C. Melody

The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: AT&T Information Services, Inc.

File: B-223914

Date: October 23, 1986

DIGEST

1. Protest challenging contracting agency's justification for sole-source award based on urgent circumstances is timely when filed within 10 days after protester receives the justification, despite the fact that the protester had learned earlier of agency's selection of awardee, since the protester did not know the grounds of its protest until the justification was received.

2. Agency procuring telecommunications services adequately demonstrated the urgency required by statute (41 U.S.C. § 253(c)(2)) to use noncompetitive procedures where, due to age of the existing telecommunications equipment, the user agency was experiencing periodic losses of telecommunications services which could have a serious adverse impact on the agency's operations.

3. Although agency's need to replace existing telecommunications equipment was of sufficient urgency to justify limiting the number of sources considered, it was improper for the agency to make a sole-source award without considering any other offers, since the agency failed to show that the time constraints imposed by the urgency of the agency's needs prevented the agency from using abbreviated competitive procedures to consider proposals from other sources.

4. When protest of an improper sole source is sustained, protester is entitled to recover costs of filing and pursuing the protest, even where recommended relief is a new procurement under which the protester will have the opportunity to compete.

DECISION

AT&T Information Systems, Inc. (AT&T) protests the award of a contract by the General Services Administration (GSA) to the

Chesapeake and Potomac Telephone Company (C&P) for telecommunications services at the Veterans Administration (VA) Central Office, Washington, D.C. AT&T challenges GSA's determination that urgent and compelling circumstances justified award to C&P without soliciting offers from other sources. We sustain the protest.

Since the breakup of the Bell system in January 1984, telecommunications services at the VA Central Office have been furnished under an agreement between AT&T and GSA[1]/ providing for continued lease from AT&T of the equipment already in place at VA, a Western Electric Company 701 private branch exchange switch. The service agreement extends through December 31, 1986.

Beginning in March 1982, VA sought GSA's approval to replace the 701 switch, which is approximately 50 years old. GSA ultimately granted approval for a competitive procurement of replacement equipment in April 1984. VA issued an RFP in August 1984, but, due to an apparent ambiguity in the specifications, the RFP was canceled in August 1985. VA subsequently decided to accept an offer from AT&T to replace the 701 switch with a new system, the AT&T System 85. When asked for approval of VA's plan, GSA suggested that VA consider obtaining services from C&P as an alternative to the AT&T System 85, and requested that VA conduct a cost comparison of the two systems.[2]/

In April 1986, VA advised GSA that it had decided to use the C&P system and began discussions with C&P regarding the equipment changeover. On July 15, the GSA contracting officer issued a justification for the C&P order which discussed VA's prior attempts to procure replacement equipment, the performance problems VA was experiencing, and VA's cost comparison of the AT&T and C&P systems. GSA then placed an order with C&P for the services on July 22.

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[1]/ GSA has overall responsibility for obtaining telecommunications services for federal agencies. See 40 U.S.C. § 295 (1982). Agencies are required to secure GSA approval for any changes to their telecommunications resources. Federal Information Resources Management Regulation, 41 C.F.R. § 201-39.001 (1985).

[2]/ According to GSA, many other agencies already receive telecommunications services under the C&P Centrex system. The services are ordered by GSA on behalf of the agencies based on C&P's published tariffs.

The protest was filed on July 31. GSA decided to allow C&P to proceed with performance notwithstanding the protest, based on its finding under the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3553(d)(2)(A)(ii) (Supp. III 1985), that urgent and compelling circumstances would not permit waiting for a decision on the protest. According to GSA, the award to C&P is an interim arrangement which will be used until a contract is awarded for telecommunications services on a consolidated basis for all federal agencies in the Washington, D.C. area. Specifically, GSA states that it plans to issue an RFP for the consolidated system, called the Washington Interagency Telecommunications System (WITS), in October 1986, with award planned for late 1987. Thus, the current agreement with C&P for services at the VA Central Office is expected to last for approximately 3 years, until performance starts under the WITS contract.

As a preliminary matter, GSA contends that the protest is untimely. GSA argues that AT&T was put on notice of the basis of its protest by a letter from VA dated May 28, 1986, advising AT&T that VA had decided to convert to the C&P Centrex system, instead of replacing the existing switch with the AT&T System 85. Since the protest was not filed until July 31, GSA argues, the protest is untimely under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (1986).

AT&T states that its in-house counsel called GSA's counsel in late May 1986 to advise her that AT&T had learned that VA had selected the C&P system. GSA counsel agreed to check on the VA decision, and a few days later advised AT&T's counsel that no orders with C&P had yet been placed or were imminent, and that she would look into the status of the VA procurement. No further information regarding the progress of VA's plans passed between the parties until July 23, when GSA provided AT&T with a copy of GSA's July 15 justification for making award to Centrex. The protest then was filed with our Office on July 31.

