The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Pacific Northwest Bell Telephone Co., Mountain States Bell Telephone Co.--Reconsideration
File: B-227850.2

Date: March 22, 1988

DIGEST

1. Conclusion that requirement for single contract covering two Bell Operating Company (BOC) regions unduly excluded BOCs from competition is affirmed on reconsideration. Inability of BOCs to provide utility service outside of their respective regions is a simple fact of telecommunications marketplace, and evidence submitted in support of request for reconsideration does not establish that prior decision was in error in finding lack of justification for single contract requirement.

2. Agency is not precluded by statute from employing options to synchronize the expected lives of leased and purchased systems to provide a common basis for evaluation. Further, such basis would be more accurate than adding a residual value factor to a base offer, since it would be based on actual expected costs instead of the assumptions attendant to a residual factor analysis. Agency could, however, consider the flexibility and control provided through an ownership arrangement as part of the technical evaluation.

DECISION

The General Services Administration (GSA) requests reconsideration of our decision, Pacific Northwest Bell Telephone Co., Mountain States Telephone Co., B-227850, Oct. 21, 1987, 87-2 CPD ¶ 379, in which we sustained a protest against GSA request for proposals (RFP) No. KET-LH-87-0008. We found that the solicitation unreasonably restricted competition and unfairly discriminated against the protesters. We affirm our decision, with clarification.

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The RFP contemplated a single contract for local telephone and communications capabilities and related services for federal agencies within GSA's Pacific Zone, which includes the states of Arizona, California, Idaho, Nevada, Oregon and Washington. The capabilities could be acquired either through the purchase of private branch exchanges (PBXs) or by obtaining services from the local telephone companies on a basis analogous to a lease. Because GSA considered that PBXs would have a life of 15 years, but that contracts for services from local telephone companies would be limited by statute to 10 years, the RFP provided for an offer of a PBX system to be credited in year 10 with one-third of its cost to account for the added useful life.

The protesters were two of the local telephone companies, known as Regional Bell Operating Companies (BOCs or RBOCs), within GSA's Pacific Zone. The protesters contended that they could not offer their service, known as Centrex, outside of their respective regions, and argued that because GSA's Pacific Zone spanned several regions, they were unfairly precluded from the competition. The protesters also argued that GSA's purported need to aggregate the procurements into a zone in order to accelerate the acquisition process was due to poor planning on GSA's part, and contested the method prescribed in the RFP for comparing lease versus purchase alternatives.

GSA argued that it was essential to have the systems in place by 1990 in order to provide access to FTS-2000, and stated that GSA implemented the zonal approach to accelerate the procurement process and enhance the oversight of system operations and services through centralized management. GSA noted that centralized management on a zonal basis was consistent with the consolidation of GSA's regional Information Resources Management Services (IRMS) organization into zones, with consequent savings and reductions in management.

We concluded that GSA's single contractor, "total package" requirement excluded the protesters from the competition and did not appear justified. We also found merit in the protesters' objections to GSA's proposed method of evaluating lease versus purchase offers and we recommended that GSA consider assessing both types of offers over the expected 15-year systems life by evaluating options sufficient to cover the entire 15-year period.

GSA contends that we erred in finding that the RFP excluded the protesters and in what GSA characterizes as our determination that GSA's zonal approach was unreasonable. In support of this assertion, GSA contends that we misconstrued the decision in United States v. Western Electric Co., Inc., 797 F.2d 1082 (D.C. Cir. 1986), which GSA states

removed legal barriers prohibiting the BOCs from providing exchange services outside of their respective regions. GSA contends that the protesters therefore were not excluded and were free to compete anywhere in the Pacific Zone, either by offering Centrex at all sites, or by offering Centrex in each region and PBXs for the rest of the zone, or by combining with the other BOC in a single offering for Centrex at all sites in the Pacific Zone. GSA argues that our decision ignores the fact that the zonal approach is based on extensive studies to derive GSA's most efficient organization, which GSA contends provides a reasonable basis for the zonal approach. GSA states that "since there are no insurmountable barriers to competition, GSA's zonal approach has not been shown to be unreasonable."

