

DECISION

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

FILE: B-209617, B-209617.2 **DATE:** April 12, 1983

MATTER OF: Tymnet, Inc.
GTE Telenet Communications Corporation

DIGEST:

1. Where first month of proposal is the only month priced differently than remaining 11 months of the contract and the 36 months which make up the 3 option years, and the difference totally relates to installation costs, the proposal is not mathematically unbalanced, since each month appears to be reasonably related to the expenses the offeror will incur in each of those years.
2. Requests for second and third rounds of best and final offers are not objectionable where valid reasons existed for the action.
3. GAO does not find the contracting agency's determination that the services being procured are not subject to tariff to be arbitrary.

Tymnet, Inc. (Tymnet), and GTE Telenet Communications Corporation (GTE) protest against the contract awarded to CompuServe Data Systems, Inc. (CompuServe), under Department of Commerce (Commerce) request for proposals (RFP) No. AA-82-RFP-T4024.

We deny the protests.

The RFP solicited offers for the implementation of a nationwide dial-up telecommunications network for access to the Commerce Departmental Computer Center. This network must allow up to 64 users to simultaneously dial-up and access the computer center. Computer interface will be direct through one or another of two existing Memorex Terminal Control Units located at the center. These terminal units will direct the users to one of three computers at the center. In addition, the RFP initially

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provided that the proposed prices for the 4-year period (January 1, 1983, to December 31, 1986) will be evaluated and estimated usage levels will be applied to all proposed variable changes. The 4-year period was subsequently changed by amendment No. 2, which limited evaluation to the first year prices, but the 4-year period was reinstated by amendment No. 3. A contract was to be awarded to that technically acceptable offeror who proposed the lowest total estimated price. The RFP, through amendment No. 4, also provided that if the Government exercised any of the options for an additional year, "all of that year's unit prices for which telephone lines are a substantial component shall be adjusted upward or downward according to changes in an element of the Producer Prices Index."

These protests were filed after Commerce became aware of the FCC rulemaking proceeding, known as Computer II, which overhauled the regulatory scheme concerning the inter-relationship of telecommunications and data processing, and before the United States Court of Appeals affirmed the FCC decision in its entirety (Computer and Communications Industry Associates v. F.C.C., 693 F.2d 198 (D.C. Cir. 1982)). Under Computer II, common carriers were required by the FCC to provide basic transmission service under tariff on an equal basis to all customers. Basic service is defined as the offering of "a pure transmission capability over a communication path that is virtually transparent in terms of its interaction with customer supplied information." With respect to enhanced service and customer premises equipment, the FCC discontinued, with certain exceptions, tariff regulation. The FCC defines enhanced service as any service other than basic. It "combines basic service with computer processing applications that act on format, content, code, protocol or similar aspects of the subscriber's transmitted information, or provide the subscriber additional information, or involve subscriber interaction with stored information."

Tymnet submits that it is a regulated carrier and, therefore, a request for 4-year firm, fixed prices without allowing for an economic adjustment clause based on American Telephone and Telegraph-regulated tariff increases is improper. It is Tymnet's position that since it was not clear whether tariffs would be present by January 1, 1983, award should have been based on current filed tariffs and evaluation should have been for first year prices only. In addition, Tymnet questions Commerce's requests for second

and third best and final offers. Furthermore, Tymnet contends that CompuServe's proposal was mathematically and materially unbalanced. Tymnet argues that CompuServe's first year is 30 percent higher than Tymnet's and, consequently, all of the options will have to be exercised before Commerce will receive the "full advantage of CompuServe's 'low price.'"

GTE's protest is twofold. Like Tymnet, GTE argues that it is unreasonable to require offerors, who are subject to FCC tariffs, to submit firm, fixed prices for a 4-year period. In addition, GTE, as did Tymnet, points out that it is not clear which services will still be subject to tariff and which will be deregulated. Furthermore, GTE objects to the call for a second round of best and final offers. It is GTE's position that award should have been made after the first request for best and final offers. We note that there were three calls for best and final offers and that GTE was the only technically acceptable offeror who did not submit a best and final offer.

