



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** United Telephone Company of the Northwest

**File:** B-246977

**Date:** April 20, 1992

Thomas J. Madden, Esq., and William L. Walsh, Esq., Venable, Baetjer, Howard & Civiletti, for the protester, Richard O. Duvall, Esq., and Richard L. Moorhouse, Esq., Dunnells, Duvall & Porter, for Westinghouse Hanford Company; and Thomas P. Humphrey, Esq., and Mark D. Colley, Esq., Davis, Graham & Stubbs, for US WEST Communications Services, Inc., interested parties, Paul Lewis, Esq., Department of Energy, for the agency, Christine F. Bednarz, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

A management and operations contractor of the Department of Energy violated the terms of its own procurement provisions and the "federal norm" in failing to amend a solicitation for a telecommunications system, despite significant changes in its requirements occurring after the award selection decision in the 2 1/2-year delay before award caused by various protests.

### DECISION

United Telephone Company of the Northwest protests the award of purchase order No. MOW-SVV-393260 to US WEST Communications Services, Inc., under request for proposals (RFP) No. K393260, issued for the acquisition of an integrated voice/data telecommunications system for the Department of Energy (DOE) Hanford Nuclear Site. Westinghouse Hanford Company conducted the procurement by or for DOE in its capacity as a Hanford site management and operations (M&O) contractor.

We sustain the protest.

This fixed-price requirement was originally solicited in 1986 by a predecessor M&O contractor. The RFP required the contractor to design, engineer, install, operate, and maintain a total information exchange service with a 10-year minimum useful life to support the DOE Richland Operations Office and its Hanford site. In particular, offerors were

to provide a telecommunications system that both interfaces with the site's existing data communications technology, including Hanford's Local Area Network (LAN), and provide its own voice and data transmission capabilities integrated into one digital network. The specifications state that the integrated system must support the RFP's estimated telecommunication requirements, both at the time of cutover (Table 2.1 of the technical specifications) and over the 10-year useful life of the system (Table 2.3 of the technical specifications).

Table 2.1 stated, among other things, the number of voice-only stations, data-only stations, integrated voice/data stations, and off-premise stations that offerors must "equip" (i.e., install for service, with the necessary line and trunk interface cards) and "wire" (i.e., install wiring and card cages, but no interface cards) before cutover. Under the solicited system, most of these transmission lines would proceed to a host switch, which would "switch" voice traffic to voice lines and data traffic to the communication controllers of the computer facility. Table 2.1 stated the estimated number of "equipped" and "wired" lines and trunks needed to convey this voice and data traffic to their respective terminations. The system also must possess sufficient memory and central processing units to support an estimated 30,000 ports.<sup>1</sup> Under the RFP's variable quantities clause, Westinghouse may increase the quantities called for under the purchase order up to a total of 50 percent of the established baseline quantities.

The RFP provided for award to the firm offering the most advantageous technical and cost proposal. The RFP specified four evaluation criteria: (1) mission suitability factors, including the merit of the proposed operating system, planning and implementation approach, and follow-on support services; (2) cost factors, including the realism of the proposed cost, and the total probable cost to the buyer over the system's life cycle; (3) company experience and past performance factors; and (4) other factors, such as financial condition, availability of facilities, and stability of labor-management relations. Under the evaluation scheme, factor one is 6 times as important as factors three and four combined, and factor three is 3 times as important as factor four.

Westinghouse assumed responsibility for the procurement in early 1988 and requested proposals on the basis of an amended RFP. Following negotiations with each offeror,

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<sup>1</sup>The RFP assumes two ports to equip each line and integrated voice/data station, and one port to equip each trunk, voice-only and data-only station.

Westinghouse requested best and final offers on December 29, 1988, to which four firms, including United and US WEST, responded.

