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U4214

A. Zuckerman
Proc. II

DECISION



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

FILE: B-157783

DATE: November 16, 1977

MATTER OF: General Telephone Company of California

DIGEST:

1. Agency's annual appropriation is not available for payment of equipment lessor's entire capital cost at commencement of lease, and consequently low bid for lease of telephone equipment for 10 years which requires payment of bidder's capital costs at the outset of lease is properly rejected as requiring an advance payment contrary to law.
2. Advance payments authorized by statute and implementing regulations are financing tool used where no other means of contract financing are available; a bid conditioned upon the receipt of advance payments would be required to be rejected pursuant to FPR 1-30.407(b).
3. Installation costs of telephone equipment are expenses properly incurred during fiscal year in which contract was awarded and properly could be paid from annual appropriation available for such purpose for that fiscal year; however, had bidder unbalanced its bid by including the capital cost of its equipment in the installation cost, contracting officer would not be authorized to accept the bid because such costs would be far in excess of reasonable value of the installation services performed and payment would be in violation of 31 U.S.C. § 529.
4. Failure to consider present value of money factors or residual values in determining low bidder under lease/purchase alternatives is proper where IFB does not include such factors for evaluation. In advertised procurements, if any factors other than bid price are to be considered in determining low bidder, IFB must advise of such factors.
5. While solicitation failed to set forth objectively determinable evaluation factors, protester was not prejudiced thereby.

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General Telephone Company of California (GTC) protests the award of a contract to Northern Telecom, Inc. (NTI) for the purchase of a telephone system for the Veterans Administration (VA) Hospital, Loma Linda, California. GTC asserts that it was the lowest bidder under the evaluation criteria set forth in the second step of a two-step formally advertised procurement and thus it, not NTI, was entitled to the award.

I. Background

The VA invited bids for the hospital telephone system on two alternate bases, i. e., purchase or lease. In addition, bids were requested for maintenance and certain "follow-on" services such as system expansion. Bids for the purchase of the system were to be evaluated on the basis of the purchase cost, plus the cost of maintenance and follow-on services for a period of five or ten years, and in the case of the lease evaluation was to be based on the cost for a 5 or 10 year lease period plus maintenance and follow-on services for that period. For the purpose of evaluation, a 5 percent per year escalation factor was added to the annual recurring costs (maintenance, lease costs, and follow-on services as appropriate) for the 5 or 10 year period for either alternate.

Bids were received from several firms, with the following evaluated on a 10 year basis as low and second low respectively:

General Telephone Company of California	\$1,096,441.35
Northern Telecom, Inc.	\$1,103,554.50

The GTC low bid for the lease of the telephone equipment was formulated under a so-called tier pricing concept. As explained by GTC in its bid:

"The Tier Pricing concept of rate making essentially divides the total cost of providing service into the categories of capital recovery [basic charge or] Tier A, generally considered fixed costs, and on going operating costs Tier B, such as maintenance and administration which are considered variable.

"The payment plan consists of four components:

1. Nonrecurring charge to be paid at the time the service is provided.

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2. Basic charge which may be paid off totally, or in part, at time of installation or;
3. Paid off on a monthly basis during the term of the contract (Tier A)
4. Monthly on going costs which continue throughout the term of service (Tier B)

* * * * *

"The Tier Pricing concept applies to the basic switching system only. Charges and rates for station equipment and various supplemental services are those now on file or to be filed in the Company's tariffs which will continue throughout the term of service [Tier B]."

GTC offered three "plans" (only one of which is essential to this discussion) and bid as follows in accordance with the tier pricing concept:

	<u>Nonrecurring Charge</u>	<u>Basic Charge</u>	<u>Tier A</u>	<u>Tier B</u>
<u>PLAN A</u>				
Option I		*	*0	0
First 5 years	\$28,095.35	\$468,424	\$583,500	\$218,388
Subsequent 5 years				218,388
Option II				
First 10 years	27,095.35	468,424	712,650	436,776

The asterisk referred to a statement in the bid that:

"Customer has the option of paying all or part of the basic charge to reduce, or eliminate, the Tier A pricing. Prices shown are the sum of 60 or 120 months times the monthly rate."

Follow-on services were quoted in a separate schedule. NTI bid a firm fixed price for the purchase of the telephone system and included all equipment and apparatus. Follow-on service and maintenance were also bid as required and were included in the evaluated prices.