Our conclusion that the RFP excluded the protesters was predicated, in part, on sections of the RFP that required fiber optic, microwave, and other means to interconnect PBXs. We interpreted these sections, in light of the protesters' contentions, to mean that vendors had to provide this interconnection capability throughout the Pacific Zone. This would be tantamount to requiring interexchangeable communications capabilities, apparently prohibited to the BOCs by the American Telephone & Telegraph Company (AT&T) divestiture agreement, which would have excluded them from the competition.

Based on submissions by GSA, the protesters and others, we now are persuaded that the RFP does not require interexchange capabilities. Our comments and conclusions to the contrary in our prior decision, therefore, may be disregarded. This does not, however, negate our view of the protesters' exclusion from the competition under this RFP.

The central issue in this protest is whether in procuring telephone services for federal agencies and offices in a six-state area GSA can restrict the way the long-term, traditional suppliers of such services--the telephone companies--offer their public utility services in competition with PBX vendors. In this regard, while it may be, as GSA argues, that the BOCs are not subject to geographic restrictions on their provision of exchange services under the terms of the AT&T divestiture agreement, the opinion in United States v. Western Electric Co., Inc., supra, which concerned mobile telephone and paging services, recognized that there may be other barriers with respect to the more traditional telephone services of the type being acquired for the Pacific Zone under this RFP. In doing so, the decision stated:

> "It must be remembered that exchange service consists principally of local landline telephone

> service, and it is hardly conceivable that one BOC would want to enter another BOC's area in order to provide such traditional service in competition with the established BOC. This case, on the other hand, involves special types of exchange service that can be offered in competition with an established BOC." 797 F.2d 1082, 1091.

We think this statement recognizes a simple fact of the telecommunications marketplace--that the BOCs are not free to offer their traditional utility services outside of their respective regions--and provides ample support for the protesters' contention that they were excluded from the competition.

GSA's suggestion that the protesters could have competed by offering PBXs or by combining in a joint offering simply avoids the question. The Competition in Contracting Act of 1984 (CICA) generally requires that solicitations permit full and open competition and contain restrictive provisions and conditions only to the extent necessary to satisfy the needs of the government. 41 U.S.C. § 253(a)(2) (Supp. III 1985). The question, therefore, is not whether, through new business arrangements or by entering new lines of business, potential competitors can surmount "barriers to competition," but whether the barriers themselves--in this case, the single contract requirement--are required for the government's minimum needs to be met. Indeed, it is probably true in almost any protest against a total package procurement that the protester could compete by entering a new business or as a subcontractor or a joint venture; the question in such protests, however, including this one, is whether the need for the total package approach justifies excluding the protester from competing to provide service directly to the government in what the protester regards as its customary and most efficient arrangement.

Moreover, GSA's characterization of our decision as finding that its zonal approach was unreasonable reflects an overly broad reading of the opinion. We did not criticize GSA's aggregation of procurements into the Pacific Zone, but concluded only that the single contract requirement for the entire Pacific Zone lacked adequate justification, and that GSA had provided no persuasive evidence that it would be unduly burdensome or otherwise conflict with GSA's reorganization into zones to provide for two contracts for the Pacific Zone in lieu of one, as advocated by the protesters.

GSA has now provided an expanded discussion of its "most efficient organization" studies and GSA's resulting reorganization into zones. GSA states that this procurement was designed to fit the new organizational structure by

providing for the performance of contract administration and management functions at zonal offices and user interface and technically specialized functions at major installations elsewhere in the zone. The agency asserts that it might have to restore some mid-level management, and that there would be a duplication of time and effort of more offices that "would certainly be required," if multiple contracts were employed. GSA also notes that the contracting officer reaffirmed his determination that "the geographic makeup of the subject procurement meets the government's needs in the most efficient manner and at the lowest reasonable cost."

