



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Canon USA, Inc.; Minolta Corporation

File: B-272414.7; B-272414.8; B-274628; B-274628.2

Date: December 20, 1996

Andrew Mohr, Esq., Cohen & White, for Canon USA, Inc., and Robert Brams, Esq., and Michael Schaengold, Esq., Patton Boggs LLP, for Minolta Corporation, the protesters.

Trisa J. Thompson, Esq., and G. Matthew Koehl, Esq., Seyfarth, Shaw, Fairweather & Geraldson, and Harry Orenstein, Esq., for Xerox Corporation, an intervenor.

Turhan Robinson, Esq., and Marie Adamson Collins, Esq., General Services Administration, for the agency.

Guy R. Pietrovito, Esq. and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Dismissal of protests as academic is affirmed where the corrective action provided by the contracting agency prior to the filing of the agency's report on the protests is the maximum relief that the General Accounting Office would have provided had a decision been issued finding the protests have merit; protesters are not entitled to reimbursement of the costs of filing and pursuing the protests where the agency timely implemented its promised corrective action.

2. Protest that a modification to a firm's multiple award schedule contract exceeds the scope of the contract and is an unjustified sole source procurement is academic where the modification was rescinded within two weeks of the date on which the protests were filed, and prior to the modification's effective date, ordering agencies were advised that equipment could not be ordered pursuant to that modification.

DECISION

Canon USA, Inc. and Minolta Corporation request reconsideration of our dismissal of their protests of the award of delivery orders to Xerox Corporation by the United States Army Information Systems Command (USAISC) and the General Services Administration (GSA) under contract No. DAE32-94-D-0004 (0004), for the rental and maintenance of photocopier equipment. Canon and Minolta also protest GSA's issuance of modification No. 49 to Xerox under its Federal Supply Contract Group 36, Part IV Schedule Contract No. GS-26F-1001B (1001B) for photocopier equipment, maintenance, and services, to allow federal agencies to convert

equipment ordered under other government contracts (including contract No. 0004) to the schedule contract. Canon and Minolta request that we sustain the protest against the award of delivery orders to Xerox under contract No. 0004 and against the issuance of modification No. 49 to contract No. 1001B, and that we recommend that the orders placed under those contracts be terminated, the equipment ordered thereunder be removed, and the protesters be reimbursed their costs of filing and pursuing the protests.

We affirm the dismissal of Canon's and Minolta's protests of the delivery orders under contract No. 0004 as academic; dismiss as academic Canon's and Minolta's protests of modification No. 49 to contract No. 1001B; and deny Canon's and Minolta's requests for entitlement to costs.

Contract No. 0004, as awarded to Xerox by the Army on August 10, 1994, provided that the USAISC could order copier equipment and services for USAISC headquarters, subordinate commands, and field operating activities within the continental United States (CONUS) up to stated estimated quantities; the contract also provided that other military and civilian agencies within the CONUS could order copier equipment and services "as long as their annual requirements do not exceed 30 percent of the estimated annual quantities established for USAISC." The contract with option years extended through June 1999. Subsequent to award, control and administrative responsibility for the contract was transferred by the Army to GSA. Pursuant to the contract, a number of delivery orders were issued to Xerox for the rental of copiers for USAISC and other agency offices.

Minolta and Canon protested that many of the orders placed by other agency offices under contract No. 0004 exceeded that contract's maximum quantity limitation for non-USAISC offices and, pursuant to Liebert Corp., 70 Comp. Gen. 448 (1991), 91-1 CPD ¶ 413, should have been the subject of competition. The protesters requested that the performance of all government delivery orders in excess of the contract's maximum quantity be suspended and those requirements competed.

Subsequent to the filing of the protests and prior to the submission of the agency's reports on the protests, GSA modified contract No. 0004 to accede to Minolta's and Canon's interpretation of the contract's maximum quantity limitation provision and agreed not to exercise the contract option for performance beginning October 1, 1996. According to GSA, this meant that after September 30, the copiers delivered under the contract must be removed and the government's requirements for copiers and copier services reprocured. The Army stated that, in accordance with the transfer of contract responsibility to GSA, the Army would not place any new delivery orders against the contract. On August 21, GSA notified its customer agencies of the expiration of contract No. 0004 and that the customer agencies' copier needs could no longer be met through that contract. GSA also notified

customer agencies that GSA had in place alternative contracts, such as the federal supply schedule contracts, to meet the rental copier needs.

On August 30, we dismissed Canon's and Minolta's protests as academic because GSA's promised corrective action provided the maximum relief that our Office would have provided had we issued a decision finding the protests to have merit. See East West Research, Inc.--Recon., B-233623.2, Apr. 14, 1989, 89-1 CPD ¶ 379.

On September 5, GSA issued modification No. 49 to Xerox's federal supply schedule contract No. 1001B, which provided, effective October 1, 1996, for a temporary price reduction for the rental of certain Xerox copier models and that "[f]ederal customers renting (currently installed) any Xerox . . . copiers under any and all Federal contracts as of September 30, 1996, may convert to the monthly fixed rate rental prices shown below." [Emphasis in original.] Pursuant to this modification, equipment ordered from Xerox under contract No. 0004 could have been converted to coverage under the Xerox schedule contract.

