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Decision

Matter of: Virginia Electric and Power Company; Baltimore Gas & Electric Company

File: B-285209; B-285209.2

Date: August 2, 2000

Michael W. Clancy, Esq., and Thomas D. Leland, Esq., Holland & Knight, for Virginia Electric and Power Company; and Kevin P. Mullen, Esq., Carl L. Vacketta, Esq., Karen Gray, Esq., and David P. Handler, Esq., Piper, Marbury, Rudnick & Wolfe, for Baltimore Gas & Electric Company, the protesters.
Madeline L. Shay, Esq., Douglas W. Kornreich, Esq., and J.J. Cox, Esq., U.S. Army Corps of Engineers, for the agency.
David A. Ashen, Esq., Office of General Counsel, GAO, participated in preparation of the decision.

DIGEST

1. Protest that solicitation for privatization of utilities at military installations is defective for failure to acknowledge a requirement for state and local approval before selected contractor can commence performing natural gas and electric distribution services at the installations is denied, where 10 U.S.C. § 2688(b) requires that if more than one utility or entity expresses an interest in a conveyance, the conveyance shall be carried out using competitive procedures; section 2688 does not authorize restricting competition by requiring state and local approval (which would effectively eliminate all but one source for each utility), and while agencies may impose restrictions necessary to meet their needs, they may not, unless authorized by statute, impose restrictions not based on their needs.

2. Protest against requirement, in solicitation for privatization of 13 utility systems (including electric, natural gas, water, and wastewater) at five military installations, that offerors propose on all utility systems at an installation (with no more than one, consolidated contract to be awarded for each installation) is denied, where agency not only anticipated realizing significant savings from consolidation, but also determined that there was a significant risk that permitting offerors to propose on the basis of 13 individual utility systems would result in not receiving an acceptable offer for some or all of the water and wastewater systems; where an agency reasonably does not anticipate that it will receive competition for all of its

requirements if it solicits separately for them, it properly may combine them in a single procurement.

DECISION

Virginia Electric and Power Company (VEPCO) and Baltimore Gas & Electric Company (BG&E) protest the terms of request for proposals (RFP) No. DACA31-00-R-0026, a competitive solicitation issued by the U.S. Army Corps of Engineers (Corps) for the privatization of utilities at five installations in the National Capital Region under the Military District of Washington (MDW). VEPCO and BG&E contend that the RFP is improper because it fails to recognize that the privatization of the utilities is subject to state and local utility law and regulation. In addition, VEPCO challenges the solicitation provision for the award of one consolidated contract that includes all of the (different types of) utility systems at each installation.

We deny the protests.

The RFP was issued on March 28, 2000, as part of the overall Department of Defense (DOD) program to privatize utility systems. That privatization program is governed by section 2688 of Title 10, United States Code, enacted in 1997, which provides that the "Secretary of a military department may convey a utility system, or part of a utility system, under the jurisdiction of the Secretary to a municipal, private, regional, district, or cooperative utility company or other entity." 10 U.S.C. § 2688(a) (Supp. IV 1998). Further, section 2688 provides that "[i]f more than one utility or entity . . . notifies the Secretary concerned of an interest in a conveyance . . . the Secretary shall carry out the conveyance through the use of competitive procedures." 10 U.S.C. § 2688(b); see Government of Harford County, Maryland, B-283259, B-283259.3, Oct. 28, 1999, 99-2 CPD ¶ 81 at 4 n.6. Following enactment of section 2688, DOD first issued DOD Reform Initiative Directive (DRID) No. 9, directing the military departments to develop plans for privatizing electric, water, wastewater, and natural gas utility systems by January 1, 2000, and then in 1998 issued DRID No. 49, directing the military departments to develop plans providing for the award not later than September 30, 2003 of privatization contracts for all utility systems except those exempted in the attached guidance. DRID No. 9, Privatizing Utility Systems, Dec. 10, 1997; DRID No. 49, Privatizing Utility Systems, Dec. 23, 1998.[1]

[1] Section 2688 prohibits conveyance of a utility system until the Secretary has submitted to Congress, and Congress has had 21 days to review, an economic analysis demonstrating that the long-term economic benefit of the conveyance to the United States exceeds its long-term economic cost and that the conveyance will reduce the long-term costs of the United States for utility services. 10 U.S.C. § 2688(e). DRID No. 49 exempts from privatization utility systems that would be (continued...)

The RFP contemplates the award of one or more 50-year contracts for the transfer of ownership (except for the natural gas systems), and the operation by the new owner to provide services to the government, of the following specified 13 utility distribution and collection (UDC) systems at five installations in the National Capital Region: (1) electric and natural gas systems at Fort Meade, Maryland; (2) electric, natural gas, water, and wastewater at Fort McNair, District of Columbia; (3) electric, water, and wastewater at Fort Myer, Virginia; (4) electric, water, and wastewater at Fort Belvoir, Virginia; and (5) electric at Fort A.P. Hill, Virginia. (While the contractors will not be required to assume ownership of the existing natural gas UDC systems, they will be required to operate and maintain those systems until they have completed new natural gas systems to be owned and operated by the contractors. RFP § C.3.2.) Upon award, the selected contractor for an installation is required to initiate action to bring the UDC systems into compliance with local, state and federal codes, regulations and laws pertaining to the design, installation, operation, maintenance and repair of UDC systems. Capital improvements needed to bring the Fort Myer natural gas distribution system into compliance must be completed not later than 18 months after award; those required for the Fort Meade natural gas distribution system must be completed within 30 months; and those required for all other UDC systems must be completed within 60 months. RFP §§ C.5.1.1, C.8.1. Although the contractor will be responsible for funding any required capital investments, the RFP provides for the cost of expansion and upgrades to be recovered from the government over a period of time that is consistent with the contractor's standard capital investment recovery process or as required by a financing institution. RFP § H.1.1.

