

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

ERVIN AND ASSOCIATES,  
INCORPORATED, ET AL.,

Plaintiffs,

v.

HELEN DUNLAP, ET AL.,

Defendants.

Civil Action No. 96-1253 (WBB)

**FILED**

OCT - 2 1999

NANCY WATSON WHITTINGTON, CLERK  
U.S. DISTRICT COURT

**PLAINTIFFS' SUPPLEMENTAL STATEMENT  
OF UNCONTESTED MATERIAL FACTS**

Pursuant to Local Rule 108(h), Plaintiffs Ervin and Associates, Incorporated, et al. ("Ervin") submitted a Statement of Uncontested Material Facts in support of its Motion for Partial Summary Judgment on Counts I, II, and VI of the Second Amended Complaint. In its opposition, the Federal Defendants have attempted to escape liability for Ervin's First Amendment Claims by rationalizing that the Government would have terminated Ervin's AFS contract for default absent Ervin's protected speech. As such, the Federal Defendants have raised certain issues in their opposition that must be addressed with Supplemental Uncontested Material Facts, as follows:

**I. ERVIN WAS AWARDED THE AFS CONTRACT BECAUSE IT HAD THE LOWEST PRICE OF THE FOUR TECHNICALLY ACCEPTABLE AND EQUALLY CAPABLE OFFERORS**

212. Section M of HUD's Request for Proposals for the Annual Financial Statement Review procurement (the "AFS Procurement") set forth the factors for award. See Exhibit 75.

213. Section M-2 of the AFS Procurement Request for Proposals, Relative Importance of Technical Versus Cost/Price Factors, subsections (b) and (c), set forth the methodology by which HUD would award a contract in the event that two or more offers were determined to be technically equivalent:

M-2 (b) The Government may award a contract to other than the lowest priced offer. In the event that two or more offers are considered technically equivalent, the evaluated cost or price will be of primary importance in determining the proposal most advantageous to the Government. (emphasis added)

M-2 (c)<sup>1</sup> The Offeror's Cost Proposal, while secondary, will be considered in addition to the [technical] factors stated above to determine the proposal or proposals most advantageous to the Government. Cost will be the deciding factor when proposals ranked under the above factors are considered acceptable, fall within the competitive range, and are substantially equal. (emphasis added)

See Exhibit 75.

214. Upon completion of the Source Selection Process for the AFS Procurement, HUD's Office of Procurement and Contracts prepared a memorandum entitled "Summary of Negotiations" in which the Contract Specialist, Theresa Oliver, presented her recommendation to the Contracting Officer, Lucille Scruggs. Oliver signed the recommendation on February 4, 1994, and Scruggs approved the recommendation on February 4, 1994. See Exhibit 76.

215. HUD's Review of the Initial Best and Final Offers for the AFS Procurement resulted in Ervin's proposal being awarded the highest technical score by the Source Evaluation Board. Despite the seemingly large difference in technical scores (Ervin's proposal received a

102.1, Coopers received a 101.1, Kenneth Leventhal received an 89.8, and Fields received an 82.8). the Source Evaluation Board determined that "all the firms could do the job and were technically equal." As such, and as was required by Section M-2 of the AFS Procurement Request for Proposals, "cost would be the deciding factor." See Exhibit 76, p. 4 and Exhibit 75.

216. A review of the costs proposed in the Initial Best and Final Offers revealed that Kenneth Leventhal had the lowest evaluated price (for the five year potential contract term, Kenneth Leventhal bid \$30.1 million, Ervin bid \$37.1 million, Fields bid \$51.1 million, and Coopers bid \$52.0 million). Therefore, a recommendation was made to award a contract to Kenneth Leventhal, who was notified of their selection and put on standby for contract signing. See Exhibit 76, p. 4.

217. Due to budget constraints, subsequent to the Initial Best and Final Round, HUD decided to adjust the Statement of Work so that professional reviews would only be performed on 30% of the financial statements instead of the 100% originally required. In addition, other tasks were either reduced and/or eliminated from the Statement of Work. Due to these changes, an award was not made to Kenneth Leventhal, and HUD instead determined that all offerors in the competitive range should be permitted to submit Revised Best and Final Offers. See Exhibit 76, p. 5.

