

**DECISION**

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

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**FILE:** B-217535 **DATE:** May 24, 1985  
**MATTER OF:** Scott Fischman Company

**DIGEST:**

1. Agency's sole-source purchase of a security card-entry system is improper where the agency failed to publicize the intended purchase in the Commerce Business Daily at least 30 days before the award, and such failure precluded the protester, an alternative available source, from competing.
2. The 1984 Act to Combat International Terrorism, Pub. L. No. 98-533, does not authorize the State Department's noncompetitive purchase of a security card-entry system for use at the Department's facilities in Washington, D.C., since the Act confers extraordinary procurement authority only for the acquisition of items solely for use by Foreign Service posts abroad to meet emergency overseas security requirements.

Scott Fischman Company protests the Department of State's award of a sole-source contract, No. 1027-500314, to Cardkey Systems. The contract requires Cardkey to supply and install a computerized entry system using coded identification cards that the Department had purchased previously from Cardkey. The Department never formally solicited offers for the system or the cards and failed to synopsise the card procurement for publication in the Commerce Business Daily (CBD). A synopsis of the current procurement was published in the CBD dated December 28, 1984, stating that negotiations were being conducted with Cardkey on a sole-source basis to acquire a system to interface with the identification cards. Although Scott Fischman timely objected to the sole-source negotiations in its protest filed January 7, 1985, the Department apparently proceeded with the award on January 8 before it was notified of the protest.

According to the protester, both Cardkey's and Scott Fischman's equipment utilize a Weigand process, which, as we understand it, employs a coded pattern of magnetic wires

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embedded in the identification cards. When a card is passed through a sensing device, the device detects the pattern and transmits it to a reader for decoding. The protester alleges it can modify its equipment to read Cardkey's cards and objects to the Department's failure to afford it an opportunity to compete.

We sustain the protest.

### Background

The Department's report on the protest explains that the Department's Office of Security had been working with commercial firms for several years to develop proposals for a system that would satisfy the Department's needs. The security office contacted about 15 firms, informed them of the Department's needs, and invited informal proposals from each firm. While several firms did not respond with proposals, the security office received two proposals that were completely acceptable to it--Cardkey's proposal and a proposal submitted by CMC Corporation. Based on an evaluation of technical and price factors, the security office recommended in September 1984 that the Department accept Cardkey's proposal.

In making its recommendation, the security office stated that given the length of time necessary to develop the Cardkey and CMC proposals, it was unlikely that any additional proposals would be available for review in the near future. In addition, the security office noted there was some urgency for acquiring the system since there existed a very real threat of domestic terrorist incidents.

The Department adopted the security office's recommendation, purchased the identification cards from Cardkey, and then initiated negotiations to acquire the access system. The January 8 award was in the amount of \$137,398.

### Issues

Federal procurement statutes generally require agencies to obtain the maximum practicable competition so that, absent statutory authority providing otherwise, a sole-source award is permissible only where the contracting agency reasonably expects that just one source can meet the

agency's minimum needs within the required timeframe and without undue technical risk. Aerospace Research Associates, Inc., B-201953, July 15, 1981, 81-2 C.P.D. ¶ 36. To support this expectation, the contracting agency has to make reasonable efforts to determine the availability of competition. Id.

The issue in this case is not whether Cardkey was in fact the only source capable of meeting the Department's needs. The Department does not refute the protester's assertion that it was capable of providing a system that interfaces with Cardkey's cards. Apparently conceding this point, the Department argues that it was unaware of Scott Fischman's capabilities, and that it entered into sole-source negotiations only after a thorough market survey revealed just one source that would meet its needs. In addition, the Department argues that 22 U.S.C. § 2669(h), as added by the 1984 Act to Combat International Terrorism (Act), Pub. L. No. 98-533, § 303, 98 Stat. 2706, 2710 (1984), gives the contracting officer authority to waive competition for a security requirement where the use of normal acquisition procedures would not meet the Department's requirements.

Thus, the basic issues are: (1) whether the Act provided authority for the sole-source award and, if not, (2) whether the Department made a reasonable effort to ascertain the availability of potential alternative sources.

#### Discussion

For the reasons stated below, we resolve both issues in the protester's favor.