After extensive evaluations, only the proposals of United and US WEST remained in the competitive range. Although United received a slightly higher technical rating than US WEST, neither offeror was considered technically superior. Consequently, Westinghouse compared United's and US WEST's respective prices and proposals for the alternative acquisition methods solicited by the RFP.<sup>2</sup> Based on this comparison, Westinghouse selected US WEST's "lease to ownership" proposal as most advantageous to the government, considering price and technical factors. Although Westinghouse considered United's "direct purchase" proposal very competitive (only slightly less advantageous than US WEST's "lease to ownership" proposal under Westinghouse's rating scheme), it recommended award to US WEST owing to the firm's lower cost for a technically comparable proposal and funding limitations affecting the direct purchase acquisition method.

On April 27, 1989, after pursuing an agency-level protest, United protested to the General Services Administration Board of Contract Appeals (GSBCA) that a conflict of interest tainted Westinghouse's award selection of US WEST, a selection that DOE was prepared to approve. After determining that it had jurisdiction, the GSBCA proceeded to trial on the merits and sustained the protest, finding that US WEST was ineligible for award. United Tel. Co. of the NW., GSBCA No. 10031-F, 89-3 BCA ¶ 22,108, 1989 BPD ¶ 215. The GSBCA directed award to United as the only remaining acceptable offeror.

US WEST and Westinghouse appealed the GSBCA's decision to the Court of Appeals for the Federal Circuit, while DOE, through the Department of Justice, and United argued for the decision's affirmation. On July 29, 1991, the court of appeals vacated the GSBCA's decision on jurisdictional grounds without reaching the merits of United's bid protest. US WEST Comms. Servs., Inc. v. United States, 940 F.2d 622 (Fed. Cir. 1991). Westinghouse then awarded the contract to US WEST on October 8, 1991, having obtained DOE's approval. United protested the award to our Office on October 18, 1991.

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<sup>2</sup>These four acquisition methods are straight lease, lease to ownership, lease with option to purchase, and direct purchase.

We dismissed United's protest of the 1989 source selection as untimely because it was filed more than 10 days after the selection decision, which formed the basis for its protests before GSBICA and our Office. United Tel. Co. of the NW., B-246333, Dec. 18, 1991, 91-2 CPD ¶ 563, aff'd, B-246333.2, Feb. 19, 1992, 92-1 CPD ¶ 206. We found that the forum election provision of the Competition in Contracting Act of 1984, 31 U.S.C. § 3552 (1988), effectively precluded the tolling of our timeliness requirements on the basis of a reversed GSBICA protest, and that United's protest, filed 2 1/2 years after the Westinghouse source selection decision at which it was directed, was untimely under our Bid Protest Regulations. Id. We declined to consider United's untimely collateral attack on the same issues considered by the GSBICA, based upon DOE's 1991 approval of the selection decision, because the "protestable event in a subcontract award protest is generally the award decision itself, not the government's approval of that decision." Id.

During our consideration of United's protest, DOE and Westinghouse issued an agency report that included, among other things, a review performed by Westinghouse after the GSBICA decision was vacated to determine whether the RFP sufficiently reflected Hanford's current telecommunication needs to justify awarding the contract. This review indicated a basic change in the mission of the Hanford site owing to the passage of time and to developments in energy, defense, and environmental policy. In addition, because of changed users' needs on the site, the telecommunications system needed significantly fewer data-only stations and significantly more integrated voice/data stations.

Within 10 working days of receiving the report on its subsequently dismissed protest, United filed the instant protest on December 11, 1991, challenging the reasonableness of Westinghouse's award in the face of its findings that the telecommunications requirements had changed. In its protest, United argues that the RFP no longer reflects Hanford's needs and cannot serve as a proper vehicle for award under Westinghouse Procurement Manual (WPM) § 5.2. That procurement provision is the virtual equivalent of Federal Acquisition Regulation (FAR) § 15.606, which generally requires the government to issue an amendment to a solicitation whenever its requirements change.<sup>3</sup> Since

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<sup>3</sup>Westinghouse is subject to our bid protest jurisdiction as an M&O contractor that effectively awards subcontracts "by or for" the government. 4 C.F.R. § 21.3(m) (1991); Rohde & Schwarz-Polarad, Inc.--Recon., B-219108.2, July 8, 1985, 85-2 CPD ¶ 33. Such contractors are not directly bound by federal procurement law, but must conduct procurements according to the terms of their contracts with the agency

United did not file this protest within 10 calendar days of contract award, Westinghouse has not stayed performance of the US WEST subcontract.