218. HUD's Review of the Revised Best and Final Offers for the AFS Procurement once again resulted in Ervin's proposal being awarded the highest technical score (Ervin's proposal received a 109.0, Coopers received a 102.4, Kenneth Leventhal received a 92.1, and Fields received an 83.0). Once again, despite the seemingly large difference in technical scores,

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<sup>1</sup> The RFP, in what appears to be a typographical error, included two of section M-2 (c) and two of section M-2 (d). The referenced quotation is from the second section M-2 (c), located on page M-4 of the RFP.

the Source Evaluation Board determined that "all of the firms were technically capable of satisfying the requirement and that they were technically equal." See Exhibit 76, pgs. 5-6.

219. HUD's review of the Revised Best and Final Offers for the AFS Procurement also determined that Ervin had the lowest evaluated price (for the five year potential contract term, Ervin bid \$12.3 million, Kenneth Leventhal bid \$14.5 million, Coopers bid \$25.8 million and Fields bid \$34.1 million). See Exhibit 76, p. 6.

220. Section B.2. of the Summary of Negotiations Memorandum, entitled "Selection" reflects that a decision was made to award a contract to Ervin based on Ervin's price:

A review of the cost submissions revealed that Ervin and Associates submitted the lowest evaluated price. Therefore, a recommendation made (sic) to award a contract to Ervin and Associates.

See Exhibit 76, p. 6.

## **II. HUD'S OFFICE OF PROCUREMENT AND CONTRACTS REJECTED THE SOURCE EVALUATION BOARD'S DETERMINATION THAT ERVIN WOULD PROVIDE EXTRA SERVICES TO HUD**

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221. Attached as Tab 15 to the Summary of Negotiations memorandum was a memorandum from Nicolas Retsinas, Assistant Secretary for Housing-Federal Housing Commissioner and Source Selection Official for the AFS Procurement, to Roosevelt Jones, Director of HUD's Office of Procurement and Contracts, recommending that HUD's OPC initiate negotiations with Ervin and Associates (and its bidding partner, Reznick, Fedder and Silverman) for contract award. Attached to the recommendation memorandum was a copy of the Final Source Evaluation Board Report. See Federal Defendants Exhibit 74.

222. The FAR, § 1.601(a), requires that "Contracts may be entered into and signed on behalf of the Government only by contracting officers." See Exhibit 77.

223. The FAR, § 1.602-1(b), requires that "No contract shall be entered into unless the contracting officer ensures that all requirements of law, executive orders, regulations, and all

other applicable procedures, including clearances and approvals, have been met.” See Exhibit 77.

224. Neither Nic Retsinas, nor any member of the Source Evaluation Board, was a Contracting Officer at HUD. As such, the recommendations of the Source Selection Official and the Source Evaluation Board to award a contract to Ervin required contracting officer review and approval. See Exhibit 77

225. The Final Source Evaluation Board Report states that the Source Evaluation Board determined that Ervin’s Revised Best and Final proposal “was far superior in their formal response to the revised statement of work.” The SEB report identified two specific aspects of Ervin’s proposal which led to this determination: 1) Ervin’s proposal stated that Ervin “will be in a position to provide the HUD field offices with a comprehensive computerized review and draft findings letter on all 16,000 financial statements at no additional cost to HUD”; and 2) Ervin “stated that they upgraded their data processing capacity which will enable them to provide better service.” See Federal Defendants Exhibit 74, pp. 6-7.

226. The Final Source Evaluation Board report recommended that an award be made to Ervin and Associates “which proposal represents not only the lowest cost of the four final competitors, but also represents the most service. Their proposal is far in excess of the revised statement of work and the proposals submitted by their competitors.” See Federal Defendants Exhibit 74, p. 7.

227. Ed Girovasi, Director of the Policy and Evaluation Division within HUD's Office of Procurement and Contracts, testified<sup>2</sup> that HUD cannot, as a matter of law, enter into a contract or task order to receive more services than was solicited in the RFP:

What can't change is you can't buy more in the contract than you solicited. [The Statement of Work] can become narrower, it can't get wider than the solicitation.

