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DECISION



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

FILE: B-208143
B-208143.2

DATE: April 14, 1983

MATTER OF: NCR Corporation; General Systems Corporation

DIGEST:

Contract providing automatic data processing equipment and related software and services on a negotiated basis under "public exigency" exception to formal advertising should not have been for longer period than was necessary to cover urgent need. GAO recommends that contracting agency not exercise remaining options in contract.

NCR Corporation (NCR) and General Systems Corporation (GSC) protest the Federal Maritime Commission's (the Commission) award of a contract for providing automatic data processing equipment and related software and services to Sperry Univac. The protesters alternatively contend that: (1) the Commission illegally invoked section 1-3.202 of the Federal Procurement Regulations (FPR) (1964 ed., amend. 192), the public exigency exception to the requirement for formal advertising, to negotiate award of the contract; (2) the contract awarded to Sperry Univac should not have contained options since it was negotiated on the basis of public exigency; and (3) the Commission did not accurately describe to the protesters the nature of its needs during negotiations, and, therefore, they were denied an opportunity to compete on an equal basis with other offerors and, in particular, with Sperry Univac.

The protests are sustained.

The record shows that the Commission has been supplied NCR-manufactured computer hardware, software, and related services by GSC for the past 5 years. The computer system was used primarily to aid the Commission in verifying the financial responsibility of ships entering ports of the

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United States and serves as a data bank for maintaining financial information on parties engaging in freight forwarding and allows the Commission to identify, cross-reference, and account for applicants which want to be licensed by the Commission. GSC had been awarded its contract originally on a sole-source basis. The Commission determined that the services had become too costly under GSC's contract and the Commission decided to attempt to obtain the services on a more economical basis upon expiration of GSC's contract on September 30, 1982. To this end, the Commission decided, on April 23, 1982, to solicit competitive proposals from a number of suppliers.

The Commission argues that it was fully justified in negotiating this contract instead of procuring it through formal advertising. The Commission reported to our Office that, "Because formal advertising procurement procedures would necessarily result in a lapse in the agency's ADP [automatic data processing] programs with a resulting adverse impact on essential agency missions, it was not considered a viable alternative." According to the Commission, GSC was unwilling to enter into a short-term contract which would allow sufficient time for formal advertising of this requirement. The Commission argues that it had only three available choices: (1) again negotiate a sole-source contract with GSC; (2) negotiate only with suppliers of NCR equipment; or (3) negotiate with as many different suppliers as time would allow. The third option was chosen.

The protesters argue that GSC had offered, prior to expiration of its contract, to contract with the Commission for 1 additional year at a considerable savings when compared to GSC's then current contract terms. According to the protesters, this offer eliminated any urgency and, therefore, an award based on the public exigency exception to formal advertising was not justified. GSC also contends that the Commission did not properly plan for the competitive procurement of these computer needs and should not have waited until April 1982 before assessing its budgetary constraints and how best to fulfill its computer-related needs. Thus, GSC concludes that the Commission created any urgency and should not be allowed to use urgency as justification for negotiation instead of formal advertisement of this procurement. The protesters also contend that the

contract awarded to Sperry Univac should not have included any option periods because inclusion of an option provision in a contract awarded under a public exigency justification is improper.

In our view, there is merit to the protesters' argument that the contract awarded to Sperry Univac should not have contained option provisions. This procurement was conducted under negotiated procedures without formal advertising under authority of 41 U.S.C. § 252(c)(2) (1976) because of the Commission's determination that the public exigency would not permit the delay incident to formal advertising. The Commission has indicated that it needed a term beyond the September 30, 1982, expiration date of the GSC contract to have sufficient time to procure by formal advertising. However, the contract awarded by negotiation contained an initial period, from the June 23, 1982, award until September 30, 1982, for computer installation and testing, a first year option for performance and four additional 1-year performance options. There does not appear to be any urgency that would support the four additional 1-year options. See International Business Services, Inc., B-209279.2, February 8, 1983, 83-I CPD 142; see also Alton Iron Works, Inc., B-179212, March 6, 1974, 74-I CPD 121. Therefore, we recommend by letter of today that the Commission not exercise any further options under Sperry Univac's contract.

In view of the above finding sustaining the protests with respect to the option provisions, we need not consider the other arguments presented by the protesters.

Since our decision contains a recommendation for corrective action, we have furnished copies to the congressional committees referenced in section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 720 (formerly 31 U.S.C. § 1176 (1976)), which requires the submission of written statements by the agency to those committees concerning the action taken with respect to our recommendation.

for *Harry R. Van Cleave*
Comptroller General
of the United States