

DECISION



19822 Kilbee
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-202238

DATE: October 20, 1981

MATTER OF: Illinois Bell Telephone Company

DIGEST:

1. GAO has no basis to conclude that provisions in solicitation for an automatic call distributing system do not reflect agency's legitimate needs, where protester, a regulated public utility offering telephone services, complains that provisions make it impossible for a regulated carrier to bid, but does not show that the agency's rationale for including the provisions is unreasonable.
2. Specification which describes with particularity the performance objectives of the telephone call distributing system being procured, including the manner and sequence for accomplishing specific functions, will not be questioned by GAO when protester does not show that contracting agency has no reasonable basis for imposing detailed requirements of this type.
3. Fact that the protester, or even all regulated public utilities cannot meet Government's requirements is not per se indicative that solicitation unduly restricts competition.
4. Timeliness of protest depends upon timeliness of specific bases of protest. Information submitted in support of timely raised bases of protest will be considered. However, where protester in its initial protest complains that several specific solicitation provisions are restrictive and later in its comments on the agency report alleges that a different provision is restrictive, allegation contained only in report comments is untimely.

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Similarly, specific arguments first raised in protester's report comments are untimely where protester first contended in the report comments that specific portions of the specification describe a competitor's product, but only contended in its initial protest that the specification was generally limited to one product.

5. GAO's duty under section 21.2(d) of Bid Protest Procedures to seek clarification of inadequately stated protest is applicable only where initial protest letter fails to state any basis for protest. Where initial protest adequately states basis of protest for one or more issues, section 21.2(d) is not applicable; it is the protester's duty to diligently pursue all other aspects of protest in a timely manner.
6. When offeror had solicitation available for review for period of months, and agency issued amendment deleting restriction affecting that offeror and extending date for receipt of initial proposals by 13 days, offeror had adequate opportunity to respond to solicitation.
7. Agency was under no obligation to hold a preproposal conference since such conferences are held at the agency's discretion.

Illinois Bell Telephone Company (Bell) protests that request for proposals (RFP) No. IRS 81-29, issued by the Internal Revenue Service (IRS) to procure an automatic call distributing system, is restrictive of competition mainly because the specification describes one manufacturer's equipment and certain RFP terms limit the ability of regulated public utilities to compete.

The IRS responded to certain of Bell's objections by amending the solicitation. The remaining issues are either without merit or untimely.

Background

As a result of a recent consolidation of its telephone inquiry function, the IRS anticipated that its Chicago office would receive approximately 20,000 calls daily from taxpayers seeking guidance. The IRS therefore determined that it needed automatic equipment to systematically distribute these calls to some 200 agents handling telephone inquiries and for other related functions. The subject solicitation sought offers for an integrated system to automatically perform this call distribution function, which includes agent stations, supervisory control stations, processors for electronic switching between lines, and auxiliary equipment, plus maintenance.

The IRS issued its original solicitation on January 22, 1981, which called for the submission of proposals on February 9. By letters dated January 30 and February 3, Bell pointed out a number of errors and inconsistencies in the solicitation and requested additional time to prepare a proposal. On February 4 the IRS contacted the offerors by telephone to advise them that the date set for receipt of proposals was to be extended. The IRS issued amendment No. 1 to the solicitation on February 13 correcting the deficiencies noted by Bell and extending the date for submission of proposals to February 26. This amendment in effect revised the entire solicitation.

Bell filed a protest with this Office on February 19, complaining that it was precluded from submitting a proposal because of the deficiencies in the original solicitation and stating that it had not received the amendment to the solicitation that the IRS had promised and that its request for a preproposal conference had not been honored. Further, the protester argued that certain specific terms and conditions in the solicitation prevented it, as a regulated public utility, from submitting a proposal. Bell finally maintained that the specification "described the mechanical functions" of another firm's equipment, therefore making it impossible for Bell to compete.

Shortly thereafter, on February 27, the IRS issued amendment No. 2 to the solicitation deleting one of the allegedly restrictive provisions and extending the date for receipt of proposals to March 12. Bell did not submit

a proposal by the amended closing date. On April 20 the competition was reopened to incorporate minor revisions into the solicitation. Although the amendment was sent to Bell, it did not respond by the April 30 closing date.

The contracting officer subsequently determined that immediate award was in the Government's best interest and proceeded under Federal Procurement Regulations § 1-2.407-8(b)(4) to award the contract despite Bell's protest.

Solicitation Provisions

Bell contends that the proposed contract provisions contained in the solicitation were unnecessarily restrictive in a number of areas. The first of these provisions precluded the consideration of special assembly tariffs proposed by communication carriers. This prohibition was deleted by amendment No. 2 to the solicitation and thus this aspect of the protest has been resolved.

