

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of AGS GENASYS CORPORATION	)	
	)	Docket No. MSBCA 1326
Under DHR Procurement No.	)	
OIM/OIM 11/87-028	)	

August 19, 1987

**Noncompetitive Procurement** - An agency may not award a sole source contract based on a noncompetitive procurement unless it finds that a critical condition, public exigency, or emergency makes the contractor alone uniquely qualified as the single available source to meet an urgent or critical delivery schedule.

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**OPINION BY MR. KETCHEN**

This is an appeal of a Department of Human Resources' (DHR) procurement officer's final decision denying Appellant's protest that DHR improperly awarded a contract without competition contrary to Maryland procurement law.

**Findings of Fact**

1. On January 23, 1987, DHR awarded a contract without competition (sole source contract) in the amount of \$28,050.00 to Systemhouse, inc. to provide computer programming, technical, and project management support services to complete implementation of DHR's Asset Collection Project.
2. DHR's Office of Information Management (OIM) provides necessary data processing services to support the Asset Collection Project administered by DHR's Child Support Enforcement Administration (CSEA).
3. DHR announced award of the captioned contract to Systemhouse on February 27, 1987. The contract's term was from January 23, 1987 to March 23, 1987 and it has been fully performed. This contract constituted Phase 2 of DHR's effort to acquire automated data processing services to implement the Asset Collection Project. The purpose of the instant Phase 2 contract was to update and replace parts of the computer file that had been created under an earlier contract.
4. The Asset Collection Project is a statewide program by which CSEA obtains information about the assets of parents who have left the family structure and who have past due child support obligations. The basic premise of the Asset Collection Project is its priority scheme. Under the Asset Collection Project, CSEA identifies individuals who are working or who have assets and have failed to make their child support payments.

There is a huge volume of cases where child support payments are in arrears. In order to manage asset collection, DHR has developed a priority system that computer programmers must understand regarding which absent parent obligors are the best candidates

for successful asset collection. Factors which contribute to the assignment of priority include the type of asset, the size of support and benefit payment, and the status of the absent parent. The Asset Collection Project's computer runs assign status or priority on the basis of information obtained about these factors. The information obtained about the absent parent obligors in this manner is then furnished to local governmental entities to assist them in their child support collection efforts.

5. Prior to award of the disputed sole source contract to Systemhouse, it had performed a related contract under Phase 1 of DHR's Asset Collection Project based on Task Order No. 87-3 in the amount of \$26,562. This task order was issued to Systemhouse on September 17, 1986 under DHR Contract No. OIM/OIM 09/85-010. This contract was an indefinite services agreement under which both Appellant and Systemhouse performed automated data processing services and computer system consulting services on an as needed basis pursuant to task orders issued by DHR for performance of work.

6. The Phase 1 automated data processing services sought by DHR pursuant to Task Order No. 87-3 were needed as the first step taken by CSEA pursuant to Maryland statute<sup>1</sup> to obtain a wage lien in every child support case in which there is a 30-day arrearage in child support payments.

7. Under Task Order No. 87-3, i.e., under Phase 1, Systemhouse developed and tested fifteen data processing programs with the objective of matching a list of child support obligors, whose Federal and State tax returns had been intercepted for payment of child support arrearages, with a Department of Employment and Training wage record file. By this exercise DHR created a list of wage earners from whom it would be advantageous to obtain wage liens.

8. Systemhouse completed performance of the requisite programming services under Phase 1 of the Asset Collection Project pursuant to Task Order No. 87-3 on November 28, 1986.

9. DHR characterizes the captioned sole source contract as Phase 2 of implementation of the Asset Collection Project. The purpose of the Phase 2 contract was to provide feedback regarding use of the computer files created under Phase 1 of the Asset Collection Project. Thus, under the Phase 2 contract Systemhouse updated the computer file developed in Phase 1 to indicate the absent parent obligors against whom liens were actually obtained or to indicate the current status of those cases.

