DECISION

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

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FILE: B-178542 DATE: October 17,1975

MATTER OF: Continental Cablevision of New Hampshire, Inc.--Reconsideration

DIGEST:

1. Allegation by protester on reconsideration that agency did not adequately consider "repair capabilities," of eventual awardee is unfounded as contractor's proposal contained detailed method of operation for repair work and manner of effecting repairs was same as that offered by protester. Listing by contractor of telephone answering service which relayed repair calls was compliant with RFP clause which only required location where contractor could be contacted, not where repairs would be made.

2. Contention that successful offeror gained cost advantage by being allowed to have local office (trailer) on Government property when protester was unaware of such option is without merit as RFP clearly stated that contractor could place temporary buildings on Government property if approved by contracting officer and successful offeror's proposal provided for the possibility of local office on Government property. Cost of utilities currently provided by agency does not change standing of offerors with regard to cost.

3. On reconsideration, prior decision is affirmed where original protester has failed to demonstrate that offer for microwave services for CATV franchise was other than for indefinite time in future at undetermined cost, and was improperly not considered for evaluation purposes.

4. Contracting officer raised valid points of negotiation with offeror where information imparted relative to use of microwave in CATV system was matter of public knowledge within industry and Government and from filings before FCC. Record discloses that successful offeror had prior knowledge during negotiations of possibility of use of microwave. No improper transfer of information to successful offeror found.

5. Formation of subsidiary by contractor after award (approved by agency) to perform contract does not constitute violation of Assignment of Claims Act (41 U.S.C. § 15) since subsidiary is supervised by contractor and subsidiary is viewed as agent of contractor rather than assignee.

6. Allegation that successful offeror had weak financial position and was, therefore, nonresponsible at time of award is not for consideration as GAO does not review protests against affirmative determinations of responsibility unless, unlike here, either fraud is alleged on the part of procuring officials or where solicitation contains definitive responsibility criteria which allegedly have not been applied.

Continental Cablevision of New Hampshire, Inc. (Continental), has requested reconsideration of our decision in the matter of Continental Cablevision of New Hampshire, Inc., B-178542, July 19, 1974, 74-2 CPD 45, in which we denied Continental's protest against the award of a cable television (CATV) franchise at Pease Air Force Base (AFB), New Hampshire to Satellite System Corporation (Satellite).

Continental contends that, in light of additional information which it has discovered, our decision of July 19, 1974, should be reversed. That decision held there was nothing improper in the manner in which the negotiations with Satellite or Continental were conducted or in the way proposals were evaluated.

Continental contends that the Air Force did not apply the evaluation for award formula in the request for proposals (RFP) properly by failing to adequately consider the "repair capabilities" and "demands that will be made on Government furnished property" insofar as the awardee was concerned.

Regarding the evaluation of repair capabilities, Continental argues that Satellite did not possess a repair facility at the address given in the latter's proposal at paragraph 14. Located at the address given was, inter alia, a telephone answering service. The Air Force responds to this argument by stating that there was no

requirement in the RFP for a contractor to have a repair facility at a specified location. The only requirement of the RFP in this regard was contained in paragraph 14 which stated:

> "14. Repair Services. When notified to do so by a subscriber or by the contracting officer, the contractor agrees to make repairs, as necessary, at a subscriber's location as quickly as possible and on a totally nondiscriminatory basis. Unreasonable, frequent or widespread delay in making repairs shall be grounds for termination of this Agreement under the clause entitled 'Termination for Default.' Agents of the contractor responsible for making repairs may be contacted at: _____ (Contractor shall insert required information when completing offer.) and shall be available during the following hours: _____. (The contracting officer desires that the contractor respond to a repair service call within twenty-four (24) hours and perform repair service within seventy-two (72) hours.) Failure to make repairs at a subscriber's location shall constitute a 'signal interruption or diminution' within the meaning of subclause (b) of the clause of this Agreement entitled 'Continuity of Service.'" (Emphasis supplied.)

The Air Force further states that Satellite makes its repairs out of mobile vans which respond to the telephone calls relayed by the answering service.

We must agree with the Air Force. We do not believe it is reasonable to equate "repair capabilities" in the award formula to a requirement that a repair facility as such be supplied. If an offeror (contractor) has a means by which he can be contacted to effect repairs, we believe he has complied with the requirement of paragraph 14 and it is not necessary that he possess a repair facility at the address given in paragraph 14. Moreover, we note upon review of Continental's proposal that the manner of effecting repairs proposed by Continental was the same as that proposed by Satellite, namely, four mobile vans equipped with two-way radios.

Of particular importance, the Satellite proposal accepted for award contained a detailed method of operation for the repair work necessary under the contract, including the role of the telephone answering service. Therefore, based on the record before us, we conclude that the "repair capabilities" of Satellite were adequately considered.

Continental further contends that Satellite has been allowed to maintain an office on Pease AFB and that there was no indication of this option being available either from the RFP or during negotiation. Continental argues that its proposal would have been lower in price if it had been aware of this and due to the closeness of the offers (Continental - $45,400 per year; Satellite - $44,475 per year), Continental would have been the successful offeror.

Our Office has been advised that Satellite maintains a trailer at Pease AFB which is used as an office. As mentioned above, Satellite's proposal contained a method of operation. Included therein was a provision for a possible local office on Air Force property. The Air Force furnishes water and electricity to the trailer at a cost of $12 per month and the other utilities are paid for by the contractor. The Air Force states that there is nothing improper in this arrangement as it was contemplated by paragraph 17 of the RFP which allowed the contractor to construct or place on the Base equipment or facilities, including temporary buildings, if approved by the contracting officer.

