

19548

DECISION



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

FILE: B-198094.3 **DATE:** September 29, 1981
MATTER OF: International Business Machines Corporation

DIGEST:
Protest of sole-source computer purchase is sustained where agency improperly had equipment installed without a delegation of procurement authority from the General Services Administration and then used the installation as the reason for the sole-source purchase.

International Business Machines Corporation (IBM) protests the Navy's sole-source purchase of an Amdahl V/7 computer from Federal Data Corporation (FDC) for the Marine Corps Headquarters (HQ) in Quantico, Virginia. We sustain the protest.

This protested acquisition is related to two other procurement actions. In the first action the General Services Administration (GSA) awarded FDC a contract (under RFP No. GSC-CDPPE-79-00003) to furnish one basic and a second optional IBM 3032 computer system and peripherals, or equal, to be used by the Naval Air Test Center at Patuxent River, Maryland.* An Amdahl V/7 system is considered equal to an IBM 3032 system. The second procurement action, called the "big seven" procurement, is proceeding now (under RFP No. N66032-80-R-0015) and entails the purchase of seven computer systems, including one for installation at Marine HQ.

The procurement history of the sole-source purchase begins in approximately December 1979, when the Navy decided it needed to replace Marine HQ's old system, which had become saturated, with an interim system until the "big seven" procurement could be completed. To this

* We denied an IBM protest involving this procurement in International Business Machines Corporation, B-198094, B-198094.2, November 18, 1980, 80-2 CPD 363.

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end, the Navy attempted in May and June 1980 to have GSA exercise its option to acquire the second computer system from FDC under the Patuxent River contract and have the system transferred to Marine HQ. Representatives from GSA initially agreed to this plan, which included returning the system acquired under the option to Patuxent River after the "big seven" procurement is completed. GSA, however, never formally agreed to the plan, and later rejected it. The precise reason for rejection is not clear from the record. According to GSA, the reason was that the Patuxent River contract required new equipment, and GSA reasoned that the system acquired under the option would no longer be new once it had been used to fulfill Marine HQ's needs. According to the Marine Corps, the reason was that the equipment available under the option would exceed the Marine Corps' minimum needs.

Before officials at Marine HQ learned of GSA's formal position, FDC delivered and installed the V/7. This action, although unauthorized at the time, apparently was because the officials, based on GSA's previous informal agreement, expected formal authorization as a matter of course. In this respect, while the Navy apparently knew of GSA's formal decision before the removal and installation, the Navy apparently did not advise the Marine Corps of it until afterward. GSA asserts, however, that a GSA representative warned the Marine Corps that it lacked authority to remove its old system and to install the V/7, and advised the Corps not to do it. Notwithstanding this alleged advice, the Marine Corps permitted the installation of the V/7 and shipped the old system to another installation in Georgia.

After this transpired, GSA issued the Navy a delegation of procurement authority (DPA) for the temporary competitive lease of a replacement system. The Navy meanwhile insisted that it urgently required a system at Marine HQ and that the V/7 system already on hand was the only system that could meet the Navy's urgent requirement. Therefore, GSA augmented its DPA to give the Navy authority to make a sole-source acquisition through lease, purchase or otherwise. There appears to be some confusion about the effect of GSA's DPA; the Navy believes that it represented GSA's agreement to a sole-source purchase from FDC of the already-installed V/7, whereas GSA contends that the DPA merely authorized

a sole-source acquisition but that the Navy still was responsible for independently justifying a sole-source award to a particular firm. Based on the DPA, the Navy purchased the already-installed V/7.

IBM protests that Marine HQ in effect created the urgency that led to the sole-source purchase by having FDC's V/7 installed without GSA's authorization.

Procurement regulations require that acquisitions be conducted on a competitive basis to the maximum extent practicable. Federal Procurement Regulations (FPR) § 1-4.1107-2 (1964 ed. amend 170) (now FPR § 1-4.1109-2, 46 Fed. Reg. 1204 (1981)). A sole-source acquisition is authorized when the legitimate needs of the Government so require, e.g., when the minimum needs of the procuring agency can be met only by items or services which are unique; when time is of the essence and only one known source can meet the agency's needs within the required time frame; when it is necessary to insure compatibility between the procured and existing equipment; or when an award to other than the proposed sole-source contractor would pose unacceptable technical risks. Electronic Systems U.S.A., Inc., B-200947, April 22, 1981, 81-1 CPD 309.

Because of the requirement for the maximum competition practicable, however, an agency's decision to buy equipment without competition is subject to close scrutiny. Electronic Systems U.S.A., Inc., supra. The standard of review applied by this Office is one of reasonableness; unless it can be shown that the contracting agency acted without a reasonable basis, our Office will not question the decision to procure on a sole-source basis. Federal Data Corporation, 59 Comp. Gen. 283 (1980), 80-1 CPD 167. A decision to make a sole-source award based on urgency is unreasonable if the agency had adequate time to assess its needs and to conduct a more competitive procurement (if necessary, an accelerated procurement, see Las Vegas Communications, Inc. -- Reconsideration, B-195966.2, October 28, 1980, 80-2 CPD 323), but failed to do so or otherwise took improper action which created the urgency. See Amdahl Corporation, B-198911, March 27, 1981, 81-1 CPD 230. It is well established that administrative expediency or convenience by itself provides no basis for restricting competition. Las Vegas Communications, Inc., supra.