Bell also asserts that the solicitation contained other terms which Bell, as a regulated communications carrier, could not satisfy due to tariff restrictions. The provisions in question: (1) provide for a one year fixed-price contract with fixed-price one year options; (2) prohibit the assessment of termination or cancellation charges; and (3) permit the Government to assess penalties for equipment downtime.

In reply, the IRS states that as it must operate on annual funds appropriated by Congress and in view of the rapidly changing technology in this area the most advantageous arrangement for the Government is an annual lease without cancellation changes and with option periods. The agency also states that fixed-price offers were required for accurate price comparison and because it is the preferred contract form for this type procurement. Finally, the IRS notes that the provisions relating to downtime penalties are needed to motivate the contractor to repair phone lines as quickly as possible and in effect constitute an equitable adjustment for lines which become inoperable.

The IRS argues that these contract provisions reflect its judgment as to the best business arrangement for procuring a complex system of this kind. IRS further states that where the solicitation conditions reflect the legitimate needs of the Government, they are not unduly restrictive of competition simply because they exclude one or more offerors.

A tariffed communications carrier, whose rates are subject to change and which by law must treat all classes of customers receiving similar service in the same manner, generally cannot be considered for the award of a fixed price contract for services covered by the tariffs. American Telephone and Telegraph Company, B-200989, August 19, 1981, 81-2 CPD 157; but see Anchorage Telephone Utility, B-197749, November 20, 1980, 80-2 CPD 386. Fixed price contracts, however, are accorded a statutory preference under 41 U.S.C. 254(b) and this Office will not take legal objection to their use. National Veterans Law Center, B-198738, February 2, 1981, 81-1 CPD 58.

With respect to Bell's contentions that the solicitation provisions prohibiting cancellation changes and assessing penalties for downtime are restrictive, the determination of the Government's minimum requirements and the best methods for accommodating them are properly the responsibility of the contracting agency. Maremont Corporation, 55 Comp. Gen. 1362 (1976), 76-2 CPD 181. This Office will not substitute its judgment for that of the contracting agency unless it is shown that the agency's judgment is unreasonable. General Telephone Company of California, B-190142, February 22, 1978, 78-1 CPD 148. While the solicitation must be drafted in a manner to maximize competition, the fact that one or more potential offerors may be precluded from participating because of its terms does not render those terms restrictive if they reflect the legitimate needs of the agency. Willard Company, Inc., B-187628, February 18, 1977, 77-1 CPD 121. The prohibition against undue restriction of competition does not require that a Government need be compromised in order to accommodate all potential offerors.

Here, although Bell argues that these provisions unduly restrict competition by preventing it from competing, the protester does not question the rationale set forth by IRS for the inclusion of the provisions. In view of this and since the provisions appear reasonable we have no basis to conclude that they do not reflect legitimate agency needs.

After receipt of the agency report on the protest, Bell objected to the solicitation provision concerning the Government's right to order optional equipment. Bell states that while the provision indicated the amount of optional equipment which would be required over the ten-year option period, it did not indicate in which of the ten years the equipment would be needed. The protester argues that no common carrier can possibly bid without knowing when the equipment would be required. Our Bid Protest Procedures require that alleged improprieties in the solicitation be protested prior to the closing date for receipt of initial proposals. 4 C.F.R. § 21.2 (b)(1)(1981); AIL West, B-190239, January 17, 1978, 78-1 CPD 38. In our opinion, Bell could and should have advanced these arguments in its initial protest letter or at least prior to the March 12 closing date for receipt of proposals. We will therefore not consider this element of Bell's protest which it did not raise until its comments on the agency report were filed on May 29.

Specification Restrictions

Bell's initial letter of protest contended that the specification was unnecessarily restrictive, in that it allegedly described the mechanical functions of the automatic call distributing system manufactured by another firm. Bell pointed out that the IRS originally intended to procure the other firm's equipment without competition, as evidenced by the November 12, 1980, announcement in the Commerce Business Daily.

The IRS responds that the specification was drafted to meet its legitimate needs for increased service, and that the protester must demonstrate how the agency has failed to satisfy this test. The IRS further states that because Bell's allegations were so indefinite, it cannot speculate as to the parts of the specification Bell believed were unduly restrictive.

It is the protester's responsibility to establish that the specification is, in fact, unduly restrictive by showing that the alleged restrictions are not reasonably related to the agency's needs. Alan Scott Industries, B-193530, April 27, 1979, 79-1 CPD 294. We do not believe that Bell can satisfy its burden of showing that the specification is unduly restrictive by simply asserting that it is functional in nature and that those functions describe the manner in which a competing product operates. Oshkosh Truck Corporation, B-198521, July 24, 1980, 80-2 CPD 161.