Commerce argues that it required evaluation of prices for the 4-year period based on Computer II and Federal Procurement Regulations (FPR) Temporary Regulation 51. In addition, Commerce states that the contracting officer spoke with the FCC Tariff Review Branch and Legal Branch, Tariff Division, concerning the status of tariffs for the required service. Commerce states that the contracting officer was advised that, "barring an adverse court decision [Computer and Communications Industry Association, supra, had not at that time been decided favorably to the Commission], the required services would no longer be offered under tariffs after December 31, 1982." Commerce submits that, once a regulatory agency issues a decision, other Government agencies may reasonably rely on it and need not take into account the possibility that a court may overturn the decision. Furthermore, Commerce points out that Computer II was eventually upheld by the court. In regard to the call for a second best and final offer, Commerce contends that, since the evaluation period was changed from 1 year to 4 years, a new round of best and final offers was required. Also, Commerce states that, upon receipt of the second round of best and final offers, it noticed that the option year prices were high. Commerce was advised the reason for the high option year prices was that offerors were attempting "to protect themselves against the possibility of large future increases in rates for interstate private lines." It is Commerce's view that "these services account for about

half of all contract costs." In order to rectify this situation, Commerce states that it amended the RFP (amendment No. 4) to include a clause which would protect offerors against increases in rates for interstate private lines, see above, and requested a third round of best and final offers. With respect to the allegation that CompuServe's proposal was unbalanced, Commerce argues that CompuServe's first year was only 7 percent higher than each of the option years. Commerce states that this difference is insignificant and, therefore, demonstrates that the proposal is not mathematically unbalanced.

With respect to the unbalanced proposal allegation, our Office has recognized that there are two aspects involved in reviewing the allegation. The first is a mathematical evaluation of the proposal to determine whether each item carries its share of the cost of the work plus profit or whether the proposal is based on nominal prices for some work and enhanced prices for other work. The second step--material unbalancing--involves an assessment of the cost impact of a mathematically unbalanced proposal. A proposal is materially unbalanced if there is a reasonable doubt that award to the offeror submitting the mathematically unbalanced proposal will not result in the lowest ultimate cost to the Government. Solon Automated Services, Inc., B-206449.2, December 20, 1982, 82-2 CPD 548. If a proposal is found not to be mathematically unbalanced, the second aspect of review need not be undertaken.

We find that CompuServe's proposal is not mathematically unbalanced. A review of its proposal indicates that only the first month is priced differently than the remaining 11 months of the contract and, for that matter, the 36 months which make up the 3 option years. That difference is totally made up of installation costs which will be incurred by CompuServe in the first month. This is consistent with this type of contract. Since the remaining months are all priced the same, it seems apparent that the base and option years are reasonably related to the expenses the offeror will incur in each of those years.

Therefore, this aspect of Tymnet's protest is denied.

In regard to the protester's objections to more than one round of best and final offers, we find that to be without merit. Initially, proposals were submitted on September 29, 1982. However, during negotiations, a series of complaints were lodged against the 4-year price

evaluation period. Consequently, the RFP was amended to provide for an evaluation of only the first year prices. This resulted in a second round of best and final offers. At that time, as noted above, Commerce noticed that the option prices were high. In addition to being advised as to the reason for that, Commerce was also advised that the FCC had mandated an end to tariffs effective January 1, 1983. At that point, Commerce again amended the RFP and the evaluation period reverted back to the 4-year requirement. A third round of best and final offers followed.

Our Office has held that, after negotiations and best and final offers, negotiations should not be reopened unless it is clearly within the best interest of the Government. ILC Dover, B-182104, November 29, 1974, 74-2 CPD 301. We have upheld agency determinations to request a second round of best and final offers when a valid reason exists for the action. Sycor, Inc., B-185566, April 27, 1976, 76-1 CPD 284. We believe the rule should also apply to a third round of best and final offers.

The reason for requesting the second round was to eliminate the alleged problems with the 4-year price evaluation period specified in the RFP. Offerors found it difficult to determine what the FCC would allow in tariff increases over the evaluation period. Commerce's rationale for the third round was essentially that, since the FCC was eliminating tariffs, the difficulties the offerors were experiencing under a 4-year evaluation period were no longer a factor. We find that the decisions to reopen negotiations in light of the reasons set forth above were not arbitrary or without a reasonable basis. We view the actions as falling within the permissible bounds of discretion.

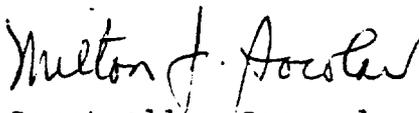
The remainder of the protests before our Office concerns whether the services to be supplied to Commerce for a nationwide dial-up telecommunications network described by Commerce in the RFP are subject to tariff or not. Commerce made the determination that the desired services were enhanced and, therefore, not subject to tariff. Consequently, Commerce employed an RFP with a 4-year evaluation period. While the protesters have submitted their interpretations of Computer II and Computer and Communications Industry Association, supra, in support of their position, we do not find that such are conclusive on this issue. Obviously, any final determination on the tariff issue must

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come from the FCC. See Federal Communications Act of 1934, as amended, 47 U.S.C. § 151 (1976). In this circumstance, we cannot say that Commerce's conclusions in this matter were arbitrary absent a definitive ruling by the FCC.

Protests denied.

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Comptroller General
of the United States