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DECISION

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

FILE: B-195595 DATE: December 18, 1979

MATTER OF: Computer Election Systems, Inc.

DIGEST:

1. [Protest against sole-source] award is sustained where procuring activity never developed specifications or statement of minimum needs to rationally decide which voting machine system would fulfill its needs, and record does not support determination that time would not permit competitive procurement.

2. Failure of agency to conduct price negotiations or price analysis prior to sole-source award leads to conclusion that lower price possibly could have been obtained.

3. Prohibition in contract and 31 U.S.C. § 529 (1976) against advance payments was violated when District of Columbia paid full contract price prior to delivery of software package, valued at one-tenth of contract cost.

4. Whether contractor complies with contract requirement for supplying new equipment is matter of contract administration and not for resolution by GAO under Bid Protest Procedures (4 C.F.R. part 20 (1979)).

5. Claim for proposal preparation costs is denied since claimant never submitted proposal and no solicitation was issued.

Computer Election Systems, Inc. (CES), protests the sole-source award by the District of Columbia to Diamond International Corporation (Diamond) for a voting and registration system.

CES contends principally that there was no adequate justification for the sole-source award, the District never developed specifications to

reflect its minimum needs, and no price negotiations were conducted with Diamond.

For the reasons that follow, the protest is sustained.

In 1978, Congress appropriated $650,000 for the District to purchase a voting system, the funds to be expended by September 30, 1979. Diamond's voting machine system, Datavote, had been utilized on a trial basis in the District's elections in November 1978 and May 1979. On June 20, 1979, the District's Board of Elections and Ethics approved Datavote as the system which would satisfy the minimum needs of the District and requested the District's procurement branch, the Department of General Services, to execute a Determination and Findings (D&F) for a sole-source award. On June 26, 1979, the D&F was executed and concluded that only Diamond's Datavote system could meet the immediate and near future needs of the District and because the funds had to be obligated by September 30, 1979, and the system ready for operation in the November 1979 election, it was impracticable to conduct the procurement by formal advertising. On July 13, 1979, a contract in the amount of $647,700 was awarded to Diamond.

It is the position of the District that it conducted a thorough study of all existing voting systems and found that only Diamond's Datavote would meet its needs. The District has furnished our Office numerous charts which compare various manufacturers' systems. This information was gathered from venders' literature and from submissions and presentations to the Board of Elections and Ethics by venders. CES made a presentation to the Board on February 14, 1979, and requested that CES be permitted to furnish its machines for an upcoming election on a trial basis as Diamond had been allowed. This request was denied.

As to a statement of minimum needs by the Board of Elections and Ethics, the District, in its report to our Office in response to the protest, points to the numerous charts prepared as stating its minimum needs. These charts compare seven systems in the areas of initial cost, support services, costs in

past elections, personnel needed and personnel costs. However, only the listings for the Datavote system and the Valtec system, both of which were used by the District in past elections, have detailed information. The other five companies show entries such as "No cost information," "no written proposal," and "N/A" for various areas. Also, the Board, in responding to a report issued by the District of Columbia Auditor on September 14, 1979, points to minutes of the Board meeting of August 2, 1978, as stating the immediate and future needs of the District. The applicable portion of the minutes reads as follows:

> "* * * Mr. _____ stated that he had no particular preference on which system to use as long as a system will do what the Board has to do and will enable the elections operation to have something close to the on-line system and the capability to accommodate the Office of Campaign Finance."

This falls far short of being an adequate statement of minimum needs. Clearly, the District never defined its minimum needs with any of the required specificity in order to make a rational decision regarding the selection of a voting machine system. In this regard, the District's Materiel Management Manual (MMM) § 2620.2C.1 defines "Specification" as a "clear and accurate description of the technical requirement for a material, product, or service, including the procedure by which it will be determined that the requirements have been met." The most that can be said to have occurred was that the District determined that it desired a punchcard voting system as opposed to a lever machine, video system or other type of voting system. However, Diamond's Datavote is not the only punchcard system on the market. CES's Votomatic is a punchcard type and there may be others.