The RFP provides for only one award to be made per installation, and offerors are required to propose on all utilities at a particular installation. Offerors also are permitted, but are not required, to propose on more than one installation; if an offeror proposes on more than one installation, it may also submit a combination offer at a discounted price covering the installations upon which it proposed. RFP §§ B.3, B.5. The contemplated term of the utility services contracts is 50 years, but the RFP requires submission of total costs for each utility for each year, including operation and maintenance costs and the estimated annual cost associated with the offeror's initial capital improvement plan, for only the first 15 years; pricing thereafter will be determined under the price redetermination provisions of Federal Acquisition Regulation (FAR) § 52.216-5.[2] RFP § B.3.4.

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uneconomical to privatize or for which there are unique security reasons not to privatize. DRID No. 49 § III.A.

[2] This RFP replaces RFP No. DACA31-99-R-0044, issued on July 20, 1999, under which the Corps had previously sought to privatize utility systems at National Capital Area installations. Among other differences, the earlier solicitation required offerors
(continued...)

STATE AND LOCAL UTILITY REGULATION

Position of the Parties

Both BG&E and VEPCO argue that the solicitation was defective for failure to acknowledge that privatization of the UDC systems here is subject to state law and regulation. BG&E specifically asserts that the solicitation is defective because it fails to account for the fact that the states generally have authority under the Federal Power Act of 1935, 16 U.S.C. § 824(b)(1) (1994), and the Natural Gas Act of 1938, 15 U.S.C. § 717(c) (1994), over intrastate transactions in electric energy and natural gas, and that this authority is applicable to the privatization of the electric and natural gas UDC systems at Fort Meade in Maryland. BG&E asserts that it is the only entity authorized by Maryland law and the Public Service Commission of Maryland (PSC) to own, operate and maintain electric and natural gas distribution systems in the Fort Meade area. According to BG&E, before any other entity can perform the utility privatization requirements for electric and natural gas distribution services at Fort Meade, that entity must first obtain an electric franchise and right to operate from the Maryland state legislature, as well as revision by the PSC of its order designating BG&E as the sole entity responsible for electric service in the Fort Meade area, and obtain a gas franchise from Anne Arundel County, Maryland, and the consent of local authorities and the PSC to exercise the gas franchise. BG&E Protest at 13-14.[3]

In response, the Corps cites the written opinion of DOD's General Counsel, dated February 24, 2000, that state laws and regulations do not apply to the conveyance of an on-base utility system under section 2688. Opinion of DOD's General Counsel, The Role of State Laws and Regulations in Utility Privatization, Feb. 24, 2000 (DOD GC Opinion), at 4. DOD's General Counsel based his conclusion on the constitutional principles that the states may not regulate the federal government

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to propose on all UDC systems at all installations, rather than merely all UDC systems at any installation, and it contemplated the award of a single 15-year contract. The earlier solicitation was cancelled after VEPCO filed a protest with our Office challenging the solicitation provision for the award of a single consolidated contract and arguing (as did BG&E in an agency-level protest) that the solicitation was improper because it failed to recognize that the privatization of the utilities was subject to state utility law and regulation. Virginia Elec. and Power Co., B-284597.

[3] BG&E has submitted an opinion from the general counsel of the PSC stating that the commission will have jurisdiction over any non-federal entity awarded the contract to own, operate and maintain the natural gas and electric distribution systems at Fort Meade. Letter from PSC General Counsel to BG&E at 2 (Jan. 7, 2000), Opinion at 2-5, 13.

except to the extent that the Constitution so provides or Congress consents, citing McCulloch v. Maryland, 17 U.S. 316 (1819), and that for Congress to consent to such regulation, it must unequivocally and unambiguously waive the sovereign immunity of the United States, citing United States Department of Energy v. Ohio, 503 U.S. 607, 615 (1992) and Hancock v. Train, 426 U.S. 167, 178-79 (1976). According to DOD's General Counsel, the authority granted by section 2688 to convey an on-base utility system is in furtherance of Congress' authority under Article IV, section 3, of the Constitution "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ." DOD GC Opinion at 2. DOD's General Counsel concluded that nothing in section 2688 or otherwise evidences the explicit waiver of federal sovereignty required before a state can restrict the disposal of federal property. Id. at 1-4, 8.

BG&E, however, argues that the DOD General Counsel's analysis fails to account for the U. S. Supreme Court's decision in North Dakota v. United States, 495 U.S. 423 (1990), where the Court stated that it "has more recently adopted a functional approach to claims of governmental immunity, accommodating of the full range of each sovereign's legislative authority and respectful of the primary role of Congress in resolving conflicts between National and State Governments." 495 U.S. at 435. Applying this analysis, the Court in North Dakota upheld a state requirement, as applied to alcoholic beverages sold at clubs and package stores on military bases under concurrent federal and state jurisdiction, that importers of liquor into the state must file a monthly report on the volume of liquor imported and affix a label to each bottle of liquor sold to a federal enclave indicating that the label is for domestic consumption within the enclave. Id. at 426-44, 448-49. Likewise, according to BG&E, under the Supreme Court's functional analysis in North Dakota, Maryland's recognized authority over intrastate transactions in electric energy and natural gas, which does not involve regulation of the federal government directly but instead operates against all utility companies, without discrimination against the federal government, does not violate the Supremacy Clause of the Constitution when applied to the contractor selected to perform electric and natural gas distribution services at Fort Meade.