10. DHR's justification for entering a contract with Systemhouse without competition was as follows:

**D. JUSTIFICATION:**

The Child Support Division (CSD) has a documented need for timely assistance in relieving whatever paper load automation can. These programs will provide the remainder of a CSD designed system. Systemhouse is currently finishing the implementation of the first phase of ADP in Baltimore. Since Systemhouse has the trained staff available for this task, it seems in the best interests of the State and the Child Support Division to contract [with] them to finish the system. This would allow the implementation integrity that would not be available otherwise."

**F. JUSTIFICATION OF IDENTIFIED RESOURCES:**

The Systemhouse (SHL) staff has demonstrated experience in performing the required duties proficiently. The SHL staff indicated performed the Phase 1 implementation of the ADP (Task Order 87-3). DHR Staff is not available nor is it projected to be in the near future.

Agency Report, Ex. 2.

11. DHR thus determined that during Phase 1 of the Asset Collection Project, Systemhouse's staff gained familiarity with DHR's staff and knowledge about the Asset Collection Project and its asset collection priority scheme.

<sup>1</sup>See: Md. Annotated Code, Family Law Article, §10-120 et. seq.

12. DHR's basis for awarding Systemhouse the captioned sole source contract for Phase 2 of the DHR Asset Collection Project further considered that the Systemhouse staff that had worked on Phase 1 was available for Phase 2 and thus could guarantee delivery and implementation in a timely manner. According to DHR, any other contractor's computer programming staff would have required a period of time to learn the policy and procedures related to implementation and operation of the Asset Collection Project and to become acquainted with CSEA's personnel involved in automated data processing for the Asset Collection Project. DHR determined that this would have delayed implementation of Phase 2 and generally states that this would have resulted in additional expense.

13. DHR did not quantify the nature of the additional savings alluded to nor compare the described additional expense to savings in contract price that might be realized from competition. In addition, DHR made no determination that an emergency existed or that there was a need to cope with a public exigency condition. The record does not indicate that DHR considered or determined that award by competitive procurement methods would have jeopardized an essential program service date. Further, other than general statements concerning the necessity to reduce its paper load through automated data processing, DHR did not make an objective determination that familiarizing a contractor other than Systemhouse with Phase 1 of the Asset Collection Project in order to assure adequate Phase 2 performance would have caused DHR to fail to meet an urgently needed requirement by some critical date. In short, DHR's justification for this sole source procurement was based on the fact that Systemhouse performed Phase 1, Systemhouse acquired knowledge and experience that would be valuable in performing the Phase 2 contract, and DHR did not want to have to bring another contractor "up to speed" with respect to the specifications for the computerized system regarding the Asset Collection Project. Southall Deposition, pp. 42-43. Appellant, however, had the capability and expertise to perform the work in DHR's view, although DHR believed it would have taken Appellant some unspecified amount of time longer than Systemhouse to perform Phase 2. Southall Deposition, p. 44.

14. Appellant's computer programming personnel through their performance of work on other contracts involving CSEA's administration of its substantive programs are familiar with the Asset Collection Project and the CSEA staff responsible for implementation and operation of the Asset Collection Project through use of data processing services.

15. By letter dated February 5, 1987 to DHR, Appellant protested award of the captioned contract to Systemhouse on a noncompetitive basis.

16. In a final decision issued on March 12, 1987, a DHR procurement officer denied Appellant's protest in part on the ground that Systemhouse had unique knowledge gained on the Phase 1 contract implementing DHR's Asset Collection Project.

17. Appellant filed a timely appeal on March 19, 1987.<sup>2</sup>

#### Decision

Maryland procurement law applicable to this procurement at the time of contract award<sup>3</sup> provides, in pertinent part, as follows:

§ 13-201. Methods of awarding contracts.

(b) Preferred methods.—(1) Except as provided in paragraph (2) and (3) of this subsection, in selecting one of the methods authorized by subsection (a) for the awarding of contracts, it is the public policy of this State that competitive sealed bidding shall be the preferred method for awarding contracts.