We find that the protest is timely. Our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2), require that protests such as this one be filed within 10 days after the protester knew or should have known the basis of its protest. Here, while the May 28 letter from VA which GSA refers to notified AT&T that VA had selected C&P, AT&T was not advised of the grounds for that decision, on which its protest is based, until July 23, when it received GSA's July 15 justification for the award to C&P. In fact, at the time the VA letter was written GSA had yet to execute its July 15 justification. Further, based on conversations between counsel for AT&T and GSA, AT&T reasonably could conclude that the status of the decision to award to C&P was unclear since GSA, the agency

with overall responsibility for telecommunications services, apparently had not yet approved VA's decision. Under these circumstances, AT&T acted reasonably in waiting until it received the GSA justification before filing its protest challenging the justification. See EDO Corp., B-224386, Sept. 18, 1986, 86-2 CPD ¶ ___.

The July 15 justification prepared by the contracting officer at GSA is based on GSA's finding that award to C&P could be made with less than full and open competition as authorized by 41 U.S.C. § 253(c)(2), as amended by CICA, due to VA's urgent need to replace the existing equipment. The justification states that replacement was deemed urgent because, due to the age of the current switch, difficulty in acquiring spare parts, and inadequate maintenance, VA was experiencing equipment failures resulting in loss of telephone service and delays in processing and receiving calls. The justification also states that expansion of VA programs is hampered because the 701 switch has reached capacity. In addition, the justification concludes that the C&P Centrex system will cost less than the AT&T System 85.

AT&T contends that (1) GSA has failed to show the "unusual and compelling urgency" required by 41 U.S.C. § 253(c)(2) to use noncompetitive procedures; (2) GSA acted improperly by failing to solicit other sources, including AT&T, and instead making a sole-source award to C&P; (3) the GSA justification is defective because it was not properly certified by the contracting officer, does not indicate that a market survey was done, and relies on an inaccurate cost comparison of the AT&T and C&P systems; and (4) contrary to GSA's finding, the C&P Centrex system does not provide the same services as the AT&T System 85.

With regard to AT&T's first contention, 41 U.S.C. § 253(c)(2) authorizes an executive agency to use noncompetitive procedures when:

> "the executive agency's need for the property or services is of such an unusual or compelling urgency that the Government would be seriously injured unless the executive agency is permitted to limit the number of sources from which it solicits bids or proposals."

Here, GSA argues that the potential adverse impact on VA's operations due to performance problems with the 701 switch satisfies the statutory requirements for using noncompetitive procedures. Specifically, GSA states that the lack of reliable services from the 701 switch threatens the two primary functions of VA's Central Office, management of VA hospitals and providing health care to the Department of Defense in emergencies.

AT&T does not dispute that the 701 switch has malfunctioned; on one occasion cited by GSA, for example, a switch malfunction left the VA Central Office without telephone service for 2 hours during the workday. Rather, AT&T argues that GSA has failed to show that the problems with the 701 switch actually have seriously injured VA's operations. We do not agree with AT&T's contention that VA was required to wait for actual injury to occur before its need for a replacement switch could be considered sufficiently critical to invoke 41 U.S.C. § 253(c)(2). In our view, it is reasonable to conclude that telecommunications services are critical to VA in carrying out its statutory mission, and, to the extent the existing switch fails to provide reliable services, VA's need to replace the switch is urgent.

AT&T also argues that VA's delay in replacing the 701 switch demonstrates that the need for replacement equipment is not urgent. While VA began efforts to replace the switch at least as early as 1982, the record shows that the services at VA in more recent years have been deteriorating due to the condition of the switch. For example, GSA and AT&T recently entered into a separate contract for an AT&T technician dedicated to maintenance of the VA switch, since VA believed that AT&T was not adequately maintaining the switch as evidenced by the high number of "trouble reports" at VA. Thus, in our view, AT&T has not demonstrated that it was unreasonable for GSA and VA to conclude that the need to replace the switch became more urgent due to the passage of time and the resulting deterioration in the services at VA.

Finally, AT&T contends that, in accordance with 41 U.S.C. § 253(f)(5)(A), GSA and VA were precluded from using noncompetitive procedures to make award to C&P because any urgency in replacing the 701 switch was due to the agencies' lack of advance planning. As discussed above, the delay in selecting replacement equipment until mid 1986 was due principally to the cancellation of the RFP in 1984 and other delays resulting from the required coordination efforts between GSA and VA. Since 1982, however, both agencies clearly have addressed the need to replace the 701 switch, and we see no evidence of insufficient diligence on their part which would amount to a lack of advance planning within the meaning of 41 U.S.C. § 253(f)(5)(A).