Analysis

We conclude that the protesters have failed to demonstrate that the solicitation was defective in this regard. First, we note that the RFP already requires the successful contractor to "comply with all relevant and appropriate local, state/district and federal codes, regulations or laws, and changes thereto, as they pertain to the design, installation, operation, maintenance and repair of the utility distribution/collection systems. The Contractor shall comply with all relevant and appropriate ordinances,

rates, standards, operating policies or standard operating procedures, as well as modifications thereto, as they are made and enacted."[4] RFP § C.8.1.

Second, we are not persuaded by the argument that the solicitation was defective for failure to acknowledge a requirement for state and local approval of the awardees. The effect of the protesters' argument would be that the contracts for electric and gas distribution would be awarded on a sole-source basis to the company holding the local utility franchise at each installation.

The apparent conflict between the federal statutory mandate for competition in 10 U.S.C. § 2688 and the state and local system of what are effectively utility monopolies raises constitutional questions briefed at length by the parties here. Our Office leaves to the courts the resolution of constitutional questions; we look only to whether contracting agencies are complying with clearly established judicial guidance in this area. See Elrich Contracting Inc.; The George Byron Co., B-262015, B-265701, Aug. 17, 1995, 95-2 CPD ¶ 71 at 2.

In our view, unless a court rules otherwise, an agency is entitled to view 10 U.S.C. § 2688 as preempting any effort to limit competition for providing utility distribution services at the military installations to the entities currently approved by the respective states. Nothing in the protesters' pleadings suggests clear federal judicial precedent requiring the federal government to yield to state regulation over utility distribution services at the federal installations. In particular, we note that the decision in North Dakota, relied on by BG&E, specifically acknowledged as instructive a line of Supreme Court cases on congressional preemption that invalidated state regulations that prohibited what federal procurement statutes required. The Court noted that, "for example, in Public Utilities Comm'n of California v. United States, 355 U.S. 534 (1958), we put to one side 'cases where, absent a conflicting federal regulation, a State seeks to impose safety or other requirements on a contractor who does business for the United States.' Id., at 543.

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[4] According to DOD's General Counsel:

> while the entity to whom the Department conveyed the on-base utility system is not required to submit to state licensing or similar requirements that undermine the Federal competitive selection of that entity, to the extent that the state has regulations regarding the conduct of operation and ownership of utility systems, the entity may have to comply with those requirements if those state requirements do not impose a significant burden on the Federal Government, conflict with a Federal system of regulation, or undermine the Federal policy being implemented.

DOD GC Opinion at 9.

We invalidated the state law because there was a clear conflict between the state policy of regulation of negotiated rates and the federal policy, expressed in statute and regulation, of negotiated rates. Id. at 544." 495 U.S. at 435-36 n.7. The Court cited to cases "in which we invalidated state regulations that prohibited what federal law required. We stated in [Paul v. United States, 371 U.S. 245 (1963),] that there was a 'collision . . . clear and acute,' between the federal law which required competitive bidding among suppliers and the state law which directly limited the extent to which suppliers could compete. 371 U.S., at 253." 495 U.S. at 440.[5]

Here, there is a federal statute that mandates a particular procurement approach. Section 2688 expressly directs and requires that "[i]f more than one utility or entity . . . notifies the Secretary concerned of an interest in a conveyance . . . the Secretary shall carry out the conveyance through the use of competitive procedures." 10 U.S.C. § 2688(b).

It is undisputed that more than one utility or entity has expressed an interest in the privatization of utilities at these installations. BG&E, however, argues that the section 2688 requirement for use of competitive procedures does not preclude imposing a requirement for state and local approval before the selected contractor can commence performing natural gas and electric distribution services. BG&E notes in this regard that, even under the Competition in Contracting Act of 1984 (CICA), agencies need not obtain full and open competition through the use of competitive procedures "in the case of procurement procedures otherwise expressly authorized by statute," 10 U.S.C. § 2304(a)(1) (1994), or where the product or services "are available from only one responsible source or only from a limited number of responsible sources and no other type of property or services will satisfy the needs of the agency." 10 U.S.C. § 2304(c)(1).

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[5] See United States v. Commonwealth of Virginia, 139 F.3d 984 (4th Cir. 1998), where the Fourth Circuit invalidated a state licensing requirement as applied to an investigator performing federal background checks. In reaching its decision, the court specifically distinguished the decision in North Dakota, noting that unlike the case before it, the liquor regulations addressed in North Dakota "did not attempt to alter the criteria under which the federal government made its decision. Nor did those regulations prevent the federal government from selecting the bid it believed was most competitive or otherwise enable the state to second-guess the federal government's judgment as to who should supply the federal enclave." 139 F.3d at 989 n.7; see Gartrell Constr. Inc. v. Aubry, 940 F.2d 437 (9th Cir. 1991) (state may not require a construction contractor performing work for the federal government at a military installation, and having been determined responsible by the federal government, to obtain a state license, as that would interfere with federal government functions and frustrate the policy of selecting the lowest responsible bidder).

