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DECISION

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

FILE: B-194709 DATE: July 14, 1981

MATTER OF: Federal Data Corporation

DIGEST:

1. "Installment purchase plan", which provides for monthly payments over 39-month term, to be renewed at Government's option at end of each fiscal year, submitted in response to solicitation for ADPE containing Master Terms and Conditions (MTC) was improperly evaluated, classified and accepted under solicitation as a purchase as it did not conform with the terms of the solicitation and solicitation was not amended so that all offerors were given opportunity to submit such plans.

2. Although ADPE under "installment purchase plan" does not clearly fall into either category of Government-owned property or contractor-owned property, since terms of "installment purchase plan" obligate agency to pay contractor full price of equipment upon loss, for purpose of risk of loss this ADPE should be considered contractor-owned property.

3. Since risk of loss provision in "installment purchase plan" and incorporated into contract imposes on agency risk of loss for contractor-owned equipment, agency should have either obligated money to cover possible liability under risk of loss provision or specified in contract that such losses may not exceed appropriation at time of losses and nothing in contract is to be considered as implying Congress will appropriate sufficient funds to meet deficiencies.

[Protest of Contract Award for Automatic Data Processing Equipment]

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Federal Data Corporation (FDC) protests the award of a contract for automatic data processing equipment (ADPE) to International Business Machines Corporation (IBM) under solicitation No. GSA-CDPR-T-00007N issued by the General Services Administration (GSA). The solicitation, which was issued to satisfy the requirements of the Defense Logistics Agency (DLA), Columbus, Ohio, requested offerors to propose plans for purchase, lease and lease with option to purchase. It also indicated that alternative proposals meeting all mandatory provisions would be accepted. Award was to be made to that offeror proposing the lowest overall cost to the Government.

FDC contends that an IBM alternative purchase plan (APP) accepted by GSA was, in fact, a lease with option to purchase (LWOP) and was not a purchase, although it was evaluated as such. In addition, FDC argues that the IBM plan did not meet the mandatory solicitation requirements applicable to either a purchase or a lease and that the risk of loss clause is improper. The protest is sustained as we do not believe that the APP conforms with the terms of the solicitation. We also believe there is merit in FDC's objection to the risk of loss provision.

The solicitation was issued under the GSA Master Terms and Conditions (MTC) program. Generally, the MTCs establish requirements such as bid bonds, performance bonds, acceptance testing, maintenance requirements and acceptable price plans. These requirements are attached to every solicitation issued under the program and the solicitation specifies the particular ADPE requirements and other technical requirements of the user agency for which GSA is conducting the procurement.

The solicitation and the MTCs contained provisions common to both rental and purchase plans and separate provisions applicable to only rental or purchase plans.

In general, the IBM APP provided that, after acceptance of the equipment, most of the rights and obligations of ownership vest in GSA (GSA, however, cannot sell, transfer or encumber equipment except in accordance with the plan) and the agency shall make monthly payments for 39 months until the entire purchase price is paid, at which time GSA acquires unencumbered ownership of the equipment.

GSA's obligation for payment is conditioned on that agency exercising an option at the end of each fiscal year to continue payments for the subsequent year. Ownership reverts to IBM and the equipment is to be returned to the company if the option is not exercised. The APP provides that in the event a machine is lost, destroyed or damaged beyond repair during the term of the APP, the agency must pay IBM the sum it would have paid had it prepaid the total amount due at the time the loss occurred. In short, the APP requires that agency to pay IBM the full price for all equipment lost or destroyed during its term even if the agency had the equipment only a short period under the APP.

FDC asserts that the APP was improperly classified as a purchase plan by GSA and evaluated under the solicitation terms applicable to purchases when, in fact, the APP was a LWOP which should have been considered and rejected pursuant to the solicitation terms applicable to rental plans. Thus, the protester contends the APP conflicts with the following two solicitation provisions which apply to rental but not to purchase plans:

1) Article XVI which provides that the Government shall have the right of discontinuance (right to cancel) without incurring a financial penalty and the contractor shall remove the equipment at its expense.

(a) Under the APP the Government is obligated for all payments for each one-year term and must pay the transportation costs for equipment which is returned.

2) Article XVIII (a) and (b), as amended, provides for payment on a monthly basis with invoices to be submitted for the month following use.

(a) The APP provides that at the beginning of each one-year option period the Government is obligated for all payments for that term and monthly invoices are to be paid in advance.

It is FDC's position, citing 48 Comp. Gen. 494 (1969), that in order to qualify as a purchase, a plan must require that current fiscal year funds be committed to fully pay the price for the equipment. Since there is no such commitment here, FDC concludes that the transaction is no different than a LWOP and must be evaluated as such.