See Deposition Transcript of Ed Girovasi, attached hereto as Exhibit 78, at p. 265, lines 3-5.

228. The Summary of Negotiations memorandum prepared by HUD's Office of Procurement and Contracts summarizes many of the items reflected in the Final SEB Report supporting its recommendation to award a contract to Ervin. Specifically, the memorandum refers to the Source Evaluation Board's determination that Ervin's Best and Final response to the Revised Statement of Work was considered to be superior to that of other offers:

It should be noted that while all of the technical scores increased slightly, the board was particularly impressed with Ervin and Associates' revised submission in that they expanded their capability to automate. They felt that this (sic) would result in greater assurance of quick turnaround process. (See Tab 14 for SEB report)

See Exhibit 76, p. 5.

229. The Summary of Negotiations memorandum did not, however, reflect or refer to any consideration given by the Contracting Officer to Ervin's reference to computerized reviews in its Revised Best and Final proposal. In fact, nowhere in the entire Summary of Negotiations memorandum is Ervin's statement that it would "be in a position to" provide computerized reviews on 100% of the inventory mentioned. The Source Evaluation Board's determination that HUD would be receiving "more services" from Ervin than those solicited in the RFP is also not

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<sup>2</sup> Mr. Girovasi was HUD's 30(b)(6) designee concerning "HUD's general contracting procedures, practices and policies relating to" several specific areas, including but not limited to "HUD's evaluation of the performance of contractors" and "HUD's issuance of task orders."

identified as being given any consideration by the Contracting Officer in making the determination to award a contract to Ervin. See Exhibit 76.

### **III. THE AFS CONTRACT DID NOT REQUIRE COMPUTERIZED REVIEWS**

230. Although HUD drafted the AFS contract after negotiations with Ervin, the recommended offeror, HUD did not include any requirement for or reference to computerized reviews in the AFS contract. See Federal Defendants Exhibit 3.

231. Although Ervin's December 29, 1993 Revised Best and Final Offer is identified as being incorporated by reference into the AFS contract, Girovasi has testified that incorporating a proposal by reference into a contract does not have the effect of requiring the contractor to perform every service identified in the proposal:

Mr. Travell: . . . to the extent that a proposal may contain representations regarding what a contractor will do and a contract is subsequently signed which says the proposal is incorporated by reference, does that necessarily mean that every service which the contractor promoted in the proposal is incorporated by reference in the contract?

Mr. Girovasi: No, it does not because the marketing content of the proposal is irrelevant to the contract that's been established. What's relevant, if there are named key personnel in the contract, that's a relevant issue. What's relevant is the – the specific services that the contract requires performance and then what the proposal indicates are the methods and the operational manner in which the contractor will carry out those responsibilities.

See Exhibit 78, p. 244, lns 4-20.

232. Girovasi has also testified that, if a contractor offered to provide a free good to HUD and a contract was awarded for legitimate reasons other than that free good, then an agency cannot default the contractor if it later fails to provide the free good:

Mr. Girovasi: . . . Okay. I am going to assume for the sake of this example that the record demonstrates that company A was selected for the reasons in the file, and there's no mention of this free good.

Now, downstream, you are saying, contract's awarded, it's in place. Now, this free good isn't being provided and that's -- you are saying that's now the basis for the agency saying --

Mr. Travell: Right

Mr. Girovasi: -- their contractor's failing to perform.

Mr. Travell: Right

Mr. Girovasi: -- and we need to terminate them?

Mr. Travell: Right.

Mr. Girovasi: Yeah, I don't see how that's supportable.

See Exhibit 78, p. 260, lns 3 -- 16.

**IV. HUD KNEW ERVIN WOULD NOT BE PROVIDING COMPUTERIZED REVIEWS DURING OPTION YEAR 2 PRIOR TO THE ISSUANCE OF TASK ORDER 3**

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233. Between August 25, 1995 and April 22, 1996, Lar Gnessin, the GTR on Ervin's AFS contract, attempted to modify and expand the contract to include computerized reviews and other requirements. Ervin informed Gnessin that computerized reviews were not required and refused to agree to these changes. See Exhibit 74, p. 10.