We do not find BG&E's position persuasive. While agencies may impose restrictions necessary to meet their needs, they may not, unless authorized by statute, impose restrictions not based on their needs. See 10 U.S.C. § 2305(a)(1)(B). Here, neither section 2688 nor another federal statute authorizes the use of noncompetitive procedures or the restriction on competition--a requirement for state and local approval--which BG&E seeks to impose. To the extent that BG&E argues that, notwithstanding the absence of a statutory requirement to restrict competition, the agency's needs require, in effect, imposing a state and local licensing requirement, we note that our Office will not consider contentions that specifications or other terms and conditions should be made more restrictive, since our role in reviewing bid protests is to ensure that the statutory requirements for full and open competition are met, not to protect any interest a protester may have in more restrictive specifications. ATA Defense Indus., Inc., B-282511.8, May 18, 2000, 2000 CPD ¶ ___ at 5; Simplix, B-274388, Dec. 6, 1996, 96-2 CPD ¶ 216 at 5-6.[6]

Section 8093

In support of its position, BG&E cites section 8093 of the Department of Defense Appropriations Act, 1988, Pub. L. No. 100-202, § 8093, 101 Stat. 1329, 1329-79, and both BG&E and VEPCO cite its implementing regulation, FAR §§ 41.201(d), (e). Section 8093 generally provides, with some exceptions not relevant here, as follows:

> None of the funds appropriated or made available by this or any other Act with respect to any fiscal year may be used by any Department, agency, or instrumentality of the United States to purchase electricity in a manner inconsistent with State law governing the provision of

[6] As noted by BG&E, section 2688 does envision compliance with state regulation in one circumstance. Section § 2688(c) provides that the Secretary of the military department concerned shall require consideration for a conveyance in an amount equal to the fair market value of the right, title, or interest of the United States conveyed, and states that this consideration may take the form of a lump sum payment or a reduction in charges for utility services provided by the utility or entity concerned to the military installation at which the utility system is located. In the latter event, "[i]f the utility services proposed to be provided as consideration . . . are subject to regulation by a Federal or State agency, any reduction in the rate charged for the utility services shall be subject to establishment or approval by that agency." 10 U.S.C. § 2688(c)(2). This provision, however, concerns the acceptability of only one form of consideration that may be offered, that is, a reduction in the rate charged for utility services that are subject to regulation by a federal or state agency, and it in no way supports an intention to generally limit the competition to entities that have, or can obtain before commencing performance, state and local approval for furnishing natural gas and electric distribution services. See generally H. R. Conf. Rep. No. 105-340, at 858-59 (1997).

> electric utility service, including State utility commission rulings and electric utility franchises or service territories established pursuant to State statute, State regulation, or State-approved territorial agreements.

We do not consider section 8093, or its implementing regulations, to furnish a basis for restricting competition in the selection of a conveyee for on-base UDC systems. As an initial matter, we note that DOD's General Counsel, in his February 24, 2000 opinion, takes the position that a plain reading of section 8093's language, referring to the "purchase [of] electricity in a manner inconsistent with State law governing the provision of electric utility service," when considered in light of the constitutional principle that waivers of sovereign immunity should be narrowly construed, United States Department of Energy v. Ohio, 503 U.S. at 615, necessarily indicates that the waiver of sovereign immunity in section 8093 is limited to the purchase of the electric commodity (electric power) and does not extend to acquisition of distribution or transmission services. DOD GC Opinion at 5.

In support of his view that section 8093 does not apply to the conveyance of a utility system, DOD's General Counsel cites the legislative history of section 8093, which indicates that "[t]his provision is intended to protect remaining customers of utility systems from the higher rates that inevitably would result if a Federal customer were allowed to leave local utility systems to obtain retail electric utility service from a nonlocal supplier." S. Rep. No. 100-235, at 70 (1987); see H. R. Conf. Rep. No. 100-498, at 673 (1987). As suggested by DOD's General Counsel, the disposal of a government-owned utility distribution system, not part of the local utility's service base, and the subsequent acquisition of services from that system, does not appear to be the harm which section 8093 seeks to avoid, that is, utility abandonment by federal customers. See West River Elec. Ass'n, Inc. v. Black Hills Power and Light Co., 918 F.2d 713, 717, 719 (8th Cir. 1990) (given section 8093's purpose of avoiding utility abandonment by federal customers, and since the federal enclave was not previously a customer of the local utility, there was no indication that the section was intended to apply so as to secure the local utility the exclusive right to supply electricity).[7] Further, we note that the terms of the solicitation here are consistent with this distinction between the procurement from the local utility of electric power as a commodity and the acquisition of distribution services from the conveyee, in that the RFP provides that "[t]he services being procured by this solicitation do not include the purchase of electricity, natural gas, or potable water or the treatment of wastewater. . . . We do not anticipate that this procurement will interfere with any franchises or authorities." RFP § B.2.

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[7] In both West River, 918 F.2d at 719, and City of Tacoma, Dep't of Public Utilities v. United States, 28 Fed. Cl. 637, 646 (1993), the courts found that section 8093 did not manifest the necessary clear and unambiguous intent on the part of Congress to defer its exclusive jurisdiction over a federal enclave and authorize state regulation.

Accordingly, we do not believe that the provision in section 8093 regarding the purchase of electricity conflicts with the mandate in section 2688 for competitive procedures in the conveyance of utility systems. However, to the extent that the protesters contend there is a conflict, the specific mandate in the subsequently enacted section 2688 must prevail.[8]

DRID No. 49

BG&E and VEPCO also cite DRID No. 49 in support of its position. That directive generally states that "[c]ompetitive procedures will be used in conducting the privatization of utility systems," and that "[i]f the installation resides in an area served by a franchised and regulated utility, that franchise holder shall not be considered the presumptive conveyee, nor shall another responsible and responsive utility or entity that expresses interest be excluded from the competition." DRID No. 49 § IV. However, DRID No. 49 also adds that "[s]tate law and regulatory policy should be considered when determining the form of competition for franchised and regulated utilities. Where state law and regulatory policy specifically prohibits competition, a sole-source negotiation may be pursued after evaluating response to the synopses." Id. (The directive cautions, however, that the agency "may not rely on the assertions of the franchised or regulated utility in this regard," but instead "must make an independent legal finding that the franchised or regulated utility is the only entity authorized to own and operate the utility system to be privatized." Id.)

