IBM Enjoins Hitachi's State Contract

The Georgia Supreme Court on Wednesday granted International Business Machines' request to forestall the state from installing about $10 million of new Hitachi mainframe computers.

At issue is not only a lost multimillion-dollar sale for IBM, but also the legal question of whether the state may avoid frustrated-bidder suits simply by raising a sovereign immunity defense.

Now that the Supreme Court has granted an injunction and expedited appeal, IBM will argue for the high court to reverse a Fulton Superior Court ruling that says the doctrine of sovereign immunity can prevent frustrated bidders from seeking judicial review of procurement decisions.

The injunction prevents the state from installing the Hitachi computers until further order of the court. How soon oral argument can be heard in the case is not expected to be determined before the end of the week. *International Business Machines v. Evans,* No. S95M0044 (Sup. Ct. Ga. order Sept. 28, 1994).

In Search Of A Property Interest

Although IBM claims to have tendered the low bid by nearly $1 million, the state Department of Administrative Services in May selected Hitachi Data Systems Corp. from the four vendors vying to sell the state new mainframe computers.

After losing an administrative appeal, IBM sued in Superior Court, seeking a temporary restraining order and injunction. IBM claimed the state improperly awarded the contract by not following its own scoring guidelines set out in the request for proposal.

But in granting the state's motion to dismiss, Fulton Superior Court Judge William B. Hill Jr. held that the sovereign immunity defense barred the claim because IBM could not successfully argue why a waiver would apply. *International Business Machines v. Ga. Dept. of Admin. Services,* No. E-31381 (Fult. Super. order Sept. 8, 1994). Hill also denied IBM's motion for an injunction pending appeal.

Following Hill's reasoning, says IBM's lawyer David L. Balser of Long, Aldridge & Norman, the doctrine of sovereign immunity can prevent frustrated bidders from seeking judicial review of procurement decisions.

"We believe that this decision is contrary to the Georgia Supreme Court decisions in recent bid procurement cases in which the court expressly found relief is available to frustrated bidders," Balser says.

In his ruling, Hill explains why the high court decisions IBM cites do not apply. IBM has standing to complain, the judge held, but "is not possessed of a protectable property right such as to preclude application of the doctrine of sovereign immunity."

In the central case IBM cites, *Amdahl Corp. v. Ga. Dept. Admin. Services,* 260 Ga. 690, 696 (1990), the court held that Amdahl Corp., as a frustrated bidder, had standing to sue the state under general principles of law

and obtain judicial review of a state procurement decision.

Ironically, Amdahl had lost a state computer contract to IBM. In fact, IBM argued as amicus curiae with the state.

Amdahl held that frustrated bidders may receive injunctive relief, but the Supreme Court declined to rule on the sovereign immunity issue because the state first raised the defense on appeal.

Hill even noted he had no direction from the Supreme Court on the issue of sovereign immunity and frustrated-bidder complaints.

"Amdahl, unfortunately, did not address the issue of the possession of a protectable property right by a frustrated bidder, nor the difficult issues of the application of the doctrines of sovereign and qualified immunity, the issues this Court confronts in this case," the judge wrote.

However, the IBM case properly presents the question, says ***Richard L. Robbins***, litigation partner at Sutherland, Asbill & Brennan, the attorney who represented Amdahl in its frustrated-bidder case.

The sovereign immunity issue "was bound to be before them another time," Robbins says, noting the irony of IBM's now-adversarial position with the state. "[*Amdahl*] left a significant ambiguity. I think it's an important issue the court needs to resolve.

'Bloody Pressure'

During the bidding process in dispute, the state's purchasing agent, Errol Gold, left a voice-mail message for IBM marking representative James Erdy. Gold purportedly assured Erdy the IBM proposal would receive an additional 66 points for answering 'yes' to whether IBM's computers would run on a single software license, according to the motion.

"I'll take a lot of bloody pressure, but I don't see any problems with that," Gold said on Erdy's voice mail, according to IBM's motion.

But IBM did not receive the 66 points, and the state awarded the contract to Hitachi.

Further, IBM notes, the day after the vendors submitted the bids, which it describes as "voluminous," the state announced it had selected Hitachi.

The state scored IBM's bid in "an arbitrary, capricious and unlawful manner," IBM claims in its court papers. If the state "had performed its calculations in accordance with the grading scale set forth in the [request for proposal], IBM, as the low bidder, would have been awarded the contract."

Moreover, if the high court does not grant relief, IBM claims, "the computers obtained pursuant to 'bloody pressure' for $1 million more than the lowest bid will be installed to the disservice of the taxpayers of this State."

IBM argues, "If the Court below is correct, D.O.A.S. can accept or reject any bid it chooses, unrelated to the dictates of any law or regulation, without any independent review."

The attorney representing the state, Assistant Attorney General William M. Droze, declines to comment.

IBM claims the state wanted to accelerate installation of the computers to Oct. 8: "To accelerate installation to Oct. 8, 1994, D.O.A.S. is arguably engaging in a litigation tactic designed to thwart IBM from obtaining the relief it seeks."

Robbins, Amdahl's attorney, says he likes IBM's chances because the court is not likely to say in one case a frustrated bidder can receive relief and then turn around and say in another case it can't.

"It would seem to me to be inconsistent," he says. "I personally support the concept that sovereign immunity should not bar these types of claims," he says, declining to comment on whether Amdahl will join IBM's position as amicus, even though Amdahl was also a losing bidder.

Hitachi does not plan to take a position on the sovereign immunity issue, says its lawyer, Troutman Sanders litigation partner Mark S. VanderBroek.

"That's an issue that is relevant between IBM and the state, not relevant between IBM and Hitachi," he says. "Hitachi obviously feels that the procurement was properly implemented by DOAS and that Hitachi submitted the bid that was most advantageous to the state . . . ."

Arguing The Flip Side

IBM attorney Balser says he'll have no problem arguing against the company's position in *Amdahl*.

"I don't think that the position IBM took in *Amdahl* will have any bearing on the outcome of the appeal that's presently before the court," Balser says. Before the court issued its *Amdahl* decision, he says, "the Supreme Court's decisions in the procurement area were unclear as to whether injunctive relief is available to frustrated bidders."

King & Spalding, not Long, Aldridge, represented IBM in the *Amdahl* case, according to Balser.

Since that case, "IBM has abandoned the position it took prior to *Amdahl* and is now following the law of the State of Georgia," Balser says.

Robbins agrees. "I find courts are distinctly uninterested in whether attorneys have taken inconsistent views in the past, as a practical matter."

Robbins says he will watch what the court does in the *IBM* case. "I think it's real interesting. You really do find yourself in a delicate situation."

The suit is IBM's first against the state in 20 years of doing state business, Balser says.

"Because of the unique circumstances involved in this procurement, IBM took the unusual step of suing a very valuable customer because IBM believes it should have been awarded the mainframe contract."