

DECISION

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

FILE: B-218571
MATTER OF: Pacific Bell

DATE: May 7, 1985

DIGEST:

1. The allegation that an awardee submitted an unreasonably low bid in order to "buy-in" to a contract provides no legal basis for protest, as it is well-settled that a contracting agency may accept a below-cost bid if the bidder is determined to be responsible. By awarding the contract, the agency has made such an affirmative determination, and GAO does not review affirmative determinations of responsibility except in limited circumstances, which are not present here.
2. Procedural deficiencies, involving an agency's award of a contract notwithstanding a pending agency protest, failure to furnish an administrative report on an earlier protest which was subsequently withdrawn, and failure to inform the present protester and other bidders of the earlier protest, do not affect the validity of an otherwise proper award.

Pacific Bell protests the award of a contract to AT&T Information Systems, Inc. (AT&T-IS) under invitation for bids (IFB) No. N62474-83-B-2985, issued by the Department of the Navy, Naval Facilities Engineering Command (NAVFAC). The procurement is for the acquisition of a consolidated area telephone system to provide telecommunications services for all Navy and Marine Corps facilities located in San Diego, California. Pacific Bell, which submitted a bid with GTE Communication Systems, Inc. as a joint venture, alleges that the bid of AT&T-IS is unreasonably low and therefore should not have been accepted. In addition, Pacific Bell asserts that the award of the contract involved numerous procedural irregularities. We dismiss the protest.

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Background

The solicitation was issued on September 5, 1984. On November 15, 1984, AT&T-IS protested to this Office that the solicitation was materially defective because (1) sealed bidding was not the appropriate method of procurement given the complexity of the government's requirements, and (2) the IFB in any event was ambiguous and incomplete as drafted. Although this Office requested NAVFAC to file an administrative report on the matter, such a report was not furnished because, as NAVFAC advised us, there were indications that AT&T-IS would withdraw its protest if the solicitation were amended to the firm's satisfaction. The IFB was in fact amended, but AT&T-IS continued to assert that it remained defective. Nonetheless, the firm submitted a bid by the extended bid opening date of February 7, 1985, and the bid was low.

This Office renewed its request for an administrative report on several occasions, but NAVFAC again advised that AT&T-IS would withdraw the protest. On April 15, we received written notification from AT&T-IS that it was withdrawing the protest, and we accordingly closed our file in the matter without further action.

On April 12, Pacific Bell filed a protest with NAVFAC, which it supplemented on April 15. The protest asserted that AT&T-IS's bid was unreasonably low and that the firm was apparently trying to "buy-in" to the contract. NAVFAC did not consider Pacific Bell's protest submission of April 12, but proceeded to award the contract to AT&T-IS later the same day.

On April 19, Pacific Bell filed this protest with our Office, the essential grounds of which are that (1) AT&T-IS's bid is unreasonably low and therefore should not have been accepted; (2) NAVFAC acted improperly by awarding the contract in the face of Pacific Bell's April 12 protest; and (3) NAVFAC acted improperly by failing to furnish an administrative report to this Office regarding AT&T-IS's original protest and by failing to notify Pacific Bell and other bidders of the protest. We find no ground for review of the matter.

Analysis

It is well settled that an allegation that a firm has submitted an unreasonably low bid provides no legal basis to object to an award to the firm. Western Waste Management, B-216392, Sept. 24, 1984, 84-2 CPD ¶ 344. Whether a bidder will be able to meet the government's requirements in view of its offered price is a matter of responsibility, and before making an award, the contracting agency must affirmatively determine that the bidder is responsible. Id. Here, NAVFAC's award to AT&T-IS constitutes such an affirmative determination of the firm's responsibility. Ameriko Maintenance Co., B-216247, Sept. 12, 1984, 84-2 CPD ¶ 287. We do not review affirmative determinations of responsibility unless there is a showing of possible fraud or bad faith on the part of contracting officials, or an allegation that a definitive responsibility criterion was not met. Id. Although Pacific Bell implies that NAVFAC acted in bad faith by awarding the contract in the face of its protest, it does not contend that the agency's affirmative determination of AT&T-IS's responsibility was made in bad faith, nor has Pacific Bell alleged that a definitive responsibility criterion was not met. Therefore, neither exception to the general rule is applicable here.

Regarding Pacific Bell's allegation that AT&T-IS, by submitting an unreasonably low bid, was attempting to "buy-in" to the contract, we point out that such a bidding approach is not illegal. Western Waste Management, B-216392, supra, 84-2 CPD ¶ 344 at 2. Although contracting officers are required to take appropriate action to ensure that "buy-in" losses are not recovered through change orders or otherwise, see Federal Acquisition Regulation, 48 C.F.R. § 3.501-2(a) (1984), the possibility of a "buy-in" provides no valid basis to challenge an award to a firm that is found to be responsible. Id.

Regarding Pacific Bell's allegation that NAVFAC acted improperly by awarding the contract in the face of the April 12 protest, it is apparent from the firm's submissions that NAVFAC regarded the protest as untimely. While the protester disputes this conclusion, it is not necessary to resolve the question since, in any event, an agency's failure to follow its regulations concerning the

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making of an award notwithstanding the pendency of a protest filed with it does not affect the validity of an otherwise proper award. See PNM Construction, Inc., B-215973, Nov. 30, 1984, 84-2 CPD ¶ 590.

Similarly, NAVFAC's failure to furnish this Office with a timely administrative report and to advise Pacific Bell and the other bidders of AT&T-IS's original protest are only procedural deficiencies which do not affect the validity of the award. See E.S. Edwards & Son, Inc.; et al., B-212304, et al., June 18, 1984, 84-1 CPD ¶ 631. Moreover, as indicated, NAVFAC did not furnish its administrative report as requested because there were repeated indications that AT&T-IS would withdraw its protest, and, in fact, the protest was withdrawn. Further, the issues raised in AT&T-IS's protest were wholly unrelated to Pacific Bell's present allegations. Accordingly, it is clear that Pacific Bell was not harmed by the agency's failure to submit a timely report or to inform Pacific Bell and the other bidders of AT&T-IS's protest.

The protest is dismissed.

Ronald Berger
Ronald Berger
Deputy Associate
General Counsel