At the outset, we must resolve the several requests for summary dismissal. Westinghouse requests that we dismiss the protest as untimely because United is purportedly the incumbent telecommunications contractor at the Hanford site and, therefore, must have known of the changed telecommunications environment well in advance of the agency report documenting such changes. United is not actually the incumbent contractor, but is part of a joint venture with General Telephone and Electronics of the Northwest (GTE) to provide telecommunications services to Hanford. An affidavit from United's primary DOE/Westinghouse liaison states that GTE, not United, is the operating partner in the joint venture and that United lacks any resident employees at the site. Consistent with this affidavit, Westinghouse's evidence does not show that United has an operating presence on the site. For example, United employees must request visitor's badges to gain access to the site.

More important, United's protest concerns Westinghouse's decision to proceed with award to US WEST, notwithstanding the results of its review of the RFP requirements against Hanford's estimated current needs. It is both illogical and improbable to assume that United would have any knowledge of this review process, even if it did maintain a presence at the site, and there is no evidence to suggest that the information was accessible to United before the release of the agency report. Therefore, we will resolve any doubt regarding the timeliness of this protest in United's favor. Afftex, Ltd., B-231033, Aug. 12, 1988, 88-2 CPD ¶ 143; Dock Express Contractors, Inc., B-227865.3, Jan. 13, 1988, 88-1 CPD ¶ 23.

Westinghouse and US WEST also suggest that this protest is untimely based upon our dismissal of United's subcontract award protest in United Tel. Co. of the NW., B-246333, supra, aff'd, B-246333.2, supra, pointing to our language that the "protestable event in a subcontract award protest is generally the award decision itself." Unlike the dismissed protest, this protest is not aimed at

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and their own agency-approved procedures; we will review a procurement to determine whether it conforms to the "federal norm." Chesapeake Laser Sys., Inc., B-242350, Apr. 8, 1991, 91-1 CPD ¶ 358. However, because the Westinghouse provision which governs this protest is virtually identical to FAR § 15.606, we may appropriately refer to case law interpreting and applying FAR § 15.606.

Westinghouse's 1989 selection decision, but at Westinghouse's 1991 award decision in the face of its review of the solicitation requirements that allegedly established significant changes in the government's requirements. This event is also protestable, and United timely filed this protest within 10 days of receiving the underlying documentation. See Afftrex, Ltd., supra.

US WEST also urges us to dismiss the protest because United discovered the underlying documents through an "improper invocation of the [General Accounting Office's] jurisdiction," i.e., during the subcontract award protest that we dismissed as untimely. Our Bid Protest Regulations require only that protesters file within 10 days after the basis of protest is known or should have been known. 4 C.F.R. § 21.2(a)(2). This rule does not provide or imply that a protester may not derive its basis for protest from an agency report to a protest that our Office ultimately dismisses. Thus, we decline to dismiss United's protest.

Turning to the merits of the protest, United argues that Westinghouse's decision to award the purchase order to US WEST under the RFP as issued was improper because the RFP no longer reflects the agency's true needs as of the 1991 award date. United bases this argument upon Westinghouse's 1991 pre-award review documents, which show that the Hanford site needs 90 percent fewer data-only stations and almost three times as many integrated voice/data stations from the amounts specified in the RFP. United asserts that these changes would have a significant impact on its and US WEST's price proposals. In addition, according to United, the substantial decrease in data-only stations, and concomitant increase in integrated voice/data stations, suggests that Hanford has absorbed most of the data traffic originally intended for the solicited telecommunications system into its LAN network. To corroborate this assertion, United points to Westinghouse documents which show that the number of LAN connections have increased 12-fold since the issuance of the baseline RFP and 3-fold since 1988. Essentially, United claims that Hanford may no longer need a dedicated data transmission system as required under the RFP and, thus, that a properly amended RFP may well warrant a different technical design approach, with attendant cost savings.<sup>4</sup> United has submitted a detailed affidavit that its

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<sup>4</sup>As a corollary to this argument, United identifies changes in Hanford's estimated data and integrated voice/data transmission needs within each of the service areas specified in the RFP. United asserts that the new configurations within each service area would also affect the overall architecture of the proposed telecommunications system.

technical approach and pricing would have been significantly different if it had been able to respond to the changed requirements.

