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Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: US Sprint Communications Company Limited Partnership
File: B-243767

Date: August 27, 1991

Michael W. Clancy, Esq., Pettit & Martin, for the protester.
Robin L. Redfield, Esq., MCI Telecommunications Corp., an interested party.
Jacqueline H. Caldwell, Esq., United States Information Agency, for the agency.
Anne B. Perry, Esq., Glenn G. Wolcott, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. In determining whether to grant access to documents under protective order, the General Accounting Office considers whether the applicant primarily advises on litigation matters or whether he also advises on pricing and production decisions, including the review of proposals, as well as the degree of physical and organizational separation from employees of the firm who participate in competitive decisionmaking and the degree and level of supervision to which the applicant in subject.

2. Protest challenging elimination from the competitive range solely on the basis that protester's price was slightly higher than two other competitors is sustained where offerors' prices were based on different assumptions and inadequate analysis was performed to determine whether protester could reasonably lower its price during best and final offers.

DECISION

US Sprint Communications Company Limited Partnership protests the exclusion from the competitive range of its proposal under a solicitation issued by the United States Information Agency (USIA) for dedicated transmission service between Voice of America (VOA) Washington, D.C. and VOA London, England. Sprint's proposal was eliminated from the competitive range because of its high price. Sprint alleges that the price difference between its offer and those included in the competitive range was not only nominal, but also was the result of an unequal competition among offerors.

We sustain the protest.

USIA orally solicited tariff quotes from four potential vendors on or about February 19, 1991.1/ On March 4, the agency purportedly transmitted a written copy of the specifications via telefax to the vendors.2/ Vendors were notified on March 8 that quotes were due by March 12, and AT&T Communications, IDB Communications Group, MCI Telecommunications Corp. and Sprint submitted timely quotes.

The written specifications sought "leased, clear channel, fractional T1 service . . . between VOA Washington . . . and VOA London . . ." and required that the service be carried by fiber optic cable. The specifications allowed for various solutions for the needed conversion between United States and European standards. All vendors' quotes were evaluated to determine whether they met the minimum requirements. All vendors were given the coding and standards requirements necessary to accomplish the interface with the VOA terminal equipment located in London and Washington, D.C. In the initial proposals, vendor pricing for this circuit was to be submitted for a 3-year contract priced with an option to extend to 5 years.

After receipt of initial proposals, the agency evaluated the proposed solutions and determined that MCI, IDB and Sprint were technically acceptable. The agency then reviewed the prices contained in each of the proposals.3/ The proposals were made up of separate prices for the United States half of the circuit and the British half of the circuit. In submitting a price for the British half of the circuit, each offeror made a different assumption regarding the exchange

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1/ Sprint did not protest the agency's failure to obtain full and open competition through issuance of a formal written solicitation. However, we note that the agency's purported justification of urgency based on its unilateral cancellation of a prior contract is not supported by the record. The primary cause of the agency's failure to have sufficient time to issue a formal solicitation appears to be lack of its advance planning. See Federal Acquisition Regulation (FAR) § 6.301(c)(1).

2/ Sprint alleges that it never received this written copy of the specifications; however, Sprint concedes that it was not prejudiced by its nonreceipt.

3/ Due to the proprietary nature of much of the relevant information, our decision today does not discuss the specific prices or other elements of the individual proposals.

rate from dollars and pounds; these assumptions ranged from a low of $1.88/pound to a high of $1.95/pound.

The contracting officer then made a competitive range determination based solely on the prices stated in the proposals without considering whether the prices were based on the same exchange rates. He determined that only IDB and MCI should be included in the competitive range since their prices, as stated, were very close. Sprint's proposal was eliminated from the competitive range on the basis that its stated price was higher than those of the other parties.

On March 22, USIA requested that MCI and IDB submit their best and final offers (BAFOs) on price by March 27. After the agency received these BAFOs it realized the offerors had taken different approaches in preparing their price proposals with respect to the currency exchange rate and who bore the risk of currency fluctuation. VOA also determined that it could not award a 3-year contract. As a result, on March 28, the agency requested IDB and MCI to submit second BAFOs and, for the first time, specified that offers should be made for a firm, fixed price in U.S. dollars under which the offerors bore the risk of currency fluctuation. The agency also changed the base contract period from 3 years to 1 year and provided for two 1-year options. The second BAFOs were due on April 1.

