



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

REDACTED DECISION

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Matter of: Sprint Communications Company, L.P.

File: B-262003.2

Date: January 25, 1996

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DIGEST

Protest that a sole source award of a 15-month bridge contract to AT&T for continued provision of the Department of Defense's telecommunications system used in support of command, control, communication and intelligence requirements until completion of a pending competition is improper is denied where the record shows that the agency: (1) properly justified and published its intent to award an interim sole source contract; (2) planned to hold a competition for these services by the end of AT&T's existing contract, but was unable to complete the planning required to do so; and (3) has reasonably concluded that while other offerors might perform portions of the work included in the interim contract, the agency's needs would be best served by avoiding further piecemeal competitions and continuing its plans to competitively award several contracts designed to achieve significant economies of scale.

DECISION

Sprint Communications Company, L.P. protests the decision of the Defense Information Systems Agency (DISA) to award a sole source contract to AT&T Corporation to bridge the gap between the expiration of AT&T's Defense Commercial Telecommunications Network (DCTN) contract, and the expected award of several competitive procurements collectively referred to as the Defense Information System Network (DISN) contracts. Sprint argues that the sole source

award of a 15-month bridge contract is improper, and claims that the agency is improperly consolidating additional services onto the contract that could be awarded by competition. In a supplemental protest, Sprint argues that the vehicle used to consolidate the additional services onto the DCTN contract is a July 14 agreement between AT&T and the agency, which, Sprint contends, is an improper sole source letter contract.

We deny the protests.

BACKGROUND

The expiring DCTN contract here was awarded to AT&T on March 28, 1984. Under the contract, AT&T provides the agency with "a leased, long-haul telecommunications system providing end-to-end common user, switched voice and video, and dedicated data service in support of DOD [Department of Defense] command, control, communication and intelligence (C3I) requirements." WilTel, Inc. v. DISA, GSBICA No. 12310-P, 93-3 BCA ¶ 25,982 at 129,194, 1993 BPD ¶ 106 at 3. The DCTN contract initially contemplated a 10-year service life, but because of a 2-year delay in implementing the network, the agency (in 1986) extended the planned expiration of the DCTN contract from March 1994 to February 29, 1996.¹ Currently, DISA estimates that the DCTN contains 22,000 switched voice circuits, 200 video circuits, and 5,000 dedicated, point-to-point circuits. First Agency Report, Aug. 23, 1995, at 28.

Since the award of the DCTN contract in 1984, there have been substantial changes in the telecommunications industry, including the ripple effects of the divestiture of AT&T, and the emergence of new technologies involving the blending of the telecommunications industry and the information services industry. As a result, DISA has been planning to hold major competitions for each of several segregable components of the agency's planned network of information services, the so-called DISN contracts.²

¹In July 1994, Sprint filed a lawsuit in the Eastern District of Virginia alleging that the agency improperly extended the DCTN contract from March 1994 to February 1996, and improperly added certain services to the contract. The court dismissed the action on two grounds: (1) it held that Sprint had not shown actual injury from the extension; and (2) it held that Sprint's claim was time-barred by the 6-year statute of limitations applicable under the Administrative Procedures Act. Sprint Communications Co., L.P. v. United States, Civil Action No. 94-891-A, mem. op. (E.D. Va. Oct. 11, 1994).

²The DISN component procurements are set forth in four solicitations--three of (continued...)

As part of the effort to plan for this competitive procurement, the agency held a DISN Industry Day on September 30, 1993. During the presentation, attended by approximately 800 representatives of the telecommunications industry (including representatives of Sprint), the then-Director of DISA provided information about the upcoming procurements "to assist industry in planning for further DISA acquisitions." Sept. 1993 DISA Briefing Packet at 1. On that day, DISA announced that the planned competitive procurements would not be completed by the scheduled February 29, 1996, expiration of AT&T's DCTN contract, and distributed a schedule showing a 15-month extension of the contract. Id. at 45.