Upon review of paragraph 17, which clearly gave contractors the option to place appropriate facilities on the Base, we find nothing improper in allowing Satellite to place its trailer on the Base. The fact that Continental did not explore this option during the period when it was preparing its proposal or during negotiations does not affect the validity of the award to Satellite. Also, contrary to Continental's assertion, paragraph 17 is not directed only to the use of technical equipment (cables and wires) needed to place the CATV system in operation. Moreover, the $144 per year benefit in the form of water and electricity furnished by the Air Force to Satellite does not change the cost standing of the offerors.

Continental also argues that its offer of microwave services should not have been disregarded and, moreover, that its contention in the original protest that information regarding that offer was improperly transferred to Satellite during the course of negotiations was not answered in our decision.

We dealt with the manner of evaluation of microwave services in our prior decision, as follows:

> "The offer for microwave services evidenced Continental's intention to use it when it became commercially available. Existing facilities did not permit microwave utilization until some indefinite time in the future. In this vein, evaluation of proposals to determine the most advantageous offer to the Government should be confined to matters that are not subject to speculation whether they will occur or not and should be quantifiable. Cf. 53 Comp. Gen. _____ (B-178684, supra); B-173915, December 21, 1971; 43 Comp. Gen. 60 (1963). Since prices were not required, or submitted, for microwave services, they could not form a part of the cost evaluation. Also, since Continental could not definitely state when microwave services would be available, they could not qualify for consideration under the evaluation scheme as a '* * * supplementary service offered above and beyond specific minimums * * *' so as to justify award to other than the lowest cost proposal."

Continental now contends that the offer was not speculative, and it was proffered at no cost to the Government. Therefore, the offer should have been considered and evaluated as a "supplementary service." We do not believe this is borne out by the record before our Office. In Continental's proposal, the only mention of microwave is in the section entitled "Future Services and Potential Subscribers" wherein it is stated:

> "* * * it is likely that in the intermediate term future signals from New York City television stations will be available by microwave, in this area."

Further, no price was quoted for microwave service nor was a commitment contained in the proposal that no additional charge would be made. Also, the record of negotiations with Continental do not definitize the offer or the costs of the microwave services to the extent alleged by Continental.

Because of the above holding in our decision with regard to the evaluation of microwave, we did not find it necessary to discuss the possible improper transfer of information alleged by Continental. However, since it has been raised again on reconsideration, a discussion of the matter follows.

At the time of the procurement, Continental was negotiating with a company for microwave services which had applied for a license to the Federal Communications Commission (FCC). Continental alleges that it advised the contracting officer of these facts on the day prior to the date set for submission of best and final offers, January 11, 1973, during the final round of negotiations. Continental contends that the contracting officer then contacted Satellite later that afternoon and transferred the above information. By the morning of the next day, Satellite had contacted the microwave company and advised the contracting officer that it could provide such services. The contracting officer states that he called Satellite after the negotiations with Continental to inquire if Satellite could obtain microwave services and advised Satellite that two companies had applied to the FCC for licensing and gave the name of the company with whom Continental was negotiating, but not that negotiations were taking place.

It is the position of the Air Force that there was no "technical transfusion" of Satellite's proposal with information from Continental's proposal.

A review of the record shows that Satellite, during prior negotiations, on December 5, 1972, was asked if it was considering anything for the future other than that included in its proposal. The response mentioned microwaving and the fact that there was a network moving up from New York and one in Canada. Satellite stated that it was their understanding that any CATV company could buy the system but it would entail an extra charge and involve a modification to the contract.

As microwaving had already been discussed with Satellite during prior negotiations, we see nothing improper in renewing discussions in this area. Also, the record of prior negotiations reveals that Satellite was aware of presence of the two systems in the geographic area.

Our review of the record indicates that the contracting office raised valid points of negotiation with Satellite. The information imparted appears to have been a matter of public knowledge within the industry and Government and from filings before the FCC. In any case, as mentioned above, the issue of microwave services properly played no part in the evaluation to determine the most advantageous proposal.

Continental also asserts that Satellite has violated the Assignment of Claims Act (41 U.S.C. § 15 (1970)) which bars the assignment of contracts except in certain circumstances, because immediately after award Satellite formed "Pease Cable Television Company" to perform the contract. The Air Force states that it approved such a corporate restructuring by Satellite at a preperformance conference, that the new subsidiary is personally supervised by Satellite, and that Satellite is considered the contractor with the new subsidiary as its agent.

The courts have held that when a contractor, after the contract has been entered into, forms a corporation or subsidiary, but personally supervises the contract work, the newly formed corporation is regarded as the agent rather than the assignee of the contractor. United States v. Axeman, 152 Fed. 816 (1906). Therefore, we find no violation of 41 U.S.C. § 15 on the part of Satellite.

Finally, Continental alleges that, due to what it considers the weak financial position of Satellite at the time of award, Satellite should have been found nonresponsible by the contracting officer. (Continental received a copy of the preaward survey on Satellite after our decision was issued.) We will not review protests against affirmative determinations of responsibility unless either fraud is alleged on the part of procuring officials or the solicitation contains definitive responsibility criteria which allegedly

have not been met. As neither of these exceptions are for application in the instant case, we must decline to consider this portion of the request for reconsideration. In any event, the preaward survey on Satellite thoroughly considered the firm's financial capability and recommended complete award.

Accordingly, our decision is affirmed.

Deputy Comptroller General
of the United States