As discussed above, we find reasonable the agency's position, as expressed in the recent opinion of DOD's General Counsel and the agency's pleadings in this case, that state and local law and regulation do not apply to the award of a contract for conveyance of an on-base utility distribution system under section 2688. Again, section 2688 specifically requires competition in the conveyance of utility systems. To the extent that the protesters maintain that the policy expressed in DRID No. 49 calls for another, noncompetitive approach, in effect a sole source, on account of state and local regulation, the specific statutory mandate in section 2688 for competition must prevail.

[8] Both BG&E and VEPCO also cite Defense Federal Acquisition Regulation Supplement § 241.201(1), which provides that in acquiring utility services, "[e]xcept as provided in FAR 41.201, DOD, as a matter of comity, will comply with current regulations, practices and decisions of independent regulatory bodies which are subject to judicial appeal." Again, to the extent that this regulatory provision is inconsistent with section 2688, that section's specific statutory mandate for competition in the conveyance of utility systems must prevail.

CONSOLIDATED CONTRACTING APPROACH

VEPCO challenges the solicitation requirement that offerors propose on all utility systems at an installation and the provision for the award of no more than one, consolidated contract at each installation. According to the protester, this bundling of different types of utility systems precludes competition by regulated utilities in Virginia, does not meet the section 2688 requirement for the use of competitive procedures, and is not necessary to meet the agency's actual needs. VEPCO contends that the agency instead should permit offerors to propose on any of the 13 individual utility systems being privatized here.

CICA generally requires that solicitations permit full and open competition and contain restrictive provisions or conditions only to the extent necessary to satisfy the needs of the agency. 10 U.S.C. §§ 2305(a)(1)(A), (B). Since bundled, consolidated, or total-package procurements combine separate, multiple requirements into one contract, they have the potential for restricting competition by excluding firms that can furnish only a portion of the overall requirement. The Urban Group, Inc.; McSwain and Assocs., Inc., B-281352, B-281353, Jan. 28, 1999, 99-1 CPD ¶ 25 at 9; Aalco Forwarding, Inc., et al., B-277241.12, B-277241.13, Dec. 29, 1997, 97-2 CPD ¶ 175 at 6. Where a protester challenges the bundling, we will review such solicitations to determine whether the approach is necessary to satisfy the agency's needs.

Based upon our review of the record, we find that the agency has reasonably determined to consolidate all utilities at each installation into a single contract rather than permit offerors to propose on individual utility systems.

Agency Justification

In this regard, we note that the agency expects to achieve significant cost savings from awarding no more than 5 contracts, that is, one for each installation, rather than awarding as many as 13 contracts, that is, one for each utility system. First, the agency expects that, as a result of contractor efficiencies and economies of scale arising from having one contractor responsible for all of the privatized utilities at an installation, there will be significant contract savings accruing to the government in the form of lower contract pricing and a lower cost to the government for cost reimbursable capital improvements. The government anticipates a more efficient, fuller utilization of personnel and equipment, particularly specialists and specialized equipment, when personnel or equipment can be switched between a number of systems at a particular installation depending on demand and schedule. The government also anticipates better coordination, mobilization and sequencing of work on construction projects at an installation so as to mass similar work and avoid conflicts and piecemeal efforts. For example, this could include [DELETED]. Agency Post-Hearing Comments, July 11, 2000, at 7-9.

In support of its expectation of contract savings from these and similar efficiencies, the agency offered at the hearing our Office conducted in this matter testimony from the Deputy Chief of Staff for Support, Military District of Washington, an experienced construction manager and engineer (who also signed the determination and findings supporting the consolidation of utility systems at each installation), Hearing Transcript (Tr.), July 6, 2000 (II), at 6-10,19-20, 36-37, 62-63, 65, 67, 72, as well as testimony from an outside consultant. Tr., June 30, 2000 (I), at 183-84, 216, 239-42. In addition, the agency pointed to indications it had received from offerors or potential offerors that consolidation could result in significant contract savings. For example, [DELETED]. Tr. II at 19-20, 36-37. Also, the record includes the government analysis of an offer submitted by Evantage, a unit of VEPCO, in response to MDW's solicitation for an energy savings performance contract for energy-saving upgrades and maintenance for the National Capital Region. The agency's analysis indicated that Evantage's 1999 proposal for the consolidated line item, which consolidated the individual line items for Fort Meade, Fort Belvoir and Fort McNair/Fort Myer, offered very significant financial advantages relative to the sum of its individual line offers, including approximately an additional $11.6 million (or approximately 21.3 percent) in investment, a decrease in the overhead rate from 15.8-19.3 percent rates for the individual line items to 5.9 percent, and a reduction in the interest rate from 7.9 percent to 6.31 percent. Review of Jan. 15,1999, Proposals, § 4, Analysis of Individual Offers, at 7-8; Tr. II at 42-50. (The agency considers Evantage's proposed reduction in overhead rates in the event of consolidation to be particularly significant because it believes many of the economies of scale it expects to realize from consolidation will be related to a decrease in managerial and administrative costs. Agency Post-Hearing Comments, July 14, 2000, at 11; see Tr. I at 241.)

