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**DECISION**

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

[Protest of Contract Award by State Agency]

FILE: B-194365 DATE: July 7, 1980

MATTER OF: International Business Machines Corp.

DIGEST:

1. Attachment O to OMB Circular A-102, which provides for grantee review of award protests does not affect GAO review of complaints arising from grantee awards in accordance with announcement published at 40 Fed. Reg. 42406, as GAO review is in accordance with its statutory responsibility to investigate all matters relating to application of public funds and is focused on role of grantor agency in requiring that its grantees' awards comply with applicable laws, regulations and terms.

2. States are required to obtain maximum practicable competition and treat all suppliers equally in making awards for data processing equipment funded by Department of Labor under Wagner-Peyser Act.

3. State agency violated Federal norm by improperly conducting discussions with sole offeror remaining in competitive range and awarding contract based on equipment other than that proposed by awardee in response to RFP and under terms different from those in RFP.

4. Although initial award was improper, GAO will not recommend that requirement be resolicited as grantor agency ordered grantee to modify contract so that it calls for same equipment initially proposed and evaluated as best technically and least costly.

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International Business Machines Corporation (IBM) requests that we review the award of a contract to Sperry Univac (Sperry) under a request for proposals issued by the Employment Security Division of the Connecticut State Labor Department (ESD). The procurement was conducted under a grant from the United States Department of Labor (DOL).

IBM complains that ESD improperly conducted negotiations with Sperry after best and final offers were received, which resulted in an award to Sperry based on equipment other than that proposed by that firm in response to the RFP and under terms different from those in the RFP. IBM argues that the contract with Sperry must be terminated and the requirement resolicited even though DOL has required ESD to modify the contract to conform with the RFP and to include the type of equipment originally proposed by Sperry. We agree with IBM that the original award was improper; however, since the contract has been modified we do not believe it would be appropriate to recommend corrective action.

DOL indicates that this procurement was conducted pursuant to a grant under the Wagner-Peyser Act, 29 U.S.C. §§ 49-49K (1976). Under this law the Secretary of Labor grants funds for the administration of State employment offices. The RFP issued by ESD in December 1976 called for proposals for computer hardware, software and associated support services. We are informed that the RFP required that the equipment and software offered pass a benchmark test and have been operational at least six months prior to the date for receipt of proposals. We are also informed that the RFP provided that offers would be evaluated on the basis of two and five year periods.

On February 15, 1977, four proposals were received, including one from Sperry based on its model 1100/42 processor and one from IBM based on "distributed" processors. Only IBM and Sperry remained in the competition after the benchmarks were completed. On January 31, 1978, ESD selected the Sperry proposal based, in part, on its conclusions that Sperry's processor configuration was more powerful than that offered by IBM and its overall approach less risky. ESD also concluded that Sperry's offer was considerably cheaper on each of the

the three approaches, lease, lease with option to purchase and purchase, called for by the RFP. This determination was forwarded to DOL's Regional Administrator, who indicated on March 28 that he approved ESD's selection of Sperry.

Sperry was informed of the choice and ESD commenced contract negotiations with that firm. As a result of these negotiations, ESD awarded a contract to Sperry on June 30. Although Sperry's proposal was based on its model 1100/42 and the RFP indicated that offers would be evaluated on the basis of a five year period, the contract provided for a Sperry model 1100/82 and was for a period of seven years.

IBM, which had not been informed of Sperry's selection and, of course, did not participate in the negotiations, proposed on August 1 that ESD reopen negotiations to take advantage of new equipment developments. ESD rejected this request and by letter of October 3 informed IBM that Sperry had received the award.

After ESD held a debriefing, IBM protested the award to the Governor of Connecticut by letter of November 7. Although the record indicates that the Deputy Attorney General of Connecticut advised the Governor that the June 30 contract was binding, the record does not show that a formal written decision has been issued by the State.

On February 27, 1979, DOL informed ESD that its approval of the award to Sperry was based on the use of the 1100/42 system and indicated that DOL did not approve of an award based on the 1100/82 system. DOL categorized the award based on the 1100/82 system as a "serious violation of Federal and State procurement regulations" since the 1100/82 had not been offered in response to the RFP and not benchmarked. Consequently, in July 1979, ESD modified the contract with Sperry to specify a 1100/42 system and to reduce its term from seven to five years.

Sperry argues that our Office should not consider this complaint because Attachment O to Office of Management and Budget Circular A-102, which applies to State and local Government grantees, provides that

the grantee is responsible for the resolution of award protests. Sperry notes that IBM has filed a protest with the grantee.

We believe that our review of grantee awards is both appropriate and well settled whether or not Attachment O is applicable. In our public notice entitled "Review of Complaints Concerning Contracts under Federal Grants", 40 Fed. Reg. 42406, September 12, 1975, we advised that our Office would undertake reviews concerning the propriety of contract awards made by grantees in furtherance of grant purposes upon the request of prospective contractors. We believe that our review serves a useful function and is appropriate to the exercise of our statutory responsibility to investigate all matters relating to the application of public funds (31 U.S.C. §§ 53, 54 (1976)) where the involvement of Federal funds in the grant project is considerable. We undertake such reviews to insure that grantor agencies are requiring their grantees, in awarding contracts, to comply with any requirements made applicable by law, regulation or the terms of the grant agreement. See Copeland Systems, Inc., 55 Comp. Gen. 390 (1975), 75-2 CPD 237; BBR Prestressed Tanks, 56 Comp. Gen. 575 (1977), 77-1 CPD 302. The fact that a grantor agency has a review procedure does not eliminate the need for our own review. Edward L. Nezelek, Inc., B-192478, June 19, 1980, 80-1 CPD ___. Similarly, we do not believe the Attachment O provisions and the existence of a grantee's review process should negate the need for our review pursuant to our statutory mandate.

