

DECISION

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

PL-1
Ruppert

120194

FILE: B-206327.4

DATE: December 22, 1982

MATTER OF: Rolm Intermountain Corporation

DIGEST:

1. Protest against a noncompetitive award filed within 10 days after the protester states it knew the grounds for its protest is timely under 4 C.F.R. § 21.2 (1982) of our Bid Protest Procedures notwithstanding conflicting fact statement by agency. Doubt as to timeliness is resolved in favor of protester.
2. Noncompetitive award of a 5-year contract in 1981 for a telephone system was not adequately justified in view of record, including Determination and Findings for noncompetitive award, indicating that competitive procurement could be effected in 2 to 3 years.

Rolm Intermountain Corporation (ROLM) protests a noncompetitive order placed by the General Services Administration (GSA) for a telephone system and services for a 5-year term to Mountain Bell Telephone Co. (Mountain Bell).

The protest is sustained.

ROLM essentially bases its protest on the ground that it can supply the equivalent equipment or services for Federal offices in Ogden, Utah, at a lower cost than Mountain Bell. Therefore, ROLM alleges that the noncompetitive procurement from Mountain Bell for 5 years is not justified and is contrary to oral advice received from GSA that the noncompetitive procurement would not exceed 18 months.

The new telephone service was ordered on June 15, 1981, and on June 19, 1981, GSA informed the Heads of Federal agencies with offices in Ogden, Utah, about the conversion to the new system. The system was installed in November 1981.

GSA reports that ROLM submitted a Freedom of Information Act (FOIA) request to GSA, Region 8, on July 2, 1981, requesting all correspondence between GSA and the Internal Revenue Service regarding telephone service in Ogden, Utah. A response was sent enclosing the notice to the Heads of Federal agencies with offices in Ogden as the only existing described document except for IRS routine service order forms. GSA states that the FOIA request did not cover documentation between GSA and Mountain Bell. GSA reports that the Director of the Automated Data and Telecommunications Service (ADTS), Region 8, told ROLM personnel that interim service would be procured off the tariff (i.e., from the tariffed carrier) and that the system would be reprocured competitively at a later date. GSA states that the Director neither said nor suggested that the service would be acquired on a month-to-month basis, or that a competitive procurement would be held in 18 months. Under these circumstances, GSA argues that ROLM's protest, filed with our Office on February 26, 1982, is untimely under 4 C.F.R. § 21.2 (1982), since it was not filed within 10 days of the protester's knowledge of its basis for protest upon receipt of FOIA documents in July 1981.

ROLM contends that misrepresentations by GSA personnel about the nature and type of contract awarded resulted in the protest not being filed immediately in July 1981. ROLM states that in July 1981, it inquired about the contract to be awarded and was informed by the telecommunications director for GSA in Denver that no documentation existed between GSA and Mountain Bell regarding the contract inquired about and that a long-term contract would not be awarded to Mountain Bell. ROLM states that the telecommunications director represented that Mountain Bell's system and services were only being obtained on a "month to month" basis and that a competitive procurement would take place in approximately 18 months. He further stated that ROLM had no reason to be concerned because it would be notified and permitted to participate in the procurement.

ROLM states that it accepted the explanation of the telecommunications director and was awaiting the new solicitation when it learned in February 1982, that GSA had not in fact procured the Mountain Bell system and services on a month-to-month basis but had entered into a long-term

contract with the firm. ROLM contends that if it had known in July 1981, that GSA was going to proceed as it did and not as it represented, a protest would have been filed in July 1981.

The record is not clear as to when ROLM obtained the information which formed the basis for its protest, namely, the long-term contract award to Mountain Bell. There is no written statement from the telecommunications director to support GSA's position, which is disputed by ROLM. Under these circumstances we resolve doubt as to the timeliness of the protest in favor of the protester and will consider it on the merits. See Applied Services Corporation, B-199371, February 4, 1981, 81-1 CPD 65 and cases cited therein.

GSA reports that telephone service for Federal offices in Ogden, Utah, had been scheduled for replacement by competitive procurement during fiscal year 1983. However, in the spring of 1981, it became clear that the fiscal year 1982 GSA budget would require a reduction in personnel which would affect the ability of the staff of the ADTS to complete these procurements as scheduled. GSA states that competitive procurements have generally been taking 18 months or longer to complete. The ADTS staff in Region 8, which was responsible for the Utah procurement, was involved in two major systems procurements at that time. The system then in use in Ogden was running out of capacity, could not be upgraded to meet new requirements of some agencies and could not be converted to an unattended service, which service was necessitated because of budget-required staff reductions. Since the service in Ogden needed immediate adjustments and the responsible office was not adequately staffed to perform a competitive procurement for the replacement, GSA made a determination to acquire on a noncompetitive basis an interim replacement service from the tariffed carrier.

Although ROLM concedes that the foregoing circumstances justified a noncompetitive award, it contends that such an award was not justified for a 5-year term. It is ROLM's position that a competitive procurement can be effected in approximately 2 years and that a noncompetitive award of any longer duration is unjustified.

GSA placed an order for new service with Mountain Bell in June 1981. After consideration of available prices for such service, the rescheduling of a competitive procurement and relevant legal constraints, a 60-month, two tier pricing plan for a dimension system (two on-site PBX's) was chosen. GSA contends that the noncompetitive procurement of telephone service for Federal offices in Ogden as awarded was in accordance with the applicable regulations. GSA reports that a competitive procurement for this service is targeted to begin in fiscal year 1985.

ROLM requests our Office to reverse the noncompetitive procurement action and require GSA to procure such services on a competitive basis "within two to two and one-half years from June 1981." ROLM cites our decision in RCA Alaska Communications, Inc., B-178442, June 20, 1974, 74-1 CPD 336, which found that GSA must obtain maximum practicable competition in the procurement of telephone systems. ROLM objects to GSA's refusal to furnish it a solicitation for the services even after it "all but guaranteed that the needed system or services could be supplied by ROLM on a sole-source basis at less cost than that for Mountain Bell."

Because of the general requirement that procurements be conducted on a competitive basis to the maximum practical extent, Federal Procurement Regulations (FPR) § 1-3.101(d) (1964 ed. amend. 194), agency decisions to procure on a noncompetitive basis must be adequately justified and are subject to close scrutiny. R&E Cablevision, B-199592, February 19, 1981, 81-1 CPD 110. In determining the propriety of a noncompetitive award, the standard we apply is one of reasonableness; unless it is shown that the contracting agency justification for a noncompetitive award is unreasonable, our Office will not question the procurement. Diesel Parts of Columbia, B-200595, July 20, 1981, 81-2 CPD 50, Federal Data Corporation, 59 Comp. Gen. 283 (1980), 80-1 CPD 167. We have recognized that noncompetitive awards may be made where the minimum needs of the Government can be satisfied only by one firm which could reasonably be expected to produce the required item without undue technical risk within the required timeframe. Fermont Division, Dynamics Corporation of America, B-198197, September 9, 1980, 80-2 CPD 184.

Here, we find that the noncompetitive award for 5 years was not adequately justified since the record in this case, including the Determination and Findings in March 1981 justifying the noncompetitive award, indicates that replacement of the system could be effected in 2 to 3 years. Moreover, there is nothing in the record indicating that only a 5-year contract was feasible or necessitated by cost or other considerations. In view thereof, we fail to see why a contract of shorter duration was not awarded and a competitive procurement begun.

Therefore, the protest is sustained and we are recommending that GSA consider the feasibility of immediately starting a competitive procurement.

for 
Comptroller General
of the United States