The opposing parties, DOE, Westinghouse, and US WEST, do not dispute the changes identified in the 1991 review documents regarding Hanford's current integrated voice/data and data transmission requirements, or the growth in the number of LAN users since 1988. Instead, they claim that the contract has the flexibility to encompass these changes through its variable quantities clause, which allows Westinghouse to increase the quantities called for under the purchase order up to a total of 50 percent of the established baseline quantities. In this regard, Westinghouse has submitted an affidavit stating that it does not intend to issue a contract modification to satisfy its current requirements. In addition, the opposing parties maintain that the variable quantities clause reflects the dynamic nature of Hanford's telecommunications needs and enables offerors to anticipate the various changes at issue here.

The opposing parties also claim that the RFP provides for a telecommunications system with a dynamic, flexible design and that this design can accommodate the fluctuations identified by United. In particular, they note that the RFP requires offerors to design their systems with sufficient memory, central processing units, and expansion capability to support 30,000 ports. Because the total number of lines Westinghouse now requires does not approach this 30,000-port capacity, the opposing parties maintain that no reconfiguration of the system is required, including that of the basic system architecture.

Finally, the opposing parties claim that the increase in voice transmission lines offsets the decrease in data transmission lines from both a technical and cost standpoint and, therefore, that United has suffered no prejudice from this shift in emphasis.

Generally, where the government's requirements change after RFP issuance, it must issue an amendment to notify offerors of the changed requirements and afford them the opportunity to respond. See FAR § 15.606(a). One circumstance requiring the issuance of an amendment is a significant change in the government's quantity requirements. See Universal Techs., Inc., B-241157, Jan. 18, 1991, 91-1 CPD ¶ 63; Management Sys. Designers, Inc. et al., B-244383.4 et al., Dec. 6, 1991, 91-2 CPD ¶ 518. While a contract that permits the ordering of indefinite quantities, such as this one,

does give the government flexibility when it cannot determine its needs in advance of contracting, the use of such a contract does not excuse the government from actually identifying its needs. Management Sys. Designers, Inc. et al., supra; N.V. Philips Gloellampenfabriken, B-207485.3, May 3, 1983, 83-1 CPD ¶ 467.

As stated above, the WPM provision that governs this protest is consistent with the above principles. It provides that "[w]hen, either before or after receipt of proposals, [Westinghouse] changes, relaxes, or otherwise modifies its requirements, a written amendment to the RFP shall be normally issued." WPM § 5.2.

The opposing parties first dispute the applicability of WPM § 5.2, which they read to cover only those changes that occur before the source selection decision, but not, as here, after that decision. The WPM provision does not contain any such limiting language. In fact, the provision, when read as a whole, suggests that it encompasses changes occurring after the source selection, providing that "[i]f a change is so substantial that it warrants complete revision of a RFP, [Westinghouse] shall cancel the original RFP and issue a new one regardless of the stage of the acquisition." (Emphasis added.) WPM § 5.2.4.<sup>5</sup>

This view is consistent with our decisions interpreting FAR § 15.606. For example, in N.V. Philips Gloellampenfabriken, the record clearly showed that in May 1982, the Air Force was prepared to award a contract to Philips as the low, qualified offeror, but did not do so as the result of a bid protest filed with our Office by another offeror. In the ensuing 9 months while the protest was pending, the Air Force's estimated initial order quantity under the RFP substantially declined because of new recycling procedures. As a result, the Air Force canceled the solicitation after the protest was withdrawn, revoking its source selection decision in favor of Philips. We reviewed the protest based

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<sup>5</sup>See also FAR § 15.606(c), which states:

"If the proposal considered to be most advantageous to the [g]overnment . . . involves a departure from the stated requirements, the contracting officer shall provide all offerors an opportunity to submit new or amended proposals on the basis of the revised requirements."

