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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: MCI WorldCom Deutschland GmbH

File: B-291418; B-291418.2; B-291418.4; B-291418.5; B-291418.6

Date: January 2, 2003

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Stephanie A. Kreis, Esq., and JoAnn W. Melesky, Esq., Defense Information Systems Agency, for the agency.
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DIGEST

Agency's inclusion of a clause in solicitations for telecommunication circuits between various United States military installations located in European nations that are members of the North Atlantic Treaty Organization (NATO), requiring that telecommunication providers (TP) be accredited by the National Long Lines Agency (NALLA) of the NATO nation or nations where the military installations are located, is unobjectionable, where the record establishes that the provision of the services by NALLA-accredited TPs is reasonably related to the agency's needs.

DECISION

MCI WorldCom Deutschland GmbH protests the terms of numerous solicitations issued by the Defense Information Technology Contracting Organization (DITCO)--Europe, Defense Information Systems Agency, for telecommunication circuits between various United States military installations located in European nations that are members of the North Atlantic Treaty Organization (NATO).[1] The protester argues that a standard provision included in the solicitations, requiring that contractors be accredited by the National Long Lines Agency (NALLA) of the NATO

[1] The solicitations for the telecommunication circuits protested by WorldCom that are the subject of this decision involve Alliance Long Lines Activity (ALLA) circuit Nos. 130499, 130500, 130501, 262706, 262705, 264469, 264448, 264465, 264467, 264466, 264470, 262708, 262709, 268890, 262824, 262825, and 262822.

nation or nations where the military installations are located, is unduly restrictive of competition.

We deny the protest.

DITCO-Europe is tasked with providing certain communication circuits for the United States military. To meet its responsibilities, DITCO-Europe leases telecommunication circuits within, to, and from NATO nations using an acquisition process established by ALLA, a NATO agency. The ALLA process was developed by NATO to, among other things, standardize the acquisition of telecommunication circuits by NATO members in NATO nations. Contracting Officer's Statement (Nov. 4, 2002) at 2.

The ALLA process provides for the establishment of NALLAs in each NATO nation. Agency Report (AR), Tab 3, ALLA Handbook, at I-3. NALLAs, among other things, maintain a list of the telecommunication providers (TPs) in their respective countries that have become NALLA accredited, that is, through application to the NALLA they have "accepted the ALLA circuit ordering procedures and corresponding obligations." Id. at I-3, II-3. These obligations include the TPs' employment of "personnel with the necessary clearance to access defence facilities." Id. at II-3. The NALLAs also provide "an interface" between customers, such as DITCO-Europe, and the TPs. Id. at I-3, II-3. In this regard, the NALLAs can obtain information for customers regarding the services available and pricing from the NALLA-accredited TPs, coordinate the acquisition of the telecommunication services for the customers and TPs, and assist customers in the resolution of problems "regarding the provision or operation of ALLA registered circuits." Id. at I-3.

As indicated, each telecommunication circuit obtained through the ALLA process is registered with ALLA and receives an ALLA number. The circuit's ALLA number is known to the customer, TP, NALLA or NALLAs involved, and according to the ALLA Handbook, "recogniz[es] the importance of the circuit for NATO or national defence purposes." Id. at I-5. The NALLAs also "maintain up-to-date records of all internal and international ALLA registered circuits concerning their countr[ies]." Id. at I-3, II-3.

One of the primary advantages of using the ALLA ordering process to obtain telecommunications circuits is that such circuits are accorded "preferential treatment in times of peace, disasters, crisis or war, within the limits of the relevant national regulations or legislation." Id. at I-5. In this regard, each ALLA registered circuit carries a designation as to its "restoration priority" should the circuit be interrupted. Id. at A-3; Supplemental Agency Report (SAR) at 8.[2]

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[2] A similar system is in place in the United States to ensure priority restoration of "telecommunication services vital to the national interest" in times of national

(continued...)

Another advantage of using the ALLA ordering process is the assurance that NALLA-accredited TPs employ personnel with the requisite security clearances to access the necessary facilities. The agency points out here that "[m]ost of the circuits DITCO-Europe procures terminate on military facilities that are not owned by the United States," and that because these facilities are owned by the NATO nation or nations in which the facilities are located, DITCO-Europe "is entirely dependent on security certifications granted by the host country to enable [TPs] access to these facilities for installation and maintenance work." SAR at 13-14.

