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DECISION



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

FILE: B-220752

DATE: February 18, 1986

MATTER OF: Cable Antenna Systems

DIGEST:

1. Since GAO decides protests that involve procurements of property or services by a federal agency, the award by a federal agency of a franchise contract for cable television services is subject to GAO's bid protest jurisdiction.
2. GAO will not consider under its bid protest jurisdiction allegations that an agency has not complied with the renewal provisions of the Cable Communications Policy Act of 1984, 47 U.S.C.A. § 521, et seq. (West Supp. 1985), because that act expressly provides for judicial resolution of such disputes.
3. Incumbent cable television franchisee is not an interested party to contest provisions in a solicitation issued by an agency for a second franchise where the agency has determined properly that the incumbent franchisee is not eligible for award under the solicitation.

Cable Antenna Systems (CAS) protests the issuance by Vandenberg Air Force Base, California, of a request for proposals (RFP) for a nonexclusive franchise to provide cable television services to subscribers at the base. CAS contends that the RFP violates its rights as an incumbent franchisee under the Cable Communications Policy Act of 1984, 47 U.S.C.A. § 521, et seq. (West Supp. 1985) (Cable Act), and complains about other alleged improprieties regarding the issuance of the solicitation.

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The arguments in this case have focused almost exclusively on the jurisdiction of this Office to decide the protest. As discussed below, we conclude that although the protest is of the type that generally we will consider, the specific issues raised and the protester's peculiar status as an incumbent franchisee are such that we will not do so here. We dismiss the protest.

Background

In 1974, the agency awarded CAS an exclusive, 10-year franchise to provide cable television services to subscribers at Vandenberg. Prior to the expiration of that franchise, the agency issued a solicitation on December 11, 1984, seeking proposals from offerors wishing to provide the same services when the CAS franchise expired on August 31, 1985. CAS filed a protest with this Office (B-218212.2) contending that some of the provisions of the solicitation were inconsistent with the recently passed Cable Act, but withdrew the protest when the agency canceled the solicitation and agreed to consider renewing CAS' existing franchise under the renewal provisions of that act.

In February 1985, CAS submitted to the agency a proposal to renew its franchise. In addition, CAS and the agency discussed transferring the franchise to a third party. When CAS' negotiations with the third party were not concluded by August, however, the agency extended CAS' franchise on a nonexclusive basis through September 30. (The agency subsequently issued another short-term extension.) By letter dated September 20, CAS notified the agency that it had terminated unsuccessfully the transfer negotiations with the third party and requested renewal of its franchise for its own account. On September 24, the agency issued the solicitation that is the subject of this protest.

Basis for Protest

The protester contends, first, that by failing either to renew its existing franchise or to initiate proper renewal proceedings, the agency has not complied with the requirements of the Cable Act, the directive the agency

issued to implement the act, or the statements the agency made to this Office that led CAS to withdraw its earlier protest. The solicitation further violates the Cable Act, says the protester, because it allegedly provides for evaluating an incumbent cable operator's renewal proposal on a competitive basis. CAS contends also that the solicitation is defective because it does not contain evaluation criteria. Finally, CAS contends the agency acted improperly with respect to soliciting offers in that it did not cause a timely synopsis of the solicitation to be published in the Commerce Business Daily, did not allow the required 30 days for offerors to prepare their proposals, and attempted to prevent CAS from submitting a proposal.

Jurisdictional Arguments

The position of the Air Force regarding CAS' protest is that this Office has no jurisdiction to consider it. The agency takes this position basically for two reasons. First, the agency maintains that the contemplated award of a cable franchise will not involve the expenditure of appropriated funds. The Air Force explains that this solicitation is not for cable service for the government, but is merely intended to result in a second cable franchise at Vandenburg in order to introduce competition between cable franchisees. Should the agency desire to acquire cable services for an appropriated fund activity, it will procure such services through a competition between the two franchisees.

The Air Force acknowledges that, under limited circumstances, this Office in the past has considered protests of franchise awards not involving appropriated funds. Those circumstances are where the franchise provides a direct benefit to the government or services to an appropriated fund activity or where the government would receive a share of the income generated by the franchise. See West End Associates, B-215536, Jan. 14, 1985, 85-1 CPD ¶ 36. We have cited the government's potential liability for termination costs as another factor to be considered in deciding whether we would take jurisdiction, but have indicated that potential termination liability alone is not

enough to invoke our review. Id. The agency contends, however, that none of these circumstances exist in this case.

The agency's second basis for contending that this Office lacks jurisdiction is that CAS' objections to the solicitation largely involve alleged violations of the Cable Act. Such matters are not for us to consider, says the Air Force, because under 31 U.S.C.A. § 3552 (West Supp. 1985) we decide protests alleging violations of procurement statutes or regulations, and the Cable Act is not a procurement statute. Finally, the agency notes that the Cable Act provides that cable operators adversely affected by a final decision of a franchising authority regarding franchise renewal may file an action in a state court or a United States district court. 47 U.S.C.A. § 555.

The protester contends that our Office has jurisdiction over this protest pursuant to the precedent established by prior cases and that nothing in the Cable Act precludes us from exercising that jurisdiction. The protester argues that the franchise will involve services to the government under both franchise paragraph 25, which requires the franchisee to construct or modify its system to allow for a temporary emergency broadcasting capability, and paragraph 26, which requires the franchisee to reserve one cable channel for agency programming viewable only by government subscribers. Also, the protester notes that the government is liable for termination costs under franchise paragraph 38. In any event, says CAS, appropriated funds in fact are involved in this case since the agency already has decided to purchase cable services for appropriated fund activities and the operator who receives a franchise under this solicitation will be one of the two sources from whom such services may be obtained.