On June 29, 1995, the agency published in the Commerce Business Daily (CBD) a notice announcing the award of an interim sole source contract to AT&T to allow the transition from the DCTN contract to the competitively awarded DISN component contracts. The notice advises that the interim award will cover a period of 15 months, from February 29, 1996, to May 28, 1997. The notice states that an interim sole source contract is justified under 10 U.S.C. § 2304(c)(1) and (c)(6) (1994), permitting award without competition where there is only one responsible source for the supplies or services, and where a sole source award is required for purposes related to national security, respectively. On June 30, the agency formally approved a Justification and Approval document (J&A) in support of the contract action. Within 10 working days of the CBD notice, Sprint filed its protest with our Office.

The Findings in the J&A

The J&A concludes that a sole source award to AT&T is justified under 10 U.S.C. § 2304(c)(1), which, as stated above, authorizes the use of other than competitive procedures when the supplies or services needed by the agency are available from only one responsible source, or from a limited number of responsible sources, and

²(...continued)

which are in draft form and are currently released for public comment, and one of which has been formally issued. These include solicitations for: (1) video services, including hardware, facilities and software for video transmission; (2) network support services, including engineering, logistics and planning support; (3) network switch/bandwidth manager services, including voice switching and data bandwidth management; and (4) transmission services, including synchronous optical network backbone and local access circuits.

no other product will satisfy the agency's needs.³ In addition, the J&A cites Federal Acquisition Regulation (FAR) § 6.302-1(a)(2)(iii), which implements 10 U.S.C. § 2304(d)(1)(B), permitting the agency to conclude that services are

"available only from the original source in the case of follow-on contracts for the continued provision of highly specialized services when it is likely that award to any other source would result in (A) substantial duplication of cost to the [g]overnment that is not expected to be recovered through competition, or (B) unacceptable delays in fulfilling the agency's requirements."

FAR § 6.302-1(a)(2)(iii).

In reaching its conclusion, the J&A explains that replacing the current DCTN services "requires extraordinary efforts of contracting, engineering, implementation, and transition activities which cannot be completed by the mandatory contract expiration date." J&A, June 30, 1995, at 1. In addition, the J&A explains that the DCTN provides the majority of the communications infrastructure for DOD command, control and intelligence information and that the service "provides military critical features such as multi-level precedence and preemption, network surge capacity, redundancy, survivability and end-to-end interoperability on a worldwide basis which are not immediately available on other telecommunications networks." *Id.* at 3. Further, while the J&A acknowledges that other prospective offerors could modify their networks to meet these needs, it states that such modifications would be significant, and would require considerable expense and time. Thus, the J&A concludes that the agency may award an interim contract to AT&T to permit the agency to complete its competition for the DISN component contracts.

The July 14 Agreement between DISA and AT&T

Approximately 2 weeks after the CBD notice and formal approval of the J&A, AT&T prepared a letter to the Director of DISA memorializing the results of negotiations between representatives of the company and the agency regarding an approach to satisfying the agency's need for continuity of services following the February 29, 1996 expiration of the DCTN contract. In this July 12 letter, AT&T states that the parties agree that the agency will use AT&T's DCTN contract as the DOD's common user network until the contract expires and will award to AT&T the transition contract for "continued satisfaction of service requirements, consolidation of those

³Unlike the CBD notice, the J&A relies only upon 10 U.S.C. § 2304(c)(1) as a basis for the contract action here, and not upon 10 U.S.C. § 2304(c)(6), permitting award without competition for purposes related to national security.

requirements, and transition support to DISN." Letter from AT&T to Lt. Gen. Albert J. Edmonds, July 12, 1995, at 2 (emphasis added). In return, AT&T agrees to a new pricing schedule for the duration of the DCTN (and the term of the transition contract) "reflecting substantial discounts . . . effective August 1, 1995." Id. DISA agreed to the AT&T letter on July 14, and estimates the value of the rate reduction at \$2.84 million per month.

For both the remaining period of the DCTN contract and the period of the transition contract, the letter states that AT&T understands, and DISA represents, that the agency will use these two contract vehicles "as the DOD's common user network for consolidating DOD voice, data and video services requirements (switched or non-switched and regardless of expected service life) except where prohibited by law." Id. at 3.⁴ Finally, the letter states that : (1) "DISA agrees to zealously defend against any protest of the [transition contract] award"; and (2) if the agency "is prevented by the courts, or other administrative protest bodies, from awarding the [transition] contract . . . AT&T has the right to immediately withdraw any tariff filed pursuant to this agreement" Id. at 5.

