



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

DOCUMENT FOR PUBLIC RELEASE

A protected decision was issued on the date below and was subject to a GAO Protective Order. This version has been redacted or approved by the parties involved for public release.

Matter of: Comdisco, Inc.

File: B-277340

Date: October 1, 1997

Ron R. Hutchinson, Esq., and Scott W. Woehr, Esq., Doyle & Bachman, for the protester.

Rand L. Allen, Esq., and David A. Vogel, Esq., Wiley, Rein & Fielding, for Troy Systems, Inc., an intervenor.

Terence W. Carlson, Esq., Department of Transportation, for the agency.

Glenn G. Wolcott, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Task orders under which an agency acquires the unrestricted discretionary right to require the contractor to provide specifically defined hardware and software constitute the "acquisition" of that hardware and software.
2. Contract under which the agency acquires the right to exclusive use and control of specifically defined equipment for a period of time in return for monetary consideration effectively constitutes the "lease" of that equipment.
3. In task orders where terms of underlying contract limits acquisition of hardware/software to 25 percent of the task orders' value, protest is sustained where agency is purchasing the right to acquire substantial quantities of hardware/software and provides no credible evidence that the limitation is satisfied, instead arguing that the nature of the acquisition makes it impossible for the protester to affirmatively demonstrate that contract limitation has been exceeded.

DECISION

Comdisco, Inc. protests the Department of Transportation's (DOT) award of three task orders to Troy Systems, Inc. and its subcontractor, SunGard Recovery Services, Inc., under contract No. DTOS59-96-D-0411. Comdisco asserts that the task orders for disaster recovery computer equipment and related services are outside the

scope of the Troy Systems contract because they exceed the underlying contract's express limitation on the acquisition of computer hardware and software.

We sustain the protest.

BACKGROUND

The contract which provides for the challenged task orders was awarded under request for proposals (RFP) No. DTOS59-96-R-00005, generally referred to as the Information Technology Omnibus Procurement (ITOP). The ITOP solicitation contemplated the award of multiple indefinite delivery/indefinite quantity (ID/IQ) contracts under which task orders would be issued "to obtain the gamut of support resources related to Information Resource Management." DOT states that the value of the ID/IQ contracts "could potentially reach \$1 billion over the seven year life of the contract."

The ITOP RFP divided the tasks to be performed into three functional areas: information systems engineering (ISE); systems/facilities management and maintenance (SFM); and information system security support services (ISS). Under each of the functional areas, the RFP listed various tasks. Listed under the ISS area were, among other things, "Disaster Recover, Continuity of Operations, and Contingency Planning."

Section C.1.5 of the ITOP RFP contained the following limitation:

Integral to the services necessary in performing the preceding functional areas, acquisition of hardware/software on a leased, depreciated, or purchased basis may also be required of the Contractor. Under any of the three functional areas, a task order may be used to acquire hardware/software up to 25% of the value of the task order.

Section H.22 of the ITOP RFP made clear that this language imposes a mandatory ceiling, stating: "As stated in Section C, paragraph 1.5, the value of [hardware, software and related supplies] shall not exceed 25% of the value of the TO [task order]."¹

¹At a hearing conducted in connection with this protest, the ITOP Director of Acquisitions testified that this limitation was placed in the solicitation because the ITOP contracts were intended to be primarily contracts for services, not hardware or software, explaining: "There's enough other GWACs [government-wide agency contracts] or government contracts out there to buy hardware." Hearing Transcript (Tr.) at 7-8. Consistent with this understanding, labor categories, labor rates, and
(continued...)

Troy Systems was awarded an ITOP contract for the ISS functional area in May 1996. Thereafter, DOT awarded task order Nos. T970003 ("task order No. 3"), T970005 ("task order No. 5"), and T970006 ("task order No. 6") to Troy Systems and its subcontractor SunGard Recovery Services, Inc.² Each of the task orders was awarded at the request of a particular customer agency,³ and each provides that in the event of a disaster,⁴ Troy/Sungard will provide replacement computer equipment and related services to the customer agency. More specifically, the SunGard proposal states that, when an agency determines, in its sole discretion, that a disaster has occurred,⁵ Troy/Sungard will make the specified replacement equipment

¹(...continued)

burden rates were the only cost factors evaluated by DOT in making ITOP awards. Similarly, the cost proposals submitted by ITOP offerors, including Troy, contained descriptions of the labor categories, labor rates, and indirect burden rates, but did not refer to disaster recovery computer equipment or provide prices for such equipment.