Because the low GTC bid was calculated using the \$468,424 basic charge payable upon completion of the installation (under the VA evaluation the use of any of the "Tier A" charges would not have

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resulted in the low bid), the VA rejected the bid on the assumption that it required an advance payment in violation of 31 U.S.C. § 529, and awarded the contract to NTI.

GTC asserts the following bases for its protest:

1. The GTC basic charge was not an advance payment
2. The VA improperly evaluated the bids by not applying present value cost determinations to the bids as well as other cost factors.

GTC argues that the basic charge should be considered a non-recurring installation cost which was specifically permitted by the invitation. Alternatively, GTC points out that in any event, advance payments may be allowed as provided by 41 U.S.C. § 255 and Federal Procurement Regulations (FPR) 1-30.400 et seq. (1964 ed.).

II. Discussion

A. Advance Payments

The "low" GTC bid rejected by the VA as "illegal" required the agency to pay \$496,519 upon completion of installation, \$468,424 (the basic charge) of which represented the capital recovery for the equipment it offered to lease, plus \$28,095 which was the cost of installation. The \$468,424 was payable whether or not service continued for the duration of the lease. The basic charge, therefore, is, in our view, tantamount to the purchase of the leased equipment without benefit of title (and the incidents thereto).

Necessary to the consideration of the questions raised by the VA's rejection of the GTC low bid is the following section of title 31, United States Code:

"§ 529 Advances of public moneys; prohibition against. No advance of public money shall be made in any case unless authorized by the appropriation concerned or other law. And in all cases of contracts for the performance of any service, or the delivery of articles of any description, for the use of the United States, payment shall not exceed the value of the service rendered, or of the articles delivered previously to such payment. * * * (Emphasis added.)

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GTC argues that the advance payment statute, 51 U. S. C. §529, supra, does not prohibit the award of the contract under its plan calling for payment of the \$488,464 basic charge, because payment on its low bid was not required prior to the completion of the installation of the equipment leased to the Government. GTC bases its argument on the theory that an advance payment is a payment for goods or services "not yet received." GTC asserts that because the VA required installation and operation of a telephone system in the current fiscal year, payment of that firm's capital costs for equipment which it proposes to lease to the Government for 10 years is an expense properly incurred in that fiscal year. GTC has not indicated what the standard monthly tariff charges would have been for a similar installation during the current fiscal year, although GTC has offered the Government an option to pay the capital costs at the rate of \$71,265 annually for the duration of the lease.

In 1 Comp. Gen. 143 (1921), we considered the advance payment statute in regard to the legality of Government partial (progress) payments for materials which had not been delivered. We held that the provisions of the statute do not necessarily preclude the making of any payment under a contract until the entire subject has been completed and delivered to the Government, stating that the statute was "not intended to prevent a partial payment in any case in which the amount of such payment had actually been earned by the contractor and the United States had received an equivalent (title) therefor." We concluded that because the partial payments were not in excess of the amount actually earned by the contractor in the performance of the contract, and because title to all property upon which payment was made vested in the Government, the Government received the corresponding benefit which justified the making of a partial payment in advance of delivery.

In 20 Comp. Gen. 917 (1941), we approved a proposed contract amendment to provide for partial payment of the contract price prior to delivery to the Government upon the condition that title to the materials for which payment was made passed to the Government. See also 28 Comp. Gen. 468 (1949). We have also approved the payment of earnest money under an agreement of sale for real estate to the Government on the theory that under the proposed agreement of sale, equitable title would vest in the Government prior to the vesting of legal title, which remains in the seller only to secure the payment of the purchase price. 34 Comp. Gen. 659 (1955).

