

DECISION



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

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FILE: B-209393

DATE: September 19, 1983

MATTER OF: GTE Automatic Electric, Inc.

DIGEST:

1. Protest that the procuring agency is required to equalize the incumbent contractor's competitive advantage is denied where the advantage is not the result of preferred treatment or other unfair action by the Government.
2. Where an RFP containing performance-oriented specifications permits offerors to propose old equipment; entirely new equipment; or a mixture thereof for a specified portion of the work, the RFP need not establish different evaluation bases for old and new equipment, since consistent with the RFP as issued the agency will evaluate all proposals as to whether, and what extent, the equipment offered meets the performance criteria, which is not dependent upon the equipment's age.

GTE Automatic Electric, Inc. protests that the incumbent contractor has an unfair advantage in the competition under request for proposals (RFP) No. F11628-82-R-0002 seeking telephone services for Robins Air Force Base, Georgia. Because we conclude that the Air Force was not required to compensate for the incumbent contractor's competitive advantage, we deny the protest.

The solicitation, issued June 14, 1982, seeks the design, engineering, furnishing, installation, operation and maintenance of a complete telephone system capable of providing specified levels of services for the approximately 9,200 existing telephones at Robins, and for estimated future requirements. In addition to the basic

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switching equipment, distribution frames, telephone instruments and in-house cabling, the contractor is to provide the necessary outside plant, which consists primarily of cables between buildings in underground conduits. As amended, the solicitation permits offerors to propose used equipment for the outside plant and identifies the location, type and installation date of outside cables owned by the incumbent contractor, Southern Bell Telephone and Telegraph Company. The solicitation contemplates a performance period of up to 10 years, including 2 start-up years, and permits offerors to propose straight lease, lease to ownership plans and lease with option to purchase plans. Initial offers have been received and the Air Force is proceeding with evaluation pending the outcome of this protest.

GTE's major concern is that the incumbent, Southern Bell, has what GTE characterizes as an insuperable competitive advantage because it owns the outside plant at Robins. According to GTE, Southern Bell's ability to use its existing underground cable system may give it up to a 75 percent cost advantage over competitors who would be forced to provide and install new underground cabling. GTE contends that other agencies, when procuring telephone systems under similar circumstances, have taken steps to place all offerors on an equal footing. Although the methods used by these agencies differ, they basically involve the Government's appraisal of the incumbent's useful plant, which is added to the price of competing offers proposing its use.

While GTE recognizes that the Government is not ordinarily required to equalize an incumbent's competitive advantage when that advantage is not unfair, GTE argues that Southern Bell's allegedly enormous cost advantage, which results from its parent's prior monopoly status, distinguishes this case. Consequently, GTE argues, the Air Force has an affirmative duty to neutralize the incumbent's competitive advantage here. GTE also contends that RFP clarifications permitting offerors to propose used equipment essentially have converted an otherwise competitive procurement to a sole source for Southern Bell. Finally, GTE argues that the solicitation is defective because it does not provide guidance comparing new equipment (such as GTE's) to used equipment for evaluation purposes.

A competitive advantage which a firm might enjoy by virtue of its incumbency on a similar contract is not unfair, so long as it is not the result of preferred treatment or other agency action. Romar Consultants, Inc., B-206489, October 15, 1982, 82-2 CPD 339. The fact that the incumbent, by virtue of its prior contracts, previously may have acquired and amortized the cost of the equipment necessary to perform the contract is a legitimate competitive advantage which the Government is not required to equalize. B.B. Saxon Company, Inc., 57 Comp. Gen. 501, 513 (1978), 78-1 CPD 410. As a consequence, where one firm may be able to offer a lower price than another firm because of the competitive advantages it has gained from its prior contracting activities, the Government is not precluded from taking advantage of that offer. Id.

The Air Force reports that it investigated the possibility that the incumbent, Southern Bell, might have such an inherent advantage that the Air Force should act to equalize the competition, but after thorough review decided that adequate competition would be possible without such action. The Air Force points out that in its view much of the existing outside cabling does not satisfy the RFP specifications and that substantial additional cabling would be required to satisfy the increased performance requirements called for in the RFP. Further, the Air Force argues, it has provided full information on the type, location and installation date of the incumbent's existing outside cabling for those prospective offerors who may wish to use it, or a portion of it, for their proposed telephone systems, and those firms can deal directly with the incumbent.¹

Moreover, in the Air Force's experience, many offerors are able to propose lower prices on the basis of a complete new outside plant tailored to the characteristics of their proposed telephone system and the capabilities of their switching equipment. Consequently, the Air Force concludes that while the incumbent may enjoy some advantage by virtue of its ownership of the outside plant and its ability to use the existing plant during the transition to the new system, its advantage is in no manner so substantial as GTE

¹In this regard, GTE has furnished our Office a letter from Southern Bell stating that while all of the cable involved is not for sale, Southern Bell would provide a price quotation on the cable that is for sale for a \$12,000 appraisal charge, which would be waived if the cable is purchased.

suggests. As evidence of this position, the Air Force notes the substantial investment of time by prospective offerors conducting pre-proposal reviews of Robin's facilities and the number of highly competitive proposals received in response to the solicitation.

The Air Force also states that it in fact has investigated the feasibility of equalizing whatever competitive advantage Southern Bell might enjoy. For example, the Air Force considered attempting to estimate the value of the outside plant to apply to all offers other than Southern Bell's. The Air Force states, however, that it considered it fruitless to estimate the value of Southern Bell's outside plant because of the perceived magnitude of the changes that would be needed "to bring the current system into compliance with Robins AFB requirements for evolution to a single line system * * * (a potential 300 percent increase in requirements)"; the Air Force concluded that it would not make sense to place a cost on a system that probably does not meet the agency's needs.