The evidence GSA provides still does not establish why two contracts for the Pacific Zone might be unduly burdensome. The question is whether GSA's management of two contracts would require an unreasonable expenditure of resources beyond that already contemplated to manage one contract. The record suggests strongly that the answer is no. As GSA's own statements acknowledge, the RFP already contemplates providing different levels of management from several sites throughout the zone, and, as we noted in our prior decision, the number of users and the locations to be served remain the same whether there is one contract or two, and the bulk of the management of the acquired capabilities will be performed by the using agencies, not GSA. In other words, it does not appear that the addition of a second contract would substantially increase GSA's management responsibilities. Also, "lowest overall cost" is a fact generated by the competition, not the prejudgment of the contracting officer. In these circumstances, GSA's bald assertions that it might have to restore some unspecified level of additional resources to manage two contracts simply does not persuade us that our prior decision was incorrect.

GSA also argues that it needs the Pacific Zone capabilities in place by 1990 in order to provide access to FTS-2000, the replacement for the government's current long-distance telephone system, and contends that complying with our recommendation that the solicitation be canceled and reissued will delay implementation beyond this date. GSA has not, however, provided any evidence that access to FTS-2000 cannot be provided through the Pacific Zone's present facilities, at least until the more advanced features of FTS-2000 become available. We therefore do not find this position to be persuasive.

GSA also asserts that because we never found GSA's use of a residual value factor unreasonable as a way to evaluate lease versus purchase offers, our recommendation that both types of offers be assessed over the full 15-year systems

life, by evaluating options attendant to offered lease arrangements, amounted to an improper substitution of our judgment for that of GSA. GSA points out that in Chesapeake and Potomac Telephone Co., B-224228, B-224228.2, Feb. 5, 1987, 87-1 CPD ¶ 120, we stated that, in general, the reasonableness of a residual value factor is a matter of administrative discretion that is not subject to question unless the determination is clearly unreasonable or resulted from fraud or bad faith, and argues that, since we never found unreasonableness, bad faith or fraud in GSA's use of the residual value concept in this RFP, our recommendation was improper. In further support of its use of the residual value factor, GSA cites General Telephone Company of California, B-190142, Feb. 22, 1978, 78-1 CPD ¶ 148, aff'd, B-190142, Dec. 7, 1978, 78-2 CPD ¶ 395, in which we approved of the use of a residual value factor to compare a 10-year leased system against the value of a purchased system (PBX) that was expected to have a useful life of 18.5 years. There, we found that a residual value factor afforded a reasonable basis for evaluating lease versus purchase offers by providing a way to recognize the added value of ownership, which GSA presently describes as the value of control, including the right to modify the equipment or move or warehouse it for future use.

We think GSA again is misreading our decision. All we did in our prior decision on this protest was note that GSA was not precluded by the statute limiting to 10 years contracts for services from local telephone companies (40 U.S.C. § 481 (1982)) from using options to synchronize the lives of leased and purchased systems, and recommend that GSA reassess its approach to the cost evaluation. Moreover, we have some difficulty in understanding GSA's present reluctance to consider a method of cost evaluation that would appear to provide a more accurate basis for evaluation than would residual value, since it would be based on concrete figures, instead of assumptions, and thus would seem to be more consistent with GSA's obligation to ascertain the lowest overall systems life cost.

This should not be considered as a suggestion by our Office that ownership has no value. Indeed, we certainly recognized, as did the protesters, that ownership provides flexibility and control that has inherent value (although we are uncertain of the value we would ascribe to the right to put the equipment into storage). We think, however, that it would be more appropriate to consider the added flexibility

and control provided through an ownership arrangement as part of the technical evaluation, rather than as an element of the cost evaluation.

Our decision is affirmed, subject to the above clarifications.

Milton J. Socolar

for Comptroller General
of the United States