

L. Glass



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** New York Telephone Company; New England Telephone and Telegraph Company; Bell Atlantic Network Services, Inc.

**File:** B-236023; B-236097

**Date:** November 7, 1989

### DIGEST

1. General Accounting Office (GAO) will consider protest against General Services Administration (GSA) solicitation to provide public pay telephones in government controlled property under GAO's bid protest authority where awards under solicitation will provide a service to government employees and will satisfy GSA mission needs, and thus the solicitation is a procurement of services by a federal agency.
2. Requirement that offers to provide public pay telephones cover specific General Services Administration regions only unduly restricts competition where requirement excludes Regional Bell Operating Companies from competing in their regular course of business and otherwise is not a legitimate need of the agency.

### DECISION

Bell Atlantic Network Services, Inc. (Bell), and New York Telephone Company, jointly with New England Telephone and Telegraph Company, protest request for proffers (RFP) No. M/PP89-01 issued by the General Services Administration (GSA).<sup>1/</sup> The protesters contend that the solicitation unreasonably restricts competition and unfairly

<sup>1/</sup> The joint protesters are two local exchange telephone companies and Bell is a Regional Bell Operating Company. Both were created by the AT&T divestiture agreement. See United States v. Am. Tel. & Tel. Co., 552 F. Supp. 131 (D.D.C. 1982), aff'd sub nom., Maryland v. United States, 460 U.S. 1013 (1983); United States v. Western Elec. Co., 569 F. Supp. 1057 (D.D.C. 1983), aff'd sub. nom., California v. United States, 464 U.S. 1003 (1983).

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discriminates against them. We sustain Bell's protest in part and deny it in part. We deny the joint protest of New York Telephone Company and New England Telephone and Telegraph Company.

The RFP, issued on April 25, 1989, provides for GSA to grant one or more licenses covering the furnishing, installation, maintenance, and operation of public pay telephones on GSA-controlled property nationwide. The license(s) will be for a period of 5 years and GSA receives fixed monthly fees for the license(s). The RFP allowed proffers for service for one or more of the nine GSA regions and further allowed proffers for nationwide service. The RFP provided that award was to be made to the technically qualified profferer(s) offering the highest single proffer for GSA nationwide, or the aggregate of the highest proffers (for each GSA region), whichever was higher. GSA reserved the right to make no selection under the RFP or to select proffers for less than all GSA regions, if GSA determined that the fixed monthly fees offered were unreasonably low or if GSA determined that the rejection of all proffers was in the public interest. Proffers were received on July 7, 1989.

As a preliminary matter, GSA argues that the protests should be dismissed as beyond the jurisdiction of our Office because the solicitation does not involve the procurement of property or services subject to the provisions of the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3551 et seq. (Supp. IV 1986). GSA cites our decisions in San Francisco Bay Brand, Inc., B-227988, July 31, 1987, 87-2 CPD ¶ 122, and Jefferson Bank & Trust, B-228563, Oct. 23, 1987, 87-2 CPD ¶ 390, in support of its argument.

Under CICA, our bid protest jurisdiction encompasses procurement of property or services by a federal agency. Artisan Builders, 65 Comp. Gen. 240 (1986), 86-1 CPD ¶ 85; Monarch Water Sys., Inc., 64 Comp. Gen. 756 (1985), 85-2 CPD ¶ 146. In the two cases cited by GSA, we found that the protests concerning, respectively, a proposed agreement by a private contractor to harvest shrimp on government property and a lease of government office space, were not procurements of property or services.

Here, the RFP states that this procurement of phone services is the result of GSA policy to provide sufficient pay telephones for the personal use of government employees working in government controlled facilities as well as to make phones available to visitors to those facilities conducting business with the government. In this connection, GSA PBSP 5815.2A provides that GSA has a

responsibility to arrange for services, including public pay telephones, required for the health, comfort, or efficiency of government employees while on duty. Thus, although ultimately resulting in a license to provide pay telephone service, the RFP will result in service to government employees and is intended to satisfy GSA mission needs. Under these circumstances, we conclude it is a procurement for services for purposes of our bid protest jurisdiction. See Gino Morena Enters., 66 Comp. Gen. 321 (1987), 87-1 CPD ¶ 121; T.V. Travel, Inc. et al.--Request for Reconsideration, 65 Comp. Gen. 109 (1985), 85-2 CPD ¶ 640.

Bell argues that the RFP requirement is unduly restrictive of competition because the GSA regions listed in the RFP do not conform to the operating territories of the Regional Bell Operating Companies (RBOC). Bell argues that GSA's regional divisions make it difficult for RBOCs to compete in the ordinary course of business, because it is difficult for them to provide services outside their designated regions.

GSA contends that to adopt regional boundaries which correspond to boundaries of the RBOCs would be restrictive of competition. It is GSA's position that to adopt regional boundaries which coincide with those of the RBOCs would automatically put all non-Bell companies at a competitive disadvantage. Furthermore, GSA argues that the protesters are not precluded from offering the services outside their operating areas or RBOC regions and in fact can provide the services outside their area through the use of customer-owned, coin-operated telephones (COCTs), subcontracts, joint ventures or cooperative agreements.

