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Kinney

DECISION



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

FILE: B-205729

DATE: September 7, 1982

MATTER OF: GTE Telenet Communications Corporation

DIGEST:

1. Protest filed more than ten working days after the protester received documents which provide its basis of protest is untimely.
2. The failure of an awardee to submit a proposed tariff with its proposal to provide Valued Added Network Tariff Service does not affect the validity of award where the request for proposals (RFP) did not make such a submission mandatory and where the firm, upon award, clearly became bound to file an amended tariff consistent with the prices submitted.

GTE Telenet Communications Corporation protests the award of a contract to Tymnet, Inc. under request for proposals (RFP) GS-81N-00F-0008 issued by the General Services Administration (GSA). We dismiss the protest in part and deny it in part.

The RFP is for Valued Added Network (VAN) Tariff Service. A VAN is a system of communications circuits and switches which enables the user's communications terminals to interface with a central computer. The RFP contemplates a VAN that provides a communications link between the GSA's Office of Data Systems and approximately 100 terminals in ten GSA regional offices. Under this system the Government in effect shares, by lease, the circuitry with other customers of the VAN contractor.

The RFP provides for an award based on lowest cost to the Government provided that all mandatory technical requirements are met. The GSA found that the proposals submitted by Telenet and Tymnet met all technical requirements. Therefore, the GSA awarded a contract to Tymnet on the basis of an evaluated price of \$602,949. Telenet's evaluated price was \$763,209.28.

Telenet contends that GSA evaluated Tymnet's price in a manner inconsistent with the terms of the RFP. In particular, Telenet objects to the evaluation of Tymnet's provision of services in the Auburn, Washington area. Telenet points out that at the time of evaluation and award, Tymnet did not have a tariff applicable to Auburn on file with the Federal Communications Commission. Telenet believes that since Tymnet's proposal was evaluated partially on the basis of a non-tariffed service while all of Telenet's services were the subject of a tariff, GSA has treated the offerors unequally.

We will not consider this contention because it was untimely filed. GSA awarded the contract to Tymnet on September 4, 1981. The record indicates that in late October the GSA, pursuant to a Freedom of Information Act request, forwarded copies of the contract and Tymnet's current tariff to Telenet. The date on which Telenet received these documents is unclear. However, a letter from Telenet to GSA dated November 17, 1981 indicates that by this date, Telenet had received the copies of the contract and tariff. The tariff does not list Auburn. Thus, GTE was aware of this basis of protest on November 17 at latest. Our Bid Protest Procedures require that protests be filed with our Office within ten working days of the time the protester became aware of the basis for the protest. 4 C.F.R. § 21.2(b)(2)(1982). Since Telenet did not file a protest with our Office until December 7, the protest on this issue was untimely filed.

In any event, the following provision of the RFP clearly permits award based on tariffs to be filed in the future:

The prices agreed upon at the time the contract is awarded shall be the prices (charges/termination liability) that the carrier shall file in applicable tariffs

with appropriate regulatory authority.* * *
The offeror will indicate whether this service will be provided under an existing tariff or a tariff to be filed with the Federal Communications Commission (FCC)* * *. If the prices quoted are not filed tariffs, the proposed tariff pages should be submitted with the proposals.

To the extent that GTE objects to award on this basis, its objection is based on an alleged solicitation impropriety and it should have filed a protest prior to the closing date for receipt of initial proposals, 4 C.F.R. § 21.2(b)(1).

GTE next contends that the award was improper because Tymnet did not submit with its proposal a proposed tariff amendment to include Auburn. It does not appear that GTE, at any time prior to the filing of this protest, was aware that Tymnet had not submitted a proposed tariff and, therefore, the contention was timely filed. We find, however, that the contention is without merit. Contrary to GTE's assertions, the RFP does not make the submission of proposed tariffs mandatory, but merely states that proposed tariffs should be submitted. Importantly, during discussions Tymnet explicitly agreed to provide toll-free access to Auburn. As noted, the RFP provides that "prices agreed upon at the time the contract is awarded shall be the prices * * * that the carrier shall file in applicable tariffs with appropriate regulatory authority." Thus, upon award, Tymnet clearly became bound to provide services at the agreed upon rates and to file a tariff consistent with those rates. Under the circumstances, we do not believe that the failure to submit a proposed tariff rendered the evaluation or the award improper.

Telenet also argues that GSA's evaluation of proposals was improper because it was based upon rebates by Tymnet of toll charges GSA will incur until Tymnet can make available toll-free access in Auburn. Tymnet cannot provide toll-free access until the American Telephone & Telegraph Co. (AT&T) completes a work order filed by Tymnet to upgrade Auburn to a "foreign" exchange. Telenet argues that computing price on the basis of a rebate is not contemplated by the RFP; rather, under the circumstances, the GSA should have added its anticipated toll charges to Tymnet's evaluated price.

Telenet's allegations are not supported by the record. GSA evaluated Tymnet's price on the basis of a binding promise by Tymnet that toll-free access would be provided, not on the basis of rebates for tolls accrued in Auburn. Tymnet placed a work order with AT&T to upgrade the service in Auburn on July 24, 1981, and anticipated that the work would be completed by October 1, the date on which contract performance was to begin. The upgrading of the Auburn service was delayed, however, by factors outside of Tymnet's control. In November 1981, well after the award of the contract, Tymnet agreed, in order to meet its contractual obligations, to absorb GSA's reasonable access charges. Thus, it is clear that GSA did not evaluate Tymnet on the basis of a "rebate." Moreover, to the extent Telenet finds the post-award agreement to absorb costs to be objectionable, it is a matter of contract administration for the contracting agency and, as such, will not be considered by our Office. See Delta Systems Consultants--Reconsideration, B-201166.2, July 31, 1981, 81-2 CPD 72.

The protest is dismissed in part and denied in part.



Acting Comptroller General
of the United States