While District officials argue that an exhaustive study and comparison was made prior to the sole-source selection of Datavote, we do not find the experience of using a system for two elections (Datavote) as opposed to a 1-hour demonstration before the Board (Votomatic)

to have been a fair comparision. These two firms plus other firms which forwarded documentation to the Board were never advised of what factors the District considered important because of the failure to specify its minimum needs.

The fact that a procuring activity has a preference for a certain item, even if it believes that item to be superior to other similar items, cannot support a sole-source award unless only that item can satisfy the Government's needs. Precision Dynamics Corporation, 54 Comp. Gen. 1114 (1975), 75-1 CPD 402. The District has failed to present evidence that only Datavote would meet its needs other than by conclusionary statements.

Concerning the statement by the District that only Diamond could supply the items for the November 1979 election and of the need to commit the fiscal year funds prior to September 30, 1979, we find the facts do not support this conclusion.

Regarding whether another firm could have supplied the items for the November 1979 election, there is no evidence in the record that the District ever made any inquiries as to any other firm's delivery capability.

The need to have a contract awarded by September 30, 1979, and the conclusion that only by awarding sole-source could this objective be met also appear unsupported by the record. On May 3, 1979, the Board wrote the District's Office of General Services as to the procedures to be followed if the purchase were made sole-source or competitively. On May 21, 1979, a response explained the procedures and stated that the Board should allow 3 months to establish a contract by open-market, formal advertising and 2 months for a sole-source procurement. Therefore, assuming a competitive procurement was commenced on or about June 1, 1979, the District could have been in a position to award a contract, based on the above timetable, on September 1, 1979, or 30 days before the September 30, 1979, deadline. Accordingly, we do not view the element of time as a persuasive argument to support the sole-source award.

Based on the foregoing, we do not find the sole-source procurement to have been properly justified and, therefore, the protest is sustained.

We believe that other matters raised by CES, not directly related to the sole-source award, deserve comment. CES has alleged that the District failed to conduct price negotiations with Diamond but instead merely accepted Diamond's initial price offer. The District has responded by stating that the citations by the protester of portions of the MMM are inapplicable as these sections deal with competitive negotiations, not sole-source.

We find this position of the District to be unpersuasive. Negotiated contracts encompass all contracts other than those which are formally advertised, including those awarded competitively or sole-source and, therefore, we find the citations to be applicable.

CES cites MMM § 2641.9c(1) as requiring the contract negotiator to exercise reasonable care, skill and judgment and to avail himself of all of the organizational tools (including cost or price analysis) necessary to serve the best interests of the District.

The District states that it accepted the Board's recommendation and cost breakdown in determining that the offered price was reasonable and since there were no uncertainties in the Diamond proposal, it was unnecessary to conduct discussions. The District, in its initial report to our Office, further argues that it obtained the best possible price since the current Diamond price list shows a cost of $220 per voting booth and in 1978, Montgomery County, Maryland, paid $190 per booth. The District paid $195 per booth for the 1,620 booths purchased.

The cost breakdown to which the District refers is no more than the line item prices offered by Diamond. There is no evidence that the District conducted any cost or price analysis of the Diamond proposal. Moreover, the District has subsequently informed our Office

that it has now learned that Montgomery County did not pay $190 per booth but that the price was negotiated to $150 per booth.

We believe that the above facts lead to the conclusion that if the District had conducted price discussions with Diamond or performed a cost or price analysis, a lower cost could have been obtained for the contract.

Further, CES has raised the issue that the District violated 31 U.S.C. § 529 (1976), a prohibition against advance payments, also contained in the Diamond contract, when it paid, on August 2, 1979, the full contract price when the software package, valued at $59,375, had not been delivered nor installation of the system completed.

