

DECISION



19899
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-200430.2

DATE: October 28, 1981

MATTER OF: Florida TelCom, Inc.

DIGEST:

1. Protest after award that awardee's offer was nonresponsive because it contained termination liability clause which conflicts with standard Termination for Convenience of Government clause is untimely where solicitation was amended to allow termination liability clauses, because protester knew from amendment that such clauses would be acceptable. Complaint is really against amendment permitting such clauses to be offered and, to be timely, protest against alleged defect incorporated in solicitation must be filed before next closing date after incorporation.
2. Awardee, a regulated telephone company whose rates must be approved by State commission, based offer on current rate structure, even though it had requested a rate increase which was pending with State commission. Protest that acceptance of such offer was not in the best interest of the Government is denied, where permitting rate increases to be passed through on telephone contracts is standard Government policy necessitated by nature of telephone industry. In any event, agency reevaluated offer based on projected new rates, and offer was still low, so protester was not prejudiced.
3. Protest that agency improperly waived preaward contract clearance is denied, since regulation providing for clearance is merely internal agency guideline, without force and effect of law.

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4. Issues raised by interested party must independently meet timeliness rules of GAO Bid Protest Procedures to be considered. Since issues were raised more than 10 working days after party had knowledge of grounds underlying issues, they are untimely and are dismissed.

Florida TelCom, Inc. (FTI), protests the award of a contract for a telephone system to Southern Bell Telephone and Telegraph Company (Southern Bell), under request for proposals (RFP) AT/TC 18855, issued by the General Services Administration (GSA).

FTI contends that the award was improper because, after initially determining that Southern Bell's offer was nonresponsive because it included a termination liability clause which conflicted with the Government's Termination for Convenience clause, GSA amended the RFP to permit such clauses. Additionally, the protester argues that the award was not in the best interest of the Government because Southern Bell had based its price on a rate structure for which an application for change was pending and which would be adjusted upward. Finally, FTI complains that GSA improperly waived its preaward contract clearance requirement.

The protest is dismissed in part and denied in part.

Best and final offers were due on August 7, 1980. After the receipt of best and finals, the contracting officer determined that Southern Bell's offer was non-responsive because it contained a termination liability clause that was inconsistent with the Government's standard Termination for Convenience clause. According to GSA, it had been accepting offers including termination liability clauses on telephone procurements for some time. The reason for this policy was that tariffed companies, which have their rates set by State commissions, usually have termination liability provisions incorporated into their tariffs. In order to facilitate business dealings with that large segment of the industry, GSA accepted the provisions, even though the RFP's and contracts also contained Termination for Convenience clauses. GSA claims that early in 1980, it began to realize that there were conflicts

between the two clauses and began to consider methods of accommodation. One potential solution that was being considered, but had not been implemented, was to apply for a deviation from the regulation requiring the inclusion of Termination for Convenience clauses, to apply to all telephone procurements.

When the contracting officer found Southern Bell's offer nonresponsive, in order to continue the ongoing policy of accepting termination liability clauses, the GSA Regional Administrator applied for a deviation for this procurement from the required Termination for Convenience clause. The Commissioner of the Automated Data and Telecommunications Service granted the deviation on September 25, 1980. The solicitation was amended to permit termination liability clauses and negotiations were reopened, with a new closing date of October 23, 1980.

It is our view that FTI's arguments concerning this issue are untimely and, therefore, they are dismissed. Section 21.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. § 21.2(b)(1) (1981), provides that in negotiated procurements alleged improprieties not contained in the initial solicitation, but which are subsequently incorporated therein, must be protested not later than the next closing date after the incorporation. FTI casts its complaint partly in terms of GSA's initial finding that Southern Bell's offer was nonresponsive. However, the essence of its protest is that GSA changed the rules of the procurement in midstream. It was clear when the solicitation was amended that offers including termination liability clauses would now be acceptable. Therefore, any complaint concerning that amendment had to be filed before October 23, 1980. The protest was not filed here until January 28, 1981.

In response to FTI's allegation that acceptance of Southern Bell's proposal when it had a pending request for a tariff change was not in the Government's best interest, GSA states that its policy has always been to permit tariffed carriers to pass through tariff changes when they are approved. According to GSA, due to the length of telecommunications regulatory proceedings and the time required

to complete telephone system procurements, GSA would not be able to competitively procure telephone systems if it refused to accept approved tariff rate increases. In any event, GSA points out that, being aware of the imminent rate increase, it reevaluated Southern Bell's offer based on the rate increase and the offer remained low.

Based on GSA's response, which FTI does not dispute, it is our view that GSA acted properly in evaluating and accepting Southern Bell's prices. In any event, since Southern Bell's prices remained low even after GSA's reevaluation, FTI was not prejudiced.

Finally, concerning FTI's allegation that GSA improperly waived its regulatory requirement for pre-award contract clearance, the requirement for contract clearance is an internal agency regulation and does not have the force and effect of law. See, e.g., LTV Aerospace Corporation, 55 Comp. Gen. 307, 328 (1975), 75-2 CPD 203. Moreover, we note that the regulation itself provides for waiver of the preaward contract clearance and substitution of a postaward clearance when an immediate award is necessary. This portion of the regulation was complied with by GSA.

Northern Telecom, Inc., filed a submission as an interested party in the protest and raised a number of issues not raised by FTI. When new grounds for protest are filed in an ongoing protest, they must independently satisfy the timeliness of our Bid Protest Procedures. See KET, Inc.--Request for Reconsideration, B-190983, January 12, 1981, 81-1 CPD 17. To be timely, the new grounds must have been filed within 10 working days of Northern Telecom's knowledge of them. 4 C.F.R. § 21.2(b)(2) (1981). The latest date that Northern Telecom knew of the new grounds for protest was February 13, 1981. The submission was filed on March 3, more than 10 working days later, and is therefore untimely.

for Milton J. Fowler
Comptroller General
of the United States