²Each of these was issued on a "directed" basis, that is, without seeking proposals from other ITOP contract awardees. In documenting the basis for the directed award, the customer agency for task order No. 3 stated:

SunGard Recovery Services, Inc., the [Troy] subcontractor actually providing the direct disaster recovery service to the Government, is the organization most suited to fulfill the Government's needs for a hot site location. . . . If SunGard had been a prime contractor on the ITOP contract, the Government could have contracted directly with SunGard; because SunGard, however, is a [Troy] subcontractor on this contract, subcontracting becomes necessary.

³Task order Nos. 3, 5, and 6 provided disaster recovery equipment and related services to the Criminal Division of the Department of Justice, the Corporation for National Service, and the National Oceanic and Atmospheric Administration, respectively.

⁴Troy/SunGard defines a "disaster" as "any unplanned event or condition that renders the [customer agency] unable to use a Location for its intended computer processing and related purposes."

⁵ In its proposal responding to task order No. 3, Troy/SunGard stated: "You decide what constitutes a disaster." Paragraph C-5.1 of the work statements for task order Nos. 5 and 6 states:

(continued...)

available for the agency's exclusive use,⁶ at either a contractor or government facility, for a period of up to 6 weeks. Each task order also requires Troy/SunGard to provide equipment for the customer agency to use during specified periods in which the agency will test its disaster plan.⁷ In consideration, Troy/SunGard charges a lump-sum fee which is paid by the customer agency in monthly installments. During the first 30 days following declaration of a disaster, there is no additional daily charge. Thereafter, a daily fee may be assessed in addition to the monthly rate.

DISCUSSION

Following DOT's issuance of the task orders, Comdisco filed this protest, arguing that the task orders violate the express limitation in the ITOP solicitation regarding acquisition of hardware/software and, therefore, that Comdisco, which does not hold an ITOP contract, was improperly precluded from competing for the requirements. Comdisco's protest specifically asserts that the challenged ITOP task orders contemplate the customer agencies' acquisition of hardware/software, and that the value of such acquisition exceeds 25 percent of the value of the task

⁵(...continued)

In the event any unplanned condition (disaster) renders the [customer agency] unable to use its data processing equipment for an amount of time that, in its sole discretion, is unacceptable, the contractor shall provide the [customer agency] immediate access to the [computer backup capability] for six (6) weeks and the coldsite for up to twenty-six (26) weeks as described in the following paragraphs, for 7 days a week, 24 hours a day, until the [customer agency] is able to restore an acceptable level of service at its own facility.

⁶Paragraph 5.1 of the work statement for task order No. 3 states that "the Contractor shall provide, for the exclusive use of the [customer agency], one IBM AS/400 . . . and one SunSparc/1000." Troy/SunGard's proposal for task order Nos. 5 and 6 state that the replacement computer equipment will be available for the customer agency's "immediate and exclusive use." Troy/SunGard's Program Manager further testified that the computer equipment provided under all three task orders at issue here could only be used by one customer at a time. Tr. at 109.

⁷The work statement for task order No. 3 states: "At least annually, the Contractor shall allow the Government to test its disaster plan(s) at no additional charge. To perform the test, the Contractor shall make the hot site available at a mutually agreed upon time and location for a period of up to two days (48 consecutive hours.)" Similarly, the work statements for task order Nos. 5 and 6 provide: "The contractor shall provide [the customer agency] with thirty two hours of test time in eight hour increments each year."

orders, thereby constituting out-of-scope modifications to the ITOP contract. See, e.g., Neal R. Gross & Co., Inc., 69 Comp. Gen. 292 (1990), 90-1 CPD ¶ 212 (out-of-scope contract modifications are subject to competition requirements absent valid sole-source justifications). Comdisco, a large provider of disaster recovery services, currently provides the type of equipment and services being obtained under the challenged task orders under General Services Administration contract No. GSOOK93AJC0593, another government-wide contract. Comdisco maintains that it did not participate in the ITOP procurement because it viewed the scope of that contract as limited to advisory services.

DOT first replies that, because Troy/SunGard's obligations under the task orders are contingent upon the customer agency's declaration of a disaster, the agency is only acquiring a service in the nature of an insurance policy and, therefore, that the task orders cannot constitute an "acquisition of hardware/software." To support this argument, DOT refers to paragraph C-11 in the work statements for task order Nos. 5 and 6 which states: "No hardware or software will be provided."⁸

However, in direct conflict with the statement in paragraph C-11, paragraph C-5 of task order No. 5 states:⁹

The contractor shall provide a fully operational computer and network system equipment configuration equal to or greater in capacity than that described below.