Further the specification is functional only in the limited sense that it describes the manner in which the performance objectives are to be met; it does not impose physical design requirements upon offerors. Consequently, offerors were free to choose any combination of equipment which would perform the described operations in the manner and sequence indicated.

Subsequently, when commenting upon the agency report to this Office, Bell specified a number of particular specification provisions which it alleged were unduly restrictive of competition. For example, Bell notes that the specification required that incoming calls be connected directly to an agent when one is available while Bell's equipment would process such calls through a recorded message. The specification also required that incoming calls be placed with the agent who has been idle the longest while Bell's equipment would assign incoming calls randomly to available agents.

The IRS argues that Bell's belated challenge of these particular aspects of the specification is untimely. The IRS also notes that one of the contested specification provisions has been deleted by

amendment No. 3 to the solicitation. Without admitting the timeliness of Bell's contentions, the IRS also points out its rationale justifying each of the remaining specification requirements. The IRS also identifies other manufacturers which produce equipment satisfying the challenged specification provisions.

In a situation where a protester merely listed the relevant paragraph numbers from the challenged specification without further explanation, we held that subsequent amplifying arguments amounted to untimely, piecemeal presentation of the issues. Radix II, Inc., B-186999, February 8, 1977, 77-1 CPD 94. It follows that Bell's initial protest, which did not even list particular paragraphs, did not adequately convey Bell's intent to challenge specific portions of the specification. Accordingly, Bell's detailed challenge is untimely since the provisions in question were apparent on the face of the solicitation and the protest identifying them was first received by this Office after the date for receipt of initial proposals.

Bell, however, contends that this Office was obliged to request additional information from Bell under section 21.2(d) of our Bid Protest Procedures. In Bell's view, our failure to request additional details meant that those aspects of its protest had been presented properly. Bell therefore concludes that it was free to present any argument which was relevant to its initial allegation that the specification was restrictive.

Under section 21.2(d) of the Procedures, we request details when an initial protest filing is so vague or incomplete that neither we nor the procuring activity could be expected to identify a basis for protest. When the initial filing does adequately state at least one ground for protest, we do not seek details of other issues, no matter how incompletely they may be presented, since the agency involved can identify and respond to what the protester appears to care about most of all. In the final analysis, it is the protester's duty to diligently develop its own protest, not this Office's responsibility. Thus, if portions of a protester's initial submission do not suffice to identify some issues adequately, we view any subsequent submissions from the protester as having to satisfy the timeliness test of Radix II.

Meaningful Opportunity to Respond

Bell contends that the restrictive specification and solicitation provisions, the short time allowed for proposal preparation, and the IRS failure to conduct a preproposal conference, taken together, denied it a meaningful opportunity to compete.

The allegations relating to the restrictiveness of the specification and solicitation provisions have been discussed above. In our opinion, when IRS issued amendment Nos. 2 and 3 deleting the prohibition against special assembly tariffs and one of the protested specification requirements, the remaining solicitation provisions and the specification reflected the agency's minimum needs and were therefore not unduly restrictive of competition. Thus, if they excluded Bell from submitting a proposal, that firm simply could not meet the agency's needs.

As to the alleged lack of time to prepare a meaningful response to the solicitation, Bell received the original solicitation in January 1981 and sought its revision by letters dated January 30 and February 3. The record shows that Bell received amendment No. 1, which substantially revised the solicitation, on February 20. Amendment No. 2, which was sent to Bell by telegram on February 27, extended the date for submission of initial proposals to March 12. In view of Bell's familiarity with the IRS requirements gained in its review of the initial and revised solicitation, Bell should have been able to respond rapidly once the prohibition against the use of special assembly tariffs was dropped. In these circumstances, we believe that the nearly two weeks allowed for submission of proposals by amendment No. 2 was adequate. Further, Bell was given another opportunity to submit an offer when the competition was reopened on April 20 by amendment No. 3.

Finally, Bell questions the IRS failure to hold a preproposal conference, contending that the conference would have given Bell an opportunity to seek clarification of the solicitation provisions it now protests. As noted in A. J. Fowler, B-191636, October 3, 1978, 78-2 CPD 252, preproposal conferences are not held routinely

but are used when the procuring agency believes that a conference is necessary to explain complex aspects of the procurement. While recognizing that a preproposal conference may prove useful to offerors in certain instances, we will not question the agency's discretionary decision not to hold such a conference. Fox & Company, B-197272, November 6, 1980, 80-2 CPD 340.

Consequently, we do not believe that Bell was denied a meaningful opportunity to respond to the solicitation.

The protest is dismissed in part and denied in part.

for Milton J. Fowler
Comptroller General
of the United States