234. On February 28, 1996, John Ervin informed Gnessin that if a global resolution of all of Ervin's intellectual property concerns on the AFS contract was not reached between Ervin and HUD, then Ervin intended to follow "the letter of the [AFS] contract." This included the fact that Ervin did not intend to provide computerized reviews in the third option year of the AFS contract or provide HUD with any benefits from Ervin's proprietary systems and data. See Gnessin Deposition, attached hereto as Exhibit 79 p. 665, ln. 21 through p. 667, ln. 3 and the handwritten notes of Lar Gnessin attached hereto as Exhibit 80.

235. Prior to the Issuance of Task Order 3, Gnessin sent a draft of Task Order 3 to Ervin that would have required Ervin to “perform a computerized review of 100% of the statements received” (pg. 3), as well as certain other items not specified in the Statement of Work for the contract, including but not limited to “Financial Data to complete the 1995 Loan Loss reserve calculations for the FHA Audit.” (pg. 5) See Exhibit 81.

236. Ervin “wouldn’t sign a Task Order containing” computerized reviews. See Exhibit 82.

237. On April 22, 1996, HUD issued Task Order 3 to Ervin and it did not include any requirements not set forth in the statement of work in the contract, including but not limited to computerized reviews or providing data for Loan Loss Reserve. See Exhibit 1 and Federal Defendants Exhibit 3.

238. On April 22, 1996, a meeting was attended by Lar Gnessin, Dolores Ammons-Barnett, Helen Dunlap and others in which it was determined that HUD would not provide a task order to Ervin until Ervin agreed to sign a task order including computerized reviews and other services. By the time the meeting was concluded, however, Ervin had already picked up the signed copy of the task order from HUD that did not include computerized reviews. The GTR then sent a cc: Mail to several individuals, including the Contracting Officer, acknowledging that “The Task Order does not cover 100% computer review of the inventory”. See Exhibit 83.

#### V. INDEFINITE QUANTITY, FIXED UNIT RATE CONTRACTS

239. In 1995, George Chabot and Dolores Ammons-Barnett had drafted Task Order 2 under the AFS contract and presented the draft Task Order to Annette Hancock, the Division Director, for approval. On August 25, 1995, Hancock wrote a note to Chabot and Ammons-Barnett and explained the relative importance of the text portion of a task order vs. the CLIN line items of a Task Order issued pursuant to the AFS contract:

I do not believe Office Director's review of this T.O. [Task Order] is necessary as the rates for the applicable option periods are fixed. There is basically no negotiation taking place. Because the pricing is fixed, there really is no need for the issuance of individual Task Orders. Funding could have been just obligated under the basic contract and the GTR order in accordance with the CLINS and the applicable rates established.

See Exhibit 84.

240. Section G-1 of the AFS contract, Ordering Procedures (Indefinite Quantity/Fixed Unit Rate), specifies that "Orders may be placed in writing or by facsimile (fax) machine by the Contracting Officer or authorized ordering official (see (b) below)", and that "(b) The following individuals re (sic) authorized to issue orders under the contract: Contracting Officer." See Exhibit 85.

**VI. ERVIN'S DISCUSSIONS WITH HUD'S DEPUTY GENERAL COUNSEL,  
MONICA SUSSMAN**

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241. In September, 1995, Ervin's Corporate Counsel, Bernard Oleniacz, met with Monica Sussman, then HUD's Deputy General Counsel, in her office, and informed her of Ervin's perception of procurement problems at HUD. During the conversation, Ms. Sussman informed Mr. Oleniacz that, if he was bringing these matters to her attention in her official capacity, she would be required to report them to the Inspector General. See declaration of Bernard S. Oleniacz attached hereto as Exhibit 86.

242. On October 27, 1995, Mr. Oleniacz took certain concerns Ervin had over HUD's misappropriation of Ervin's intellectual property to Ms. Sussman. Ms. Sussman's response was that if Ervin was stupid enough to provide information to HUD and HUD misused it, then "shame on [Ervin]." See Exhibit 74, p. 4.

