



## Decision

**Matter of:** IDB International

**File:** B-257086

**Date:** July 15, 1994

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Steven W. DeGeorge, Esq., for AT&T Corporation; and Robin L. Redfield, Esq., for MCI Telecommunications Corporation, interested parties.  
Douglas G. White, Esq., and Clifton M. Hasegawa, Esq., Defense Information Systems Agency, for the agency.  
Daniel I. Gordon, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. Agency reasonably rejected protester's best and final offer because its pricing structure appeared to be premised on a 10-year contract and to impose termination liability on the government if the contract lasted only 5 years, where the solicitation provided for a base period of 5 years with five 1-year options.
2. Agency was not required to reopen discussions to clarify a possible ambiguity introduced for the first time in the protester's best and final offer.

### DECISION

IDB International protests the rejection as unacceptable of its proposal under request for proposals (RFP) No. DCA200-93-R-0057, issued by the Defense Information Systems Agency (DISA) for leased communications services. IDB contends that its proposal satisfied all of the RFP requirements.

We deny the protest.

The agency issued the RFP on September 30, 1993, seeking proposals for a fixed-price contract for satellite communications services between Andrews Air Force Base in Maryland and Lajes Air Base in the Azores, Portugal. The RFP called for the award of a base contract for 5 years with five 1-year options, with proposals to be evaluated on the basis of the prices for all 10 years. The RFP stated that

proposals providing for "basic termination liability"--an amount payable to a regulated common carrier in the event of early service termination by the government--must include a detailed listing of the items for which the government would be liable.

For the part of the contract work that will take place in Portugal, all offerors will have to rely on the local monopoly carrier, Companhia Portuguesa Radio Marconi (Marconi). Offerors were required to include Marconi's quote in their proposal. Because of Marconi's monopoly status, DISA anticipated that offerors would propose essentially identical offers for the Portuguese portion of the services, with price competition occurring for the domestic portion.

The monopoly foreign carrier's special role affected the procurement in other ways as well. Relevant to this protest is the RFP provision that, while the contract will in most respects have fixed prices, authorized modifications to the rates charged by the foreign carrier will generally be passed through to the U.S. government; that is, if Marconi increases or decreases the charges for the Portuguese portion of the communications, the cost to the government will be adjusted on a dollar-for-dollar basis.

IDB and other offerors submitted initial proposals in January 1994. IDB's proposal included the required quote from Marconi for the work to be performed in the Portuguese segment. That quote stated a monthly charge based on a 5-year contract, and stated that the monthly charges for the option years, if exercised, would be 5 percent lower than for the base period. It also set forth, in summary fashion, the basic termination liability that Marconi would impose in the event of termination before the completion of the 5-year contract period.

Among the deficiencies that DISA raised during discussions with IDB on February 2 was the absence in its proposal of a detailed listing of the items that would be included in the basic termination liability. The written question on this subject required IDB to provide such a listing.

In its February 14 reply, IDB explained how the basic termination liability would be calculated for the domestic portion of the route. It then continued:

"The quote from Marconi states that the value of their [basic termination liability] reduces by 1/60 per month of contract period. IDB is attempting to get a clarification from Marconi, however, the individual responsible . . . is on vacation and no one else is able to answer

specific questions about the Marconi proposal. IDB will notify [the agency] as soon as we receive clarification from Marconi."

Apparently, on the basis of clarification received from Marconi, IDB supplemented this response on February 18, confirming that the termination liability would decrease by  $1/60$  each month; this meant that, if the contract ended after the completion of the basic 5-year period, Marconi would be owed nothing in the way of termination liability. The clarification concluded: "In the event a service . . . is canceled prior to the completion of a 60 month [that is, 5 year] service term, the remaining termination liability is due to Marconi."

The agency found this response acceptable, and requested that IDB and other offerors submit best and final offers (BAFO) by March 22. IDB's BAFO included a new quote from Marconi. In that quote, Marconi offered what it termed a "new scenario," premised on the assumption that the contract would run for 10 years. The monthly charge offered was lower than the monthly charge previously quoted for a 5-year contract. The revised quote did not identify the monthly rate that Marconi would charge for a 5-year contract.

