



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: MCI Telecommunication Corporation

File: B-239932

Date: October 10, 1990

William A. Roberts, III, Esq., and Lee P. Curtis, Esq.,
Howrey & Simon, for the protester.
George J. Affe, Esq., for US Sprint, an interested party.
Linda A. Donaghy, Esq., United States Department of Justice,
for the agency.
Vincent L. Crivella, Esq., and Stuart Young, Esq., General
Services Administration, for the agency.
David Ashen, Esq., and John M. Melody, Esq., Office of the
General Counsel, GAO, participated in the preparation of the
decision.

DIGEST

1. Requirement for long-distance telephone service for federal inmates comes within the scope of the FTS2000 telecommunications services contracts. Where the long distance service does not differ in any technical respect from that being provided under the FTS2000 contracts, the contracts specifically provides for additional users, and the contracts cover telephone services related to official government business, including telephone calls by inmates.

2. Where agency requirement for long-distance telephone service for federal inmates comes within the scope of the FTS2000 telecommunications services contracts, agency is required to place orders for the service under the FTS2000 contract in the absence of an exception granted by the General Services Administration and such orders will not constitute improper sole-source procurements.

DECISION

MCI Telecommunications Corporation protests that the Department of Justice (DOJ), Bureau of Prisons (BOP), improperly contemplates procuring long-distance telephone service for federal prison inmates from the US Sprint Communications Company on a sole-source basis. MCI contends that BOP's contemplated issuance of an order under Sprint's "FTS2000" contract (GS00K-89-AHD0009), with the General

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Services Administration (GSA) for telecommunication services will constitute both the improper use of the FTS2000 contract for personal calls and an improper sole-source award.

We deny the protest.

The Attorney General is charged with providing the "proper government, discipline, treatment, care, rehabilitation, and reformation" of inmates at federal correctional institutions. 18 U.S.C. § 4001 (1988). Inmates are entitled to place telephone calls "subject to limitations and restrictions which the Warden determines are necessary to insure the security, good order, and discipline of the institution and to protect the public." 28 C.F.R. § 540.100 (1989). According to BOP, phone privileges both allow inmates to maintain ties to their families and communities, thereby facilitating rehabilitation and reassimilation into the community after release, and, because access to telephones is desired by most inmates, it provides a means for behavior control. Telephone calls by inmates at most institutions are made by means of operator-assisted collect calls.

Recently, BOP has evaluated a new inmate calling procedure at the Federal Correctional Institution in Butner, North Carolina. Under the new procedure, inmates earn funds which are credited to their accounts and used to pay for telephone calls; the ability to make a telephone call is governed by a computer, which determines whether the inmate has current phone privileges and is authorized to call the number in question, verifies that sufficient funds are available in the inmate's account to pay for the call, limits the length of the call, and maintains a record of all calls. Based on the results of the Butner program, BOP has decided to adopt the new telephone system throughout the correctional system. BOP reports that the new system offers several potential benefits, including promoting correctional objectives by making inmates responsible for the cost of their calls, elimination of telephone company collection problems, thereby assuring access to telephone services for inmates able to pay for telephone calls, and enhancement of security by permitting telephone calls only to approved numbers and maintaining a record of the numbers being called.

For the Butner pilot program, BOP conducted a competitive procurement and selected MCI as the contractor to provide the telephone service component, but not the equipment. Subsequently, in December 1988, GSA awarded comprehensive, fixed-price, indefinite quantity contracts for intercity telecommunications services--including switched voice

service--to AT&T Communications, Inc. and Sprint. The resulting FTS2000 contracts provide that the FTS2000 program will be mandatory for all federal activities subject to the Brooks Act, 40 U.S.C. § 759 (1988), which includes the DOJ. 40 U.S.C. §§ 472, 759. Pursuant to the Federal Property and Administrative Services Act of 1949 (FPASA), 40 U.S.C. §§ 486(c) and 751(f) (1988), GSA promulgated Federal Information Management Regulation Interim Rule 1, 41 C.F.R. § 201-41.005. This rule requires that federal activities use the FTS2000 network to satisfy telecommunications requirements which are within the scope of FTS2000 network services, unless an exception is obtained from GSA on the basis of an agency's unique or special purpose network requirements, or an exception is otherwise specifically available by law or regulation. This general requirement for use of FTS2000 was subsequently set forth in section 621 of Pub. L. No. 101-136, 103 Stat. 783, 821, which provides that:

"None of the funds appropriated by this or any other Act may be expended by any Federal agency to procure any product or service that is subject to the provisions of [the Brooks Act] and that will be available under the procurement by the Administrator of General Services known as 'FTS2000' unless--

"(1) such product or service is procured by the Administrator of General Services as part of the procurement known as 'FTS2000'; or

(2) that agency establishes to the satisfaction of the Administrator of General Services that--

"(A) the agency's requirements for such procurement are unique and cannot be satisfied by property and services procured by the Administrator of General Services as part of the procurement known as 'FTS2000'; and

(B) the agency procurement, pursuant to such delegation, would be cost-effective and would not adversely affect the cost-effectiveness of the FTS2000 procurement."