On July 17, DISA incorporated much of the July 14 agreement into a Communication Service Authorization (CSA) issued by the contracting officer modifying AT&T's DCTN contract. The purpose of the CSA, as stated on its face, is "to establish a discount pricing plan based on negotiations between AT&T and DISA/DITCO during the week of 10 through 14 July 1995." CSA, July 17, 1995 at paragraph 1. Of particular interest is paragraph 13 of the CSA, which repeats the statement in the July 14 agreement that the agency will use the DCTN as the DOD's "common user network for consolidating DOD, voice, data, and video services requirements (switched or non-switched and regardless of expected service life) except where prohibited by law."

In an undated guidance document prepared in late July 1995,⁵ the DISN Program Manager issued interim instructions to DISA procurement personnel expressly requesting that the agreement with AT&T be implemented "by issuing an interim

⁴The recognition that DOD will act to consolidate these services on the AT&T contract vehicles "except where prohibited by law" is stated expressly with respect to the remaining period of the DCTN contract; it is not stated with respect to the transition contract.

⁵We conclude that this document was prepared in late July 1995 because it expressly references the July 14 agreement with AT&T and references the expiration of the bridge contract "in 22 months." Since the bridge contract expires on May 28, 1997, it appears likely this guidance was prepared after July 14 and before August 1, 1995.

policy to use the DCTN contract as the first choice for fulfilling customer requirements" Approximately 1 month later, on August 25, DISA issued formal procurement policy guidance by memorandum from the Chief of DISA's Procurement Management System. In this memorandum, DISA employees are advised that DISA intends to use DOD's common-user system contracts to consolidate its requirements. The August 25 memorandum does not reference the AT&T agreement, and does not repeat the guidance that the DCTN contract should be the contractual vehicle of first resort for new requirements.

PROTESTER'S CONTENTIONS

Generally, this protest raises: (1) a challenge to the sole source bridge contract DISA intends to award to AT&T; and (2) a claim that DISA is improperly consolidating additional services onto AT&T's existing DCTN contract, and the follow-on bridge contract, in return for price concessions set forth in the letter agreement.

Specifically, Sprint's initial protest challenges the agency's decision to award a sole source transition contract on the basis that the agency wrongly concluded that no other potential offerors could provide these services; that the J&A lacks the requisite market survey (or an explanation for why a market survey was not performed); and that the extension and consolidation of services onto the DCTN and transition contracts exceeds the agency's minimum needs. In its supplemental protest, Sprint argues that consolidation of the services onto AT&T's existing contract was accomplished via the July 14 agreement between DISA and AT&T, which Sprint argues is an illegal sole source letter contract that: lacks a proper J&A; violates FAR restrictions on letter contracts; improperly bars its own termination; inappropriately procures services not needed for 7 months; violates restrictions involving organizational conflicts of interest; and was wrongly awarded without a CBD notice.

TIMELINESS

Both AT&T and DISA argue that Sprint's challenge to AT&T's sole source contract is untimely, and should not be considered. Both argue that Sprint has been aware for more than 2 years--*i.e.*, since DISA's September 1993 Industry Day Program--that the agency intended to procure these services with a bridge contract upon expiration of AT&T's DCTN contract. Under our Bid Protest Regulations, protesters are required to file a protest no more than 10 working days after the protester knew, or should have known, of the basis for its protest. 4 C.F.R. § 21.2(a)(2) (1995).

While we need not set forth all of the arguments forwarded on this issue, the record shows that Sprint clearly knew--and has known for some time--that the agency intended to extend AT&T's contract to permit completion of the pending competition. We note, for example, the Declaration of William J. Brougham, Jr. (Sprint's "Opportunity Manager" for DOD telecommunications procurements), dated September 1, 1994, and filed with the United States District Court for the Eastern District of Virginia, wherein Mr. Brougham stated

"DISA plans to further extend the DCTN contract with AT&T on a sole source basis until the transitions are completed. DISA has stated that it will extend the DCTN contract with AT&T at least through the third quarter of FY 1997, through June 1997."