Analysis

Prior to January 15, 1985, the effective date of the bid protest provisions of the Competition in Contracting Act of 1984 (CICA), 31 U.S.C.A. § 3551, et seq., our bid protest authority was based on our authority to adjust and settle government accounts and to certify balances in

the accounts of accountable officers. See Monarch Water Systems, Inc., B-218441, Aug. 8, 1985, 64 Comp. Gen. ____, 85-2 CPD ¶ 146. Thus, we generally would decline to consider protests concerning contracts that did not involve the expenditure of appropriated funds. Conusstan Products, West Germany, B-210846, Mar. 14, 1983, 83-1 CPD ¶ 253 (award of rug concession for nonappropriated fund activity). With respect to protests involving cable television franchises, our jurisdiction was based on the fact that at least a portion of the subscription fees would be paid by the government for cable services provided to appropriated fund activities. See Teleprompter of San Bernadino, Inc., B-191336, July 30, 1979, 79-2 CPD ¶ 61. In some cases in which the franchising agency argued that the direct expenditure of appropriated funds was not involved, however, we cited the provision of services to the government and the government's potential liability for termination costs as factors underlying our decision to assume jurisdiction. See, e.g., B.M.I., Inc., B-212286, Nov. 2, 1983, 83-2 CPD ¶ 524; Group W Cable, Inc., B-212597, Oct. 25, 1983, 83-2 CPD ¶ 496.

CICA expressly defines the bid protest authority of this Office. Monarch Water Systems, Inc., 64 Comp. Gen. ____, supra. Under that act, our bid protest jurisdiction is based on whether the protest concerns a procurement contract for property or services by a federal agency. T.V. Travel, Inc., et al.--Request for Reconsideration, B-218198.6, et al., Dec. 10, 1985, 65 Comp. Gen. ____, 85-2 CPD ¶ 640 (protest jurisdiction exists where agency contracts for travel management services on a no-cost, no-fee basis). In other words, it is no longer necessary to find a direct or indirect expenditure of appropriated funds in order for us to exercise bid protest jurisdiction. Rather, we will decide a protest if it involves the procurement of property or services by a federal agency. Artisan Builders, B-220804, Jan. 24, 1986, 65 Comp. Gen. ____, 86-1 CPD ¶ _____. Clearly the instant solicitation represents a procurement of services by a federal agency.

Although this Office has jurisdiction to consider protests involving the award of cable television franchises, we will not do so in this case. The principal complaint raised by the protester is that the agency has

violated its rights under the Cable Act as an incumbent franchisee. Section 626 of the act, 47 U.S.C.A. § 546, contains detailed procedural requirements and criteria applicable to the renewal of a cable franchise. Unlike complaints concerning initial awards of cable franchises, however, the Cable Act expressly provides that a cable operator adversely affected by a failure of a franchising authority to act in accordance with the procedural requirements of section 626 may file an appeal in a United States district court or any state court of general jurisdiction having jurisdiction over the parties. The act sets forth the circumstances under which a court may grant relief. From our reading of the Cable Act and its legislative history, it appears to us that Congress has specified the forums where disputes over franchise renewals may be resolved; it did not contemplate further administrative appeals, such as review by this Office of the renewal process. To the extent this protest concerns alleged violations of the renewal provisions of the Cable Act, we will not consider it. See Wynn Baxter/Educational Training Concepts, B-197713, May 20, 1980, 80-1 CPD ¶ 349.

The remainder of the issues raised in this protest are not related to the renewal of CAS' existing franchise, but rather involve alleged deficiencies with respect to the issuance of the RFP. We need not reach the merits of these issues, however, since it is clear that CAS is not an interested party under our Bid Protest Regulations, 4 C.F.R. § 21.0(a) (1985).

The agency issued the solicitation for the purpose of selecting a second cable operator to provide services to subscribers at Vandenberg. This action was consistent with the revised policy of the Air Force to award more than one franchise at each installation in order to promote competition as a means of ensuring quality cable services at the lowest price to subscribers. Although the solicitation did not state that the incumbent franchisee, CAS, would not be permitted to compete for the second franchise, the exclusion of the incumbent was necessary in order to achieve the objective of awarding a franchise to a second cable operator. While we believe the solicitation should have advised all potential offerors, including CAS, that

the incumbent would not be permitted to compete, we can find no reason to object to the exclusion.^{1/}

Since CAS is not eligible at this time to compete for the second cable franchise to be awarded under the protested solicitation, CAS is not the proper party to pursue whatever defects the solicitation might contain. We dismiss this aspect of the protest because CAS is not an interested party under our regulations. 4 C.F.R. § 21.0(a); Prospect Associates, Ltd.--Reconsideration, B-218602.2, Aug. 23, 1985, 85-2 CPD ¶ 218.

The protest is dismissed.

Harry R. Van Cleve

Harry R. Van Cleve
General Counsel

^{1/} The Air Force states that should it not renew CAS' current franchise, it will issue a new RFP to obtain a second franchisee. CAS, of course, would be eligible to compete under such an RFP.