In addition, the revised quote provided that, although the total dollar amount of the basic termination liability was not changed from the earlier quote, that liability would decline by only  $1/120$  per month (rather than  $1/60$  as in the initial quote). Accordingly, instead of zero liability if the contract ended after 5 years (as in IDB's initial proposal), Marconi proposed that it would be entitled to 50 percent of the amount of the basic termination liability (roughly the cost to the government of a full year's services under the contract) if the contract ended at that point.

IDB's BAFO appeared to offer the lowest price among the competing proposals. In the course of its review, however, the agency determined that the new Marconi quote improperly assumed that the contract would run for 10 years, and that Marconi's incorrect assumption had been incorporated into IDB's proposal. Thus, IDB had filled in its BAFO price list by simply copying Marconi's lower, 10-year monthly charge; the BAFO did not indicate whether Marconi would increase its monthly charge upon learning that DISA was awarding only a 5-year contract or whether IDB intended to absorb such an increase rather than passing it through to the government under the RFP provision permitting the contractor to pass through rate increases imposed by the local carrier.

Moreover, the agency found that IDB's inclusion of Marconi's revised quote in its BAFO appeared to impose on the government the risk of substantial termination liability in the event the government did not exercise all of the options after the initial 5-year contract period. The agency noted that the other offerors had received the revised Marconi quote, but had all declined to use it as the basis of their BAFOs, and had instead continued to use the earlier 5-year Marconi quote in their BAFOs. On the basis of its determination that IDB's BAFO incorporating the revised Marconi quote was inconsistent with the RFP requirement that offerors propose prices for a basic 5-year contract period, the agency rejected IDB's BAFO as unacceptable. This protest followed.

IDB contends that nothing in its BAFO was inconsistent with the RFP, and that the agency should have assumed that IDB was itself taking on the risk of liability for higher charges, whether monthly rates or termination charges, as a result of Marconi's revisions to its quote. Specifically, IDB argues that its BAFO did not address, and therefore did not alter, the company's earlier indication that the termination liability would decrease by 1/60 each month. According to IDB, the revision to Marconi's quote affected only IDB's liability to Marconi (by increasing IDB's exposure), and not the government's liability to IDB (or to Marconi). IDB alleges that the agency effectively evaluated proposals based on a criterion not set forth in the solicitation, namely, that the foreign carrier's quote must be "in the identical format" as the offeror's proposal to the government. By this allegation, IDB apparently means that, while the RFP required offerors to propose prices based on a 5-year contract term, it did not similarly restrict the foreign carrier's quotes.

Our Office will not question an agency's evaluation of proposals unless the agency deviated from the solicitation evaluation criteria or the evaluation was otherwise unreasonable. Payco Am. Corp., B-253668, Oct. 8, 1993, 93-2 CFD ¶ 214. Here, IDB contends that it was unreasonable of the agency to view IDB's BAFO as adopting Marconi's revised quote, and that, by so doing, DISA was deviating from the RFP criteria.

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<sup>1</sup>For example, one offeror sent the agency a copy of the revised quote with its BAFO, together with the following statement: "We find the terms of this alternate Marconi proposal not to be in compliance with the requirements of the RFP and therefore are not making it a part of our submission. We are standing with their original offer, previously submitted."

IDB does not deny that the agency could properly reject an offer proposing that the government pay termination liability at the end of 5 years, or one otherwise premised on a 10-year contract. IDB nevertheless denies that its BAFO imposes such liability on the government or in any other way assumed a 10-year contract term.

We find that the agency properly considered IDB's BAFO to be inconsistent with both the 5-year base term of the contract and the proposed termination liability of the government set forth in IDB's initial proposal (as clarified during discussions). Throughout the procurement, IDB presented Marconi's quotes for basic termination liability as representing charges that IDB would pass through to the government as was provided for in the RFP. Specifically, IDB's initial proposal simply attached Marconi's quote for the termination liability on the foreign segment, clearly suggesting that the offeror was incorporating that quote into its proposal to define the government's--not IDB's--liability.