<sup>2</sup>The parties waived their right to an evidentiary hearing and submitted the dispute for resolution on the written record.

<sup>3</sup>Compare: Md. Ann. Code, State Finance and Procurement Art., §11-109, et. seq. (1986, ch. 840, §1; effective July 1, 1987).

**§13-202. Competitive sealed bidding.**

**(a) Contracts requiring competitive sealed bidding.** — Contracts over the amount provided by §13-208 shall be awarded by competitive sealed bidding unless the procurement officer, with the approval of the agency head, determines that:

- (1) Specifications cannot be prepared that permit an award on the basis of either the lowest bid price or the lowest evaluated bid price; or
- (2) The price of any service or supply required in the specifications is regulated by the Public Service Commission pursuant to Article 78; or
- (3) There is only one available source; or
- (4) There is an unanticipated emergency which leaves insufficient time to use this method; or
- (5) There is some other reason in the public interest to use one of the other authorized methods which is so compelling as to override the general public policy in favor of competitive sealed bids.

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**§ 13-205. Noncompetitive negotiation.**

**(a) Single available source.**—If it is determined in accordance with the provisions of § 13-202 of this article that competitive sealed bidding cannot be used in awarding a contract because there is only one available source for the subject of the contract, the procurement officer may, with the approval of the agency head, award a State procurement contract by noncompetitive negotiation.

**(b) Insufficient time.**—If it is determined in accordance with the provisions of § 13-202 of this article that competitive sealed bidding cannot be used in awarding a contract because an unanticipated emergency leaves insufficient time to use this method, the procurement officer may, with the approval of the agency head or his designee, award a State procurement contract by noncompetitive negotiation. The using agency shall subsequently submit to the Board a report in writing justifying the need for this emergency procurement.

Md. Ann. Code, State Finance and Procurement Art., Title 13.

COMAR 21.05.05.02, "Conditions for Use of Sole Source Procurement," provides as follows:

A. Sole source procurement is not permissible unless a requirement is available from only a single vendor. The following are some examples of circumstances which could necessitate sole source procurement:

- (1) When only one source exists which meets the requirements;
- (2) When the compatibility of equipment, accessories, or replacement parts is the paramount consideration;
- (3) When a sole vendor's item is needed for trial use or testing;
- (4) When a sole vendor's item is to be procured for resale;
- (5) When certain public utility services are to be procured and only one source exists.

B. The determination as to whether a procurement shall be made as a sole source shall be made by the procurement officer, with the approval of the agency head or designee. This determination and the basis for it shall be in writing. The procurement officer may specify the application of the determination and the duration of its effectiveness. In cases of reasonable doubt, competition should be

solicited. Any request by a using agency that a procurement be restricted to one vendor shall be accompanied by an acceptable explanation as to why no other shall be suitable or acceptable to meet the need.

DHR maintains as follows:

Any other vendor would have required a learning period to familiarize its programming staff with the policy and procedures related to the operations of the ACP. They would also have had to gain familiarity with the system user staff in CSEA. This period of familiarization would have delayed implementation and would, in OIM's view have been more expensive. The award to Systemhouse was therefore appropriate.

Agency Report, p. 3.

It goes without saying that even Appellant as a competent and experienced contractor in the database management field would require some period of time to reach the same knowledge and performance level regarding DHR's computerized database management system that Systemhouse as the incumbent contractor had reached because of its advantage of having performed Phase 1 of DHR's Asset Collection Project. In this regard, DHR points out that the purpose of this procurement was to update and replace parts of the computer file that had been created by Systemhouse under the Phase 1 contract. DHR thus concluded that Systemhouse because of its experience and knowledge, gained during the Phase 1 contract in creating the computer file, could meet DHR's need to review and update the computer file as well as correct basic design weaknesses in the computer program more expeditiously and efficiently than any other contractor. DHR further bases its justification for the noncompetitive procurement on Systemhouse's personal contacts under the Phase 1 contract with Annapolis Data Center personnel who wrote the specifications for the Asset Collection Project.