Although we find that VA's need was of sufficient urgency to justify limiting the number of sources considered, we do not agree with GSA that the circumstances warranted a sole-source award to C&P without soliciting offers from other sources. As discussed above, the GSA justification for making award to C&P relied on 41 U.S.C. § 253(c)(2), which authorizes a contracting agency to "limit the number of sources" solicited. This provision thus does not authorize

a sole-source award in every case in which it is invoked; rather, as provided in 41 U.S.C. § 253(e), an agency relying on section 253(c)(2) is required to request offers from as many potential sources as is practicable under the circumstances. As a result, a sole-source award is proper under section 253(c)(2) only where, due to urgent circumstances, the agency reasonably believes that only one firm can promptly and properly perform the work required. Gentex Corp., B-221340, Feb. 25, 1986, 86-1 CPD ¶ 195. In this case, we find that GSA has failed to show that only C&P can provide the services within the time required to meet VA's urgent need.

GSA concedes that AT&T's System 85 would satisfy VA's telecommunications needs; GSA contends only that, due to the imminent expiration of its current service agreement with AT&T in December 1986, there was not enough time to conduct a formal procurement. GSA has made no showing, however, that the time constraints prevented GSA or VA from using other procedures short of a full competition to consider offers from other sources, as, for example, by inviting a price proposal from AT&T for services equivalent to those under the C&P Centrex system, whose prices are accessible from its public tariffs.

GSA maintains that VA's cost comparison of the AT&T System 85 and the C&P Centrex system served in effect as an abbreviated competition, since AT&T knew that VA was considering C&P and tailored its prices for the System 85 to be competitive with the C&P system. In our view, the fact that AT&T knew of VA's interest in C&P did not satisfy the agencies' obligation to ensure that the sources solicited were competing on an equal basis, to the extent permitted by the time constraints imposed by the urgency of the VA's needs. Although it was aware that C&P was being considered, AT&T states that GSA never asked AT&T for a price proposal covering VA's needs for the next 3 to 4 years, until performance commences under the new WITS consolidated services contract. AT&T states that had it known it was competing against a C&P proposal for the duration of VA's interim needs, AT&T would have offered lower prices than it did for its System 85.

AT&T's assertion that it would have offered lower prices is particularly significant in light of the revised cost comparison submitted by GSA in connection with the protest, which shows a significantly smaller price difference between the AT&T System 85 and the C&P Centrex system than under the original comparison.[3/] In addition, AT&T challenges the

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[3/] The original comparison relied on in the GSA justification showed that the C&P system would cost $907,024 less than the AT&T system. After correction of certain improper calculations, the revised comparison shows that the C&P price is lower by only $225,645.

revised cost comparison, arguing that the calculation of the C&P price omitted additional costs which the cost comparison itself recognizes will be incurred in changing over to the C&P system.4/ Thus, a proper cost comparison of equivalent offers from AT&T and C&P may indicate that AT&T's price is lower than C&P's.

Since we find that GSA improperly made a sole-source award to C&P without soliciting other offers, we need not consider the remaining issues raised by AT&T regarding whether the justification complied with the procedural requirements of CICA and whether the C&P Centrex system provides services equivalent to the AT&T System 85.

As discussed above, GSA decided to allow C&P to continue with performance notwithstanding the protest. GSA states that the changeover to C&P occurred on September 26 and that the contract permits GSA to terminate C&P services on 30-days notice. Accordingly, we recommend that AT&T be given an opportunity to submit a price proposal for services for the interim period equivalent to those provided under the C&P Centrex system. Based on a cost comparison of the systems, GSA and VA should determine whether to continue with the C&P system or terminate C&P's services and award a contract to AT&T.

We also find that AT&T is entitled to recover the costs of filing the protest, including attorney's fees. Our regulations permit recovery of the costs of filing and pursuing a protest where the protester is unreasonably excluded from the procurement, unless we recommend that the contract be awarded to the protester and the protester actually receives the award. 4 C.F.R. § 21.6(e). We have interpreted this to allow recovery of the costs of protesting an improper sole source award, even when we also recommend that a new procurement be conducted under which the protester will have the opportunity to compete. Washington National Arena Limited Partnership, 65 Comp. Gen. 25 (1985), 85-2 CPD ¶ 435. Accordingly, we grant AT&T's claim for costs.

The protest is sustained.

James F. Hinchman

for Comptroller General
of the United States

4/ These costs, which are not quantified in the cost comparison, are for a second entrance cable and for construction of mainframe and operator console rooms.