In addition, the agency expects that as a result of consolidation, reducing the number of contracts to no more than 5 from as many as 13, there will be significant contract administration savings. In this regard, the Deputy Chief of Staff for Support testified that, although the number of utility systems would remain the same, increasing the number of contracts from 5 to 13 could increase contract administration costs by $[DELETED] million over the life of the contract as a result of the need for additional contracting officers, contract specialists, and construction field specialists needed to supervise and coordinate the additional contractors. Tr. II at 21-26, 34-36, 94-104, 107-08. The Deputy Chief of Staff for Support noted in this regard that, since MDW will probably eliminate [DELETED] positions in the next 2-3 years, in preparation for conducting Office of Management and Budget Circular No. A-76 cost comparisons between in-house and contractor performance, MDW would likely not have the workforce needed to administer the contracts and, as a result, it would need to contract at a higher price with another agency, such as the Corps, for contract administration services. Tr. II at 27-28.

Further, the agency expects that having more contractors working at the same installation would lengthen the construction period during the upgrade phase of the contract because of coordination problems, thereby delaying the repair of facilities

(some of which are aging and need to be repaired as soon as possible) and increasing the cost to the government (both directly for contract administration and indirectly through reimbursement of a contractor's capital improvement costs). Tr. II at 37-38. The agency also expects that having more contractors at the installations--which have a workforce of approximately [DELETED] and are busy and congested--would increase the disruption to agency operations and the potential for accidents. Tr. II at 38-41.

The agency also determined that requiring offerors to take on all of the utilities at an installation was necessary so as to ensure that all of the utility systems are in fact privatized. Specifically, the record indicates that some utilities are of more interest to potential contractors than others; electric distribution systems are most attractive, followed in order of declining preference by natural gas distribution systems, and potable water distribution/wastewater collection systems. Tr. I at 185-86; Tr. II at 13. Indeed, the agency concluded from the information available to it that there was so little interest in water distribution and wastewater collection systems lacking significant treatment facilities, as is the case here with the three installations (Fort Belvoir, Fort Myer and Fort McNair) that have water systems to be privatized under this solicitation, especially when they are small systems (such as those at Fort Myer and Fort McNair) or in poor condition (as is the case with Fort Myer's wastewater collection system and Fort Belvoir's water distribution and wastewater collection systems), that there was a significant risk that the agency would be unable to obtain any offers for them if offerors were afforded the opportunity to propose on individual utility systems. Tr. I at 21-22, 189, 193-94; Tr. II at 13-14, 128; Utility Privatization Study, Military District of Washington, C.H. Guernsey & Co., Apr. 2000, §§ 3.2.4, 5.2.4. The possibility that the agency might be unable to privatize the water distribution and wastewater collection systems (or other systems) was of particular concern to the agency because the agency currently lacks the military construction funds needed to finance needed capital improvements. The agency instead seeks to acquire the needed upgrades and improvements by transferring ownership of the systems to a private contractor and then reimbursing the contractor over time (the "mortgage" concept) using operation and maintenance funds as the contractor amortizes the cost of the capital improvements it makes. Tr. II at 63-65, 68-72.

In this regard, the record indicates that in 1996-97, [DELETED] indicated that it was not interested in assuming ownership of the wastewater collection system at [DELETED], because it is in "very bad shape." Affidavit of (Former) Chief, Installation Support Division, MDW, June 20, 2000. Likewise, [DELETED] advised the Corps on November 19, 1999, that, because the solicitation required assumption of the risk for the water and wastewater systems at Fort McNair, Fort Myer and Fort Belvoir, but those systems did not provide sufficient daily activity to share the overhead of comprehensive utility systems, [DELETED] could not recruit team members and would probably be unable to submit a proposal unless significant treatment systems, such as that at Fort Meade (which was not included the solicitation), were added. Letter from [DELETED] to the Corps at 1-2 (Nov. 19, 1999). According to [DELETED], "From our discussions with leading

representatives from the water/wastewater industry, without significant treatment systems offered in the procurement, the opportunity is not of sufficient capacity for their participation." Id. at 2. In addition, consultants to the agency from C.H. Guernsey & Company, which is providing utility privatization support to the government, reported on other instances of little interest in distribution/collection systems--including, for example, at [DELETED]--unless they were accompanied by at least an opportunity to share in excess treatment capacity. Statement of Senior Vice President, C.H. Guernsey & Company, June 28, 2000; Statement of Senior Project Manager, Energy Division, C.H. Guernsey & Company, June 28, 2000.

VEPCO's Contentions

As an initial matter, VEPCO asserts that it (as well as any other regulated Virginia utility) is unable, as a matter of utilities law and regulation, to compete, either on its own or as part of a teaming arrangement, for a requirement to provide services that are not incidental and related to its regulated business, the provision of electric power.[9] VEPCO argues that, because it excludes regulated utilities and effectively leaves a field of only one firm, the agency's consolidated (i.e., bundled) procurement approach necessarily fails to satisfy the section 2688 requirement for use of competitive procedures when privatizing utilities.[10]

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[9] It is not clear why, if VEPCO in fact is unable as a matter of law to compete for a bundled requirement, it actively participated in the pre-solicitation stages of this procurement, engaging in extensive interaction with the agency for several years. In this regard, we note that in a 1999 letter to the Corps, it explained its inability to compete in terms of business considerations rather than legal restrictions. Thus, VEPCO advised the agency that

> [a]fter almost 4 years of effort and lengthy discussions with numerous industry leaders, it appears that we will be unable to secure a dedicated water/wastewater utility provider to join our team. On several occasions we have had preliminary agreement with water/wastewater providers that ultimately declined to participate after performing some due diligence of the MDW opportunity. The risk profile is not attractive, particularly with the limited information on which to base technical and financial assessments.