Accordingly, DHR determined that performance by Appellant, and we assume by any other contractor, on the Phase 2 contract would have required a "learning curve" effort to obtain a level of knowledge and experience about the Asset Collection Project and the Project's computer file specifications equivalent to Systemhouse's knowledge and capabilities gained during Phase 1 performance of the Project. DHR thus justified the sole source procurement on the basis that Appellant or another contractor would have taken longer to perform than Systemhouse and that selection of a contractor other than Systemhouse would have required additional expense.

Appellant, on the other hand, maintains that award of the data processing and programming support services for CSEA's Asset Collection Project on a noncompetitive basis was improper and contrary to Maryland procurement law. It contends that it had experience and familiarity with CSEA's Asset Collection Project and that award based on a finding that other contractors could not compete because the "learning curve" period would delay timely performance does not justify the sole source award. We agree.

The intent of Maryland's procurement law is to foster as much competition as possible. Ancillary goals include as well avoiding appearances of favoritism and unethical conduct. Md. Ann. Code, State Finance and Procurement Article, §11-201. In this regard, noncompetitive procurement is justified only where it is established that there is a critical need on a public exigency or emergency basis, not where it is merely impractical and inconvenient to engage in a competitive procurement. Furthermore, a desire for performance earlier than a competitive type procurement would allow, in and of itself, is an insufficient basis to support a sole source procurement. See: Md. Ann. Code, State Finance and Procurement Article, §§13-202; 13-205. Time of performance to justify a sole source procurement must be tied to a critical or urgent need, public exigency, or emergency. See: Md. Ann. Code, State Finance and Procurement Article, §§13-201, 13-202, 13-205; Data Transformation Corp., Comp. Gen. Dec. B-220581, January 16, 1986, 86-1 CPD ¶55. Compare: Pacific Sky Supply, Inc., Comp. Gen. Dec. B-225420, February 24, 1987, 87-1 CPD ¶206 with World-Wide Security Service, Inc.; Philips Electronic Instruments, Inc., Comp. Gen. Dec. B-224277, B-224277.2, January 8, 1987, 87-1 CPD ¶35. Accordingly, given Maryland's statutory premise that agencies are required to engage in competitive procurements to the maximum extent possible, we will uphold an agency's determination to engage in a noncompetitive procurement to meet its minimum needs only if one known source is available based on unique knowledge or qualifications to perform within the time frame necessary to meet a critical State need,

public exigency, or emergency. See: WSI Corp., Comp. Gen. Dec. B-220025, December 4, 1985, 85-2 CPD ¶626; Precision Dynamics Corp., Comp. Gen. Dec. B-183501, June 30, 1985, 75-1 CPD ¶402 (1975).

The decision of the procurement officials here had as a practical basis their implementation of the Asset Collection Project to resolve the large backlog of child support arrearage cases. Systemhouse as the incumbent contractor on Phase 1 of the project could perform in a more timely fashion than Appellant since Appellant if a successful contractor would have required some break in time. This does not meet the standard for noncompetitive procurement, although we recognize that the Asset Collection Project is an important one like many other State programs which demand provision of State services as promptly as possible.

Here, the record does not establish that the circumstances described reasonably supported a noncompetitive procurement. An emergency circumstance was not shown.<sup>4</sup> The record does not otherwise demonstrate that immediate performance was required to meet a critical condition or a public exigency thereby making Systemhouse alone uniquely qualified and thus the single source available to meet an urgent delivery schedule. Since the statutory authority for noncompetitive procurement is reserved for circumstances more circumscribed than the record demonstrates existed here, the procurement did not meet the requirements of Maryland procurement law for a noncompetitive procurement.

For the foregoing reasons, therefore, the protest is sustained.

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<sup>4</sup>COMAR 21.01.02.28 states that "emergency means a sudden and unexpected occurrence or condition which agency management reasonably could not foresee, posing an actual and immediate threat to the continuance of essential normal operation of a State agency or need to cope with a public exigency condition."