



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Department of Energy--Reconsideration;
Sprint Communications Company--
Reconsideration

File: B-250516.4; B-250516.5

Date: August 20, 1993

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DIGEST

Prior decision is affirmed where request for reconsideration does not demonstrate that decision was based on an error of fact or law.

DECISION

The Department of Energy (DOE) and Sprint Communications Company request reconsideration of our decision AT&T, B-250516.3, Mar. 30, 1993, 93-1 CPD ¶ 276, sustaining AT&T's protest against the selection of Sprint under request for proposals (RFP) No. 160506. The solicitation was issued by the University of California as the Management and Operations (M&O) contractor for DOE's Lawrence Livermore National Laboratory (UCLLNL), for commercial data communications services for the Energy Sciences Network (ESNET), a nationwide computer data communications network funded by DOE.

We affirm our decision.

This protest concerns the cell-relay technology offered by AT&T and Sprint. Cell-relay technology includes at least two methods of transferring data across a network at very high speeds: switched multi-megabyte data services (SMDS), an older, more mature technology, and direct asynchronous transfer mode (ATM), which offers greater capabilities. Although the solicitation encouraged the use of state-of-the-art, cell-relay technology, it cautioned that "it is considered important to begin high performance cell-relay

based services by late 1992." Of the four offerors responding to the solicitation, only Sprint proposed to bypass SMDS and offer direct ATM access for initial implementation by late 1992. AT&T proposed SMDS for initial implementation with an upgrade to ATM service in 1994. The questions before us on reconsideration are the same as those presented in the initial protest: did UCLLNL waive a restriction on the acceptability of ATM service by accepting Sprint's proposal, and, if so, was AT&T prejudiced by the waiver? After careful review of the reconsideration requests, it remains our belief that the answer to both questions is yes.

NONCOMPLIANCE WITH CURRENT AVAILABILITY REQUIREMENT

The solicitation provided in paragraph 4.2.1.3.1 of the Requirements Specification Document that:

"The user access interface shall initially conform to the SMDS Subscriber Network Interface. . . . Allowable exceptions are noted below.

"Alternate subscriber cell-relay based interfaces, such as direct ATM access, may be proposed for longer term alternatives, if significant advantages will result. Any alternative scheme proposed must be sufficiently comprehensive to provide end-to-end (router to router) operational capability."

At the time the solicitation was issued, AT&T had been operating a 45 megabyte ATM research network connecting a number of institutions across the country for about a year. Hearing Transcript (Tr.) at 389-91; Carolyn Duffy Marsan, AT&T, Livermore Ink Gigabit Network CRDA, Fed. Computer Wk., Dec. 7, 1992, at 1. The AT&T official responsible for the firm's response to the solicitation ("AT&T marketing director") testified at the hearing in this case that AT&T would have preferred to offer ATM services to UCLLNL because there was considerable uncertainty whether there would be sufficient commercial customers to warrant additional AT&T investment in SMDS technology. Tr. at 360-1, 393-400. ATM, on the other hand, is the likely future switching structure for major communications carriers, Tr. at 42-43, 46-47, and AT&T believed that it could offer a lower price for ATM service because of confidence in the future level of commercial demand. Tr. at 456-7.

According to AT&T, several provisions of the solicitation led it to believe that ATM technology would not be acceptable to UCLLNL at the beginning of contract performance. Tr. at 344-52. These included the reference to ATM as a "longer term alternative", and the need to

assure that the rapidly increasing ESNET traffic load, which was doubling every 6 months, could be accommodated quickly. The solicitation and UCLLNL's response to a question from AT&T stated that "it is considered important to begin high performance cell-relay based services by late 1992." AT&T thought that this desire for expedited initial implementation meant that UCLLNL wanted an older, more mature technology such as SMDS at the beginning. Tr. at 355-60. For this reason, AT&T asked UCLLNL whether it could offer direct ATM access for initial implementation. On March 30, 1992, UCLLNL distributed its response to this question and others to all offerors.¹

AT&T's question and UCLLNL's answer were as follows:

"Q. Paragraph 4.2.1.3.1 of the Requirements Specification Document specifies that user access shall be provided as SMDS SNI [subscriber network interface]. However, Figure 1 [of the Requirements Specification Document] shows several access methods, one of which is a direct ATM access. Will [UCLLNL] consider direct ATM user access instead of SMDS SNI?