We do not believe that the regulations and principles cited above contemplate as proper a situation where an agency improperly installs an item and then justifies the sole-source acquisition of the item essentially because it already is installed. In our view, to accept such a sole-source justification would allow an agency to make an improper purchase and, when the impropriety is discovered or complained of, proffer the fact of the purchase essentially as a subsequent sole-source justification.

As stated above, apparently the Marine Corps was aware through GSA advice that it lacked authority to have the V/7 installed. Besides the unauthorized installation, the record is devoid of any evidence justifying a sole-source award to FDC on the basis of an urgent interim requirement which only FDC could meet within the required time frame. The Navy became aware of the need to replace Marine HQ's previous computer system by December 1979 after the system became saturated. The Navy sought and obtained a DPA from GSA -- generally having sole authority under the Brooks Act, 40 U.S.C. § 759 (1976), to acquire commercially available general-purpose computer equipment -- to competitively acquire under the "big seven" procurement a computer to replace Marine HQ's previous one. As a result of the previous system's becoming saturated, however, the Navy concluded it needed an interim replacement. The record does not indicate any urgency to effect such a replacement after the December 1979 decision, since the Navy, after consulting representatives of GSA, did not attempt to replace the saturated system until May or June 1980. Rather, the "urgent" sole-source requirement for FDC's V/7 existed simply by virtue of the Marine Corps' unauthorized installation and its failure to seek a more competitive alternative. The record contains no evidence that a sole-source award would have been justified if the Corps had not installed FDC's V/7 precipitously and removed the previous system. In view of our discussion, the sole-source purchase of FDC's V/7 was improper.

Notwithstanding the Navy's view that GSA's DPA authorized the sole-source purchase of the installed V/7, the DPA merely gave the Navy procurement authority, vested in GSA pursuant to the Brooks Act, *supra*, to purchase computer equipment on a sole-source basis to the extent permitted by applicable regulations. GSA's regulations expressly provide:

"When acting under a GSA delegation of procurement authority * * *, the agency conducting the procurement is responsible for compliance with applicable procurement policies, regulations, and, in particular, § 1-4.1109 [which sets out the general procedures for acquiring computer equipment, and includes at § 1-4.1109-2, the requirement for the maximum practicable competition] and the specific terms of the delegation."

FPR § 1-4.1106 (1964 ed. amend 170)(now FPR § 1-4.1107, 46 Fed. Reg. 1203 (1981)). The terms of the DPA did not direct the Navy to make a sole-source award to FDC, but gave the Navy authority to carry out the sole-source acquisition while specifically advising the Navy that "Your contract files should document the requirement for computer capability at [Marine HQ] and the need to take the sole-source procurement action you indicate is necessary * * *." In this regard, FPR § 1-3.210(b) requires the contracting officer to prepare a written determination and findings justifying a sole-source award.

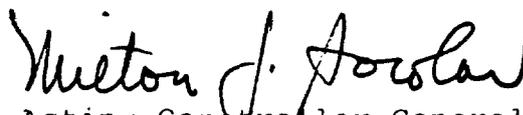
As a practical matter, we note that GSA should have known precisely what the Navy would do with a DPA authorizing a sole-source award in light of the Navy's insistence that only the V/7 could satisfy its needs. We think GSA should have recommended alternatives to the Navy, such as negotiating a short-term lease with FDC while searching for sources that would permit the conduct of an accelerated competitive procurement. In this regard, in light of the statutory and regulatory requirements for maximum practicable competition, we have held that where time constraints prevent the conduct of a regular competition, urgency may justify an expedited negotiated procurement with as complete a statement of requirements as practical submitted to each competitor, shortened response time, telegraphic or oral offers and negotiations, and such other shortcuts as may be reasonably necessary under the circumstances. Las Vegas Communications, Inc., supra.

A short-term lease in conjunction with an accelerated procurement would not have erased completely any trace of impropriety from this procurement since the sole-source

short-term lease with FDC still would have resulted from the Marine Corps' precipitous installation of the V/7 and its failure to seek competitive alternatives. Such action, however, would have mitigated any prejudice to potential competitors because it would have resulted in a competitive acquisition. We are not sure whether such action would have been feasible, but the record fails to show that it was not, or that it was even considered.

Thus, on this record, we believe that it was improper to effect the sole-source acquisition of the FDC system based simply on the fact that it already improperly had been installed. The protest is sustained.

Notwithstanding that the fact of the installation cannot in itself justify the Navy's sole-source action, we find that it does preclude a recommendation for corrective action, since we do not believe that it would be in the Government's interest to hold a competition for a short-term need at this time. Further, the Navy has advised us that the sole-source purchase will not interfere with the competitive "big seven" procurement currently under way. By separate letter, however, we are advising both the Secretary of the Navy and the Administrator of General Services of the procurement deficiency discussed.


Acting Comptroller General
of the United States