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DECISION



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

FILE: B-200989

DATE: August 19, 1981

MATTER OF: American Telephone and Telegraph Company

DIGEST:

1. Acceptance of proposals on day following formal protest to agency constitutes adverse agency action, and protest to GAO must be filed within 10 days thereafter to be considered timely.
2. When untimely protest raises previously unconsidered issues regarding GSA classification of equipment and applicability of regulations covering automatic data processing equipment vs. those covering telecommunication acquisitions, GAO will review matter pursuant to the significant issue exception to Bid Protest Procedures.
3. Under Brooks Act, GSA has discretion to define type of equipment to be considered automatic data processing equipment, and protester disagreeing with recent reclassification of modems should seek change through GSA, not bid protest process.
4. In view of need to avoid buy-ins and to evaluate life cycle costs accurately, thus insuring that Government obtains automatic data processing equipment at lowest overall cost, requirement for fixed or finitely determinable prices does not unduly restrict competition.
5. Tariffed carrier, whose existing rates are subject to change and which must by law treat all classes of customers receiving similar services in same manner, cannot be considered for award of fixed price contract.

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American Telephone and Telegraph Company (AT&T) protests the refusal of the Social Security Administration (SSA), Department of Health and Human Services, to amend a solicitation to permit tariffed carriers, whose rates are subject to change by filing of revised tariffs with the Federal Communications Commission, to compete for award of a contract for equipment to be used in connection with SSA's nationwide telecommunications system.

AT&T alleges that the equipment in question has been wrongly classified as automatic data processing equipment, which must be procured on a fixed price basis. Rather, the protester argues, it should be procured according to the regulations covering telecommunications, which require that both tariffed and nontariffed carriers be given an opportunity to compete.

We find the protest clearly untimely. However, because it raises issues which we have not previously considered with regard to which regulations apply to the equipment being procured and whether a tariffed carrier may be excluded from competition for this type of equipment, we have reviewed the matter pursuant to the significant issue exception to our Bid Protest Procedures, 4 C.F.R. § 21.2(c) (1981). For the following reasons, we find that SSA properly applied the regulations covering automatic data processing equipment, and that the fixed price requirement does not unduly restrict competition.

The protested solicitation is one of three issued by SSA, under a delegation of procurement authority from the General Services Administration (GSA), for the purpose of acquiring equipment for a system known as SSADARS (Social Security Administration Data Acquisition and Response System). This particular solicitation was for 2,040 modems (a modem is a device which modulates and demodulates signals transmitted over data communications facilities) and 7 associated diagnostics (which will detect and isolate malfunctions or mistakes) needed for the attachment of terminals to the SSADARS network. About half of the approximately 1,850 terminals are located in SSA field offices; the remainder are on GSA's Advanced Records Systems, a teletype-based message system serving Federal agencies.

The threshold issue is the timeliness of AT&T's protest. SSA issued the solicitation on June 10, 1980, with

[Protest of Agency Refusal to Amend Solicitation]

a closing date of July 25, 1980. It stated that fixed prices must be offered for the initial contract period. For each separate option renewal period, prices were required to be either fixed or finitely determinable. On June 27, 1980, AT&T requested SSA to amend the solicitation so that proposals could be submitted on other than a fixed price basis. On July 8, 1980, SSA issued Amendment No. 1 in which it again stated that fixed prices were required and that prices under a common carrier regulatory tariff would not be considered fixed for purposes of this solicitation. Although the amendment was mailed to all offerors, AT&T states that it did not receive it until a special inquiry was made on July 17, 1980. In any event, AT&T filed a formal protest with SSA on July 24, 1980, one day before closing. The firm did not submit a proposal or take any further action until it received a reply from the contracting officer dated October 9, 1980; its protest to our Office was received on October 23, 1980.

Although AT&T argues that it should not have been required to file a protest with us until the contracting officer denied its protest to SSA, this is not the case. Acceptance of proposals on the day following AT&T's formal protest constituted adverse action by SSA, and any subsequent protest to our Office should have been filed within 10 days. Bird-Johnson Company, B-199445, July 18, 1980, 80-2 CPD 49. We therefore find the protest untimely.

We have considered the matter, however, because AT&T argues that the contracting officer, in deciding that fixed-prices were required, incorrectly relied on Federal Procurement Regulations (FPR) Subpart 1-4.11 (1964 ed.), which deals with automatic data processing equipment, software, maintenance, and supplies, rather than on Subpart 1-4.12 (Temp. Reg. 51, 44 Fed. Reg. 41431 (1979)), which deals with telecommunications. We have not previously considered which regulation covers the equipment in question, although we have recognized that there is considerable confusion in this general area. See Bowne Time Sharing, Inc., B-190038, May 9, 1978, 78-1 CPD 347. It is significant because the telecommunications regulation § 1-4.1202-2(a)(3), states in pertinent part:

"(3) * * * Agency telecommunications shall not be limited to tariff descriptions. Requirements shall be set forth in a manner that will afford both tariff and nontariff suppliers opportunities to compete."

In commenting on the protest, GSA advises us that it agrees with SSA's contracting officer that modems are considered automatic data processing equipment, not telecommunications equipment. At one time, according to GSA, modems were considered communications equipment and appeared on the Federal Supply Catalog (FSC) Group 58 Schedule for telecommunications equipment. As a result of a joint study by the Federal Supply Service and the Automatic Data and Telecommunications Service (ADTS), however, modems and other equipment which are closely related to and used with automatic data processing equipment were transferred to FSC Group 70, administered by ADTS. All items appearing on the Group 70 Schedule must be procured in accord with FPR Subpart 1-4.11, GSA states.