"A. [UCLLNL] believes Paragraph 4.2.1.3.1 is quite clear on this point. However, to emphasize: Any alternative scheme proposed must be sufficiently comprehensive to provide end-to-end (router to router) operation capability. Therefore, the proposal must conclusively demonstrate current availability of the required end-to-end operational capability." (Emphasis added.)

In the face of this language, AT&T turned exclusively to preparing a proposal to offer SMDS technology for initial implementation. AT&T's marketing director testified that UCLLNL's response to its question "ruled out ATM as a short-term solution". Tr. at 353. According to the marketing director:

"We interpreted this that [UCLLNL] wished to start with a production quality SMDS environment. And that was consistent with our understanding of why SMDS would be an appropriate place to start.

"And then as ATM and other technologies became available they would move to them in this three-

¹The questions and answers became part of the solicitation. Alamo Contracting Enterprises, Inc., B-242458.2, Apr. 30, 1991, 91-1 CPD 5430.

step phase: test bed, preproduction and production."

Tr. at 416. He stated that "[t]here was sufficiently little ambiguity at that point for me to be convinced that SMDS was required and to proceed unambiguously along that path." Tr. at 354, 439. Again, in explaining why AT&T did not further pursue the matter with UCLLNL, he testified that:

"I was convinced that we would get nothing more useful back. The previous response had been quite emphatic that the original statement ought to be sufficient, and [UCLLNL] believes Paragraph 4.2.1.3 is quite clear on this point. At that point, I saw no further point in asking the same question again when I had gotten such a definitive answer back. . . ."

Tr. at 441-442.

Sprint, on the other hand, submitted a proposal to supply ATM service initially--it was the only offeror to do so--even though it had no existing network or prototype switch. In fact, a week before the selection decision, the entire Technical Evaluation Committee of the Source Evaluation Board (SEB) visited Sprint's proposed subcontractor for the ATM switch, TRW Corporation, to "verify their ATM switch" and assure themselves that TRW had the "capability" to manufacture the switch on schedule. TRW was unable to demonstrate the switch because the prototype "had not been built yet" because it "was on the drawing board". Nevertheless, the SEB, which had withheld its report pending the results of the visit to TRW, recommended the selection of Sprint to the source selection official, who concurred in the recommendation.

In our view, Sprint's proposal of an ATM switch that had not yet been built was inconsistent with the specific requirement that offerors conclusively demonstrate in their proposals the current availability of any proposed alternative to initial implementation of SMDS. Sprint and DOE have argued that the requirement to "conclusively demonstrate current availability of the required end-to-end operational capability" refers to the current capability of the offeror to furnish the required services, and design and manufacture any necessary equipment, in the future. We agree with AT&T that this interpretation is unreasonable. UCLLNL's answer to AT&T's question referred not to the current capability of the offeror, but instead to the current availability of the required "end-to-end operational capability," that is, the current availability of the required level of service. Moreover, requiring current availability of the service is consistent with a number of

other solicitation provisions, such as paragraph 4.3.8, which made clear the importance to UCLLNL of acquiring a fully operational cell relay system to meet its ESNET traffic demands. Paragraph 4.3.8 provided that, while offerors were to have an alternate system in the event of unanticipated technical problems, any approach that was not based on immediate full availability of cell relay services would be unacceptable.

In negotiated procurements, it is fundamental that any proposal failing to conform to the material terms and conditions of the solicitation should be considered unacceptable and may not form the basis for award. See Martin Marietta Corp., 69 Comp. Gen. 214 (1990), 90-1 CPD ¶ 132; Consulting and Program Mgmt., 66 Comp. Gen. 289 (1987), 87-1 CPD ¶ 229. Accordingly, it was improper to accept Sprint's noncompliant offer.

In their requests for reconsideration, DOE and Sprint essentially argue that acceptance of Sprint's proposal of direct ATM access for initial implementation was consistent with the solicitation emphasis on incorporating emerging technology into the ESNET network. As noted in our initial decision, the procurement was part of an overall program to encourage the development of very high speed data communications capabilities using commercial cell-relay and state-of-the-art technologies. The solicitation contemplated the award of a contract to furnish "commercial data communications services based on fast-packet technology as it evolves on an early availability and cost effective and on-going basis". The RFP encouraged the use of state-of-the-art technology, and specifically provided for additional capabilities, such as direct ATM access, to be incorporated into the ESNET as they become available.

