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**DECISION**



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

**FILE:** B-209412

**DATE:** April 12, 1983

**MATTER OF:** Northern Telecom, Inc.

**DIGEST:**

Bid which included restriction on release of price is nonresponsive and should have been rejected, even where contracting officer ignored restriction and disclosed price at bid opening.

Northern Telecom, Inc. (NTI), protests the Veterans Administration (VA) decision to award a contract to Universal Communication Systems, Inc. (UCS), for a telephone system at the VA hospital, Hines, Illinois, under invitation for bids (IFB) No. 578-10-81, the second step of a two-step formally advertised procurement. NTI contends that the VA improperly determined its second low bid nonresponsive, while the VA improperly accepted UCS's low nonresponsive bid.

We conclude that UCS's bid was nonresponsive, and we sustain the protest to that extent.

Under the second-step IFB, award was based on a total system price to be submitted along with worksheets providing line item prices and attachments to the worksheets containing further cost data. UCS, NTI and GTE - Business Communications Systems, Inc. (GTE), submitted technically acceptable proposals under step one. At the August 31, 1982, bid opening for step two, the contracting officer read the total prices bid and an abstract of these prices was made available. The VA advises that UCS was the only bidder under this IFB to mark its bid proprietary. After bid opening, NTI requested an opportunity to review UCS's bid but, because UCS's bid was marked proprietary, the VA representative refused, stating he would need legal advice before releasing UCS's bid. By letter dated September 8, 1982, NTI was advised that its request to review UCS's bid was denied. By letter of September 10, NTI filed a protest with the VA against the planned award to UCS. On September 22, 1982, the VA denied NTI's protest. By letter of September 23, 1982, the VA notified NTI that its bid was determined non-responsive because certain required attachments to the worksheets containing cost breakdowns were not included in the

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bid. GTE's bid was also found nonresponsive. GTE apparently failed to submit a bid bond, and it has not protested the VA's determination. Also on this date, UCS was awarded the contract to furnish and install the telephone system at a price of \$2,767,686.

On October 6, 1982, NTI protested to our Office the award to UCS on the basis that UCS's bid was nonresponsive for barring public disclosure of its bid prices. NTI also protested the VA's determination that NTI's bid was nonresponsive, contending its bid contained all necessary and required cost data.

Initially, the VA and UCS contend that NTI's protest against UCS's proprietary bid is untimely. According to UCS and VA, the contracting officer and his technical representative orally advised parties at the prebid conference held in May 1982, pertaining to both steps, that marking bids proprietary was acceptable. Therefore, the VA and UCS contend that NTI was on notice of this alleged impropriety in the solicitation before bid opening, and under our Bid Protest Procedures it was required to protest this matter before bid opening. See 4 C.F.R. § 21.2(b)(1) (1982). We disagree.

The VA technical representative states that he advised the parties at the preproposal conference of the "right to mark their bids proprietary in order to maintain the confidentiality of any sensitive information." In effect, this statement was advice to the parties to use their judgment in marking step-one proposals and step two bids proprietary. This statement does not provide a basis of protest since it did not put NTI on notice that a bidder was permitted to restrict disclosure of its bid prices and a procedure concerning proprietary information was not contained in the solicitation. The protest involves the particular UCS use of the proprietary stamp on the bid prices, which could not have been known by NTI until after bid opening. Therefore, there was no apparent impropriety in the solicitation which had to be protested before opening.

NTI contends that UCS's bid contained proprietary legends which render the bid nonresponsive. The VA concedes that UCS's bid was stamped proprietary, but argues that it is longstanding VA policy to encourage and approve of the restriction on public disclosure of both step-one proposals and step-two bids. The VA also points out that the total

system price was disclosed at bid opening, thus satisfying the public opening requirements of 41 U.S.C. § 253(b) (1976), and applicable regulations, and that, had the step-two bid not been marked proprietary, an implied agreement between VA and bidders would have prevented disclosure of anything other than the total system price, even if that price were marked proprietary.

NTI responds that VA's alleged policy does not excuse the acceptance of a nonresponsive bid, and there is no authority permitting the VA personnel to advise bidders to stamp prices proprietary. Finally, NTI asserts that the VA has released pricing information in the past.

UCS's step-two bid contained the following language in the cover letter:

"All information contained in our response is to be considered Proprietary Information, and must not be released to any individuals or companies outside the Government without the prior written consent of an officer of Universal Communication Systems, Inc."

Every page of the bid, except the bid bond information, was stamped "Proprietary Information."

This Office had held that a bid which is restricted as to the disclosure of price renders the bid nonresponsive. Prime Computer, Inc., B-204848, January 7, 1982, 82-1 CPD 20; 1010 Incorporated of Alamagordo, B-204742, December 21, 1981, 81-2 CPD 486. The VA's disclosure of the restricted bid price at bid opening does not cure the bid's nonresponsiveness. Prime Computer, Inc., supra, and 1010 Incorporated of Alamagordo, supra. The nonresponsiveness of a bid must be determined at the time of bid opening. A bidder which restricts disclosure of its price would still have the option, even if its price is exposed, to accept or reject award of a contract because its bid was conditioned on non-disclosure of its price.

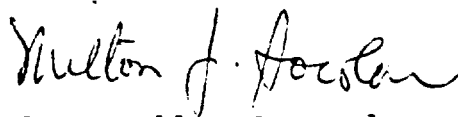
The VA asserts that, under the instant procurement and in the past, on this type of telephone system solicitation, it has permitted and encouraged the restriction on the disclosure of proprietary cost information. We consistently have taken the position that a contracting personnel's erroneous advice with regard to a procurement or prior erroneous

practices followed by the contracting officials do not estop an agency from rejecting a bid as nonresponsive where it was required to do so by law. A.D. Roe Company Inc., 54 Comp. Gen. 271 (1974), 74-2 CPD 194; See Norris Paint & Varnish Co., Inc., B-206079, May 5, 1982, 82-1 CPD 425; International Salt Company, B-200128, January 7, 1981, 81-1 CPD 142. We agree with NTI that because UCS restricted public disclosure of its total system price, UCS's bid was nonresponsive and that the VA's prior practice and advice on the instant procurement do not excuse the nonresponsiveness of UCS's bid. Thus, award to UCS was improper and we sustain the protest.

Ordinarily, we would recommend that the VA terminate the award to UCS and award to the next low otherwise responsive bidder. Here, considering the status of performance of this contract, we do not recommend corrective action. The VA advises that a notice to proceed was issued to UCS and that UCS already has ordered equipment and has commenced performance of the work. The VA estimates the costs of termination are in excess of \$500,000. In view of this, corrective action would not be in the best interests of the Government.

We note that the VA has stated in its report that it is contemplating modifying its procedures concerning restricting of pricing information under this type of solicitation. We recommend that this modification include a requirement that the total system price must be unrestricted. In our view, bidders must permit disclosure of sufficient information to permit competing bidders to know the product offered and those elements of the bid which relate to quantity, price and delivery terms. Cf. Federal Procurement Regulations § 1-2.404-2 (1976 ed.). The VA should also ensure that bidders receive appropriate instructions regarding the VA's handling and disclosure of proprietary information consistent with applicable procurement regulations.

We sustain the protest.

for   
Comptroller General  
of the United States