This clearly shows that changes to the RFP requirements identified after selection and prior to award should be the subject of revised proposals under FAR § 15.606.

upon the rule contained in Defense Acquisition Regulation § 3-805.4(b) (DAC 76-17) (the predecessor regulation to FAR § 15.606), which provides that where a change is so substantial as to warrant a complete revision of a solicitation, the agency should cancel the solicitation "no matter what stage the procurement is in."

In the Philips case, we also addressed the argument presented here--that the RFP's variable quantities clause authorizes the changes identified by United, thereby precluding a finding that Westinghouse changed or relaxed the RFP's requirements, necessitating an amendment to the RFP. The "Quantities" clause in the Philips solicitation allowed the government to order between 10 and 38,000 units, with an estimated initial order quantity of 15,658 units. This quantity dropped to 7,223 units during the ensuing protest period and prompted the Air Force to cancel the solicitation. We held that:

"[E]ven though the solicitation's various indefinite quantity provisions did not preclude the Air Force from ordering the 7,223 units, we think its doing so would have been both inappropriate and improper. Although estimates, by their very nature, are not very precise, quantity estimates in a solicitation do establish the general framework of what the government anticipates purchasing under the contract to be awarded and thus provide the basis for offerors to determine their pricing. Consequently, when the government knows that there is a serious discrepancy between a solicitation estimate and actual anticipated needs, it should not make award on the basis of the stated estimate, but rather should revise its solicitation so that offerors are provided with the most accurate information available."

In our view, the changes identified by United constitute a significant change from the RFP requirements such that the issuance of an amendment soliciting revised proposals is required.<sup>6</sup> As discussed below, the significant change in

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<sup>6</sup>In any case, some of Westinghouse's revised estimates exceed the RFP's baseline quantities by more than 50 percent. We particularly note that the increase in integrated voice/data lines goes far beyond the authorized 50 percent variation. Thus, it is not clear how this variation is within the scope of the RFP's variable quantities clause.

the estimated quantities covered by the RFP not only affect the offerors' pricing of the RFP requirements, but also could significantly affect the potential technical approaches that could satisfy Hanford's telecommunications needs. We think that these departures of the government's actual requirements from those that formed the basis for the competition are so significant that the selection can no longer be said to be based upon full and open competition. Management Sys. Designers, Inc. et al., supra.

As United has observed, the record reflects a substantial increase in Hanford's need for integrated voice/data stations (almost 3 times more than the RFP's baseline quantities) and a moderate increase in its need for voice only stations (23 percent more than the baseline quantities). Concomitantly, the number of dedicated data stations to be equipped and wired both at the time of cutover and during each of the 10 years of the system's useful life has declined by approximately 90 percent. In addition, the documentation concerning Hanford's current telecommunications needs indicates other variations from the baseline on which offerors submitted their price proposals.

Even assuming that these quantity variations in the system's components are within the scope of the US WEST contract, as awarded, they are nonetheless sufficient to require the submission of revised price proposals under the applicable Westinghouse provision. N.V. Philips Gloellampenfabriken, supra; Management Sys. Designers, Inc. et al., supra. Because quantity estimates in a solicitation anticipate the purchases to be made under the contract and provide the basis for pricing, a significant change in these quantity estimates necessitates the solicitation of revised price proposals. Id. While the opposing parties contend that the cost increase for the additional voice lines should approximate the cost decrease for the deletion of the data lines, we think that a 90 percent decrease in one quantity and a 3-fold increase in another could well have a major effect on the offerors' pricing strategy. Management Sys. Designers, Inc. et al., supra. Because the proposals of United and US West were comparable, considering both price and technical factors, such significant changes in the RFP's estimated quantities could well have been prejudicial to United. Id.

In addition, the record indicates that the respective changes in data and voice lines may allow for new technical approaches. That is, as we review the RFP's telecommunications requirements against current needs, we perceive that

Hanford's user environment has significantly changed from one necessitating heavy support for data-only lines to one relying primarily on voice and voice/data line usage. Westinghouse's pre-award review documents support United's contention that Hanford's expanded use of the LAN network has absorbed much of the data traffic originally intended for the telecommunications system.