Under the Brooks Act, 40 U.S.C. § 759, GSA is authorized to coordinate and provide for the purchase and lease of automatic data processing equipment by Federal agencies. The type of equipment to be considered within this category is largely left undefined in the statute, although the legislative history is replete with statements describing it as commercially available, mass-produced, and general purpose. The House Committee on Government Operations recognized:

" * * * [R]apidly shifting developments in the interrelated fields of defense, space, communications and ADP could make any presently acceptable distinctions obsolete. * * * there is no pressing need for strict statutory definition. * * * the specific definition of the general-purpose ADP equipment is left to the BOB [Bureau of the Budget, now Office of Management and Budget] and GSA and the issuance of appropriate regulations." H.R. Rep. No. 802, 89th Cong., 1st Sess. 34 (1965).

In view of this legislative history, we believe it is within GSA's discretion to categorize modems as automatic data processing equipment, rather than as telecommunications equipment. AT&T takes issue with the recent reclassification and notes that it was done as the result of an internal study by GSA which was not subject to public comment. Nevertheless, if AT&T believes modems have been wrongly classified, the proper forum for requesting a change is GSA, rather than the GAO through its bid protest process.

As for the fixed price requirement, the automatic data processing regulation requires use of a standard clause covering fixed price options. It states that when known requirements exceed the basic period of the contract to be awarded, to avoid buy-ins and to insure that the Government obtains the equipment at the lowest overall cost, both initial and subsequent requirements must be satisfied on a fixed price basis. See FPR §§ 1-4.1107-14, Use of Standard Clauses, and 1-4.1108-4, Fixed Price Options. In addition, this requirement for either a fixed price or, in the case of option years, a finitely determinable price is necessary if the Government is to evaluate system life costs accurately. See generally Computer Machinery Corporation, 55 Comp. Gen. 1151 at 1155 (1976), 76-1 CPD 358. Although the regulation may restrict competition to firms offering fixed prices, in view of these legitimate needs, we do not believe it is an undue restriction.

We cannot conclude that AT&T offered a fixed price, since its rates are subject to the jurisdiction of the Federal Communications Commission (FCC) and could be changed by the filing of a revised tariff during the term of the contract. Under the Federal Communications Act of 1934, as amended, a carrier may increase its rates merely by giving 90 days' notice to the FCC and to the public. No action by the Commission is needed to allow an increase to go into effect, although either upon complaint or on its own initiative the FCC may conduct a hearing into the lawfulness of any new charge. 47 U.S.C. §§ 203(b)(1), 204(a) (1976); see also American Broadcasting Companies, Inc. v. FCC, 643 F.2d 818, 822 (D.C. Cir. 1980). After a hearing, the FCC is authorized to prescribe "just and reasonable" new charges, 47 U.S.C. § 205(a), supra; however, the amount considered just and reasonable will vary according to the carrier's capital expenses and operating costs. In any event, existing rates clearly are not fixed.

AT&T argues that in Anchorage Telephone Utility, B-197749, November 20, 1980, 80-2 CPD 386, we found that a tariffed carrier could be evaluated as if it were offering a fixed price. Our decision in that case, however, turned on the unique nature of the equipment

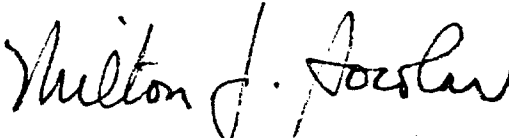
being leased ("AUTOVON" switches to be used by the Defense Communications Agency in Anchorage and Fairbanks, Alaska). The agency found that the price of this "special assembly" service had actually decreased over the term of three other contracts; in addition, rates for this type of service generally are developed to reflect actual costs, and thus are unlike services where tariffs may be increased due to political and economic factors. The agency therefore concluded, and we agreed, that the chance of an increase in rates due to regulatory jurisdiction was remote.

The Anchorage case, however, is limited to its particular facts, which are unlike those in the instant case. We also note that in Anchorage, the carrier selected for award had agreed not to initiate any rate increases from the start of service. AT&T, however, has not made any such offer and is, in effect, attempting to reserve the right to change its prices during the 96-month (with options) term of performance.

Because AT&T's existing rates are subject to change, there is no basis for comparing them with the rates of non-tariffed carriers or for determining the lowest overall cost to the Government under any of the four pricing plans to be evaluated by SSA. (These include purchase, lease with option to purchase, rental, and rental with payments to be applied to the purchase price. AT&T, obviously, would only be able to offer a rental rate based on its existing tariff.)

Moreover, except for maintenance costs after the first year, the price of the successful contractor will not be subject to escalation under the Consumer Price Index (CPI) or any other formula. According to the solicitation, maintenance costs during option years will be adjusted according to the CPI; for evaluation purposes, a 10 percent compound increase per year was projected. Whatever increases the CPI ultimately permits for maintenance--a relatively minor portion of the contract--the percent of increase will be the same for all offerors and thus may be evaluated. A price increase due to filing of a revised tariff by AT&T, on the other hand, would not be limited to maintenance and is totally unpredictable for evaluation purposes.

The protest is denied.


Acting Comptroller General
of the United States