This dispute, however, cannot be resolved based upon this one aspect of the procurement. DOE and Sprint are correct that it could be consistent with the overall solicitation emphasis on incorporating emerging technology for the RFP to allow such technology for initial implementation as long as a reliable fallback plan was available. Their position, however, fails to take into account the solicitation's requirement for current availability, while AT&T's interpretation is consistent with both the desire for early implementation and, ultimately, state-of-the-art technology.

At most, the overall solicitation emphasis on incorporating emerging technology together with the requirement for current availability could be argued to create an ambiguity concerning permissible approaches to initial implementation. SRI Int'l, Inc., B-250327.4, Apr. 27, 1993, 93-1 CPD ¶ 344 (solicitation susceptible of more than one reasonable interpretation is ambiguous); Rexon Tech. Corp.; Bulova

Tech., Inc., B-243446.2; B-243446.3, Sept. 20, 1991, 91-2 CPD ¶ 262. Where a solicitation requirement is ambiguous, with the result that offerors respond to it based upon different reasonable assumptions as to what the requirement was, the competition has been conducted on an unequal basis such that the requirement should be resolicited. Reflect-A-Life, Inc., B-232108.2, Sept. 29, 1989, 89-2 CPD ¶ 295; Flow Tech., Inc., 67 Comp. Gen. 161 (1987), 87-2 CPD ¶ 633.

Either because AT&T properly read the solicitation to preclude its offering initial use of ATM technology or was misled by an ambiguity into wrongly believing that this was so, the government did not receive an offer of ATM technology from the only source with an operating ATM network and had only one offer of that technology from a source whose switch was still on the drawing board. Whether the solicitation precluded an approach based on a nonexistent switch or was merely ambiguous, the result is the same. Acceptance of Sprint's proposal was improper.

PREJUDICE

DOE and Sprint also contend that AT&T was not prejudiced by the acceptance of Sprint's proposal.

Where, as here, material specifications are relaxed for one offeror but not another, or offerors are not competing on a common basis due to an ambiguity in the solicitation, our Office will sustain a protest if there is a reasonable possibility of prejudice. Helmets Ltd., 71 Comp. Gen. 281 (1992), 92-1 CPD ¶ 241; IRT Corp., B-246991, Apr. 22, 1992, 92-1 CPD ¶ 378; see Carson Optical Instruments, Inc., B-228040, Oct. 19, 1987, 87-2 CPD ¶ 373. We will resolve any doubt concerning the existence of prejudice in favor of the protester. Logitek, Inc.--Recon., B-238773.2; B-238773.3, Nov. 19, 1990, 90-2 CPD ¶ 401.

DOE and Sprint have presented no information or arguments we did not previously consider in concluding that AT&T was prejudiced by the waiver of the current availability requirement. For example, DOE claims that by AT&T's own admission, it "did not have the opportunity to offer ATM-based service at the time of the submission of its proposal"; according to the agency, this indicates AT&T could not have offered ATM-based services in any case, so AT&T was not prejudiced by any waiver of the current availability requirement. However, in the testimony to which DOE apparently refers, AT&T's marketing director stated, not that AT&T lacked an ATM network, but that it believed its network was not "of sufficient quality to offer for commercial service" and comply with the current availability requirement. Tr. at 360-362, 389-390. Indeed,

it is undisputed in the record that AT&T had an ATM network running before it submitted its proposal. Furthermore, AT&T's marketing director testified that AT&T viewed an SMDS network as representing a higher risk than an ATM network because of uncertainty as to whether there would be sufficient public customers for SMDS, and that it would have preferred to offer direct ATM access for initial implementation.² Tr. at 360. As noted above, had AT&T proposed an ATM approach for initial implementation, it would have received a substantially improved technical score.