243. After the meeting with Sussman, Ervin determined that from then on, it would only meet the specific requirements of its contracts and not provide extra services to HUD,

including but not limited to FOMNS data without the PC Software and Computerized Reviews.

See Exhibit 74, p. 4

**VII. GNESSIN ASSISTED IN THE PREPARATION OF THE AUGUST 12 MEMORANDUM**

244. Lar Gnessin has testified that he assisted in the preparation of the August 12, 1996 memorandum (Exhibit 50) in which Chris Greer and Kathy Rock instructed the Contracting Officer to terminate Ervin's AFS contract for default. See Deposition Transcript of Lar Gnessin, December 23, 1997, p. 971, Ins 9-11, attached hereto as Exhibit 87.

**VIII. THE FEDERAL DEFENDANTS BAD FAITH ACTIONS CONCERNING MOD. 1**

245. "Neither George Chabot [the Contracting Specialist responsible for administering Mod. 1] nor Dolores Ammons-Barnett [the Contracting Officer who signed Modification 1] have any recollection concerning whether Modification 1 to Task Order 3 was intended to be unilateral or bilateral." See Exhibit 37, Interrogatory 1E.

246. With counsel for the Federal Defendants present, Ervin entered the bilateral Modification 1 which it was provided by HUD as Exhibit 14 to Ed Girovasi's deposition on July 31, 1997, as Exhibit 36 to Lar Gnessin's Deposition on December 23, 1997, and as Exhibit 42 to Bev Miller's deposition on March 17, 1998. See Exhibits 88, 89, and 90.

**IX. THE FEDERAL DEFENDANTS ACTIONS DEMONSTRATE ITS AWARENESS OF THE SERIOUS NATURE OF THE ALTERATION AND DESTRUCTION OF DOCUMENTS IN THIS LITIGATION**

247. The Department of Justice seized control of the AFS contract file immediately upon learning of the white out on copy of Task Order 3, Modification 1 in HUD's AFS contract file. See footnote 14 to Federal Defendants' Memorandum of Points and Authorities in Opposition to Plaintiffs' Third Motion to Compel Production of Documents, attached hereto as Exhibit 91.

248. Helen Dunlap, Kathryn Rock, Chris Greer, Dolores Ammons-Barnett, Annette Hancock, George Chabot and Lar Gnessin have all requested representation from the Department of Justice to defend against Ervin's claims against them in their personal capacities, and in every instance the Department of Justice has declined representation. See entry of appearance for personal counsel in this litigation and Ervin v. Greer, et al. in this court (99-CV-01377)(WBB).

249. On May 13, 1999, the HUD Inspector General refused to release documents to Ervin through FOIA relating to the investigation into the alteration and destruction of documents from the AFS Contract File, since the records "have been compiled for a pending law enforcement investigation and their release could reasonably be expected to interfere with the investigation." See Exhibit 92.

250. On March 15, 1999, Ervin was informed that Dolores Ammons-Barnett is no longer employed by HUD's Office of Procurement and Contracts, which is the only division within HUD that has the authority to issue contracts on behalf of the Government. See Exhibit 93

**X. ERVIN DID NOT REQUEST ANY CONTRACTS TO HOLD OFF ON FILING ITS LAWSUIT WHILE THE GOVERNMENT INVESTIGATED ITS CLAIMS**

251. On May 13, 1996, Nelson Diaz, HUD's General Counsel, wrote to John Ervin and informed Ervin that HUD could not agree to the pre-conditions set by Ervin's counsel for Ervin to hold off on filing its lawsuit. Diaz specifically identified the preconditions demanded by Ervin's counsel:

... as a precondition to discussions and to forestall litigation, the Department must agree to suspend the solicitation process. This would include procurements for which your company may be a potential bidder, or for procurements for services similar to those services your company is currently performing under other HUD contracts.

See Exhibit 94.

Respectfully submitted,

TUCKER FLYER, P.C.

*Wayne G. Travell*

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Dated: October 1, 1999


CERTIFICATE OF SERVICE

I hereby certify that on this the 1st day of October, 1999, a true copy of the foregoing Plaintiffs' Supplemental Statement of Uncontested Material Facts was served by first-class mail, postage prepaid, upon the following:

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