Bell acknowledges that it can compete for pay telephone services outside its franchise area through the use of COCTs and joint ventures. Bell argues, however, that the use of non-Bell operated pay telephones is substantially different from the manner in which RBOCs ordinarily provide pay telephone service and that they should not be forced to enter into costly cooperative agreements in order to compete.<sup>2/</sup>

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<sup>2/</sup> For example, using its own facilities, Bell can provide pay telephone service in New Jersey, which is in GSA region 2, but cannot provide pay telephone service using its own facilities in the other areas covered by GSA region 2. (Region 3 would be the same as Bell's geographical coverage if New Jersey was included.) Consequently, the RFP, as issued, prevents Bell, independently, without making subcontracting or cooperative agreements, from submitting a  
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Contracting agencies are required to develop specifications in such a manner as to obtain full and open competition, and may include restrictive provisions only to the extent necessary to satisfy the agencies' needs. Restrictions are not unduly restrictive where they are necessary to meet the agencies' minimum needs, rather than merely provide ease of administration. See Burton Myers Co., 57 Comp. Gen. 454 (1978), 78-1 CPD ¶ 354; Malco Plastics, B-219886, Dec. 23, 1985, 85-2 CPD ¶ 701. The propriety of a restriction is a matter of judgment and discretion, involving consideration of the services being procured, past experience, market conditions and other factors. See Plattsburg Laundry and Dry Cleaning Corp. et al., 54 Comp. Gen. 29 (1974), 74-2 CPD ¶ 27. In this case, we do not find that GSA has shown that the restriction of offers to GSA regions in this RFP is necessary to meet its minimum needs.

The selected regions contained in the RFP follow already established GSA regional boundaries. The record does not indicate any legitimate need of the agency for these regional boundaries other than for administrative convenience. Rather, GSA's primary justification for requesting proffers on a GSA regional basis is based on GSA's concern that adopting regional boundaries which coincide with those of RBOCs would automatically put all non-Bell companies at a competitive disadvantage. We find this justification unpersuasive.

GSA has not explained how adopting regional boundaries which coincide with the Bell companies place non-Bell companies at a disadvantage. The record shows that no matter how the geographical areas are drawn, the non-Bell companies will be able to compete. This is because the non-Bell companies are not limited to the Bell geographic areas in providing service. On the other hand, the RBOCs are permitted to provide service directly only in their operating (franchise) areas. Thus, the record shows that to adopt regional lines that correspond with the RBOC regular operating regions would increase rather than limit competition, because all telephone companies would be able to compete in their normal course of business and on their most

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proffer to GSA for pay telephone services in New Jersey, even though it is the incumbent in New Jersey, because it cannot provide the service through the rest of the GSA region in its normal business operations.

profitable basis, without limiting the ability of non-Bell companies to compete.

In this connection, while potential competitors such as the RBOCs may through new business arrangements or by entering into new lines of business be capable of surmounting "barriers of competition," the agency still must establish that its geographic divisions justify excluding companies from competing in what it regards as its customary and most efficient manner. See Pacific Northwest Bell Tel. Co., Mountain States Bell Tel. Co. -- Reconsideration, B-227850.2, Mar. 22, 1988, 88-1 CPD ¶ 294. GSA simply has not met its burden in this regard.

Next, all protesters request that GSA modify the RFP to permit offers of services within a particular state, rather than across an entire region. Bell also requests that GSA allow firms to offer corridor service in certain north-eastern locations without having to proffer on services for an entire GSA established region.

GSA states that it requested proffers for an entire GSA region, as opposed to individual states, in order to insure that GSA obtains services for all its pay telephones nationwide, especially in those states where there are only a few telephones. With respect to Bell's request that GSA permit proffers for corridor service, GSA argues that there are numerous pay telephone service suppliers which operate in very small, specific areas and to allow one profferer to provide this service in one corridor would require allowing all such providers to do so in other corridors. GSA also asserts that to seek proffers on a state specific basis or to allow Bell to offer corridor services in certain locations would be an unreasonable administrative burden because of the potential number of contracts that would be involved. GSA maintains that to receive, evaluate and administer pay telephone services on these bases would be impracticable and could not be economically justified. GSA also states that while there are a few states in which GSA currently has enough pay telephones that offerors are willing to provide services, there are many other states in which GSA has so few phones that it is likely no one would be willing to provide services for those states.

As indicated above, our Office will object to procurements containing restrictive provisions based solely on ease of administration. MASSTOR Sys. Corp., B-211240, Dec. 27, 1983, 84-1 CPD ¶ 23. However, unlike the GSA regional approach which we find objectionable, the record shows that GSA has legitimate reasons for not permitting proffers on a state or corridor basis. In this connection, we have

previously recognized that providing a large enough area of service to assure that there will be sufficient providers interested in competing for the work is a reasonable basis for a solicitation which restricts competition. See Chicago City-Wide College--Reconsideration, B-228593.2, July 19, 1988, 88-2 CPD ¶ 64. The agency need not divide a procurement into areas which make no economic sense. The record indicates that a solicitation based on corridor or state service would generate little or no competition in states where GSA has few pay phones. As a result, GSA would not receive complete pay telephone coverage and be compelled to obtain the services on a local or phone by phone basis. The need to use local or phone by phone arrangements undermines GSA's goal to obtain more uniform national coverage which was the primary reason for the solicitation in the first place.

Further, given the number of possible awards that would be involved if offers were received on individual state basis or on corridor service basis as requested by the protesters, we do not find objectionable GSA's conclusion that the additional time and resources necessary to evaluate, manage and support these multiple awards would be an unreasonable administrative burden and outweigh the benefits of further breaking out this procurement.

The Bell protest is sustained in part and denied in part. The joint protest of New York Telephone and New England Telephone and Telegraph Company is denied.

Since we find that GSA failed to show that the regional boundaries as stated in the RFP are necessary to meet its minimum needs, by letter of today, we are recommending that GSA amend the solicitation to conform to the RBOCs operating regions and to permit competition on this revised basis. In addition, we find that Bell is entitled to the costs of filing and pursuing the protest, including attorneys' fees.



**Acting** Comptroller General  
of the United States