On April 2, Sprint contacted the agency to inquire about the status of the procurement and was informed that its proposal was eliminated from the competitive range and that it would receive a debriefing later. On April 5, USIA issued an "Authorization to Proceed" with contract performance to MCI as the apparent low offeror. A debriefing was conducted with Sprint on April 12, at which time Sprint was told that two offers were included in the competitive range because they were "within pocketchange" of one another and that Sprint was excluded solely because its price was higher.

Sprint protests its exclusion from the competitive range. Specifically, Sprint alleges that the contracting officer's decision to eliminate Sprint from the competitive range was not based on a finding that Sprint's price was "substantially higher" than that of the other offerors, merely that it was "higher." Further, Sprint argues that the approximately 6 percent price difference between its price and MCI's resulted primarily from the different assumptions of the offerors regarding exchange rates and the risk of currency fluctuation. Sprint also alleges that the agency materially altered the terms of the solicitation by changing the base contract period and specifying that offerors bore the risk of currency fluctuation after it had eliminated Sprint from the competitive range. In sum, Sprint alleges that had USIA properly evaluated price proposals in the first instance it

would have discovered not only that Sprint could have lowered its price, but also that each competitor was basing its price on a different set of assumptions regarding the risk of currency fluctuation.

ADMISSIONS TO PROTECTIVE ORDER

Pursuant to our Bid Protest Regulations, 56 Fed. Reg. 3,759 (1991) (to be codified at 4 C.F.R. § 21.3(d)), our Office issued a protective order covering material related to the offerors' proposals and the agency's process for evaluating proposals and selecting an awardee. Sprint retained outside counsel who submitted properly certified application for access under the protective order, and was admitted without comment. We admitted MCI in-house counsel over the objection of Sprint based on our finding that she was not involved in competitive decisionmaking as discussed in U.S. Steel Corp. v. United States, 730 F.2d 1465 (Fed. Cir. 1984).

In determining whether to grant access to protected material, we consider such factors as whether counsel primarily advises on litigation matters or whether he also advises on pricing and production decisions, including the review of bids and proposals, the degree of physical separation and security with respect to those who participate in competitive decisionmaking and the degree and level of supervision to which in-house counsel in subject. Earle Palmer Brown Co., Inc., B-243544; B-243544.2, Aug. 7, 1991, 91-2 CPD ¶ ___. Where an attorney is involved in competitive decisionmaking the attorney will not be granted access to the proprietary data of another firm because there is an unacceptable risk of inadvertent disclosure of the protected material. See U.S. Steel Corp. v. United States, 730 F.2d at K168.

MCI's counsel certified that she is a senior attorney in the litigation section of the Office of General Counsel, and that this is a separate and distinct group of 26 attorneys devoted exclusively to litigation. The litigation staff and their support personnel are located in Washington, D.C. on a separate floor, apart from other corporate counsel, and have a secure file room requiring a card key for access. Counsel certified that her role is to give advice on pending litigation matters, or provide advice on whether litigation is necessary. Any advice she has provided concerning government contracts has not involved pricing, product design, or other decisions relating to competitive structuring or review of proposals or bids. Counsel certified that the office responsible for preparing bids and proposals is located in Virginia and has its own staff attorney who reports to an officer of that unit.

Counsel is not a director or officer of MCI or any of its subsidiaries. Counsel certified that she understood that she was bound by all pertinent official standards, including the Code of Professional Responsibility, that she is "capable of safeguarding and will safeguard protect material at the MCI premises," and that MCI "is fully aware that my responsibilities as a government contracts litigation attorney require me to be 'walled off' from competitive decisionmaking." Counsel also provided documentation indicating that she was granted access to protected material in two General Services Administration Board of Contract Appeals (GSBCA) proceedings.

Based on these certifications, we concluded that the risk of disclosure of protected material was sufficiently small to warrant granting MCI's counsel access to protected material.

COMPETITIVE RANGE DETERMINATION

Generally, the competitive range should consist of those offers which have a reasonable chance of being selected for award. Informatics Gen. Corp., B-210709, June 30, 1983, 83-2 CPD ¶ 47. While a contracting officer necessarily has a considerable range of discretion in making competitive range determinations, we will review such a determination to ensure that it has a reasonable basis. Nova Int'l, Inc., B-241473, Feb. 13, 1991, 91-1 CPD ¶ 164.