Canon and Minolta now timely protest that the conversion of existing rental equipment under other contracts to contract No. 1001B under modification 49 exceeds the scope of Xerox's federal supply schedule contract because that contract did not include the rental of used equipment. Canon and Minolta also argue that the conversion of equipment ordered under contract No. 0004 to Xerox's federal supply contract would be an unjustified, sole source procurement. Canon and Minolta also request that under the circumstances we reconsider our August 30 dismissal of the protests of the award of delivery orders under contract No. 0004 because GSA's issuance of modification 49 deprived the protesters of the promised corrective action that formed the basis of our dismissal of the protests, that is, the removal of the ordered equipment. Canon and Minolta finally argue that, in accordance with our decision in Commercial Energies, Inc.--Recon. and Declaration of Entitlement to Costs, 71 Comp. Gen. 97 (1991), 91-2 CPD ¶ 499, we should recommend that the protesters be reimbursed the costs of filing and pursuing their protests because GSA not only failed to perform its promised corrective action, but issued an illegal modification to Xerox's federal supply contract to permit the continued rental of the improperly ordered Xerox copiers.

In response to the protests, on September 26, prior to the effective date of modification 49, GSA rescinded Modification 49 because the agency agreed that contract No. 1001B did not include the rental of used equipment. By letter of October 9, GSA notified its customer agencies that contract No. 0004 had expired on September 30 and that modification 49 to contract No. 1001B had been rescinded on September 26; GSA stated that:

"[a]ccordingly, there is no contract method in place available through GSA to retain the machines procured [under contract No. 0004]

beyond September 30. Therefore, the machines covered by [contract No. 0004] should have been removed unless your agency independently used another contract method permitted by the Federal Acquisition Regulation [FAR] or other legal authority."

GSA contends that its corrective action has provided Canon and Minolta with all the relief the protesters could reasonably expect in response to their protests of contract No. 0004 and modification 49 to contract 1001B. In this regard, GSA disputes Canon's and Minolta's view that by issuing modification 49 the agency reneged on its promised corrective action in response to the protests of contract No. 0004. GSA states that ordering agencies could always obtain copier rental under the multiple award schedule in accordance with the FAR, and that modification 49 was issued to notify current renters of Xerox machines under federal contracts that these machines could be rented under the Xerox multiple award schedule contract. GSA rescinded modification 49 because Xerox's multiple award schedule contract did not provide for the rental of used copiers (although the multiple award solicitation had allowed for rental of used copiers).

We agree with GSA that Canon and Minolta have received all the relief they could reasonably have expected from our Office had we issued a decision finding their protests have merit. Regarding Canon's and Minolta's challenge to the legitimate scope of contract No. 0004, GSA allowed the contract to expire and informed customer agencies that their rental copier could not be retained under this contract. While Canon and Minolta argue that GSA should have policed this promised corrective action by ordering other agencies and Xerox to remove the equipment obtained under that contract, this is not relief that Canon and Minolta could reasonably have expected from our Office. Rather, had we decided Canon's and Minolta's protests and found them to have merit, we would have recommended that GSA inform its customer agencies that the rental of these copiers exceeded the scope of contract No. 0004 and should be removed--this is exactly the corrective action provided by GSA.

Nor do we agree with Canon and Minolta that the issuance of Modification 49 to contract No. 1001B deprived the protesters of the promised corrective action in response to the protests of the orders placed under contract No. 0004. As promised in response to Canon's and Minolta's protests of contract No. 0004, GSA allowed contract No. 0004 to expire and informed customer agencies that rental copiers could not be retained under that contract. While modification 49 ostensibly informed customer agencies that currently rented Xerox copiers under any contract, including contract No. 0004, could be rented under Xerox's multiple award schedule, this was consistent with GSA's August 21 notice that multiple award schedule contracts were available to satisfy customer agencies' rental copier needs. GSA immediately rescinded modification 49, before its effective date, when the agency was informed that Xerox's multiple award schedule contract did not provide

for the rental of used copiers. Thus, Canon's and Minolta's protests against contract No. 0004 were properly dismissed as academic.

Moreover, because Canon and Minolta have received the corrective action promised by GSA in response to their protest under contract No. 0004--the expiration of that contract--we do not agree that Canon and Minolta are entitled to reimbursement of the costs of filing and pursuing the protests. Unlike Commercial Energies, Inc., supra, in which we found that a protester was entitled to reimbursement of its costs of filing and pursuing the protest where an agency did not timely implement its promised corrective action which allowed the awardee to continue performance of an improperly awarded contract, GSA here did not delay implementing its promised relief.

Finally, we find that Canon's and Minolta's protests of the issuance of modification 49 to Xerox's multiple award schedule contract are academic. As noted above, on September 26, within 2 weeks of Canon and Minolta's protests and prior to the effective date of the modification, GSA rescinded modification 49. This resolves Canon's and Minolta's complaints that this modification exceeds the scope of Xerox's multiple award schedule contract and is an unjustified sole-source action. Rescission of modification 49 and advising customer agencies that Xerox equipment could not be ordered pursuant to that modification is all the relief that our Office would recommend had we issued a decision finding the protests against the issuance of modification 49 to have merit.¹ The issues therefore are academic.²

¹GSA advises that it does not have the authority to order the physical removal of Xerox equipment order modification 49, but could only, as it did, advise customer agencies that equipment could not be ordered pursuant to this modification. While the protesters assert that GSA does have such authority, this involves GSA's administration of its contract and is thus not appropriate for review under our bid protest function. Bid Protest Regulations, § 21.5(a), 61 Fed. Reg. 39039, 39045 (1996) (to be codified at 4 C.F.R. § 21.5(a)).

²While Canon and Minolta complain that a number of ordering agencies have improperly converted rented Xerox copiers to Xerox's multiple award schedule under the authority of modification 49 and continue to rent these machines, despite GSA's notice that the modification has been rescinded, these ordering agencies' procurement actions have not been protested to our Office and are thus not for our review.

The prior dismissals of contract No. 0004 are affirmed, the requests for entitlement to protest costs are denied, and the protests of modification 49 to contract No. 1001B are dismissed as academic.

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