It is GSA's view that the APP is a purchase plan and was properly accepted and evaluated as such under the subject solicitation. In this regard, GSA argues that 48 Comp. Gen. 494, supra has been superseded by our decision, B-164908, July 6, 1970. In 48 Comp. Gen. 494, supra, our Office objected to an installment purchase plan which continued from year to year beyond the initial fiscal year, unless the Government took affirmative action to terminate the agreement, on the basis that the plan was inconsistent with the Anti-Deficiency Act, 31 U.S.C. § 665, and with 31 U.S.C. § 712(a). GSA contends that in B-164908, supra, we approved a type of purchase plan similar to the subject APP which involved the purchase of equipment through installment payments where the obligation of the Government terminated at the end of each fiscal year and was renewed only by the exercise of an option by the Government.

Although we disapproved the plan submitted in B-164908, supra, we agree with GSA that our decision indicated that plans such as IBM's APP do not violate the Anti-Deficiency Act, as long as they provide that the Government's obligation terminates at the end of each fiscal year and is renewed only by exercise of the option by the Government. We do not agree, however, that B-164908, supra, indicates that plans such as IBM's APP are acceptable under the MTCs or should be classified as a purchase under those provisions. Further, we do not believe that B-164908, supra, sheds any light on the propriety of those portions of the APP which were not common to the plan reviewed in that decision.

Both parties cite General Telephone Company of California, 57 Comp. Gen. 89 (1977), 77-2 CPD 376, in support of their respective positions. In that case, the protester submitted a lease plan calling for the payment of a basic charge during the first year in addition to the installation charge and the rental payments. In concluding that

the basic charge represented an illegal advance payment, we reviewed 20 Comp. Gen. 917 (1941), where we approved a partial payment prior to delivery where title to the material paid for was in the Government, and 28 Comp. Gen. 468 (1948), where payment of earnest money with respect to the Government's purchase of real estate was approved on the theory that under the proposed agreement, equitable title would vest in the Government prior to the vesting of legal title. We then stated that under the plan submitted by General Telephone Company, the Government would never acquire legal or equitable interest to the equipment. In this connection we pointed out at page 93:

> " * * * For example, the Government has no right to maintain the equipment independent of the lessor, nor can it demand that the equipment be relocated to another site * * *. In addition, the Government has no interest in the residual value of the equipment * * *."

It is FDC's position that the incidents of ownership set forth in General Telephone, supra -- the right to independently maintain the equipment, the right to relocate the equipment and an interest in the residual value of the equipment -- which GSA also cites as indicating that it has purchased the equipment under the APP, all exist under a LWOP submitted under the MTCs.

The classification of a plan such as IBM's APP is, of course, primarily the function of the agency which drafted the MTCs and set forth the criteria under which any such plan must be classified. However, the APP does not appear to fit within the MTC requirements for either a lease or a purchase and its proper designation is at best ambiguous.

The rights and obligations in the equipment conveyed under the APP differ in scope from those an LWOP under the MTC provisions would normally convey. For example, it conflicts with MTC Article XVI dealing with discontinuance and the cost of returning equipment to the contractor and with MTC Article XVIII (a) and (b) regarding payment of invoices in advance of use.

It further differs from a LWOP as it provides that, once it is executed, the agency has "purchased" the equipment and states that the agency shall have all rights and obligations of ownership, except that during the term of the APP it may not sell, transfer (it may relocate the equipment), assign or encumber the equipment. The APP also states that the agency must pay all costs of ownership, including insurance, maintenance and taxes and provides that in the event the equipment is lost or destroyed it must pay IBM the full purchase price. Of course, all these elements expire and ownership reverts to IBM if the Government fails to exercise its option to continue the plan at the end of each fiscal year. Although the value to the Government of such ownership obligations as the obligations to pay taxes and to assume the risk of loss is open to question, there is no doubt that such elements of ownership do not pass under the MTC provisions which apply to a LWOP. These provide that title and risk of loss shall remain in the contractor. Thus, under the MTCs the "costs of ownership" in a LWOP remain with the contractor.

Even if we were to agree with GSA and classify the APP as a purchase there is little substance to the "benefits" conveyed by the APP over what GSA would have received under a LWOP. Also the rights and obligations conveyed under the APP would still differ is some aspects from those contemplated by the solicitation.

In this regard the APP states that "this APP shall terminate only at the end of each fiscal year within this period" and "upon execution of this APP, and upon each renewal * * * the Government shall be obligated for all payments for the initial and each renewal term respectively" while the "Termination for Convenience of the Government" (T for C) clause referenced in the solicitation in essence, gives the agency the right at any time to terminate the agreement in the Government's best interest, in which case the contractor recovers his cost and profit up to the point of termination. Since both GSA and IBM agree that the termination portion of the APP was intended to be secondary to the T for C clause, it is our view that if the Government were to exercise its termination right in accordance with the T for C clause that most fundamental provision which was included in both the solicitation and contract would govern. This does not however, change the fact that the agency accepted the APP

which on its face was not consistent with the terms of the T for C clause. Thus, we are unconvinced by GSA's view that since it appears that the agency would prevail in a dispute with its contractor over termination it was proper for it to accept a plan which contained terms inconsistent with the standard T for C clause.

