circular No. 76-6, January 31, 1977). The pertinent section of the Federal Procurement Regulations, in both its then-current form, 41 C.F.R. § 1-4.1108 (1980), and its present codification, 41 C.F.R. § 1-4.1110-3 (see 46 Fed. Reg. 1210-12, January 5, 1981), provides for option provisions in ADPE contracts when the Government has "firm requirements" and specifies the use in solicitations of clauses requiring offerors to submit fixed or finitely determinable option prices to be incorporated into the contract for evaluation prior to award. The point of these provisions is that the essential terms of an option--and the corresponding commitment on the part of the contractor--must be established and fixed at the time the underlying contract is awarded; if they are not, the provision is not an "option."

The provisions to which we object in this contract lack the required element of certainty, particularly in view of NIH's expectation that the technology provided in the first years of the contract will be obsolete and either replaced or replaceable by year 6. As the contract now stands, the contractor is committed only to negotiate renewal prices for years 6 through 10, subject to a price ceiling which may itself be negotiated, for the acquisition of equipment which NIH expects to be different from that initially provided (and which is subject to negotiation under other contract provisions) to fulfill requirements which NIH has not yet established firmly and which may also be the subject of negotiation. In other words, the contractor's only real commitment is to agree at some future time about the level of service and equipment to be provided and at what price. Although we appreciate the problems NIH faced in attempting to forecast its long-range needs and technology expectations and understand the contingencies for which NIH has attempted to provide, the cumulative uncertainties in these renewal provisions remove them from the realm of options.

We remain unpersuaded that these provisions are proper. Our prior decision is affirmed. The contract renewal provisions for years 6 through 10 should be deleted.

Milton J. Socolar

Acting Comptroller General
of the United States