



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of:      Electrographic Corp.--Request for Reconsideration  
File:            B-225517.3  
Date:            September 11, 1987

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### DIGEST

Administrative Office of the United States Courts' award of a contract to a nonresponsive bidder violated 41 U.S.C. § 5. Since the award did not comply with that statute, a protester is entitled to the costs of filing and pursuing its protest, inasmuch as most of the improperly awarded contract has been performed.

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### DECISION

The Administrative Office of the United States Courts (Administrative Office) requests reconsideration of our decision in Electrographic Corp.--Request for Reconsideration, B-225517.2, June 8, 1987, 87-1 C.P.D. ¶ 578. The Administrative Office questions only the portion of that decision which awarded the protester its costs of filing and pursuing the protest. We affirm our decision.

Our decision in Electrographic affirmed our decision in Record Press, Inc., B-225517, Mar. 20, 1987, 87-1 C.P.D. ¶ 321, sustaining the protest of Record Press, Inc., against a contract awarded by the Administrative Office to Electrographic Corporation. In Record Press, we concluded that Electrographic had submitted a bid that was nonresponsive to the solicitation and recommended that the Administrative Office terminate the contract with Electrographic and reaward to Record Press.

In the Electrographic decision, we affirmed the Record Press decision and granted Record Press' request for award of its protest costs. Since the Administrative Office withheld implementation of our earlier recommendation to terminate the contract, pending the outcome of Electrographic's request for reconsideration, Record Press lost more than 6 months of the 1 year contract which had been improperly awarded. Consequently, we concluded that Record Press was

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entitled under our Bid Protest Regulations, 4 C.F.R. § 21.6(d) and (e) (1987), to the reasonable costs of filing and pursuing its protest. See Pacific Sky Supply, Inc., B-225513, Mar. 30, 1987, 87-1 C.P.D. ¶ 358.

In its request for reconsideration, the Administrative Office questions our authority to award protest costs in this case.<sup>1/</sup> The Administrative Office notes that our authority to award such costs is granted by 31 U.S.C. § 3554 (Supp. III 1985) which states:

"(c)(1) If the Comptroller General determines that . . . the award of a contract does not comply with statute or regulation, [he] may declare an appropriate interested party to be entitled to the cost of--

(A) filing and pursuing the protest, including reasonable attorneys' fees . . . ." (Emphasis added.)

The Administrative Office states that since it is an arm of the judicial branch, it is not bound by the procurement statutes applicable to the executive branch. Further, it maintains that it "is not subject to the Federal Acquisition Regulations . . . and the Administrative Office does not have its own procurement regulations." Finally, it states that since its procurement authority flows from section 3709 of the Revised Statutes, as amended, codified at 41 U.S.C. § 5 (1982), it could not violate any statute or regulation in its award to a nonresponsive bidder. The Administrative Office explains that 41 U.S.C. § 5 does not regulate the procurement process, as does the Competition in Contracting Act of 1984 (CICA), but merely sets out the general policy that favors competition in the acquisition process.

Prior to enactment of the Federal Property and Administrative Services Act of 1949 (Property Act), 41 U.S.C. § 5 was the basic procurement authority for federal civilian agencies. Congress' enactment of the Property Act established detailed procurement requirements for civilian agencies in the executive branch; however, 41 U.S.C. § 5 remained applicable to procurements by judicial branch agencies. See CSA Reporting Corp., 54 Comp. Gen. 645 (1975), 75-1 C.P.D. ¶ 70.

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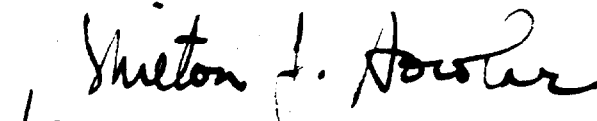
<sup>1/</sup> The Administrative Office does not question our determination that Electrographic's bid was nonresponsive and has followed our recommendation to terminate the contract.

In CSA Reporting, we considered a United States Tax Court procurement which was advertised pursuant to 41 U.S.C. § 5. We concluded that, since that statute contemplates free and open competition with the opportunity for all qualified persons to compete, solicitations issued pursuant to that authority must be such as to allow competition between offerors on an equal basis. Id.

In an earlier decision, B-163775, May 6, 1968, we specifically found that an agency could not accept a nonresponsive bid where the procurement was conducted under 41 U.S.C. § 5. There, we stated:

"The fact that the advertisement here involved was issued in accordance with the advertising requirements of 41 U.S.C. § 5 . . . could not be considered as authorizing or justifying the acceptance of a bid not complying in substance with the advertised terms and conditions of the proposed contract. In that connection . . . Section 3709, Revised Statutes, requires all contracts with the United States to be advertised and let to the lowest responsive bidder; and . . . to permit public officers to accept bids not complying in substance with the advertised specifications or to permit bidders to vary their proposals after the bids are opened would be contrary to the fundamental rules governing the award of public contracts on a competitive basis."

Accordingly, the Administrative Office's award of a contract to a nonresponsive bidder did not comply with the statutory requirements imposed by 41 U.S.C. § 5. Therefore, we affirm our earlier decision which awarded the protester its costs of filing and pursuing the protest, including reasonable attorney's fees.

  
for Comptroller General  
of the United States