A State agency may use its own procurement procedures in making awards for automatic data processing equipment to be funded by DOL under the Wagner-Peyser Act. Those procedures, however, must insure that the maximum practicable competition is obtained and that all suppliers are given a full and fair opportunity to compete on an equal basis. See 20 C.F.R. § 602.16 (1979); Department of Labor Employment Security Manual, Part IV §§ 2800-2818; see also Attachment O. In cases such as this, where neither party has cited State law governing negotiated procurements and where there does not appear to be any such State law, we generally review the matter from the standpoint of whether the grantor has insured that the

grantee's actions were consistent with the fundamental principles or norms of Federal procurement. See Burroughs Corporation, B-194168, November 28, 1979, 79-2 CPD 376.

In this instance, we agree with IBM that the original award to Sperry was not consistent with this standard. A fundamental principle of any competitive procurement system is that all competitors must be given the opportunity to submit offers on a common basis. Cohu, Inc., 57 Comp. Gen. 175 (1978), 78-2 CPD 175. We have held that when in the course of discussions with the sole offeror remaining in the competitive range it becomes obvious that the contract requirements being negotiated have significantly changed from the RFP requirements under which the competitive range was determined, this principle requires, in the absence of a compelling reason, that the contracting officer amend the RFP and seek new offers. Computek Inc., et al., 54 Comp. Gen. 1080 (1975), 75-1 CPD 384.

In this case, the record indicates that at the time the Sperry proposal was selected for award it offered a Sperry model 1100/42 processor which passed the required benchmark test[1], was evaluated as offering the lowest cost based on the five year period in the RFP and conformed with the RFP requirement that the equipment have a six-month operational history. After discussions with ESD, the original contract called for a 1100/82 processor that had not been benchmarked, did not have the required six-month operational history and was for a seven year period at a price higher than the initial proposal. ESD's willingness to accept a processor other than that originally proposed, to expand the RFP evaluation period and to waive the benchmark and operational history

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[1] In its initial protest IBM contended that Sperry was permitted to use a job matching code in benchmarking its 1100/42 which differed from the "Albany code" required of other offerors. ESD and Sperry explained that there was no requirement to run a specific job matching code as long as the code used was functionally the same as the "Albany code" and the equipment met, as did Sperry's equipment, all mandatory criteria. IBM has not disputed ESD's response and we have no reason to question its position in this matter.

requirements was not communicated to IBM. Sperry was thus given the opportunity to revise its proposal while IBM was not. As a result, IBM and Sperry did not compete on an equal basis and the award was improper.

This impropriety was recognized by DOL and that agency instructed ESD to modify the award to Sperry. As a result the current contract with Sperry is for the model 1100/42 processor originally offered and benchmarked and is to last for five years.

It is IBM's position that the prejudice suffered by it is not eliminated by the modification of Sperry's contract to provide for the model 1100/42 processor. In this regard, IBM maintains the 1100/42 processor will not meet ESD's requirements and that ESD may again modify the contract to incorporate the 1100/82 system. IBM argues that the system which is the subject of the current contract has a substantially increased memory and costs more than that originally evaluated by ESD. According to IBM, if the award to Sperry is permitted to stand an unwise precedent would be created whereby offerors could engage in post-closing negotiations knowing the only sanction if the impropriety were discovered would be to return to the status-quo. It is IBM's view that such a sanction does not fit the egregious violation of the Federal norm which occurred here. IBM further states that it would be to the benefit of ESD and DOL to resolicit the requirement so that IBM may propose the better and cheaper system it would have proposed had ESD properly held discussions with it when it did so with Sperry.

Sperry indicates that the current contract calls for the identical 1100/42 processor at the same price offered in its original proposal. Sperry explains that the increase in the contract price is due to additional peripheral equipment ordered by ESD to deal with its increased work load. There is nothing in the record to indicate that the current Sperry contract is not based on the same terms and substantially the same equipment as that originally proposed by Sperry. Nor is there anything to indicate that 1100/42 will not

meet ESD's needs or that any further modification of the contract will occur.

We agree with IBM that ESD's conduct in holding post-selection discussions with Sperry and awarding a contract to that firm for equipment other than that proposed was improper and, if permitted to stand, would create an unfortunate precedent. Since, however, the primary focus of our review in grant matters such as this is on the efficacy of the grantor's process for ensuring that its grantee's awards comply with applicable norms, laws and procedures and since the current award to Sperry is based, in substance, on the proposal which was determined technically superior and less costly than that offered by IBM, it is our view that DOL's actions in remedying the situation were reasonable and that no useful purpose would be served by a resolicitation of this requirement. See generally Donald N. Humphries and Associates, et al., 55 Comp. Gen. 432 (1975), 75-2 CPD 275; Northrop Services, Inc., B-184560, January 28, 1977, 77-1 CPD 71.

The complaint is denied.

Milton J. Socolar

Acting Comptroller General
of the United States