As stated above, the transition contract advertised in the CBD notice expires May 28, 1997.

Notwithstanding the accuracy of Sprint's prior knowledge, and our preference for resolving procurement disputes sooner rather than later, until the agency actually published its CBD notice of June 28, 1995, there was no formal action upon which to base a valid protest. In situations like this, we have recognized that our review of whether a sole source award would be justified, prior to the time of the preparation of the J&A, would preempt the decision of the individuals statutorily charged by the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2304(f), with conducting that review in the first instance. EDO Corp., B-224386, Sept. 18, 1986, 86-2 CPD ¶ 322. In our view, had Sprint challenged DISA's decision immediately after the Industry Day Program, its challenge would have been premature because there would have been no formal procurement action to review. See Tri-Ex Tower Corp., B-245877, Jan. 22, 1992, 92-1 CPD ¶ 100. Thus, we reject AT&T's and DISA's contention that Sprint's challenge to the sole source interim contract is untimely.

ANALYSIS

As explained above, the J&A concludes that no other offeror could immediately perform all of the services provided by AT&T without incurring substantial costs and causing unacceptable delay. The J&A also explains that the agency was unable to complete the planning required to conduct a competition for these services despite extraordinary efforts to do so. As a result, the agency intends to award a 15-month bridge contract to AT&T until the agency has completed the competition it has already begun for each of four significant and segregable components of the services now included in the DCTN contract. Sprint contends that our Office should overturn the agency's proposed approach because the agency should have been able to complete its planning on time, the J&A lacks a proper explanation of why the agency did not perform a market survey, and the agency is including

certain services on AT&T's contract that could be procured through competition.

Because the overriding mandate of CICA is for "full and open competition" in government procurements obtained through the use of competitive procedures, 10 U.S.C. § 2304(a)(1)(A), this Office will closely scrutinize sole source procurements conducted under the exception to that mandate authorized by 10 U.S.C. § 2304(c)(1). Test Sys. Assocs., Inc., 71 Comp. Gen. 33 (1991), 91-2 CPD ¶ 367, aff'd, B-244007.3, Mar. 17, 1992, 92-1 CPD ¶ 287; Sperry Marine, Inc., B-245654, Jan. 27, 1992, 92-1 CPD ¶ 111. When an agency uses noncompetitive procedures under 10 U.S.C. § 2304(c)(1), it must execute a written J&A with sufficient facts and rationale to support the use of the specific authority, see FAR §§ 6.302-1; 6.303; 6.304, and publish a notice in the CBD to permit potential competitors to challenge the agency's intent to procure without full and open competition. See 10 U.S.C. § 2304(f). Our review of an agency's decision to conduct a sole source procurement focuses on the adequacy of the rationale and conclusions set forth in the J&A. When the J&A sets forth reasonable justifications for the agency's actions, we will not object to the award. Turbo Mechanical, Inc., B-231807, Sept. 29, 1988, 88-2 CPD ¶ 299.

We first consider Sprint's contention that poor agency planning may not be used to justify a sole source procurement. In this regard, Sprint concedes that the agency has expended significant effort in planning for a competition at the end of the DCTN contract, but urges our Office to: (1) conclude that the agency's planning was poorly conceived and executed; and (2) refuse to permit the agency to justify this sole source bridge contract on the basis of planning problems.

While we need not recite in detail the efforts by the agency to attempt a competitive procurement by the February 28, 1996 expiration of the DCTN contract, we find that they were extensive, and that they were conducted amidst tremendous shifts within the telecommunications industry, and amidst shifts in the DOD's own attempts to organize and streamline its handling of C3I activities. Even though we agree with some of Sprint's criticisms of the efficiency and effectiveness of DISA's planning,⁶ we do not agree that these problems force us to conclude that the agency's use of a limited sole source bridge procurement is impermissible here.

⁶The General Accounting Office recently issued a report criticizing DOD for not effectively planning and managing the DISN program. See Defense Communications: Management Problems Jeopardize DISN Implementation, GAO/AIMD-95-136, July 13, 1995. In addition, GAO stated nearly 3 years ago that DOD would likely be required to award a sole source transition contract to AT&T because the agency would not be prepared to award a competitive contract for these services. Letter Report to Senator John Glenn, Chairman, Committee on Governmental Affairs, GAO/IMTEC-93-26R, April 28, 1993.