The record is clear that the agency's determination to exclude Sprint from the competitive range was based solely on its price. The agency argues its determination is supported by a recent GSBCA case, Man & Machine, Inc., GSBCA No. 11,111-P, 1991 BPD ¶ 87. In Man, the Board found reasonable the contracting officer's determination that there was no possibility of significant price reductions through discussions with certain higher-priced offerors. Here, the record does not establish that the contracting officer considered whether Sprint could have lowered its price. Rather, it appears that all the contracting officer did was examine the bottom line prices of the offerors and, finding that the total prices of IDB and MCI were within "pocketchange" of one another and that Sprint was slightly higher, determine that Sprint had no reasonable chance for award. No review of the different elements of the offered prices was conducted, nor is there any evidence that the contracting officer used anything other than his immediate reaction to the closeness of IDB's and MCI's prices to determine that they were most likely to receive award. The contracting officer's failure to examine the elements of the offerors' prices means that he had no basis on which to conclude that Sprint could not substantially lower its price and, therefore, had no reasonable basis to conclude that Sprint had no reasonable chance to receive award.

Further, had the contracting officer examined the components of the proposed prices, he would have discovered after receipt of the initial proposals, rather than after receipt of the first BAFOs, that offerors were operating under a different set of assumptions concerning the exchange rate and the risk of currency fluctuation. Had the contracting officer performed this analysis, he would have found that Sprint's price was considerably closer to MCI's and IDB's than he originally presumed. An examination of the individual elements of the prices reveals that Sprint's price for the United States half of the circuit is less than MCI's and that the majority of the price difference is due to the British half, which is largely attributable to the different exchange rates used to calculate the prices.4/

USIA argues that the different exchange rates used are of no consequence because the risk of fluctuation is on the contractor. However, at the time the competitive range decision was made neither the offerors nor the contracting officer knew who would bear the risk of currency fluctuation--the contracting officer did not resolve this matter until he asked for the submission of the second BAFO.5/ Thus, it appears that the offerors initially were not competing on a common basis with respect to the possible effect of fluctuations in currency and that Sprint's pricing might have been different had this matter been clear from the outset. Moreover, even if Sprint had been properly eliminated after submission of initial proposals, when the contracting officer clarified the currency fluctuation matter and altered the contract period, we think USIA had a duty to readmit Sprint into the competitive range since the changes made to the solicitation obviously could materially affect an offeror's price. See Information Ventures, Inc., B-232094, Nov. 4, 1988, 88-2 CPD ¶ 443.

The agency also contends that since it was accepting prices in a "tariff world" it could not have reasonably anticipated that Sprint would lower the price it initially offered. This assertion by the agency is inconsistent with the record. The record demonstrates that the agency requested offerors to submit their first BAFO solely on price. If the agency believed the offerors' tariffs precluded them from lowering

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4/ In fact, if one recalculates Sprint's price using the same exchange rate as used by MCI, Sprint's price is nearly identical to MCI's and IDB's prices.

5/ The contracting officer wrote a note on IDB's first BAFO asking, in part, "who's risk is currency fluctuation."

their prices, there would have been little reason to request the first round of BAFOs. Further, as the contracting officer acknowledged at the hearing, offerors were not precluded from offering pricing below their tariffs and, in fact, MCI submitted a BAFO price below its tariff rate.6/

While we recognize that price may be determinative in a competitive range determination, see, e.g., Informatics Gen. Corp., B-210709, supra, here there was no reasonable basis for the agency to conclude that Sprint's price was "substantially higher" than those of IDB and MCI and that Sprint had no reasonable chance for award. On this basis we sustain the protest. Contract performance began on July 1, there are leasing agreements in effect and it appears that substantial start-up costs have been incurred. Thus, we do not recommend disturbing MCI's current award; however, we recommend that the agency not exercise the contract options but, rather, issue a written solicitation and conduct a formal competitive procurement for its future requirements. We also find that Sprint is entitled to its proposal preparation costs, and its costs for filing and pursuing its protest, including reasonable attorneys' fees.

The protest is sustained.

Milton J. Socolar
for Comptroller General
of the United States

6/ Sprint also alleges that the agency waived a material requirement for MCI which represents a significant portion of the monthly price. The record shows, however, that MCI promised to comply with all of the requirements of the solicitation, and MCI has confirmed that its price includes all costs associated with providing end-to-end service between Washington, D.C. and London, England. To the extent Sprint is alleging that MCI will not adequately perform at its contract price, we dismiss its protest since this concerns a matter of contract administration not for our review. 56 Fed. Reg. 3,759 (1991) (to be codified at 4 C.F.R. § 21.3(m)(1)).