It is true, as observed by the opposing parties, that the estimated number of data lines is essentially offset by the increase in voice lines in terms of the total estimated number of lines required, and that the changes do not threaten to exceed the 30,000-port capacity of the system. However, it is apparent from our review that it is not the number of ports, but the use intended for these ports, that primarily affects the technical approach to meeting Hanford's actual telecommunications requirements.

For instance, the relatively insignificant amount of data traffic remaining outside Hanford's LAN network under the current estimates would not necessarily require the type of architecture needed to support the data requirements envisioned under the RFP. We note that the RFP did not dictate a particular system architecture, but established a variety of functional requirements that the architecture must satisfy, including its capacity for specified levels of voice and data transmissions.<sup>7</sup> It is possible that the relatively small amount of data-only traffic reserved to the telecommunications system could be served exclusively through integrated voice/data lines, eliminating the need for a dedicated data switching service and the hardware to support that service.<sup>8</sup> While the opposing parties state that US WEST does not intend to change its system architecture as a result of the respective changes in quantities of lines and stations, we believe that the offerors may

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<sup>7</sup>That the RFP specifications provide wide latitude in developing a technical approach is confirmed by US WEST's assertion that "[t]he systems offered by US WEST and United differed substantially in every aspect, including such fundamental features as the type and manufacturer of the main switch."

<sup>8</sup>In the course of reviewing Hanford's requirements, some of Westinghouse's evaluators questioned the need for a switched data service.

reconsider what would be the optimum switch, as well as other system hardware capable of satisfying Hanford's telecommunications requirements, given the shift in emphasis in the site's user needs.

We also disagree with the opposing parties' contention that the "flexible, dynamic" nature of the solicited telecommunications system should have prepared United for a 90 percent decrease in data transmission needs over the expected 10-year life of the system. For example, the RFP's maintenance estimates correspond with its estimated number of data lines and suggest a telecommunications system with primary emphasis on data transmission needs. The RFP does not fairly prepare offerors for the drastic decline in data lines evidenced in this case, the concomitant increase in other lines and stations, or the possible impact of these shifts on system architecture.

In sum, it appears that the migration of virtually all Hanford's data traffic to the LAN network may well eviscerate the need for the data-oriented telecommunications solution suggested by the RFP requirements and invite a more voice-oriented approach. An affidavit submitted by United states that its technical proposal would respond to the changed estimates by reducing the data demands upon the host switch and relying instead upon the LAN network to convey most of this traffic. Thus, offerors could well have modified their technical proposals in light of Hanford's current telecommunications needs,<sup>9</sup> and an offeror other than US WEST could be more advantageous to the government under the RFP evaluation criteria if revised technical proposals were solicited.

We recommend that Westinghouse reopen the competition on the basis of its changed requirements. If Westinghouse then determines that US WEST is not entitled to the award, it should terminate the US WEST contract and award a contract consistent with its new determination.<sup>10</sup> Under

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<sup>9</sup>It also follows that inasmuch as offerors might revise their technical proposals in response to the substantial changes in Hanford's telecommunications environment, these changes might also have an associated cost impact.

<sup>10</sup>US WEST argues that we should not recommend the possible termination of its 10-year telecommunications contract because the recompetition will further delay the system's implementation and because no other offeror could build upon the installation work US WEST commenced in December 1991, to offset the government's termination liability. These reasons do not persuade us that the recompetition of a 10-year contract, which is based upon substantially obsolete

the circumstances, United is entitled to recover the costs of filing and pursuing this protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1). United should submit its certified claim for its protest costs directly to the agency within 60 days of receipt of this decision. 56 Fed. Reg. 3759 (1991) (to be codified at 4 C.F.R. § 21.6(f)(1)).

The protest is sustained.

*Milton J. Arnold*

Acting Comptroller General  
of the United States

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specifications and which has been performed for only 5 months, would not be in the government's best interest.