

DECISION

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

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FILE: B-218642**DATE:** July 3, 1985**MATTER OF:** Information Systems & Networks Corp.**DIGEST:**

1. A contracting agency's decision to negotiate only with one firm to develop and install an urgently needed security system is proper where, as subsequent events bear out, that firm was the only one capable of meeting the agency's needs.
2. A contracting officer's signing of a contract constitutes an affirmative determination of responsibility to which GAO will not object unless the protester shows fraud or bad faith on the part of procuring officials. The protester's mere disagreement with the determination, or a contention that the officials lacked sufficient information to determine the awardee responsible, does not meet the heavy burden to show bad faith by demonstrating that procuring officials had a specific and malicious intent to harm the protester.

Information Systems & Networks Corporation (ISN) protests the Department of State's award of sole-source contract No. 2038-563322 to Draco-Lion International, Inc. (DLI) to complete the development of a security system for which ISN had performed the initial development under a separate contract. The system, termed a Marine Security Guard Integrated Security System (MSGISS), is an automated system that incorporates microcomputers utilizing artificial intelligence concepts and automated diagnostics, and is designed to allow a Marine corpsman from his guard booth to accomplish many security tasks simultaneously with the assistance of automatic monitoring and decision-making capabilities. The current contract also requires DLI to supply and install developed systems in three diplomatic missions abroad.

Because of the threat of terrorism to United States diplomatic missions abroad, the State Department determined that its needs for the systems were of such an unusual and

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compelling urgency that the government would be seriously injured unless the installations were accomplished as quickly as possible. It was therefore necessary, the Department determined, to retain the same engineering team that worked on the initial development. That team, at the time of the award, no longer was employed by ISN, but by DLI. Because the team apparently was committed to resigning their positions at ISN for employment with DLI, the Department began negotiations with DLI and, in fact, recommended DLI for the award while the engineering team was still employed by ISN.

The protester chiefly argues that the State Department's failure to solicit an offer from ISN was improper. The protester also challenges the Department's determination that DLI was responsible--that is, capable of performing the contract.

We deny the protest.

I. Background

ISN's contract for the initial development of the MSGISS was awarded on September 28, 1984, with a completion date of June 30, 1985. The contract basically entailed assembling commercially available equipment and software, and developing the interconnections and special software programs necessary to attain the efficient functioning of the system while at the same time assuring ease of operation. Shortly after the award, Congress made it clear that it supported the installation of the MSGISS in United States missions abroad as part of an overall program to enhance security. See 130 Cong. Rec. H10,451-10,462 (1984). The program was deemed so urgent that the executive branch and the Congress joined efforts to speedily enact special statutory authority enabling the State Department to take immediate action. See The 1984 Act to Combat International Terrorism, Pub. L. No. 98-533, 98 Stat. 2706 (1984) (adding 22 U.S.C. § 2669(h)). In an effort to expedite the installation of the security systems, the State Department negotiated a modification to ISN's contract, advancing the completion date to April 30.

It appears from the record that the State Department intended to compare the prototype and commercial systems,

and then decide what system to acquire for its missions abroad. Shortly after ISN demonstrated its prototype system on March 29, the State Department determined that the prototype system would best meet the agency's needs. Since it was important to install some systems as soon as possible, the Department believed it was necessary to have the follow-on development and installation of the system performed by the same engineering team that initially developed the prototype. The Department believed it would otherwise lose valuable months while a new team familiarized itself with the prototype.

At that time, the Department had reason to believe that ISN's technical team would be leaving for employment with DLI commencing May 1. The record contains a March 29 letter from DLI's president to the State Department's Procurement Division affirming that would be the case, and it is clear that, as of a somewhat earlier date, DLI had been discussing with the State Department's Office of Security and the Department's Procurement Division the possibility of DLI obtaining a sole-source contract. A joint memorandum from both State Department offices, dated April 19, states that as early as March 26 representatives of those offices proposed recommending a sole-source award to DLI in order to retain the same team that worked on the prototype. Shortly after that memorandum, and while the entire engineering team was still employed by ISN, DLI submitted an initial proposal. During discussions of the proposal with the contracting officer, ISN's project manager apparently represented himself as executive vice president and chief operations officer of DLI (as indicated by the contracting officer's notes of an April 22 meeting). Shortly afterwards, on April 24, the project manager either resigned from or was fired by ISN, and the other members of the engineering team departed ISN soon after.

Finally, in the second week of May, the Procurement Division executed a formal justification for the sole-source award to DLI based on unusual and compelling urgency, as authorized by 41 U.S.C. § 253(c)(2), as amended by the Competition in Contracting Act of 1984 (CICA), Pub. L. No. 98-369, § 2711, 98 Stat. 1175 (1984). The justification states that since ISN no longer can offer the same engineering team that developed the prototype, and because a new team would require a 4-6 month start-up period, ISN could not meet the government's needs in the required timeframe. The award to DLI was made on May 16.

II. Jurisdictional Issue

Citing our Bid Protest Regulations, 4 C.F.R. § 21.9 (1985), which provide that this Office will dismiss a protest where the subject matter of the protest is also the subject of litigation before a court of competent jurisdiction, the State Department argues that we should dismiss the current protest because ISN has filed suit in the Circuit Court for Fairfax County, Virginia, concerning the procurement. That suit, however, involves an action against DLI to enjoin DLI from performing this contract based on the allegations that DLI improperly interfered with ISN's business and that ISN's former employees are violating employment agreements with ISN. The propriety of the State Department's procurement actions is not an issue before the court. We therefore will consider the merits of the protest.