<u>Quantity</u>	<u>Description</u>
95	Pentium 120Mhz Personal Computers, minimum 16Mb RAM, minimum 1.2 Gb hard drive, 10 Mb Ethernet Card, 15" Super VGA monitor
5	HP 4SI Compatible network printers
1	ADIC 1200D - Sony SDT 5000 Tape Backup Unit with Adaptec 1542CP SCSI controller card
1	T-1 Connection to CNS Headquarters' Computer Room
1	Frame Relay Connection for backup PVC Access

⁸The provision in C-11 of task order Nos. 5 and 6 does not appear in task order No. 3.

⁹Paragraph C-5 of task order No. 6 contains identical language to that in task order No. 5, except that different hardware/software is specified.

Similarly, paragraph 5 of task order No. 3 states:

[T]he Contractor shall provide, for the exclusive use of the CRM [Criminal Division of the Department of Justice], one IBM AS/400 (Model 310A) and one SunSparc/1000 whose configurations shall meet or exceed the specifications provided in Section 5 of this document.¹⁰

In light of the task orders' specific and unequivocal requirements that "the contractor shall provide" the specified hardware/software, DOT's reliance on the provision in paragraph C-11 of task order Nos. 5 and 6 that, "[n]o hardware or software will be provided," is misplaced.¹¹

Further, DOT's assertion that the task orders contemplate the acquisition of services does not negate the fact that hardware/software is also being obtained. Indeed, the above-discussed limitation in the ITOP RFP specifically contemplates the issuance of task orders in which both services and hardware/software are acquired, stating that acquisition of the latter may be "integral to the services necessary in performing [the contract]." Finally, DOT's assertion that such hardware/software is acquired only when the customer agency declares a disaster does not alter the nature of the acquisition where, as here, the determination as to the existence of an event triggering the contractor's obligation to provide the hardware/software is within the sole discretion of the customer agency.¹² In short, we find without merit DOT's assertion that the task orders do not constitute the "acquisition of hardware/software."

DOT next argues that its acquisition of hardware/software is not "on a leased, depreciated, or purchased basis," and therefore falls outside of the ITOP limitation. We disagree.

¹⁰As in task order Nos. 5 and 6, the referenced section 5 of task order No. 3 lists with great specificity the computer hardware and software components that Troy/SunGard must provide.

¹¹At the hearing, Troy/SunGard's Program Manager testified that he believed the statement in paragraph C-11 was "boilerplate," and that, contrary to paragraph C-11, Troy/SunGard would provide the hardware/software identified in the task orders in the event of a disaster. Tr. at 124-125.

¹²We note that, whether or not a disaster is declared, Troy/SunGard is obligated to provide similar equipment for the customer agency to use in testing its disaster recovery plan. Accordingly, even if the customer agency does not exercise its discretion to declare a disaster, Troy/SunGard is still obligated to provide equipment for the customer's exclusive use during the required testing periods.

A "lease" is defined as "a transfer of the right to possession and use of goods for a term in return for consideration." Uniform Commercial Code § 2A-103(j). The term "possession" is defined as "[t]hat condition of facts under which one can exercise his power over a corporeal thing at his pleasure to the exclusion of all other persons." Black's Law Dictionary 1163 (6th ed. 1990).

Here, Troy/SunGard receives a lump-sum fee, paid in monthly installments, in return for its obligation to provide specified hardware/software, and related services, for the customer agency's exclusive use during testing and disaster periods. Regarding disaster periods, Troy/SunGard's obligation is triggered by an action within the sole discretion of the customer agency.¹³ The fact that a disaster may not, in fact, be declared during the task order period does not alter the fact that, upon payment of the monthly fee, the agency has acquired the right to the exclusive use and possession, that is, the right to exercise its power over specific equipment, at its discretion, during the disaster period, not to exceed 6 weeks.¹⁴ In short, each of the three task orders incorporates "the transfer of the right to possession and use of goods for a term in return for consideration"--that is, each calls for what is effectively a lease of the specified hardware/software.¹⁵

Finally, DOT and Troy/SunGard assert that, even if the task orders constitute an acquisition of hardware/software subject to the 25 percent limitation, the value of that hardware/software should be viewed as less than 25 percent of the task orders' value because, under past task orders, few disasters have actually been declared.¹⁶ DOT and Troy/SunGard thus maintain that, in most instances, there is no value associated with the "acquisition of hardware/software."

¹³Paragraph 12.2 of the work statement for task order No. 3 describes the obligation in the following manner: "The Government shall pay a firm-fixed monthly rate for the availability of the backup equipment and related services provided by the Contractor." (Emphasis added.)