IDB effectively confirmed that Marconi's quote represented the government's liability in its response to the agency's discussion question when it explained the government's termination liability for the foreign segment by citing "[t]he quote from Marconi," and stating that "IDB is attempting to get a clarification from Marconi" and that "IDB will notify [the agency] as soon as we receive clarification from Marconi." Once IDB obtained clarification from Marconi, it supplemented its response by stating that "the termination liability" would be reduced by 1/60 each month and, in the event service is canceled prior to the completion of 5 years, the remaining termination liability would be due to Marconi. While at no point did IDB explicitly state that "the termination liability" was the government's liability, rather than IDB's, IDB acknowledges that this was, in fact, its intent.

As in its initial proposal, IDB's BAFO attached the pages of a Marconi quote, except that this quote greatly increased

<sup>2</sup>The agency concedes that IDB could have offered to share the basic termination liability with the government. That is, the agency would have viewed as acceptable a statement in IDB's BAFO that, notwithstanding Marconi's slower reduction in termination liability, IDB would absorb any liability remaining above the 1/60 part per month reduction IDB had offered earlier. Absent such a statement in the BAFO, however, the agency reasonably viewed Marconi's revised quote as superseding its earlier one and thus rendering IDB's pricing inconsistent with the 5-year term of the basic contract.

the government's liability in the event the contract did not run beyond the initial 5-year period. The BAFO provided neither more nor less of an indication than the initial proposal that IDB intended the government to be responsible for the termination liability payment to Marconi. Since IDB concedes that it intended that the government would bear the liability set forth in the earlier Marconi quote, the government's similar interpretation of IDB's BAFO was the only reasonable reading of the BAFO.

The situation is even clearer with respect to the monthly charges. As explained above, Marconi's revised quote offered reduced monthly charges premised on a 10-year contract. Here, IDB cannot plausibly argue that Marconi's revised quote did not supersede the initial one or that it should have been ignored by the government because IDB copied as part of its BAFO prices the lower monthly charges contained in Marconi's revised quote.<sup>3</sup> Thus, Marconi's 10-year pricing structure, which was inconsistent with the RFP, was explicitly incorporated into IDB's BAFO.

In sum, the agency reasonably rejected IDB's BAFO as being improperly inconsistent with the 5-year term of the contract.

IDB further argues that, even if its BAFO appeared to impose the risk of increased monthly charges and higher termination liability on the government, the agency should have conducted post-BAFO clarifications with IDB to resolve the matter. We disagree.

Given the substantive nature of the matter, any such dialogue would have constituted discussions, rather than clarifications, and would therefore have required the agency to solicit a new round of BAFOs from all offerors. Federal Acquisition Regulation §§ 15.601, 15.607, and 15.611; see SWD Assocs., B-226956.2, Sept. 16, 1987, 87-2 CPD ¶ 256. The decision to reopen discussions and request a new round of BAFOs is largely left to the discretion of the contracting officer. Mine Safety Appliances Co., B-242379.5, Aug. 6, 1992, 92-2 CPD ¶ 76. Where an offeror modifies its proposal by introducing material ambiguities in its BAFO, it runs the risk that the agency will exercise its discretion not to reopen discussions and will evaluate the proposal less favorably due to the ambiguities. State Technical Inst. at Memphis, B-250195.2; B-250195.3, Jan. 15, 1993, 93-1 CPD ¶ 47.

<sup>3</sup>As noted above, IDB did not explain whether Marconi would charge more for the 5-year contract that was to be awarded under the RFP and whether such an increase would be passed through to the government.

As explained above, IDB's BAFO incorporated a foreign carrier's quote which was inconsistent with the RFP's 5-year term and substantially increased the financial risk to the government. Even if it is assumed, *arguendo*, that the revised Marconi quote submitted with the BAFO did not clearly supersede the earlier Marconi quote, the submission of the revised quote with the BAFO at the least introduced ambiguities without explanation or justification. By so doing, IDB subjected itself to the risk that the agency might find the proposal unacceptable without reopening BAFOs in order to resolve what it reasonably viewed as the inconsistency between IDB's BAFO and the RFP's 5-year term.

The protest is denied.

/s/ James A. Spagenberg  
for Robert P. Murphy  
Acting General Counsel