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DECISION



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

FILE: B-197471.2

DATE: August 14, 1981

MATTER OF: United Inter-Mountain Telephone Company

DIGEST:

1. Payment plan requiring Government to pay 15 percent of contract price before goods or services are provided or title is transferred to Government constitutes improper advance payment, and bid including such plan was properly rejected.
2. Where only evidence in record are conflicting statements of protester and contracting agency, protester has not carried its burden of affirmatively proving its case.

The United Inter-Mountain Telephone Company (Inter-Mountain) protests the Veterans Administration's (VA) determination that Inter-Mountain's low bid, submitted in response to invitation for bids (IFB) No. 621-2-79, was nonresponsive.

The protest is denied.

The solicitation was a two-step, formally advertised procurement for the replacement of a telephone system at the VA Medical Center at Mountain Home, Tennessee. Bidders found to be technically acceptable in the first step were to provide bids based on lease or purchase options in the second step. The IFB, at section 5.0, instructed bidders submitting purchase options to fully describe the purchase plan, total cost and method of payment. The IFB also contained the following admonition concerning payment plans:

"9.2.6 Any advance payment plan will not be accepted which provides

[Protest of Bid Rejection as Nonresponsive]

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for payments in excess of the value of service rendered."

Inter-Mountain's purchase option bid included the following provision for payment:

"The purchase price will be paid as follows:

- A. Fifteen percent (15%) upon execution of the Agreement.
- B. Sixty-five percent (65%) no later than 30 days after delivery of the equipment to the Buyer.
- C. The balance due no later than 30 days after installation completion date."

The VA determined that the payment of 15 percent of the purchase price prior to contract performance constituted a prohibited advance payment and, consequently rejected Inter-Mountain's bid as nonresponsive. The VA based its determination on section 1-30.407(b) (1964 ed. amend. 15) of the Federal Procurement Regulations (FPR), which requires rejection of bids that are conditioned or qualified in such a way that binding awards can be made only with provision for advance payment, and on our decision General Telephone Company of California, 57 Comp. Gen. 89 (1977), 77-2 CPD 376. In General Telephone Company of California, we held that payment in the first contract year of the entire capital cost of equipment to be leased for 10 years was a violation of the statute prohibiting advance payments, 31 U.S.C. § 529 (1976), and that the bid including that payment scheme was properly rejected as nonresponsive.

Inter-Mountain argues that General Telephone Company of California is inapplicable here because that case involved a so-called "two-tier" lease bid, and this case involves an outright purchase. Inter-Mountain also states that prior to submitting its bid, it contacted the designated VA contracting official concerning the meaning of IFB section 5.0,

and that official stated it referred to the company's normal method of payment. Inter-Mountain contends that the rejection of its bid offering its normal method of payment is unfair and also shows that section 5.0 of the IFB is ambiguous.

It is our opinion that Inter-Mountain's bid was conditioned on the Government's payment of an improper advance payment and was properly rejected by the VA. While Inter-Mountain's characterization of the facts in General Telephone Company of California is essentially correct, the relevant principles applied in that case are not limited to those facts.

The basic prohibition against advance payments is contained in 31 U.S.C. § 529, which provides that:

"§ 529. Advances of public moneys;
prohibition against.

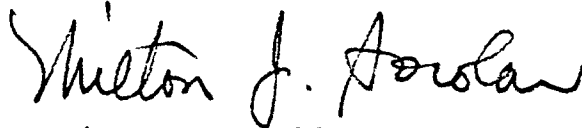
No advance of public money shall be made in any case unless authorized by the appropriation concerned or other law. And in all cases of contracts for the performance of any service, or the delivery of articles of any description, for the use of the United States, payment shall not exceed the value of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

The statute applies to both leases and purchases. See, e.g., Computer Election Systems, Inc., B-195595, December 18, 1979, 79-2 CPD 413. We have held that partial payments may be made before completion of the entire contract if the amount of the payment had been earned by the contractor and title to materials for which payment was being made had passed to the Government. See, e.g., 1 Comp. Gen. 143 (1921); 20 Comp. Gen. 917 (1941). In this case, it is clear from the record that Inter-Mountain would not have earned 15 percent of the contract price at the time of contract execution. Therefore, that amount would constitute an improper advance payment. Since the

payment plan is a material condition of the bid, the bid was properly rejected as nonresponsive.

Concerning the allegedly misleading advice given to Inter-Mountain, the VA states that its representative told Inter-Mountain to submit a purchase plan within the constraints of section 9.2.6 of the solicitation. Where, as here, the only evidence in the record are the conflicting statements of the protester and the contracting agency, the protester has not carried its burden of affirmatively proving its case. Harris Corporation, B-200321.2, June 9, 1981, 81-1 CPD 468.

Protest denied.



Acting Comptroller General
of the United States