DITCO-Europe states that it has exclusively used the ALLA "process since its inception . . . to procure circuits for U.S. military use in NATO countries." Contracting Officer's Statement (Nov. 4, 2002) at 2. In order to ensure that it awards contracts for the provision of telecommunication circuits for U.S. military use at facilities within and between NATO nations to TPs that are accredited by the relevant NALLAs, DITCO-Europe recently began inserting the following clause,[3] entitled "Standard Provision-Ten NATO Country Procedures (Sept. 2002)," in each of its solicitations:

> One or more end points of this circuit terminate in NATO countries that have [NALLAs] and NALLA accredited [TPs]. As a member and signatory in [NATO], US is obligated to acquire its military telecommunication services in accordance with NATO requirements specified in [the ALLA] Handbook. Therefore, only TPs accredited by NALLAs of respective NATO countries shall be eligible to receive any order or circuit demand resulting from this inquiry, for NATO country portions of this circuit. Additionally, only NALLA accredited TPs can be used as subcontractor TPs in NATO countries. In NATO countries having no NALLA and/or no NALLA accredited TPs, quotes from TPs possessing authorization to provide communication services from appropriate national authority shall be considered. . . . . Quotes shall

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(...continued)
emergency. See 47 C.F.R. Part 211-Emergency Restoration Priority Procedures for Telecommunications Services (2000); SAR at 7-8.

[3] From April 2002, until it began using the September 2002 clause, DITCO-Europe included a clause in its solicitations (to which WorldCom also objects) that provided in part as follows:

> Any orders issued as a result of this solicitation will . . . be ordered in accordance with [ALLA] procedures as established by the [NALLA] of that NATO country.

Protest, attach. 1, RFQ No. 23M1-3 (Apr. 19, 2002).

> provide evidence TP and all subcontractor TPs possess required NALLA accreditation or national authority authorizations for countries where this circuit terminates.

AR, Tab 17, Circuit Awards, at 87-88. For example, this clause requires that if the agency's requirement are for a telecommunication circuit between two military installations in Germany, a TP, in order to be considered for award, would have to be NALLA-Germany accredited, or if one of the installations is in Germany and the other in the United Kingdom, the TP would have to be NALLA-Germany and NALLA-United Kingdom accredited.

WorldCom protests that this provision, requiring that TPs be accredited by the relevant NALLA(s), is unduly restrictive of competition.[4] The protester points out that while it has been accredited by NALLA-United Kingdom, it has been unable to receive accreditation from any other NALLA. The protester asserts here, and the agency does not contend otherwise, that WorldCom has tried but been unable to become NALLA accredited in other NATO nations in Europe because the respective NALLAs lack "formal procedures, questionnaires, or forms . . . exhibit complete indifference and attach no importance to NALLA 'accreditation,' or are driven by a desire to preserve national carrier monopolies."[5] Protester's Comments at 2.

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[4] The protester also argues that, contrary to the language of the clause (and the agency's arguments), the United States is not obligated to acquire its military telecommunication services in accordance with the ALLA Handbook. The record supports this argument of the protester. Despite our requests, the agency has not pointed to a single document evidencing that the North Atlantic Treaty, or any other international agreement, mandates the use of the ALLA process by NATO nations in acquiring telecommunication circuits for their facilities located within other NATO nations. Additionally, the ALLA Handbook does not contain any language that mandates its use. Accordingly, although as detailed below we do not find that the solicitation is unduly restrictive, given that the protested clause is reasonably necessary to meet the agency's needs, we cannot agree with the agency that the inclusion of the protested clause in the solicitation is authorized by 10 U.S.C. § 2304(c)(4) (2000), which allows the head of an agency to use other than competitive procedures in awarding a contract "if the terms of an international agreement . . . have the effect of requiring the use of procedures other than competitive procedures."