While CICA requires advance procurement planning--and does not recognize a lack of such planning as a valid justification for a sole source procurement--CICA does not require that such planning be successful. Honeycomb Co. of Am., B-225685, June 8, 1987, 87-1 CPD ¶ 579. Here, unlike cases where we found a lack of procurement planning,⁷ the agency did engage in strenuous efforts to plan for competitive awards, but failed to achieve its goal by the expiration of the existing DCTN contract.

With respect to Sprint's argument that the J&A prepared in support of the sole source bridge contract failed to include a required explanation for why there was no market survey, the record does not support its claim. The J&A, in a section entitled "Description of the Market Survey Conducted and the Results or a Statement of the Reasons a Market Survey was not Conducted," concludes that AT&T is the only feasible source for these services after pointing out that any other contractor would incur "excessive projected duplicated cost and schedule risk to implement the network." J&A at 4. Elsewhere, the J&A elaborates on these conclusions. For example, at page 3 the J&A states that "[p]rospective offerors would have to significantly modify their networks (at considerable expense and time) to meet these needs, or else DOD's telecommunications capability to support its daily military mission would be greatly reduced." We note also that the J&A recognizes that:

"[i]t is technically possible for other service providers to modify their existing networks to provide the critical requirements; however this could only be achieved by expending considerable resources and time. As the incumbent contractor, AT&T already had the systems in place to provide these services, therefore, no implementation and transition is necessary."

Id. at 3.

In short, our review shows that the J&A did contain a brief statement regarding why a market survey was not performed, which was supported by other findings in the J&A. This is both adequate and consistent with the statutory exemption relied upon

⁷For example, our decisions in Freund Precision, Inc., B-223613, Nov. 10, 1986, 86-2 CPD ¶ 543 and TeQcom, Inc., B-224664, Dec. 22, 1986, 86-2 CPD ¶ 700, sustained protests of sole source or limited competition procurements where an agency failed to perform advance planning.

by the agency for its sole source decision here--i.e., that award to another source would require substantial duplication of cost, or unacceptable delays.⁸

Consolidation of Services on the DCTN and Transition Contracts

Sprint argues that the sole source bridge contract will include services that could have been awarded by competition and that the agency is also improperly consolidating services on AT&T's existing DCTN contract.

With respect to the sole source transition contract, Sprint argues that the agency can adequately meet its needs by using a piecemeal approach to awarding contracts for upcoming C3I needs. Specifically, Sprint points to a handful of other (smaller) DOD common-user networks, the award of single circuits via an electronic bulletin board process, and other smaller competitions. Sprint contends that the agency's inability to implement a comprehensive competitive procurement before expiration of AT&T's DCTN contract should not bar DISA from meeting its interim needs using various other contract vehicles and smaller competitions.

In our review of procurements under CICA, we have recognized that procurements by an agency on a total package basis can restrict competition. The Caption Center, B-220659, Feb. 19, 1986, 86-1 CPD ¶ 174. However, where it is reasonable to conclude that a procurement on a total package basis is necessary to meet the agency's minimum needs, we have upheld an agency's decision to procure on that basis. Institutional Communications Co., B-233058.5, Mar. 18, 1991, 91-1 CPD ¶ 292.

While the record supports Sprint's contention that the agency could hold competitions for some of the services included in the transition contract, we think that the agency reasonably adopted a comprehensive approach of procuring these services via the DCTN and transition contracts while assembling detailed data on the exact requirements for each user location for the upcoming competition, as opposed to the piecemeal approach urged by Sprint. The record sets out the benefits DOD seeks to achieve in the very near future from an orderly transition to competitively awarded contracts designed to achieve significant economies of scale. In addition, as stated above, the agency has already prepared RFPs for all four of the major component procurements, and has already begun the competition for one of the four components. Thus, we find reasonable the agency's contention that the best approach to meeting the agency's needs is to avoid the additional burden of piecemeal procurements while the agency prepares for its upcoming competition. See MCI Telecommunications Corp., B-257453, Oct. 5, 1994, 94-2 CPD ¶ 116.