¹⁴Task order No. 3 does not limit the disaster period to any period other than the term of the task order itself.

¹⁵Troy/SunGard's Program Manager submitted a declaration stating: "I have never heard anyone in the disaster recovery industry refer to any of our services as the . . . 'leasing' of hardware." However, paragraph 5.1(c) of task order No. 3's work statement, which obligates Troy/SunGard to deliver additional equipment upon request, states: "The Contractor shall provide the equipment at the leased rates specified in the Contractor's proposal" (Emphasis added.)

¹⁶Based on its past experience, Troy/SunGard asserts that "the probability of a disaster is not more than 4 or 5 percent."

Accepting, arguendo, that disasters have historically been declared infrequently and, further, that when no disaster is declared the value of hardware/software actually provided to the customer agency represents less than 25 percent of a task order's total value,¹⁷ we nonetheless reject the assertion that, on these facts, the protest should be denied. This argument assumes, essentially, that the 25 percent limitation is no barrier to award of a task order if it is more likely than not that no disaster will occur during the performance period and the value of hardware/software provided during performance will therefore have remained under 25 percent of the price of the task order overall. This approach would judge compliance either by probabilities or retrospectively. Yet the RFP does not restrict the limitation's applicability by probabilities, and, to be meaningful, the applicability of the 25 percent limitation must be determined prior to award of a task order, not upon its completion. Thus, if the occurrence of one or more disasters would mean that a task order contravened the 25 percent limitation, the task order is beyond the scope of the ITOP contract. That the task order as ultimately performed would probably prove not to have exceeded the limitation does not cure the impropriety.

As to the task orders at issue here, DOT has not identified any portion of the lump-sum fees that is properly allocable to the acquisition of hardware/software, and accordingly has not provided any documentation that the value of the task order reflected in the lump-sum fee complies with the 25 percent limitation, despite the agency's recognition in its post-hearing comments that "the hearing [conducted by GAO in connection with the protest] focused on . . . the prohibition that any acquisition of hardware under ITOP not exceed 25% of the value of the task order."¹⁸ Rather, DOT reiterates its argument that "the subscription fees are not the proper method to determine the value of a lease, because the subscription fees are not a lease." As discussed above, we believe that the task orders effectively constitute a lease of the equipment being provided.

Instead of showing that the task orders comply with the 25 percent limitation, both DOT and Troy/Sungard assert that Comdisco cannot prove that the 25 percent limitation is exceeded because Troy/SunGard prices its disaster recovery services on a lump-sum basis, does not allocate any portion of that price to hardware/software,

¹⁷As noted above, however, even when no disaster is declared, Troy/SunGard is still obligated to provide hardware/software to the customer agency in order for the agency to test its disaster plan.

¹⁸DOT and Troy SunGard did submit with their post-hearing comments various calculations regarding allocation of the daily usage fees, contending that apportionment of only those fees is appropriate. We note, however, that daily usage fees are provided for only under task order No. 6, and are charged only after the first 30 days of a disaster, and DOT acknowledges that "most disasters last [only] 10 to 14 days."

and is not capable of doing so. Specifically, DOT asserts: "GAO must deny Comdisco's protest, as Comdisco has not established that any of these three task orders violate the 25% hardware limitation."

In this regard, Troy/SunGard's Program Manager submitted a declaration which discusses the composition of Troy/SunGard's price. Paragraph 12 of that declaration states:

[deleted]¹⁹

Additionally, Troy/SunGard's Program Manager testified at the hearing as follows:

Q. To what extent does your subscription fee that you would propose on a particular -- for a particular customer relate, if at all, to the costs of particular components of their configuration?

A. [deleted]

Tr. at 156.

Contrary to DOT's and Troy/SunGard's assertions that the lump-sum fees are not related to the hardware/software provided, and that the parties are not capable of making such an apportionment, Troy/SunGard's proposals for task order Nos. 5 and 6 specifically state:

[The customer agency] may exchange certain components of [the equipment provided] for hardware representing newer technology, by giving written notice to SunGard. Upon the effective date of this exchange, the Monthly Fees due under that Schedule may increase by an amount reasonably determined by SunGard, based upon the difference between (a) SunGard's then prevailing Monthly Fees for the new hardware selected, and (b) an allocated portion of the prior Monthly Fees covering the components that were replaced. [Emphasis added.]