It appears, therefore, that the APP is not completely consistent with the terms of the solicitation no matter whether it is designated a lease or a purchase. While, given the parties intentions regarding the ultimate nature of the transaction, it may be appropriate for GSA to view the APP as it did, under the MTCs and the solicitation we believe it was inappropriate for GSA to accept the APP under one of the MTC categories without first amending the solicitation to place offerors on notice of the acceptability of such an arrangement. In this regard, it is a fundamental principle of competitive procurement that offerors must be treated equally and given a common basis for the submission of their proposals. Host International, Inc., B-187529, May 17, 1977, 77-1 CPD 346. In negotiated procurements such as this, any proposal which fails to conform with the material terms and conditions in the solicitation should be considered unacceptable and should not form the basis of an award. See Computer Machinery Corporation, 55 Comp. Gen. 1151, (1976), 76-1 CPD 358. Thus, to be acceptable under this solicitation the APP must have met the material terms and conditions applying to either a LWOP or a purchase; it met neither. Therefore, when GSA decided that the APP could be considered, we believe it owed a duty to other offerors, who could not reasonably have been expected to interpret the ground rules set forth in the solicitation as permitting the hybrid approach reflected by the APP, to place them on notice through the issuance of an amendment setting forth clear guidelines indicating the acceptability of such plans and providing an opportunity for all offerors to submit such plans. See Baird Corporation, B-193261, June 19, 1979, 79-1 CPD 435; Union Carbide Corporation, 55 Comp. Gen. 802 (1976), 76-1 CPD 134.

Further, we agree with FDC that the risk of loss provision in the APP may be inappropriate as it could impose an obligation on the Government inconsistent with 31 U.S.C. § 665 and 41 U.S.C. § 11.

The Government has a long established policy of self-insuring its own property on the theory that the size of the Government's resources permits it to do so. See General Telephone Company of California, B-190142, February 22, 1978, 78-1 CPD 148. We have also held that under certain conditions the Government may assume the risk for contractor-owned property. 54 Comp. Gen. 824 (1975).

Although the equipment under the APP does not neatly fit within either the category of Government-owned equipment or contractor-owned equipment, for the purpose of risk assumption, it is our view that it should not be treated as Government-owned property. In this regard, we believe it is most significant that the APP places the obligation on the agency, in the event of loss, to promptly pay the full price of the equipment to IBM even though the agency may have possessed the equipment only a few days and paid only one of the 39 payments. Further, we note that the agency never holds unencumbered title to the equipment under the APP and is not obligated to complete payment and obtain "clear" title to the equipment. Since under the terms of the APP the agency is obligated to pay to IBM the full price of any lost or destroyed equipment that obligation is more in the nature of reimbursing a contractor for a loss than self-insuring Government property.

Agreements to assume the risk of loss for contractor-owned equipment have often been disapproved by our Office on the basis of 31 U.S.C. § 665 and 41 U.S.C. § 11 (1976), for the reason that such agreements could subject the United States to a contingent liability in an indeterminate amount which could exceed the available appropriation. See 54 Comp. Gen. 824, supra. Here, the agency only obligates a sum sufficient to meet the monthly payments required by the APP for the current fiscal year. Any loss which might occur during the first two years of the APP would exceed that amount and therefore unobligated funds must be available in the appropriation to cover such a contingency. While in this case the agency's maximum liability is determinable, the amount of a loss could be such as to exceed the unobligated portion of the appropriation. Thus, we stated in 54 Comp. Gen. 824, supra at 827 that:

> " * * * any contracts providing for assumption of risk by the Government for contractor-owned property must clearly provide that: (1) in the event that the Government has to pay for losses, such payments will not entail expenditures which exceed appropriations available at the time of the losses; and (2) nothing in the contract may be considered as implying that the Congress will, at a later date, appropriate funds sufficient to meet deficiencies. Absent inclusion of provisions along these lines, the Department will have to obtain legislative exemption from the application of the statutory prohibitions against obligations exceeding appropriations. * * *"

Although the contract with IBM does not contain such precautions, we do not believe its absence would itself be improper if the agency at the time of contract award had obligated money to cover its possible liability under the risk of loss provision. However, the record indicates and the agency confirms that it did not obligate the funds. Thus, the assumption of risk clause in the APP could create an obligation inconsistent with 31 U.S.C. § 665 which prohibits obligations in excess of or in advance of appropriations made for such purpose unless authorized by law and is therefore improper.

For the reasons set out above, we believe the award to IBM under the APP was improper. We do not find it feasible to recommend any corrective action with respect to this contract since award was made nearly two and one half years ago. We are recommending to GSA, however, that it consider whether such APP-type "installment purchases" constitute a real advantage over LWOPs so as to justify another category in the MTC provisions in addition to those relating to leases and purchases. If such plans are considered advantageous, we are further recommending that GSA draft solicitation provisions which clearly set forth the acceptable characteristics and boundaries of such plans. Such action should avert many of the problems raised in connection with the current procurement.

The protest is sustained.

Milton J. Socolar

Acting Comptroller General
of the United States