

Protest of )  
DATAVIEW ELECTRONIC SYSTEMS, INC. ) Date: March 29, 1990  
Solicitation No. 104230-90-A-0008 ) P.S. Protest No. 90-9

### DECISION

DataView Electronic Systems, Inc. ("DataView") timely protests the terms of Solicitation No. 104230-90-A-0008, issued by the Office of Procurement, Postal Service Headquarters, on November 20, 1989, for production of 1,750 Delivery Bar Code Sorters ("DBCS"). DataView alleges patent and copyright infringement with respect to the label printer component of the DBCS.

The solicitation is a follow-on to a Modification and Test Agreement ("MTA"), issued on February 23, 1988. The specification package for the MTA contained general requirements for a Stacker Identification Display and Label Printer, but did not contain any drawings or technical data.<sup>1/</sup> Four awards were made under the MTA solicitation in

<sup>1/</sup>These specifications were as follows:

#### 15.\* Stacker Identification Display and Label Printer

Each stacker, in one module only for the test machine, shall be provided with an alpha/numeric display consisting of a minimum of two rows of 16 characters 0.3 inches in height (minimum). The display shall be located where it is easily seen by the sweeper, and shall be visible under any lighting condition. The display will be used to identify the destinating facility for the mail pieces being sorted to that stacker (i.e., DIS CINCINNATI OH 450).

A label printer shall be provided with the test machine to print container labels on demand. Each stacker in the test module shall contain a push button switch, which when pushed will cause a label to be printed. The information to be printed shall be like that displayed on the sample labels provided in attachment F. For example, the display would be -  
(examples omitted)

High reliability and good maintainability are a primary requirement for both the printer and the displays. The stacker display and printer shall be under computer control, and the information displayed and printed shall change automatically with each sort scheme change.

This specification differed very little from the first draft, written on July 13, 1987. The first draft required the stacker to have a display consisting of two rows of 10 characters, instead of 16 and no examples

August and September, 1988. Testing under the MTA was conducted between October 10 and December 15, 1989, at the General Mail Facility in St. Paul, MN. Only offerors whose equipment was successfully tested during the MTA will be considered for award under the current solicitation. DataView was neither an offeror nor an awardee under the MTA.

In its protest, DataView alleges that it is the inventor of the "On Demand Label Generation System" and that the Postal Service used its exclusive technology for a similar component of the DBCS throughout the solicitation process without DataView's knowledge or consent. In support of its contention, it voluminously documents all contacts between it and the Postal Service from July 21, 1987, to July 6, 1989, involving numerous postal facilities from Boston, MA to Long Beach, CA. These contacts ranged from presentations of its technology to interested postal personnel to actual purchases of DataView's equipment, including installation at Washington, D.C. and Chicago.

DataView strongly urges that its proprietary machine is far superior to any other alternative on the market, and that the current solicitation infringes its patents and copyrights by describing a device similar to its protected label generation system. DataView requests the Postal Service negotiate to license its system as part of the present solicitation, or compare its technology with those of offerors on this solicitation to determine which system would be in the best interests of the Postal Service.<sup>1/</sup>

The contracting officer's statement refutes DataView's allegations. The contracting officer states that the specification for the stacker identification display and label printer was based on the specification in the MTA, which was itself based on an original draft, written by the program manager on July 13, 1987. The contracting officer concludes that since the original draft was written prior to DataView's first contact with the Postal Service, it can be neither an infringement on DataView's copyrights, nor an unauthorized disclosure of proprietary information. Furthermore, the contracting officer states that the language is written in such broad terms, it cannot be construed as an infringement.<sup>1/</sup> He goes on to note that neither of the program managers who have handled the procurement had any knowledge of DataView or its equipment during the procurement process. Finally, the contracting officer questions the uniqueness of DataView's technology, stating that of the four competitors in the MTA, two have stated that the technology is available from several different vendors and has been used in the aerospace industry for many years.

were given. Other than a few other minor changes, the specifications are identical.

<sup>2/</sup>DataView also complains that, although on July 6, 1989, it asked to be on the mailing list to receive all solicitations requiring technology related to its product, it did not receive a copy of this solicitation. DataView's request to be on the mailing list for solicitations requiring technology related to its products postdates the issuance of the MTA. In addition, since DataView has failed to prove that its failure to receive solicitations or be placed on the mailing list was the result of actions taken to deliberately exclude it from competition, this issue is an insufficient basis for a protest. See Shuford Mills, Inc., P.S. Protest No. 83-49, November 8, 1983.

<sup>3/</sup>The language in the specification is essentially the same as that in the original draft and the MTA.

Martin Marietta Information and Communications Systems, an interested party, commented on the protest, stating that it is not aware of any contact with DataView and is unfamiliar with its product and design concepts. It claims that display, print and data distribution technology is available from many sources.

