

DECISION



THE COMPTROLLER GENERAL OF THE UNITED STATES WASHINGTON, D.C. 20548

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FILE: B-192171

DATE: March 14, 1979

MATTER OF: Peninsula Telephone and Telegraph Co.

DLG-01173

DIGEST:

1. Submission of proposal is not prerequisite to consideration of [protest of restrictive solicitation] filed prior to closing date for receipt of proposals.
2. Bid protest is not appropriate vehicle to question determinations made under OMB Circular A-76 or similar documents since such determinations relate to Executive Branch policy matters.
3. Solicitation which does not permit consideration of offers to lease to Government equipment needed for entirely new system is unduly restrictive where based solely on earlier analysis of comparative cost to upgrade existing system, because determination that alternative approach is not competitive as to price can only be made by competitive procurement.

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Peninsula Telephone and Telegraph Co. (Peninsula) protests Navy's RFP N00228-78-R-2127, because it solicits only offers to sell, as opposed to offers to lease, a VHF/UHF communications system to service Trident communications requirements in the Puget Sound area. We find the protest has merit.

The Navy objects to the protest because Peninsula did not submit a proposal. The protester, however, filed its objection before the closing date for receipt of initial proposals, as required by our procedures, 4 C.F.R. § 20.2(a)(1978), and is not required to submit a proposal to retain its "interested party" status under those procedures. We note that, while the protester received oral assurance from the Navy that it would consider lease proposals, the solicitation included the

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usual warning that the Government would not be bound by oral explanations or instructions given before award. Moreover, offerors were advised that the Government reserved the right to make award without holding discussions (see Standard Form 33A, paragraphs 3 and 10g), and the solicitation contained no provision for evaluating lease proposals. To the contrary, offerors were required to agree to certain maintenance and purchase-related terms, indicating that only a purchase was contemplated. Thus, had Peninsula submitted a lease proposal, its offer could have been rejected by the Navy, and it is questionable whether a protest at that point would have been a viable vehicle for the relief Peninsula seeks. Accordingly, we believe Peninsula was free to protest and obtain a formal resolution of its questions without also submitting a proposal.

The Navy concedes that for operational purposes the equipment could be leased, but asserts that the cost of leasing would not have been competitive.

Peninsula contends that Navy ownership of this system would be inconsistent with the requirements set out in Office of Management and Budget (OMB) Circular A-76, Department of Defense Directive 4100.15, and Office of Telecommunications Policy (OTP) Circular No. 13. These documents establish Government policy outlining when the Government should rely on the private sector to provide supplies and services which the Government might otherwise provide itself. In any case, the determination under these documents whether to provide services in-house is a matter of Executive policy and is outside the scope of the bid protest decisionmaking process. Rand Information Systems, B-192608, September 11, 1978, 78-2 CPD 189.

We will consider, however, whether the RFP limiting the procurement to purchase of equipment was unduly restrictive. See General Telephone Company of California, B-189430, July 6, 1978, 78-2 CPD 9. In this connection, Peninsula questions the Navy's reliance upon an earlier A-76 analysis to dismiss as too expensive anticipated lease proposals to furnish a new and different system. The earlier analysis, performed in 1976, involved a plan to augment existing facilities by adding new leased supporting systems. The Navy concluded that its needs would be best served were it to upgrade the existing system by purchasing the additional equipment needed. The Navy thinks that this analysis provided an appropriate basis for not soliciting to lease the equipment

required by this procurement. Moreover, it believes it has complied with the criteria for determining whether the Government should rent or purchase equipment contained in Defense Acquisition Regulation (DAR) § 1-317. Peninsula disagrees, urging that the question should be determined through price competition. Cf. Olivetti Corporation, B-187369, February 28, 1977, 77-1 CPD 146.

We agree with Peninsula. The system now proposed appears to differ from the earlier network in several significant respects. The number of sites served has been reduced, while the locations of others have been changed. Peninsula also says the system as now configured duplicates a significant portion of the telephone network serving the same area. Even, however, if it did not, the Navy does not advance an adequate reason for precluding Peninsula from offering to lease the needed equipment. Regardless of whether the Navy under different circumstances could decide that it required a Government-owned system, or could rely on cost estimates to support planning decisions, it here indicates that either approach, lease or purchase, is acceptable. DAR § 1-317 cautions that the Government's requirements may be met best by lease -- it does not authorize procurement personnel to disregard competitive procurement techniques where appropriate in determining whether needed equipment should be leased or purchased. Without more, as we noted in Olivetti, the contracting officer may not speculate as to whether potential offerors can or would be willing to offer competitive pricing, in the face of another firm's apparent competitive advantage. Well founded as the Government may believe its market survey to be, anticipated pricing may not be asserted as a defense to a restrictive specification where at least one offeror asserts that he can and will offer a lower price if permitted to do so.

The protest is sustained. By separate letter we are today bringing this matter to the attention of the Secretary of the Navy, along with our recommendation that the Navy cancel its solicitation and resolicit its requirement under a solicitation permitting acquisition by either purchase or lease.

  
Deputy Comptroller General  
of the United States