



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Telenet Communications Corporation--Request
for Reconsideration
File: B-224561.2
Date: May 22, 1987

DIGEST

Parties to a bid protest, including contracting agencies, that withhold or fail to submit relevant evidence to the General Accounting Office (GAO) during consideration of the protest do so at their peril, since GAO will not reconsider decisions based upon previously available and relevant evidence that is first presented in a request for reconsideration.

DECISION

The General Services Administration (GSA) requests reconsideration of our decision in Telenet Communications Corp., B-224561, Feb. 18, 1987, 87-1 CPD ¶ 181. In that decision, we sustained Telenet's protest that GSA had improperly awarded a contract to an offeror whose proposal failed to comply with mandatory technical requirements of the solicitation and omitted prices for a substantial amount of required services. We recommended termination of the contract and award to Telenet.

We affirm our prior decision, and, in addition, we find the protester entitled to the costs of filing and pursuing its protest, including reasonable attorney's fees.

GSA issued request for proposals (RFP) No. KECI-86-009 for nationwide data transmission services to support its Federal Supply Service for a base year and 5 option years. In connection with its plans to upgrade its system, GSA required offerors to include two optional services in their proposals.

The first option is for data transmission of up to 9,600 characters per second to and from Honeywell "Datnet 8" computers. The RFP stated that for evaluation purposes, offerors should assume that four circuits would be installed in each of months 13, 25, and 37 of the contract, and that

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each circuit would carry 20 million characters per month. A second option stemmed from GSA's plan to begin replacing its current basic terminals with modern 3270 terminals. GSA included transmission services for the new terminals as the second option in the RFP. The agency's plan for conversion, which will begin in 1988, is still being formulated, so GSA established certain assumptions for purposes of comparing proposals, including an assumed schedule for implementation.

We found that the proposal of Tymnet, the low offeror, had not included prices for the 20 million characters per month attributable to each new Datanet 8 transmission circuit, as required by the solicitation. In responding to Telenet's protest, GSA argued that while the RFP was "confusing" on the question, the Datanet 8 circuits would not generate additional data. The agency contended that the data to enter the communications system through its Datanet 8 terminals would be the same data that the RFP stated would enter through other terminals and was otherwise priced by the offerors.

GSA now states that in preparing its request for reconsideration, it discovered that the Datanet 8 data will be in addition to other data in the system. However, the agency argues that had Tymnet proposed a price for the additional data, it only would have charged an additional \$120,960. GSA calculated this amount by assuming that Tymnet would charge the same for Datanet 8 traffic as for other traffic, and it argues that the addition to Tymnet's price does not change the ranking of the offerors. Since, as discussed below, we find that Tymnet failed to meet another material requirement of the RFP that in itself warrants termination of the protested contract, we need not consider GSA's argument that Tymnet's failure to comply with the RFP's mandatory pricing requirements would not have affected the award.

In our prior decision, we also found that rather than propose 3270 terminals with the ability to dial into the data transmission system separately--as expressly required by the RFP--Tymnet had proposed "cluster controllers" that would connect a number of terminals to the data transmission network at a single entry point. The protester's own prices for "separate dial-up" service versus "cluster controllers" indicated that Tymnet's low offer may have been possible because of this failure to meet a mandatory technical requirement.

In its request for reconsideration, GSA states that Tymnet's proposal "appears" not to meet the mandatory requirements, particularly since the proposal states that in each region Tymnet plans to incorporate one government-furnished cluster

controller, to which it will connect a direct dial unit, a modem, and a switched business line. As GSA points out, the drawing included in Tymnet's proposal clearly shows use of cluster controllers without separate dial-up service to GSA's 3270 terminals. The structure of Tymnet's price proposal is consistent with this approach.

GSA further states that it, too, was concerned about Tymnet's proposal, and it met with the firm to discuss the matter before award. GSA asserts that in the meeting, Tymnet explained that it planned to use a "direct dial-up unit" that would meet GSA's requirements, and that it had included sufficient auxiliary equipment to meet the RFP requirements in the price of each unit. GSA states that without knowledge of these discussions, we "could fairly conclude" that Tymnet had not been evaluated on the same basis as other offerors. The agency does not indicate why it had not previously provided information clearly relevant to Tymnet's protest to our Office. Contracting agencies that withhold or fail to submit all relevant evidence do so at their peril, since it is not our function to prepare defenses to allegations raised in the protest record, and we do not reconsider decisions on the basis of previously -- available and relevant evidence first presented in a request for reconsideration. J.R. Youngdale Constr. Co., Inc.-- Request for Reconsideration, B-219439.2, Feb. 20, 1986, 86-1 CPD ¶ 176.

In this case, however, we would have reached the same conclusion even if GSA had initially disclosed the substance of its discussions with Tymnet. GSA asserts that Tymnet's discussions and the drawing of a cluster controller in each region referred to a possible approach the agency might pursue, but that GSA actually evaluated Tymnet's proposal on a "stand-alone" approach depicted in an "EVALUATION DIAGRAM" that GSA submitted with its request for reconsideration. The diagram submitted to us does not show how a Tymnet "direct dial-up unit" would provide the required service, and GSA does not indicate who prepared the diagram or when it was prepared. Moreover, GSA's account of Tymnet's representation--that it planned to provide direct dial-up units plus necessary modems that would meet requirements for separate dial-up service--contradicts the description of Tymnet's system in its proposal and in Tymnet's own drawing of that system.

GSA's memorandum recommending award to Tymnet states that discussions were held with Tymnet on August 28, 1986 to clarify an issue regarding "terminal concentrators," and it makes no reference to the discussion the agency now reports. Not only does the contract file omit the discussion, but GSA states that it did not ask Tymnet to incorporate this

"clarification" in its proposal--a proposal that is clearly inconsistent with Tymnet's representations. The protester has submitted a Tymnet commercial pricing brochure to establish that the firm's "direct dial-up units" do not in fact provide the service mandated by the RFP. What Tymnet's equipment might actually provide or what Tymnet told GSA during discussions is not strictly pertinent. Tymnet did not revise its proposal to conform with the RFP, and its contract with GSA does not obligate the firm to provide services included in other offerors' proposals.

As stated in our prior decision, any proposal that fails to conform to material terms and conditions of the solicitation may not form the basis for an award. We find no reason to reverse our original conclusion that GSA improperly accepted Tymnet's proposal. We affirm our original recommendation that GSA terminate Tymnet's contract, which was awarded on September 30, 1986, and award to Telenet. Since Telenet has lost the opportunity to perform more than 7 months of the services originally procured, we also find that Telenet is entitled to reasonable costs of filing and pursuing its protest, including attorney's fees. 4 C.F.R. §§ 21.6(d) and (e) (1986); Pacific Sky Supply, Inc., B-225513, Mar. 30, 1987, 87-1 CPD ¶ 358.

We affirm our decision.



Acting Comptroller General
of the United States