Our decisions involving the legitimacy of competitive advantages indeed do not directly address those advantages gained by virtue of a monopolistic condition; rather, they concern advantages gained either by winning a prior competition, or by having been in a justified sole-source position. Nevertheless, the fact is that so long as the Government did not unfairly create the incumbent's advantage, the Government is not required to equalize the advantage once the service in question is brought to the competitive arena. In this respect, we note that while Southern Bell's parent, American Telephone and Telegraph Company, has been charged with using its monopoly position in providing local telephone service to dominate competition among long distance carriers and equipment manufacturers, the consent decree in settlement of those charges contains no admission or finding that AT&T violated the anti-trust laws. See United States v. American Telephone and Telegraph Company, Western Electric Company, Inc. and Bell Telephone Laboratories, Inc., Civil Action No. 74-1698 (D.D.C.), opinion of August 11, 1982.

This is not to say that an agency is precluded from attempting to foster competition by providing for an evaluation method that increases the feasibility of effective competition by non-incumbents. International Computaprint Corporation, B-207466, November 15, 1982, 82-2 CPD 440. It is for the procuring agency, however, to determine whether adequate competition can be obtained in the circumstances of a given procurement; such matters are ordinarily business judgments requiring broad discretion by the contracting officer which this Office will not

question unless shown to be unreasonable. See Union Carbide Corporation, B-188426, September 20, 1977, 77-2 CPD 204.

It appears that in competitive situations subsequent to the consent degree referred to above, various contracting agencies have made reasonable efforts to mitigate the effects of any monopolistic practices. Indeed, the record in this case shows that the Air Force investigated whether and how to do so here to the extent it studied the degree of Southern Bell's advantage and whether that advantage could or should be equalized. While the protester disputes the Air Force's conclusions, we are not of the view that the fact that a regulated public utility once may have enjoyed a monopoly in its area of service justifies the conclusion that the resulting competitive advantage is illegal when, as a result of deregulation, that area is subsequently opened to competition. The protest on this issue is denied.

GTE also contends that the RFP is defective because it fails to state how the Air Force intends to compare proposals for new equipment with Southern Bell's proposal offering used equipment. According to GTE, the RFP should be amended to advise offerors of the Air Force's intended trade-off between new and used equipment, that is, whether the Air Force would prefer new equipment throughout the system or will settle for used equipment in some instances.

The Air Force points out that the RFP establishes that all offers will be evaluated as to whether, and to what extent, they satisfy the specified performance requirements and such performance-related characteristics as technical adequacy and operational and maintenance capabilities. In the Air Force's view, evaluation of these characteristics does not depend on whether the equipment proposed is new or used. The Air Force notes that in particular circumstances, used equipment may be preferable to new equipment, citing, for example, used lead-shielded cable as compared to new cable not so shielded. The Air Force summarizes its position that it makes no sense to specify evaluation factors that differentiate between new and used equipment:

"* * * The age of equipment, per se, often has little to do with the technical capabilities of the equipment. By far, the most sensible means of evaluation is strictly according to technical capability, not age. This is precisely what the Warren Robins RFP does."

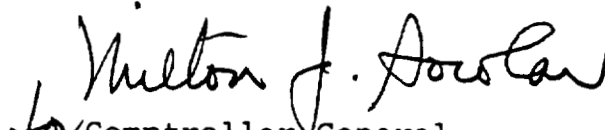
It is a fundamental principle of competitive procurement that offerors must be treated equally and be provided a common basis for the submission of proposals. Host International, Inc., B-187529, May 17, 1977, 77-1 CPD 346. Specifications must be stated in terms that will permit the broadest field of competition within the minimum needs of the agency. 32 Comp. Gen. 384 (1953). Such specifications may be performance-oriented, and in such cases offerors are to use their own inventiveness and ingenuity in proposing designs and approaches that satisfy those performance requirements. See Auto-Trol Corporation, B-192025, September 5, 1978, 78-2 CPD 171, International Business Machines Corporation, B-187720, May 19, 1977, 77-1 CPD 349. Moreover, the specification need not state a preference for new equipment where both new and used equipment will satisfy the Government's performance requirements. Tenavision, Inc., B-199485, July 28, 1980, 80-2 CPD 76. All that is needed is that the relative desirability of proposed equipment, whether new or used, be logically and reasonably related to or encompassed by the stated evaluation factors. See Buffalo Organization for Social and Technological Innovation, Inc., B-196279, February 7, 1980, 80-1 CPD 107.

The specification here is performance-oriented, calling for stated traffic capacities, grades of service and equipment capabilities, without stating how those objectives are to be accomplished or identifying any particular types of equipment that may satisfy those objectives. Consequently, offerors have great leeway in selecting that combination of equipment which they believe will best satisfy the Government's performance requirements. The fact that the procuring agency has indicated a willingness to accept used equipment for identified portions of the system does not materially alter this situation.

In evaluating the broad ranges of approaches possible under these performance specifications, the Air Force, according to the RFP, will consider such factors as the adequacy, operability and maintainability of the equipment proposed. These evaluation factors pertain just as logically to the characteristics of used equipment as they do to new equipment. For example, where, because of age, a piece of old equipment requires more maintenance than counterpart new equipment, the offer could be penalized during evaluation under a number of subcriteria, particularly reliability and maintainability.

Accordingly, we cannot agree that the Air Force must establish a separate baseline in the solicitation for comparing used equipment with new equipment during evaluation.

The protest is denied.


for Comptroller General
of the United States