##### A. Did the Act authorize the sole-source award?

The Act temporarily authorized the Secretary of State to:

"directly procure goods and services in the United States or abroad, solely for use by United States Foreign Service posts abroad when the Secretary of State, in accordance with guidelines established in consultation with the Administrator of General Services, determines that use of the Federal

Supply Service or otherwise applicable Federal goods and services acquisition authority would not meet emergency overseas security requirements determined necessary by the Secretary, taking into account overseas delivery, installation, maintenance, or replacement requirements. . . .<sup>1/</sup>

It is plain from the language of the statute that the Secretary's extraordinary procurement authority only extends to the acquisition of items solely for use by Foreign Service posts abroad to meet emergency overseas security requirements. Since the security equipment in this case is needed to meet domestic security requirements at the Department's facilities in Washington, D.C., the Act clearly is not applicable to the procurement.

B. Reasonableness of effort to obtain competition

We will assume for purposes of this discussion that the security office, by contacting several potential sources and reviewing proposals, conducted a market survey to determine the Department's minimum needs rather than an improper de facto procurement. An agency may discuss requirements with potential suppliers to ascertain what is available and to develop a statement of its minimum needs; further, the agency may seek general pricing information to develop cost estimates for a future procurement. See Maremont Corp., 55 Comp. Gen. 1362, 1373 (1976), 76-2 C.P.D. ¶ 181. The agency should not seek and evaluate informal proposals, however, where it can draft adequate specifications for a competitive procurement, which would include the procedural requirements and safeguards of the acquisition regulations. Id. at 1374. In this regard, we note the Department reports that before contacting firms, it developed a "statement" of its security requirements to be provided to all firms to assist them in preparing their proposals, so that the Department may well have been in a position to state its minimum needs without recourse to seeking informal proposals. We need not decide whether the Department

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<sup>1/</sup> The Act further provided that this authority would expire when the Competition in Contracting Act of 1984, Pub. L. No. 98-369, § 2711, 98 Stat. 1175 (1984), takes effect, which was April 1, 1985.

properly used a market survey to explore ways to meet its needs, however, since we find the Department's procedures defective even assuming that the market survey was proper.

Even though a market survey may indicate there is only one source capable of meeting the agency's needs, an agency generally must submit a synopsis of an intended sole-source procurement for publication in the CBD 30 days before commencing negotiations for award, if the award is expected to exceed \$10,000. See 15 U.S.C. § 637(e) (Supp. I 1983); Federal Procurement Regulations (FPR) Temp. Reg. 75, 41 C.F.R. Appendix to Chapter 1 (1984). The purpose of this requirement is to prevent small businesses from receiving notice of procurement opportunities when it already is too late to compete. See Tri-Com, Inc., B-214864, June 19, 1984, 84-1 C.P.D. ¶ 643. Thus, the synopsis requirement was intended to eliminate the very problem that occurred in this case. If the Department had complied with the requirement and caused a CBD notice to be published at least 30 days before the award to Cardkey, it is evident that Scott Fischman would have had an opportunity to demonstrate its ability to meet the Department's needs, since Scott Fischman filed its protest within 9 days after the notice was published. If the protester had been successful in demonstrating its ability, it would have been incumbent on the Department to conduct a competition.

An exception to the notice requirements does exist where the agency's need for the items is of such an unusual and compelling urgency that the government would be seriously injured if the time periods for publishing a notice and delaying an award were complied with. 15 U.S.C. § 637(e)(1); FPR Temp. Reg. 75, § 1-1003-2(a)(1)(ii). While the security office, in recommending award to Cardkey, stated there was some urgency to the procurement, the record contains no finding that the Department's needs were of such an unusual and compelling urgency that complying with the notice requirements would have seriously injured the Department. In this respect, we note that the security office's recommendation was dated September 30, 1984, which was more than 3 months before the actual award. Thus, it appears that ample time existed to have the CBD notice published 30 days in advance of the award and to conduct an expedited competitive procurement if an alternative source responded and demonstrated it was capable of timely meeting

the agency's needs. See Andee Boiler & Welding Co., B-212557, June 11, 1984, 84-1 C.P.D. ¶ 611. Further, the Department has advised us that the system still had not been installed 5 months after the award.

Under these circumstances, we believe the Department's failure to comply with the statutory requirement that the agency forbear negotiating a sole-source contract until 30 days after the publication of a CBD notice was improper and prejudiced the protester since it prevented the protester from competing. See Houston Fearless 76, B-209576, Apr. 15, 1983, 83-1 C.P.D. ¶ 412.

#### Conclusion

We sustain the protest. Since the equipment has been delivered, however, we do not recommend any corrective action in this case. Nevertheless, by separate letter we are recommending to the Department of State that appropriate action be taken to assure that the requirements for publicizing procurement actions are followed in future cases.

*Harry R. Van Cleve*  
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