⁸We also note that while Sprint argues that the J&A lacks sufficient justification in this area, Sprint does not claim that it could provide all of the services sought by the transition contract immediately.

In its supplemental protest, Sprint mounts a similar challenge to the ongoing consolidation of services onto the existing DCTN contract.⁹ The gravamen of Sprint's complaint is that the letter agreement, complete with its price concessions from AT&T, is evidence of an improper and unfair arrangement whereby the agency is steering the majority of its upcoming C3I needs to AT&T until completion of the pending competition. Sprint argues that the existence of the July 14 agreement casts doubt on the propriety of the agency's claim that procuring these services on a sole source basis from AT&T during the 15-month interim period will best serve the agency's needs. In short, Sprint is arguing that the agency has "cut a deal" wherein it will use a total package approach when such an approach is unnecessary and is restricting competition.¹⁰

As a starting point, our review of the extensive record of DOD's policy statements on satisfying its C3I needs while preparing for an upcoming competition, the July 14 agreement with AT&T, and the two guidance documents issued to DISA procurement personnel after the July 14 agreement leads us to several factual conclusions related to this issue. First, we find that DOD has, in fact, concluded that it will use the DCTN and transition contracts as its preferred common-user contracts until it completes the pending competitions. Second, we find that the decision to use AT&T's DCTN and transition contracts to procure C3I services, rather than several common-user contracts, occurred during the negotiations with

⁹In this regard, Sprint asserts that the consolidation of ongoing services was accomplished via the July 14 letter agreement between AT&T and DISA, which, Sprint argues, constitutes an improper letter contract. We reject Sprint's claim that the July 14 agreement is a letter contract because the agreement, by itself, does not authorize AT&T to perform any services. The FAR defines a letter contract as a "written preliminary contractual instrument that authorizes the contractor to begin immediately manufacturing supplies or performing any services." FAR § 16.603-1. Since we conclude that the July 14 agreement is not a letter contract, we need not consider Sprint's numerous arguments that the agreement violates regulatory controls applicable to letter contracts. Nonetheless, our decision responds to the underlying thrust of Sprint's complaint.

¹⁰Sprint also makes a general argument that the additional services to be acquired under the DCTN are outside the scope of that contract. The record does not support this assertion. The DCTN contract is broad in terms and scope, contemplating that DOD will order particular services within the general categories set out in the contract, as DOD deems necessary to meet its C3I telecommunications requirements for the duration of the contract. Sprint has not identified any specific services that it believes fall outside the scope of the DCTN contract, and we see no other basis in the record to conclude that the services the agency plans to acquire under the DCTN are outside the scope of the contract.

AT&T during the week of July 10-14, 1995. Third, we find that price concessions from AT&T--estimated at approximately \$2.84 million per month until award of the DISN contracts--may have spurred the decision to consolidate C3I services on that contract.

Sprint contends that this chain of events discloses the real basis for DISA's decision to consolidate these services on AT&T's contracts--that the agency was motivated by a desire to realize the price savings offered by AT&T, and not a desire to streamline the upcoming competitive procurements. While the letter agreement with AT&T may reveal the motivating factor behind the agency's decision, we conclude that, regardless of the impetus for the agency's decision, the procurement approach DISA chose is proper. The record in this case, as well as the previous reports to Congress by GAO, show that DISA has had difficulty at times even establishing with certainty the number of switches and circuits it has already procured. We are also mindful that the DCTN contract provides the majority of the communications infrastructure for all of DOD's C3I services. J&A at 2. Given the importance of this system to national security (see Sprint Communications Co., L.P. v. United States, supra, at 9-10, citing and adopting the conclusion in Wiltel Inc. v. DISA, supra, that the DCTN contract contains functions important to national security), the J&A states that the agency must not risk disruption of DCTN services by conducting further piecemeal competitions as such disruption would cause "unacceptable harm to DOD's communications network" J&A at 3. Under these circumstances, we conclude that the agency reasonably has decided to consolidate its C3I needs on one contract in order to prepare for the pending transition to several competitive contract awards. See MCI Telecommunications Corp., supra.

The protest is denied.

Comptroller General
of the United States