While section 529 is a Federal statute, we find nothing in the District of Columbia Self Government and Governmental Reorganization Act ("Home Rule Act"), Pub. L. No. 93-198 (1973), 87 Stat. 774, which would exempt the District from coverage. Section 717(b) of the Act states that no law or regulation in force on the effective date of the Act shall be deemed amended or repealed except to the extent specifically provided in the Act. The Act does not address the advance payment prohibition and, therefore, we find the District to be covered by the statute as it was prior to the enactment of the Home Rule Act.

The District argues that the payment of the full contract amount on August 2, 1979, prior to the delivery of the software package on August 10, 1979, was a clerical error, there was still a violation of the advance payment prohibition. Moreover, as the report by the District of Columbia Auditor points out, by paying 24 days earlier than required, since the contract provided for net payment within 30 days, the District lost $5,000 in interest on the contract funds.

Finally, CES states that the District accepted used equipment instead of the new equipment required under section 6 of the General Conditions of the contract. It appears from the record that the District

took title to the voting booths which had been used by the District in the past two elections, rather than having Diamond supply new unused items. The District has responded to the argument of CES by stating that the equipment was in virtually new condition, it had only been used by the District and it was guaranteed as "new" by Diamond upon installation. Whether or not Diamond has performed in accordance with the contract provisions is a matter of contract administration not for consideration under our Bid Protest Procedures (4 C.F.R. part 20 (1979)). Eastern Brokers Inc. and Jan Pro Corporation, B-193774, January 31, 1979, 79-1 CPD 75. It is the District's responsibility to take appropriate action if the contract was not performed properly.

Based on the foregoing, we find the District improperly awarded the sole-source contract to Diamond. CES has requested that our Office either declare the contract void ab initio or, in the alternative, award CES proposal preparation costs for its unsuccessful efforts to compete with Diamond.

Since the contract has been fully performed, it is not possible for our Office to recommend that the contract be terminated for the convenience of the Government, which we would do under the circumstances of this case.

Regarding the cancellation of the contract, the Court of Claims and our Office have taken the view that once a contract comes into existence it should not be canceled, that is, regarded as void ab initio, even if it were improperly awarded, unless the illegality of the award is "plain" or "palpable." John Reiner & Co. v. United States, 325 F.2d 438 (Ct. Cl. 1963); Warren Brothers Roads Company v. United States, 355 F.2d 612 (Ct. Cl. 1965); 52 Comp. Gen. 215 (1972). We have indicated that the essential test in determining whether these criteria are met is whether the award was made contrary to a statute or regulation due to some improper action or inaction by the contractor, or whether the contractor was on direct notice that the procedures followed were inconsistent with statutory or regulatory requirements. 52 Comp. Gen., supra. In our opinion, the record does not support the conclusion that Diamond

contributed to or was on notice of the improprieties in the award procedure.

CES's claim for proposal preparation costs is not allowable. Bid or proposal preparation costs may be recoverable when it is shown that arbitrary and capricious action by the Government towards a claimant has denied the claimant fair and honest consideration of its bid or proposal. T&H Company, 54 Comp. Gen. 1021 (1975), 75-1 CPD 345. The Government's failure to give fair and honest consideration breaches an implied contract which is formed by the Government's solicitation of bids or proposals and the submission of a bid or proposal in response thereto. University Research Corporation - Reconsideration, B-186311, August 16, 1977, 77-2 CPD 118. However, where the proposal is unsolicited or where no proposal is submitted, as here, no implied contract arises since no solicitation was issued and, therefore, there can be no breach of the implied duty. Bell & Howell Company, 54 Comp. Gen. 937 (1975), 75-1 CPD 273, and Joseph Legat Architects, B-187160, December 13, 1977, 77-2 CPD 458.

Accordingly, while no corrective action is possible at this time, we are bringing the numerous shortcomings in this procurement to the attention of the Mayor of the District of Columbia in order that steps may be taken to prevent a recurrence in the future.

Milton J. Socolar

For The Comptroller General
of the United States