This portion of Troy/SunGard's proposal requires the conclusion--contrary to the agency's and the awardee's assertions--that the amount of the lump-sum fees is

¹⁹The next paragraph of that declaration states: "The disaster recovery services and related products provided by SunGard also include . . .", followed by a list of various activities including "Risk Management," "Recovery Planning," "Testing and Implementation," and "Audit." During the hearing, the Program Manager acknowledged that none of the activities listed in this paragraph are covered by the task order price, but, in fact, are billed separately. Tr. at 139-141.

directly tied to the hardware/software being provided and, further, that Troy/SunGard can and will apportion those fees to reflect the value of such hardware/software under certain circumstances--for example, when such an allocation will provide a basis for Troy/SunGard to increase its fees to reflect the greater value of "hardware representing newer technology."

In conducting the ITOP procurement, DOT drafted, and Troy/SunGard accepted without objection, the specific provision limiting the value of hardware/software to be acquired pursuant to that contract. Now, these parties would have Comdisco's protest denied on the theory that, due to the lump-sum manner in which the ITOP task orders are priced, Comdisco cannot affirmatively demonstrate that the value of the hardware/software being provided reflects more than 25 percent of the task orders' value. Stated in the alternative, the parties are arguing that Comdisco's protest must be denied because Comdisco cannot disprove that the value of the space and services supporting the hardware/software make up at least 75 percent of the task orders' value--that is, the space and supporting services are three times more valuable than the hardware/software itself.

DOT's and Troy/SunGard's arguments appear to presume that, in the absence of Comdisco's affirmative allocation of the task orders' value, this Office must conclude that DOT's actions were acceptable. Under the circumstances presented here, adoption of this approach would place an inappropriate burden on the protester. Rather, we view the more relevant principle to be that procuring agencies have a fundamental obligation to adequately document their source selection decisions so that a reviewing forum can determine whether those actions were proper. See KMS Fusion, Inc., B-242529, May 8, 1991, 91-1 CPD ¶ 447 at 7; Department of the Army--Recon., B-240647.2, Feb. 26, 1991, 91-1 CPD ¶ 211 at 2. Where an agency fails to create or retain such documentation, it bears the risk that our Office will not conclude that the agency had a reasonable basis for its procurement decisions. Id.; American President Lines, B-236834.2, July 20, 1990, 90-2 CPD ¶ 53 at 6.

Here, we have reviewed the record and are unable to reasonably conclude from the documentation presented that the portion of each task order's value related to items other than hardware/software reflect value that is three times greater than the value of the actual hardware/software being provided. In reaching this conclusion, we disagree with the assertion that no portion of the lump-sum fee reflects the value of the specific replacement hardware/software. That assertion would mean that the fee would be the same, regardless of whether 10 or 1,000 replacement computers were to be provided, a proposition unreasonable on its face. On the contrary, it is clear that the lump-sum fee, paid in monthly installments, essentially constitutes the price to the agency of acquiring the right to possess and control specific replacement equipment, along with related services, during periods of testing and when the customer, in its sole discretion, determines that a disaster has occurred. While, in calculating the monthly fee, the awardee may well have discounted the

value of the hardware/software to reflect the low probability that the replacement equipment will actually be needed, the value of that equipment would still appear to be a significant (if not the primary) component of the fee.

Based on our review of the record, it further appears that the right to obtain the hardware/software constitutes a significant portion of the task orders' requirements, thus causing the task orders to fall outside the scope of the ITOP contract. In this regard, neither DOT nor Troy/SunGard has provided documentation which reasonably addresses allocation of the lump-sum fee to the acquisition of hardware/software, and those parties have thus failed to provide adequate documentation that the task orders fall within the scope of the ITOP contract. On this record, we conclude that DOT has failed to adequately document its source selection decision.

The protest is sustained.²⁰

RECOMMENDATION

We recommend that DOT terminate the three task orders and advise the user agencies that the requirements reflected in those task orders appear to fall outside the scope of the ITOP contract and therefore may not be acquired thereunder. We also recommend that Comdisco recover its cost of filing and pursuing its protest, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (1997). The protester should submit its certified claim for such costs, detailing the time expended and costs incurred, directly to the agency within 60 days after receipt of this decision. Bid Protest Regulations, 4 C.F.R. § 21.8(f)(1).

Comptroller General
of the United States

²⁰Comdisco also asserts that the ITOP solicitation contemplated the acquisition of only disaster planning services, not actual implementation of disaster plans, arguing that any task order which provides for the acquisition of equipment to implement a disaster plan is per se beyond the scope of the ITOP contract. We disagree. The solicitation expressly contemplated issuance of task orders for "Disaster Recovery, Continuity of Operations, and Contingency Planning," and expressly recognized that acquisition of a limited amount of computer hardware/software could be "integral" to performing these tasks.