Finally, contrary to DOE's and Sprint's assertions, we took into consideration the facts that AT&T's prices appear to have been substantially higher than Sprint's and that DOE considered AT&T's prices to be unreasonable. A precise comparison of the proposals in this area is difficult. As noted in our initial decision, some of the pricing information supplied by Sprint in its proposal was based on 3 years of service rather than the 5 years the contract could extend if the options were exercised; the SEB concluded that it lacked "a clear explanation of [Sprint's] pricing methodology"; and there was no evidence in the record that UCLLNL had calculated an overall most probable cost for either Sprint or AT&T before making the source selection. In any case, AT&T furnished calculations during the protest showing that it could have offered a substantial price reduction for an ATM network based upon its expectation of significantly greater future public demand for ATM than for SMDS.

Since it appeared that there could have been significant technical and cost impact from waiving the current availability requirement, we found prejudice. DOE and Sprint have not shown our conclusion to be in error.³

²AT&T's witness testified that the firm preferred to offer ATM and that he was under "pressure" from other AT&T officials to do so, but because that option was foreclosed by UCLLNL's March 30 answer to its question, no final decision was reached. Tr. at 391-7. The record shows a sufficient possibility that AT&T would have offered ATM service to establish prejudice.

³In addition to the arguments discussed above, DOE and Sprint repeat other arguments previously made and otherwise express disagreement with our decision. Under our Bid Protest Regulations, however, to obtain reconsideration, the requesting party must show that our decision contains either errors of fact or law or present information not previously considered that warrants reversal or modification of our

(continued...)

REMEDY

In our decision, we recommended that UCLLNL revise the solicitation to accurately describe the state of development it considers acceptable for the approach proposed for the initial implementation, reopen negotiations with all offerors, and then request best and final offers. We further concluded that AT&T should be reimbursed its protest costs.

In its request for reconsideration, Sprint maintains that it would suffer competitive prejudice from the reopening of negotiations because our decision disclosed that Sprint had been found to be the technical leader among the offerors, that AT&T's prices were found to be "unreasonable," and that AT&T could have substantially improved its technical score had it offered an ATM approach for initial implementation. According to Sprint, its competitors would have an opportunity during negotiations to improve their standing based on their knowledge of Sprint's proposal.

The information Sprint points to was not first made public in our decision, and, in any event, provides no grounds to reconsider our remedy. Prior to our decision, Sprint itself, through its assistant vice president for product marketing for its Government Systems Division, publicly disclosed to the trade press that it had proposed direct ATM access for the initial implementation. DOE released outside the protective order we issued in this case UCLLNL's report, dated October 23, 1992, which discloses the facts that Sprint's ATM switches were "exactly the type of technology that the RFP [was] intended to encourage"; Sprint's proposal had been evaluated as technically superior among the offerors; and Sprint's pricing was significantly lower than AT&T's.⁴

³(...continued)

decision. 4 C.F.R. § 21.12(a) (1993). The repetition of arguments made during the consideration of the original protest and mere disagreement with our decision do not meet this standard. R.E. Scherrer, Inc.--Recon., B-231101.3, Sept. 21, 1988, 88-2 CPD ¶ 274.

⁴In addition, DOE questions our conclusion that AT&T should be reimbursed its protest costs because section 970.7107 of the Department of Energy Acquisition Regulation, 48 C.F.R. § 970.7107 (1992), which specifically provides for our Office to consider protests involving acquisitions by M&O contractors, provides that the cost recovery provisions of the Competition in Contracting Act (CICA) of 1984, 31 U.S.C. § 3554(C)(1)(A) (1992), are inapplicable to protests of M&O
(continued...)

In our view, it would have been obvious to AT&T, once it knew of Sprint's offer of ATM technology, that UCLLNL considered Sprint's proposal superior technically and that the proposal was less expensive than AT&T's. As a general matter, the prior disclosure of information concerning the evaluation and offerors' proposals does not preclude reopening negotiations where otherwise appropriate--the importance of preserving the integrity of the competitive procurement system and correcting an improper award through further negotiations outweighs the risk of an auction and overrides any possible competitive disadvantage to an offeror. See Sherikon, Inc., B-250152.4, Feb. 22, 1993, 93-1 CPD ¶ 188; Lobar, Inc., B-247843.3, Aug. 31, 1992, 92-2 CPD ¶ 139. In this case, we do not believe that the general information conveyed to AT&T gives that firm a competitive advantage which would preclude reopening of negotiations.

Our decision is affirmed.



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⁴(...continued)
acquisitions. We need not consider this argument since AT&T has stated it will not submit a claim for costs.