The responsibility for providing services to DOJ under the FTS2000 contracts has been assigned to Sprint. When requested by BOP to consider providing inmate telephone service throughout the correctional system under its

FTS2000 contract, Sprint requested GSA's authorization to proceed. After GSA initially refused to authorize use of the FTS2000 system by federal inmates, DOJ requested reconsideration of GSA's decision; it advised GSA of the details of the system, the objectives to be accomplished, and the agency's determination that use of FTS2000 was cost-effective, efficient and in the best interest of BOP. Upon learning of GSA's subsequent reversal of its initial position and authorization for the placement of orders under Sprint's FTS2000 contract, MCI filed this protest with our Office.

As an initial matter, BOP and GSA, which have separately responded to the protest, maintain that MCI is not an interested party to challenge the contemplated issuance of delivery orders under Sprint's FTS2000 contract. The agencies state that under the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3551 (1988), and our Bid Protest Regulations, 4 C.F.R. §§ 21.0(a) and 21.1(a) (1990), a protest may be brought only by an interested party, defined under the statute as "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract." They point out that MCI did not submit a proposal in the FTS2000 competition, but instead participated only as a potential subcontractor. Nor do they believe that MCI falls within the definition of an interested party on the basis of any interest as a prospective offeror under a future competition for long-distance telephone service for federal inmates. In this regard, they cite the recent decision in MCI Telecommunications Corp. v. United States, 878 F.2d 362 (Fed. Cir. 1989), holding that MCI's stated intention to participate in any resolicitation did not give it standing to challenge the award of the FTS2000 contract to AT&T since MCI had not submitted a proposal in response to the FTS2000 solicitation. According to the court, "the opportunity to qualify either as an actual or a prospective bidder ends when the proposal period ends." Id. at 365.

The agencies' focus on the fact that MCI did not participate in the original competition is misplaced. If, as alleged by MCI, providing long-distance telephone service for federal inmates is outside the scope of the FTS2000 contracts, then MCI never had the opportunity to compete for award of a contract to provide this service. For this reason, the facts here are distinguishable from those in MCI Telecommunications Corp. v. United States, *supra*, where the plaintiff sought to challenge the award of a contract for which it had the opportunity to compete but chose not to do so. MCI, allegedly not having had the opportunity to

compete for providing long-distance telephone service for inmates, now seeks that opportunity by means of this protest. As such, it is a prospective offeror and therefore an interested party under CICA to file this protest. Neal R. Gross & Co., Inc., B-237434, Feb. 23, 1990, 90-1 CPD ¶ 212, aff'd, The Dept. of Labor--Recon., B-237434.2, May 22, 1990, 90-1 CPD ¶ 491 (contract modification is beyond the scope of the original contract and the subject of the modification thus should be competitively procured absent a valid sole-source justification).

Turning to the merits, we find that the inmate telephone services are within the scope of Sprint's FTS2000 contract, and that placing orders for such services thus would not require a modification or change in the contract. First, the FTS2000 solicitation advised offerors that the objectives of the FTS2000 program were to "obtain a comprehensive set of telecommunications services" through contractors "responsible for providing all services and network management" while "ensuring continued improvements in FTS2000 services and prices."^{1/} The solicitation specifically provided for additional users, stating that the contemplated "contract is for the use of all federal agencies . . . and any other user authorized by GSA."