Letter from VEPCO to the Corps at 1 (Nov. 29, 1999). (VEPCO proposed amending the solicitation either to include all water/wastewater systems (including Fort Meade's) or to remove all such systems. Id. at 2.)

[10] VEPCO points out that in a prior utility privatization procurement at Fort Hamilton, New York, the Corps received only one offer, and that was from a nonregulated utility provider. The Corps, however, has explained that there were significant differences between the Fort Hamilton procurement and this one which made the

(continued...)

We disagree. Again, agencies are required to specify their needs in a manner designed to promote full and open competition and thus may include restrictive requirements only to the extent necessary to satisfy their actual needs. 10 U.S.C. §§ 2305(a)(1)(A), (B). However, all specifications and other solicitation requirements are potentially restrictive of competition to some extent, and the mere fact that a particular prospective offeror is unable or unwilling to compete under a solicitation that reflects the agency's needs does not establish that the solicitation is unduly restrictive or that the agency is using other than competitive procedures. See Micromass, Inc., B-278869, Mar. 24, 1998, 98-1 CPD ¶ 93 at 4.

VEPCO also questions the agency's expectation of significant savings from a bundled approach. For example, the protester notes a number of inconsistencies in the approach to calculating contract administration savings between: (1) the estimate detailed in the testimony of the Deputy Chief of Staff for Support, who testified to contract administration savings of $[DELETED] million over the life of the contract from awarding only 5 contracts, rather than 13, Tr. II at 94; (2) an analysis submitted to our Office in response to the protest, which estimated that contract administration savings from awarding only 5, rather than 13, contracts would total approximately $[DELETED] million, Corps Letter, June 29, 2000, Contract Scenarios Attach., at 2-5; and (3) an earlier analysis prepared by a subordinate of, and referenced in the determination and finding signed by, the Deputy Chief of Staff for Support, which estimated contract administration savings of up to $[DELETED] million from awarding only 1 contract rather than 13. Determination and Findings Regarding Appropriate Level of Combinations of Utilities in MDW Utility Privatization (D&F), Mar. 17, 2000, § 11. However, all of the analyses agree that there will be a significant increase in contract administration costs as a result of awarding the additional contracts, and VEPCO has not shown this expectation to be unreasonable.

(...continued)
Fort Hamilton requirement significantly less attractive to offerors, including: (1) the fact that the Fort Hamilton requirement was a very small one in an area with many, much larger and more attractive opportunities; (2) the fact that the Fort Hamilton contract was to be for 10 years while the current solicitation contemplates award of a 50-year contract, see Letter from [DELETED] to the Corps at 2 (Apr. 3, 1998) (10-year contract inconsistent with standard amortization period in industry); and (3) the fact that the Fort Hamilton solicitation required a fixed-price offer for the capital improvements portion of the requirement, while the current solicitation provides for cost reimbursement for capital improvements, thereby reducing the risk to the contractor. Agency Post-Hearing Comments, July 11, 2000, at 9. We note that the extent of the actual competition received here is unknown since, although initial proposals have been received, the Corps has declined to release information about them on the basis that any release could jeopardize the integrity of the ongoing procurement.

Nor has VEPCO shown the agency expectation of significant contract savings from an installation-level consolidation of utility systems to be unreasonable.[11] We recognize that VEPCO has raised a significant question as to whether the expected savings from an installation-level consolidation of utility systems might be offset to some extent by higher prices/costs in the event that the consolidation eliminates from the field of competitors regulated local utilities, which presumably should be in a position to offer some economies of scale from integration of the installation systems into the local utility's adjacent service area. Tr. II at 171-72, 203. However, VEPCO failed to offer testimony at the hearing from experts in the construction and utilities fields as to the extent and nature of these savings, or to otherwise clearly demonstrate that any such savings are likely to be greater than the savings reasonably expected from consolidation. Cf. Pemco Aeroplex, Inc., B-280397, Sept. 25, 1998, 98-2 CPD ¶ 79 at 15 (agency failed to submit persuasive evidence to support claimed savings from bundling, or that any such savings are significant when compared to the potential cost savings from increased competition if workloads were unbundled).[12]

In any case, VEPCO has not shown that the agency was unreasonable in determining that privatizing on a utility-by-utility basis could result in the government being unable to privatize some of the less desirable utility systems, systems for which it lacks the military construction funding to make needed capital improvements. VEPCO asserts that the agency was aware that there was water company interest in privatization of the water and wastewater UDC systems if they were unbundled from the other types of utility systems. In support of its assertion, VEPCO cites an April 2, 1998 letter in which [DELETED] expressed "a great interest in providing water and wastewater ownership, operation and maintenance services to the US Government," but noted that the "complexities of one utility may delay the privatization of others"; [DELETED] suggested that "[a]n option to avoid such delays may be to bundle like

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[11] Indeed, a consultant retained by VEPCO testified that he believed that consolidation of utilities could produce "synergies" that provide "significant savings" to companies other than the local utilities. Tr. I at 365-66.