III. Discussion of Merits

As stated above, the State Department relied on 41 U.S.C. § 253(c)(2) to justify the sole-source award to DLI. That provision authorizes an executive agency to use noncompetitive procedures when:

"the executive agency's need for the property or services is of such an unusual and compelling urgency that the government would be seriously injured unless the executive agency is permitted to limit the number of sources from which it solicits bids or proposals."

Other CICA provisions circumscribe the authority granted by § 253(c)(2). Among those is a requirement that the executive agency request offers from "as many potential sources as is practicable under the circumstances," and a prohibition against resorting to noncompetitive procedures because of the "lack of advance planning." 41 U.S.C. §§ 253(e) and (f)(5)(A).

We believe the Department's decision that there existed sufficient urgency to use noncompetitive procedures was justified in light of the high priority to protect diplomatic missions abroad. Although, as the protester points out, the State Department was aware of the urgency

for installing the MSGISS in October of 1984 when the executive branch and Congress worked together to enact the 1984 Act to Combat International Terrorism, there is no showing that the Department had any reasonable alternative to waiting until the prototype was substantially developed before deciding whether actually to use the system. The Department therefore was not in a position to know that it would issue a follow-on contract until the end of March at the earliest and, thus, the urgency cannot be attributed to a lack of planning on the Department's part.

The basic question in this case is whether the Department reasonably should have considered ISN to be a potential source from which it was practicable to solicit an offer under the circumstances. In this regard, we note the protester's contention that even if the State Department did not actively solicit an offer from ISN, the Department should have published a notice of the intended procurement in the Commerce Business Daily. We point out, however, that where the use of noncompetitive procedures is justified under 41 U.S.C. § 253(c)(2), because of urgency, the agency need not publish such a notice. 41 U.S.C. § 416(c)(2) and 15 U.S.C. § 637(g)(2), as amended by the Small Business and Federal Procurement Competition Enhancement Act of 1984, Pub. L. No. 98-577, §§ 303 and 404, 98 Stat. 3066, 3077 and 3082 (1984).

It appears that ISN's project manager decided to leave ISN even before the negotiations with DLI, and that DLI actually had the commitments of the other members of the prototype engineering team, as is indicated by the fact that they departed ISN before any award to DLI. While ISN faults the State Department for this situation, the record contains no evidence that the Department induced ISN's employees to leave ISN's employ. To the extent that the protester complains that DLI's conduct improperly interfered with ISN's business, this matter is for resolution by the private parties, through the courts if necessary, and does not affect the propriety of the procurement. Kirk-Mayer, Inc., B-208582, Sept. 2, 1983, 83-2 C.P.D. ¶ 288.

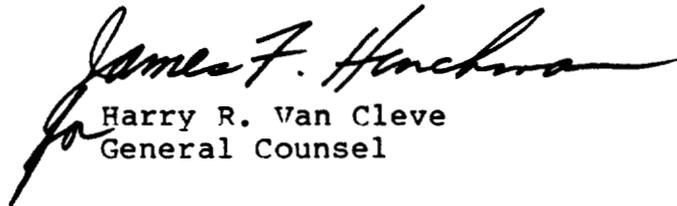
Although ISN contends it could timely perform the follow-on work without its former employees, the State Department's determination that a new engineering team would not meet its urgent needs is reasonable on its face. The reasonableness of the determination is bolstered by the fact

that after ISN's engineering team resigned, ISN delivered technical manuals that failed to reflect familiarity with many of the technical characteristics of the prototype developed late in the contract period. In any event, this Office will not question an agency's judgment of its actual minimum needs unless there is a clear showing that the determination is unreasonable, e.g., Fenwal, Inc., B-202283, Dec. 15, 1981, 81-2 C.P.D. ¶ 469, and the protester has made no such showing. Furthermore, with regard to items critical to human safety, we have recognized that the agency may narrowly define its needs to allow for the highest possible reliability and effectiveness. Id. We therefore do not question the State Department's determination that it needed to retain the original engineering team, and we find that the failure to consider ISN as a potential source was of no practical consequence since there was no likelihood ISN could meet the government's needs.

ISN also argues that the contracting officer failed to make a formal finding that DLI was responsible, and that any finding of responsibility would be in such disregard of DLI's allegedly unethical conduct and lack of other traditional aspects of responsibility as to constitute bad faith. First, the contracting officer's signature on the contract constitutes an affirmative determination of the awardee's responsibility, Federal Acquisition Regulation (FAR), 48 C.F.R. § 9.105-2(a) (1984), to which we will take no exception unless, as pertains here, the protester makes a showing of fraud or bad faith on the part of procuring officials. Ebonex, Inc., B-213023, May 2, 1984, 84-1 C.P.D. ¶ 495. To make this showing the protester has a heavy burden of proof; it must demonstrate by virtually irrefutable proof that procuring officials had a specific and malicious intent to injure the protester. Id. ISN has made no such showing. The record, which contains a contracting specialist's memorandum dated May 1 finding DLI responsible, clearly reflects that the State Department considered whether DLI had the necessary managerial, technical and financial capabilities to perform the contract, and these matters comprise the basic elements of responsibility. See FAR, 48 C.F.R. § 9.104-1. The mere fact that a protester disagrees with a contracting officer's determination of responsibility, or contends that the contracting officer lacked sufficient information to determine an offeror responsible, does not suffice to show bad faith. J.F. Barton Contracting Co., B-210663, Feb. 22, 1983, 83-1 C.P.D. ¶ 177.

IV. Conclusion

Since we believe the award to DLI was justified under the circumstances of this case, we deny the protest.


Harry R. Van Cleve
General Counsel