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Under the facts of this case, it is clear that the Government would acquire no legal or equitable interest in the title to the equipment installed under the lease. The most that it has is the limited right to physical possession for a maximum period of 10 years. For example, the Government has no right to maintain the equipment independent of the lessor, nor can it demand that the equipment be relocated to another site should it decide to terminate service at the installed location. In addition, under the terms of the bid, the Government has no interest in the residual value of the equipment whether or not services are maintained for the full term of the lease or upon its conclusion. It is, of course, not denied by GTC that the \$468,464 basic charge required at the outset of service represents the capital costs of the equipment "leased" for a period of 10 years, and as such, it seems apparent to us that a substantial portion of the basic charge would not have been "actually earned" by GTC at the time it was to be made. It is also our view that the entire capital cost of the leased equipment represents only a portion of the current fiscal year's needs, and that a majority of these costs represent telephone needs for future fiscal years. We have consistently regarded the advance payment statute as prohibiting advance payments under rental agreements with only limited exceptions not relevant here. Advance Payments for Equipment Rental, B-188166, June 3, 1977, 77-1 CPD 391; 25 Comp. Gen. 834 (1946); 19 Comp. Gen. 758 (1940); 18 Comp. Gen. 839 (1939). We are, therefore, of the opinion that any leasing scheme which obligates the Government to pay the contractor's entire capital cost at the outset of the lease is contrary to the statutory limitations of 31 U. S. C. § 529.

Although GTC contends that the basic charge should be considered in the same manner as a nonrecurring installation cost which was specifically permitted by the invitation, it is clear that the basic charge and installation charge are not the same and were not intended by GTC to be the same. GTC did not identify the \$468,424 charge as an installation cost, but rather indicated \$29,095 as the cost of installation of the equipment. The \$468,424 obviously represents something other than installation costs. Moreover, even if it had unbalanced its bid by including the capital cost of its equipment in the nonrecurring installation charge, we are of the opinion that the contracting officer would not be authorized to accept the bid for the apparent reason that such cost would be far in excess of the value of the installation services performed. Thus, while the installation cost of the system is an expense properly incurred during the fiscal year, and as such, could be paid from the currently available annual appropriation for that purpose, payment from an annual appropriation for such an unbalanced installation charge would, in our opinion, be contrary to 31 U. S. C. § 529.

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GTC also notes that if the basic charge is construed as an advance payment, such payments are authorized by 41 U.S.C. § 253 and FPR 1-30.400 et seq., 41 C.F.R. 1-30.400 et seq. (1976).

We think GTC's argument in this regard must fail. First, authorized advance payments are clearly indicated to be a financing tool where no other means of contract financing is available to the contractor, FPR 1-30.404(b), and are last in the general order of preferences stated as a means of contract financing. FPR 1-30.209. Advance payments are considered appropriate for, among other things, "rare but essential contracts to those contractors, unusually weak or overextended financially * * * ." FPR 1-30.408. GTC does not contend that it could qualify as the recipient of an advance payment under the conditions of this procurement and the criteria of Subpart 1-30.4 of the Federal Procurement Regulations. Moreover, although advance payments are authorized under certain contracts to be awarded under formal advertising, a bid such as the GTC "low" bid would nonetheless be required to be rejected since it is conditioned upon the receipt of the advance payment, contrary to FPR 1-30.407(b). We, therefore, reject GTC's assertions that an advance payment to it would be legally authorized in this case.

B. Bid Evaluation

GTC claims that the VA improperly evaluated the bids received because it failed to include an analysis of "present worth and other cost factors" in its determination of the low bid. The purpose of GTC's argument in this respect is to show that all of its bid options, including those which do not require payment at the outset of the lease were lower than NTI's bid when present worth of money factors are considered. The other cost factors which GTC claims should have been considered were the "direct Federal tax loss as a result of a purchase rather than a lease," and "additional costs associated with insuring Government-owned equipment," claiming support for that proposition from Office of Management and Budget (OMB) Circular A-76, which GTC believes is applicable to this procurement. In addition to a direct Federal tax loss, GTC states purchase of the equipment versus lease "will result in a loss of state income taxes and local equipment property taxes, which loss could have a long term impact on Federal revenue sharing programs."

The VA's failure to consider such factors in addition to price, GTC says, was in violation of 41 U.S.C. § 253(b) which requires award "to that responsible bidder whose bid, conforming to the invitation to bid, will be most advantageous to the Government, price and other factors considered * * * ." (Emphasis added.) SF 33A, included in the IIR, contains substantially the same language as the statute. GTC cites Linolex Systems, Inc. et al., 53 Comp. Gen. 895 (1974), 74-1 CPD 296, as supporting the proposition that it is necessary to make present value calculations when determining whether to buy or lease.