[12] As noted by VEPCO, in his March 17 D&F, the Deputy Chief of Staff for Support cited in support of his position that significant contract savings could be expected from consolidation an estimate ($[DELETED] million in savings) that derived from a chart prepared by a potential offeror. D&F § 12. The fact that this estimate originated with a potential offeror, and appeared to reflect the estimated potential savings available from consolidation of systems beyond those being privatized here, does not undermine the reasonableness of the Deputy Chief of Staff for Support's position that significant savings from consolidation are possible here, a position that, as noted above, he explained in his testimony. Tr. II at 6-10,19-20, 36-37, 62-63, 65, 67, 72.

utilities of several bases (water/wastewater utilities for the three bases referenced under this request for information as an example)." Letter from [DELETED] to the Corps at 1, 2 (Apr. 2, 1998). As noted by the agency, however, [DELETED] also stated in its April 2 letter to the Corps that "[w]e suggest that the Army consider retaining ownership of the facilities, and allow the private sector company to enter into a lease arrangement to operate, maintain, and manage the facilities," id. at 2; the agency viewed this as inconsistent with the concept of privatization, which involves transferring ownership of, and responsibility for, the utility systems (as distinguished from merely contracting out their operation). Tr. I at 91.

VEPCO also cites an April 3, 1998 letter to the Corps in which [DELETED] noted that at a recent industry-government forum, the Corps indicated that it was "bundling all the utilities into one package because individually they may not be economically viable for privatization." Letter from [DELETED] to the Corps at 1 (Apr. 3, 1998). [DELETED] advised the Corps that "[t]his concern may be true for single isolated installations, but in this situation there are several installations in the same metropolitan area and by considering them together in one proposal, the feasibility of separating the utilities is very possible." Id.

The record indicates, however, that the agency understood [DELETED]'s interest to be in treatment plants rather than merely collection/distribution systems. Tr. I at 98. That this understanding was not unreasonable is suggested by subsequent events. At an August 24, 1999 meeting, requested by VEPCO after [DELETED] declined to finalize a teaming arrangement with VEPCO, and which was attended by representatives of VEPCO, [DELETED], [DELETED], the Corps, and MDW, the government was advised that

> the w/ww [water/wastewater] pipe systems at Fts. Myer, McNair and Belvoir only offer at best an uncertain or low financial opportunity. Additionally, the government was told that if the Ft. Meade w/ww treatment facilities and pipes were included in the solicitation, there would be greater profit incentives for potential contractors and additional savings for the Government.

Affidavit of Program Manager for Utility Privatization, Baltimore District, Corps, June 19, 2000, at 1; Aug. 24, 1999 Meeting Sign-In Sheet, and Agenda at 7. Again, we note that after the meeting, [DELETED] advised the Corps that "[f]rom our discussions with leading representatives from the water/wastewater industry, without significant treatment systems offered in the procurement, the opportunity is not of sufficient capacity for their participation." Letter from [DELETED] to the Corps at 2 (Nov. 19, 1999). We further note that VEPCO's director of government energy programs testified that

> the water company had always said, every water company, in fact, the ones that wouldn't even come to talk to us said, well, without a water treatment system it is not large enough, so most of the water

> companies indicated that a larger bundling for them, where they had the water, including the Ft. Meade system, would be of more interest to them.

Tr. I at 286-87; see id. at 294, 298-99; but cf. Tr. I at 325-26 ([DELETED], unlike [DELETED], was willing to consider distribution systems only).

Based upon our review of the record, we conclude that given the totality of the information available to the agency, the government could reasonably determine that there was a significant risk that, if the solicitation were structured as VEPCO protests it should have been, that is, on the basis of soliciting offers on the basis of 13 individual utility systems, the agency would not receive an acceptable offer for some or all of the water/wastewater UDC systems, which lacked a treatment component. As we have previously held, where an agency reasonably does not anticipate that it will receive competition for all of its requirements if it solicits separately for them, it properly may combine them in a single procurement. Iowa-Illinois Cleaning Co., B-260463, June 13, 1995, 95-1 CPD ¶ 272 at 3; cf. Pemco Aeroplex, Inc., supra, at 14 (while GAO recognizes that the agency must have all of its workload performed, GAO finds that the agency has failed to justify consolidation as necessary to obtain adequate competition for all components of the workload).

Further, VEPCO has not shown that it was unreasonable for the agency to conclude that, to the extent that it was able to privatize all of its utility systems under separate contracts for each utility, the resulting circumstance of multiple contractors undertaking capital improvements at the same installation was likely to create coordination problems (and thus extend the construction period and delay the needed repair or replacement of utility systems) and increase the disruption to operations at the installations.

In summary, while it may well turn out (as asserted by VEPCO) that the agency's consolidated contracting approach will significantly restrict competition, we find that the above justifications cited by the agency, when considered together, provide a reasonable basis for the agency determination to consolidate all utilities at each

installation into a single contract rather than permit offerors to propose on individual utility systems.[13]

The protests are denied.

Robert P. Murphy
General Counsel

[13] VEPCO also objects to the fact that the agency allowed only 30 days to submit proposals. As noted above, however, the protester argues that the RFP's "bundled structure precludes [VEPCO] . . . from competing in the procurement." VEPCO Post-Hearing Comments, July 11, 2000, at 5. Given our conclusion above that the agency reasonably determined that the consolidated contracting approach reflected its actual needs, and in view of the protester's admitted inability to compete under that approach, it is apparent that the failure to afford the protester a longer response time did not result in competitive prejudice to the protester, and thus does not provide a basis to sustain its protest. Infrared Techs. Corp., B-282912, Sept. 2, 1999, 99-2 CPD ¶ 41 at 8 (competitive prejudice is a critical element of any viable protest).