[5] According to the agency, it considers WorldCom authorized to provide services in the United Kingdom (where WorldCom is NALLA accredited), Spain, and Iceland. With regard to Spain, the agency explains that the accreditation of TPs in Spain is handled by the Spanish Telecommunications Market Commission, and that this commission lists WorldCom as a "registered" TP. Contracting Officer's Statement at 4. The agency adds that there is no NALLA in Iceland, and thus no NALLA-Iceland accredited TPs. Id. at 5.

A contracting agency has the discretion to determine its needs and the best method to accommodate them. Parcel 47C LLC, B-286324, B-286324.2, Dec. 26, 2000, 2001 CPD ¶ 44 at 7. In preparing a solicitation, a contracting agency is required to specify its needs in a manner designed to achieve full and open competition, and may include restrictive requirements only to the extent they are necessary to satisfy the agency's legitimate needs. 10 U.S.C. § 2305(a)(1), B (2000). Where a protester challenges a specification as unduly restrictive, the procuring agency has the responsibility of establishing that the specification is reasonably necessary to meet its needs. The adequacy of the agency's justification is ascertained through examining whether the agency's explanation is reasonable, that is, whether the explanation can withstand logical scrutiny. Chadwick-Helmuth Co., Inc., B-279621.2, Aug. 17, 1998, 98-2 CPD ¶ 44 at 3. Where a requirement relates to national defense or human safety, as here, an agency has the discretion to define solicitation requirements to achieve not just reasonable results, but the highest possible reliability and/or effectiveness. Columbia Imaging, Inc., B-286772.2; B-287363, Apr. 13, 2001, 2001 CPD ¶ 78 at 3; United Terex, Inc., B-245606, Jan. 16, 1992, 92-1 CPD ¶ 84 at 4.

There is no dispute that the government's desire to have U.S. military telecommunication circuits receive "preferential treatment in times of peace, disasters, crisis, or war," and to have available TP personnel with the requisite security clearances to perform necessary services, are legitimate needs, and can be met by acquiring telecommunication circuits through the ALLA process from TPs accredited by the relevant NALLAs. Accordingly, the question becomes whether the need to have these telecommunication circuits receive such preferential treatment and have TP personnel available with the requisite security clearances can also be met by a TP, such as WorldCom, that is not accredited by NALLAs in the NATO nations where the telecommunication services are required. Based upon our review of the record and as explained below, we agree with the agency that the answer is that it cannot.

The protester asserts that it can meet these requirements because the ALLA Handbook allows for the acquisition of telecommunication circuits through "commercial procedures," and for the registration of telecommunication circuits acquired commercially with ALLA at a later point in time (in order for the circuits to receive preferential treatment in times of "peace, disasters, crisis or war"). Protester's Comments at 10.

It is true that the ALLA Handbook does provide for the acquisition of circuits under a commercial procedure that does not require the involvement of a NALLA in the acquisition process, and for the registration of commercially acquired circuits "with ALLA if so required." AR, Tab 3, ALLA Handbook, at II-43. However, this section of the ALLA Handbook also provides that "[o]nly circuits provided by TPs accredited for defence purposes can be registered." Id. Since WorldCom has not asserted that it is "accredited for defence purposes" by any NATO nation regulatory body (except

perhaps the United Kingdom), we fail to see how the agency can be assured that a telecommunication circuit acquired from WorldCom for use by U.S. military installations located in NATO nations could be registered with ALLA absent some showing that WorldCom is "accredited for defence purposes" in those NATO nations.

The protester also contends that the "preferential treatment" of military circuits in times of "peace, disasters, crisis or war" and the employment by the TP of security cleared personnel can be accomplished by DITCO-Europe's use of the necessary "contract provisions." Protester's Comments at 11; Protester's Supplemental Comments at 2-3. DITCO-Europe responds that there are no contract provisions that will ensure these things can be accomplished. We agree.

As mentioned previously, the record reflects that DITCO-Europe "is entirely dependent on security certifications granted by the host country to enable [TPs] access to these facilities for installation and maintenance work." See SAR at 13-14. WorldCom has failed to explain how the agency could be assured that a TP not accredited by a NALLA, such as WorldCom, would be able to provide personnel with the necessary security clearances simply through the use of "contract provisions." WorldCom has also failed to respond to the agency's concern as to "what [WorldCom's] contractual promise to restore an unregistered circuit would mean in a situation where the national authorities of the host countries are directing restoration priority based on the laws of that country and their previously assembled records of circuits earmarked for priority restoration" through the ALLA process. The agency asserts here that it "has no reason to think a private contractual agreement would carry any weight with NALLAs and offer anything resembling an equivalent level of security for deployed United States Forces." SAR at 13.