Electrocom Automation, Inc., also submitted comments on the protest, stating that as a subcontractor for the development of certain portions of a test machine involved in the MTA, it was able to locate numerous sources for both the pocket displays and the printer. It states that during the time it produced the test machine hardware it had no knowledge of DataView. It claims that it first became aware of DataView in March, 1989 when it received an information package from it.

DataView submitted comments on the contracting officer's report, stating that had it known about the MTA, it would have submitted a proposal. It asserts that the Memphis Division had been shown earlier prototypes of DataView's equipment by a third party as early as 1986. It also finds it unlikely that the program manager for such an important project as the DBCS would have been unaware of DataView's technology. DataView notes that in February, 1989, it installed equipment in Washington, DC that utilized a two line by sixteen character display and concludes that the success of this equipment prompted the Postal Service to amend the original specification to include a similar character display in the current solicitation.<sup>4/</sup>

DataView does not dispute the contracting officer's contention that display and print technology exists, but claims that its product uniquely combines display, print, and data distribution technology in a way not presently available from other vendors. DataView contends that the system specified in the solicitation is not sufficient to meet the Postal Service's needs. It claims that it should be the sole supplier of the multiple display and label printing component of the DBCS.

## Discussion

An initial question is whether DataView has standing to challenge the terms of the solicitation. The Procurement Manual ("PM") defines a protest as "a written objection by any interested party concerning the terms of a solicitation . . . ." PM 4.5.2 a. The test for an interested party is whether the protester would be eligible for award of the contract if the protest were upheld. York International Corporation, P.S. Protest No. 89-77, January 19, 1990; Electrocraft Industries, Inc., P.S. Protest No. 83-42, September 1, 1983. The solicitation states that only offerors whose equipment was tested under the MTA are eligible for award. Since DataView is not an offeror whose equipment was tested, it is clearly not eligible for award. DataView's contention that it would have been an offeror, had it known about the MTA, is unavailing, since the solicitation for the MTA was publicly posted and synopsised in the Commerce Business Daily.<sup>5/</sup> In certain

<sup>4/</sup>DataView does not explain how its machine, installed in February, 1989, had any influence on the decision to change the specification in the MTA, issued in February, 1988.

<sup>5/</sup>Indeed, since DataView was on constructive notice of the issuance of the MTA solicitation because of the public synopsis, its arguments should have been raised before the closing date for receipt of proposals for the MTA, because that was the point at which it would have been apparent that the Postal

limited circumstances, a potential supplier may be an interested party "where no other immediate party has a greater interest concerning the issue raised, and where there is a possibility that recognizable interests would be inadequately protected were access to our protest forum limited to potential awardees." York International Corporation, supra; Falcon Systems, Inc., et. al, P.S. Protest Nos. 86-31, 86-33, and 86-35, July 25, 1986. In such circumstances, we must give consideration to the nature of the issues raised and the direct or indirect benefit or relief sought by the protester. Id.; Damper Design, Comp. Gen. Dec. B-190785, January 12, 1978, 78-1 CPD & 31. "We must examine the degree to which the interest is both established and direct." York, supra; Climatological Consulting Corp., Comp. Gen. Dec. B-197906, August 4, 1980, 80-2 CPD & 81. Here, DataView is not even a subcontractor to a potential awardee and, thus, its interest is neither established nor direct. Accordingly, we cannot reach the merits of DataView's protest.

Even should DataView establish that it falls within the above narrow exception, its primary complaint is that the Postal Service infringed on its exclusive technology. Our bid protest function does not include jurisdiction over patent infringement issues. Facet Transportation, P.S. Protest No. 86-75, October 7, 1986; Tulsa Diamond Manufacturing Corporation, et. al., P.S. Protest Nos. 85-18, 85-20, and 85-23, June 20, 1985. Furthermore, under 28 U.S.C. ' 1498, "the remedy of an owner of a United States patent for the unlicensed manufacture or use by or for the United States is an action in the United States Claims Court for recovery of the reasonable and entire compensation due for such manufacture or use." Facet Transportation, supra. This federal law has been adopted by and made applicable to the Postal Service. See PM 9.2.2 a.1. Thus, there exists a forum outside of the bid protest arena where DataView's interests would be adequately protected.

This protest is dismissed.

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Service was allegedly infringing its proprietary rights. Therefore, a separate and distinct justification for dismissing its protest is that it was untimely filed, pursuant to Procurement Manual ("PM") 4.5.4 b. See, e.g., Coopers & Lybrand, P.S. Protest No. 89-91, March 21, 1990; USA 800, Inc., P.S. Protest No. 89-90, February 15, 1990.