Second, there was no provision in the FTS2000 solicitation which describes coverage of the contract in terms of the content of telephone calls. Indeed, FTS2000 offerors were clearly on notice that GSA considered some otherwise personal calls as being necessary in the interest of the government. Prior to the closing date for receipt of initial proposals, GSA published in the Federal Register final regulations authorizing personal calls by government employees traveling on government business and calls by employees to family, residence, local government agencies or physicians. 52 Fed. Reg. 42,292, 42,294 (1987). Here, BOP, with the concurrence of GSA, has determined that making long-distance telephone service available to inmates furthers the conduct of official government business by aiding the rehabilitative process through encouraging inmates to assume responsibility and perform useful services

^{1/} The FTS2000 solicitation incorporated into the contract specifically required supporting switched voice service from on-net locations--that is, those subscribing to FTS2000 services--to off-net locations--that is, those that do not subscribe to FTS2000 services--and further provided that delivery points may be located off government premises. This definition of the requirement clearly encompasses calls from federal correctional institutions to private locations.

so as to earn money to pay for calls, encouraging the maintenance of family and community ties, and otherwise assisting in the assimilation of released inmates into the community. As noted above, by regulation in effect when the FTS2000 solicitation was issued, inmates generally are entitled to place telephone calls. 28 C.F.R. § 540.100.

We therefore conclude that the solicitation as incorporated into the subsequent FTS2000 contracts authorized use of the FTS2000 system by additional users and covered telephone services related to official government business, including telephone calls by inmates. In these circumstances, we find no basis to question the agencies' determination that the requirement for long-distance telephone service for federal inmates committed to the care and custody of the Attorney General falls within the comprehensive scope of the FTS2000 contract. Since the requirement for long-distance telephone service for federal inmates falls within the scope of the FTS2000 contracts, the DOJ, as a federal agency subject to the Brooks Act, is required by FIRMR Interim Rule 1, 41 C.F.R. § 201-41.005(c), to use the FTS2000 network to satisfy the requirement unless an exception is granted by GSA or is otherwise specifically provided. Here, GSA has determined that DOJ must use FTS2000 and no other specific exception is applicable.

MCI argues that even if the long distance service is within the scope of the FTS2000 contracts, BOP nevertheless was obligated to consider whether a competitive procurement should be conducted to obtain better prices. MCI contends that the phone calls ultimately will be paid for by the inmates rather than by appropriated funds, and that therefore BOP was not obligated by any procurement statute or regulation to place orders under Sprint's FTS2000 contract. MCI points out that section 621 of Pub. L. No. 101-136, quoted above, which was enacted after FIRMR Interim Rule 1, prohibits the use of appropriated funds for services that are available under FTS2000 contracts unless GSA provides a waiver.

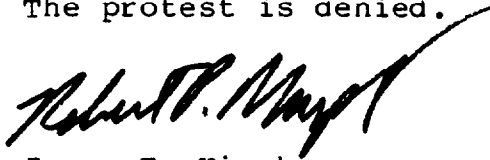
MCI's argument that the restraint on the use of appropriated funds in section 621 of Pub. L. No. 101-136 means non-appropriated funds cannot be used for FTS2000 contracts is without merit. First, long-distance telephone service for federal inmates comes within the scope of the FTS2000 contracts, which provide for the "mandatory" use of FTS2000 "as implemented by" the FIRMR; as such, the requirement for telephone services has already been competed and we are aware of no basis for requiring further competition. Nothing in FIRMR Interim Rule 1, or the FIRMR generally, limits coverage to procurements funded by appropriated

funds. On the contrary, FIRMR Interim Rule 1 defines its coverage on the basis of whether the procurement is being conducted by a federal agency subject to the Brooks Act, and the coverage of the FIRMR extends to procurements by executive agencies. 41 C.F.R. § 201-1.103(c). In this regard, the United States Court of Appeals for the Federal Circuit held in 1989 that Congress did not consider the source of the funds relevant in determining the applicability of the Brooks Act. U.S. v. International Business Mach. Corp., 892 F.2d 1006 (Fed. Cir. 1989) (procurement funded by Government Printing Office Revolving Fund).

Likewise, nothing in the history of section 621 demonstrates any intention to limit the coverage of the regulation and thus of FTS2000. Section 621 is a reenactment of an earlier provision, section 627 of Pub. L. No. 100-440, 102 Stat. 1721, 1757; the legislative history of this latter provision indicates that it was intended to limit the possible expenditure by the Department of Defense (DOD) of "scarce tax dollars" for unnecessarily duplicative or redundant systems, and designed to ensure the inclusion of additional users--such as DOD--in the FTS2000 procurement so as to increase economies of scale. S. Rep. No. 387, 100th Cong. 2d Sess. 114 (1988).

We conclude that providing long-distance telephone service for federal inmates is within the scope of the FTS2000 contracts and thus does not constitute a new requirement that must be competed.

The protest is denied.


for James F. Hinchman
General Counsel