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We do not believe that Linolex, supra should be read to be a mandate by this Office that present value calculations must be included in purchase/lease determinations. In Third Party Leaseback of ADPE, 55 Comp. Gen. 1012 (1976), 76-1 CPD 275, (also cited by GTC), we recommended that lease or purchase determinations be based on the present value of money. Of equal concern in a procurement such as this, however, where the life of the equipment could reasonably be expected to exceed the term of the lease, would be the residual value of the purchased equipment which should be considered in evaluating bids. GTC objects to any consideration of residual value simply because that factor was not specifically included as an evaluation factor. We agree with GTC in this regard; however, present value calculations, as well as the "other cost factors," were also not included in the solicitation as evaluation factors and for the same reasons, should not be considered in bid evaluation. To permit bidders to compete on equal terms, the invitation must be sufficiently definite to permit the preparation and evaluation of bids on a common basis. Bidders cannot compete on an equal basis as required by law unless they know in advance the basis upon which their bids will be evaluated. 36 Comp. Gen. 380 (1956). We have consistently held that if any factors other than bid price are to be considered in determining the low bidder, the IFB must advise bidders of such factors. AMF, Inc. B-179914, March 26, 1974, 74-1 CPD 144. Moreover, we point out that the proper time to have raised what GTC now considers to have been erroneous or incomplete evaluation factors was prior to bid opening, and GTC's reliance on what it perceived to be included in bid evaluation other than bid price, cannot be raised as a basis for bid protest after bid opening. Dunham-Bush, Inc., B-184537, January 14, 1976, 76-1 CPD 25. Moreover, while OMB Circular A-76 expresses Executive Branch policy with respect to whether certain services should be provided in-house or purchased from commercial sources, that Circular is not applicable to the establishment of evaluation factors for the purpose of contract award.

Finally as we have noted earlier, while "follow-on" services was an evaluation factor, no estimates of the type and frequency of follow-on services were indicated in the IFB. Consequently, during the course of our own review of the bids, we were unable to determine how the VA arrived at the final evaluated prices. Moreover, no consideration was given to compounding the escalated costs which, it seems to us, would have yielded a truer picture of the costs the Government would ultimately be required to bear. Depending upon the type and frequency of follow-on services, the total evaluated prices could vary significantly. As evidence of this

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fact, various submissions by the parties on the subject and our own analysis came to differing conclusions with respect to which firm was the low bidder.

It has been our position that, as a minimum, the basis of evaluation must be stated with sufficient clarity and exactness to inform each bidder prior to bid opening of objectively determinable factors from which the bidder may estimate within reasonable limits the effect of the application of such evaluation factor on his bid. Factors which are announced by representatives of the contracting agency at the time of or subsequent to the opening of bids violate the principle for the reason that they are not determinable by the bidder at the time his bid is being prepared. 36 Comp. Gen. 380, supra.

We believe that the instant IFB was lacking in clear statement of objectively determinable factors. However, accepting the premise that the GTC "Plan A" was low for the purpose of this decision, and having concluded that the GTC low bid required payment contrary to law, we believe the protester was not prejudiced by what might otherwise be considered to be an ambiguous statement of bid evaluation factors.

Moreover, we note that there is some question with respect to the effect of the Anti-Deficiency Act, 31 U.S.C. § § 665, 712(a) on this procurement. The VA procured the telephone equipment under delegation from the General Services Administration (GSA) pursuant to the Federal Property Management Regulations part 101-35 (41 C.F.R. part 101-35 (1976)). GSA has statutory authority which it delegates to Federal agencies to enter into contracts for public utility services for periods not exceeding 10 years. 40 U.S.C. § 481(a)(3). Question, therefore, arises as to the VA's authority to lease telephone equipment, separate and apart from contracting for the utility service, on a long term basis.

Unless it can be concluded that there is such statutory authority, acceptance of any of GTC's long term leasing plans would result in a violation of 31 U.S.C. § 665, which prohibits the entering into of contracts "in advance of appropriations made for such purpose, unless such contract * * * is authorized by law." Thus, it may well be that VA was precluded from considering any of GTC's proposed plans. On the other hand, we have been informally advised by GSA that it considers equipment necessary to deliver the utility service as being within the definition of utility services for the purpose of 40 U.S.C. 481, supra. However, because we have concluded that the award to GTC in this case would be a violation of the advance payment statute, supra, it is not essential for the purpose of this decision to further consider the application of the Anti-Deficiency Act.

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The protest is denied.

R. F. Kellum
Deputy Comptroller General
of the United States