

DECISION

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

26254

FILE: B-209544

DATE: September 16, 1983

MATTER OF: Satellite Business Systems

DIGEST:

When procuring agency's Inspector General is investigating procurement, is considering veracity of report on which protest is based, and has held discussions with the Department of Justice, GAO will close file without action until investigation and any subsequent criminal proceedings are completed.

Satellite Business Systems protests the Department of Energy's (DOE's) award of a contract for a satellite-based telecommunications network to Western Union Telegraph Company. Because DOE's Inspector General is investigating questions directly related to the protest and has conducted discussions with the Department of Justice, we do not believe it is appropriate for us to consider the matter at this time. We therefore close the file without action.

Background:

Under a lease, No. DE-AB01-82MA32150, awarded in July 1982, Western Union is establishing four earth stations (at Germantown, Maryland; Albuquerque, New Mexico; Livermore, California; and Kansas City, Missouri), with options for 20 more stations at various locations. In addition, the contractor is committed to develop a transportable "node" that may be used anywhere in the lower 48 states and ultimately throughout the world.

DOE's uses for the telecommunications network, referred to as an "Operational Model" or OPMODEL, will range from support of its national security-related nuclear programs to consolidation and replacement of existing communications equipment, permitting high speed transmission of both classified and unclassified data, video teleconferencing, and the like. The General Services Administration, which delegated authority for this procurement to DOE, under an interagency agreement will monitor

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and evaluate the network, assessing its potential for use in meeting Government-wide communications requirements, including modernizing the Federal Telecommunications System (FTS).

Western Union's contract is in the form of a basic ordering agreement at fixed prices subject to an escalation clause and tariff increases approved by the Federal Communications Commission. The firm is installing the network in phases, the first of which is nearing completion as scheduled 12 to 18 months after award. Service at additional sites will be ordered and funded through "communications service authorizations."

DOE issued the solicitation leading to the protested contract in December 1981, calling for an "integrated and dedicated telecommunications network having wideband connectivity." Three firms--Western Union, Satellite Business Systems, and American Satellite Company--submitted proposals and in April 1982 conducted demonstrations that were witnessed by representatives of DOE and a consultant, Calculon, Inc. The solicitation (section 1.7.1.3) specifically stated that "to verify compliance and operational capability of the mandatory requirements or bid enhancements," DOE would request a demonstration of "operational facilities" providing services "similar [to] or like" those proposed.

Final evaluation followed a series of written questions, with vendors submitting answers to DOE on June 1, 1982. At that time, DOE eliminated American Satellite from competition for failure to meet some of the 21 mandatory requirements listed in the solicitation. The agency awarded Western Union and Satellite Business Systems 600 technical points each, indicating that it regarded both as capable of meeting all mandates. In accord with the solicitation, which provided for up to 190 additional technical points for enhanced features or options, Satellite Business Systems received a total of 717, compared with Western Union's 685 technical points.

The difference in the two firms' evaluated life cycle costs, approximately \$140 million, however, was so great that in the final scoring, where technical ability was weighted at 60 percent and cost at 40 percent, Western Union achieved a total of 92 points, compared with Satellite Business Systems' 77.7.

In computing these scores, DOE did not use its Source Evaluation Board procedures, generally required for procurements of more than \$500,000; they were considered inapplicable to this procurement and were waived by the Secretary. The Source Selection Official, advised of the final scores and in effect bound by them, selected Western Union for award of the OPMODEL contract on July 27, 1982.

Satellite Business Systems' Protest:

Satellite Business Systems filed a one-line protest against the award with our Office on October 18, 1982. Nearly a month later, on November 4, 1982, the firm provided details, alleging that Western Union was "nonresponsive" because it had failed to demonstrate its ability to meet 7 of the 21 mandatory requirements and arguing that in making the award, DOE had improperly waived these requirements. In addition, the protester questioned the adequacy of Western Union's demonstration plan; alleged that a key Western Union subcontractor was not responsible; and attempted to show that DOE had incorrectly evaluated its own life cycle costs.

DOE and Western Union urged us to dismiss the protest as untimely under our Bid Protest Procedures, 4 C.F.R. § 21.2 (1983), which require filing within 10 working days after the basis for protest is known or should have been known, whichever is earlier. In this case, they argued, Satellite Business Systems knew its basis of protest either on the date of award or, at the latest, on August 11, 1982, the date of its debriefing.

These parties further alleged that Satellite Business Systems' protest was based primarily on a report prepared by Calculon after the demonstrations. They argued that this report must have been "leaked" to Satellite Business Systems, but that in any event, it was only preliminary and not entitled to substantial weight, since it did not include an evaluation of offerors' June 1 responses, which DOE also considered in determining whether ability to meet mandatory requirements had been adequately demonstrated.

Satellite Business Systems, however, asserted that its filing was based on DOE responses to Freedom of Information Act (FOIA) requests, received on October 5 and 19, 1982, and that its protest therefore was timely. With regard to the substance of its protest, Satellite Business Systems

quoted DOE memorandums stating that Calculon had been employed because DOE lacked sufficient in-house expertise to evaluate proposed systems; for this reason, Satellite Business Systems argued, its protest clearly had merit.

GAO Analysis:

We first determined that the protest clearly was not based on FOIA materials, but rather reflected, almost verbatim, the conclusions reached by Calculon. However, under the general rule giving protesters the benefit of the doubt as to timeliness, and in the absence of specific information as to when Satellite Business Systems had learned of the existence and/or contents of Calculon's report, the protest could have been considered. See Lundy Electronics and Systems, Inc., B-202181, March 4, 1982, 82-1 CPD 192. Moreover, in view of the 10-year term of the lease and the possibility of Government-wide use of the telecommunications network, we believed the protest raised issues of widespread interest to the procurement community and merited consideration on that basis under section 21.3 of our procedures. See CompuServe Data Systems, Inc., 60 Comp. Gen. 468 at 474 (1981), 81-1 CPD 374; American Telephone and Telegraph Company, 60 Comp. Gen. 654 (1981), 81-2 CPD 157.

Due to the highly technical nature of the mandatory requirements that Western Union's proposed system allegedly did not meet, our Information Management and Technology Division (IMTEC) reviewed the protest file. IMTEC's starting point was the Calculon report, which concluded that Western Union had not demonstrated its ability to meet DOE's mandates; the division also looked at DOE's subsequent questions and offerors' June 1, 1982 responses.

Now, however, we are advised that DOE's Inspector General's Office is investigating this procurement and has conducted discussions with the Department of Justice in light of possible violations of criminal law. One of the matters being considered is the veracity of the Calculon report. Since the conclusions in the Calculon report are central to this protest, and since the entire matter is the subject of an Inspector General investigation and may also result in criminal proceedings, we do not believe it would be appropriate for us to decide the protest until the

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investigation and any subsequent proceedings are completed. Since that may take a lengthy period of time, we have no choice at this point but to close the file without action.

Harry R. Van Cleve

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Acting General Counsel