Finally, in support of its contention that NALLA certification is unnecessary, the protester also points out, and the record confirms, that it has performed telecommunication circuit contracts for DITCO-Europe in the past, even though WorldCom was not NALLA accredited in certain of the NATO nations where one or both of the U.S. military installations were located.

The agency explains here that this happened because it erroneously assumed, based upon WorldCom's receipt of accreditation by NALLA-United Kingdom, that WorldCom had been accredited by other NALLAs as well. The agency states that based upon this assumption, it began providing WorldCom with solicitations for telecommunication circuits in NATO nations other than the United Kingdom. The record reflects that these solicitations included a clause advising potential contractors only that "this service is being ordered in accordance with ALLA procedures." Contracting Officer's Statement (Nov. 4, 2002) at 11-12; see AR, Tab 13, Circuit Demands Awarded to WorldCom.

According to the agency, it would send a circuit demand to the relevant NALLA or NALLAs in accordance with the process set forth in the ALLA Handbook, and because DITCO-Europe believed that WorldCom was an accredited TP, it would

provide WorldCom with an information copy of the circuit demand. Contracting Officer's Statement (Nov. 4, 2002) at 12; see AR, Tab 3, ALLA Handbook at II-3. The agency explains that "[t]he NALLAs in these countries apparently did not process the Circuit Demand and failed to inform DITCO-Europe that WorldCom was not accredited." The agency adds here that "[r]ather than coming back to DITCO-Europe and informing the Agency that it was not accredited in these countries, WorldCom simply proceeded to install the circuits," with the result being that the circuits were never registered with ALLA. The agency concludes here that because an "extended period of time elapsed between the award of these circuits and the discovery that WorldCom was not [NALLA] accredited [in these nations]," and the "critical need for the circuits," DITCO-Europe chose not to terminate these circuit contracts. Contracting Officer's Statement (Nov. 4, 2002) at 12-13. Given that, as explained by the agency, its needs with regard to the telecommunication circuits awarded to WorldCom were not met insofar as the circuits were never ALLA registered, we think that the above demonstrates the reasonableness of the agency's position that the protested clause reflects its minimum needs.

In sum, based upon this record and as set forth above, the agency has reasonably explained why its solicitations for telecommunication circuits between U.S. military installations located in NATO nations require that the TPs be accredited by the relevant NALLA or NALLAs. In this regard, there is no question that the agency's priority restoration and secured personnel needs are legitimate, and WorldCom simply has made no showing that it, as a firm not accredited by a NALLA, could provide the same priority restoration and secured personnel advantages as a NALLA-accredited TP.

Although we appreciate WorldCom's frustration regarding its inability to become accredited, by a NALLA or otherwise, in NATO nations other than the United Kingdom and Spain. However, WorldCom's frustration in this regard provides no basis on which to sustain the protest.[6] Once an agency has established a reasonable basis for the inclusion of a restrictive provision in a solicitation, as DITCO-Europe

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[6] We find reasonable the agency's approach, as mentioned previously, that it considers WorldCom authorized to provide telecommunication circuits in Iceland, given that there is no NALLA-Iceland and there are thus no NALLA-Iceland accredited TPs. The protester has identified four additional NATO nations (France, Greece, Hungary, and Luxembourg) that "do not have any 'accredited' carriers listed on their NALLA web page." Protester's Comments at 5. Should there be no NALLA-accredited TPs in any or all of these four nations (and presuming that there is no other appropriate accrediting national authority, such as in Spain), the agency's approach to the situation in Iceland would suggest that the agency should consider WorldCom authorized to provide telecommunication circuits in these countries, if otherwise appropriate.

has done here, the inclusion of the provision in the solicitation is not objectionable. Wescam, Inc., B-285792, Oct. 11, 2000, 2000 CPD ¶ 168 at 7.

The protest is denied.

Anthony H. Gamboa
General Counsel