



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

1159245

Decision

Matter of: Alascom, Inc.
File: B-259768.2; B-259769.2; B-259771.2
Date: May 22, 1995

Christopher J. Watkins, Esq., Alascom, Inc., for the protester,
Ronald A. Uitz, Esq., Manatt, Phelps & Phillips, for General Communication, Inc., and Mark A. Bell for United Native American Telecommunications, Inc., interested parties.
H. Jack Shearer, Esq., and Clifton M. Hasegawa, Esq., Department of Defense, for the agency.
Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency improperly terminated protester's awards under resolicitations for T-1 telecommunication services where the agency unreasonably concluded that it was not justified in canceling the original solicitations and resoliciting.

DECISION

Alascom, Inc. protests the Defense Information Systems Agency, Defense Information Technology Contracting Office's (DITCO) termination of three Alascom contracts for "T-1" telecommunication services awarded under telecommunication service requests (TSR) Nos. SV15APR946165, SV15APR946166, and SV15APR946167.

We sustain the protests.

On July 20, 1994, DITCO issued the TSRs to obtain competitive quotations for T-1 service from designated locations in Washington State to designated locations in Alaska for a 60-month period commencing September 1, 1994. The TSRs specified that each of the solicited T-1 telecommunications circuits was to be nonchannelized with 1.544 megabits per second transmission capacity, full duplex

operation, and full period availability.¹ The TSRs basically provided for award to the low-priced, technically acceptable offeror and stated that award would be made without discussions unless the government determined that discussions were necessary. In addition, the TSRs advised quoters that the government reserved the right to consider alternate quotes based upon alternative methods of transmission without further discussions. Technical proposals were not solicited, but quoters were required to state their intention to comply with various TSR requirements.

On August 4, DITCO received five quotes in response to the TSRs. Alascom, the incumbent contractor for these services, submitted the lowest-priced quotes on each of the TSRs (total price \$543,268). Alascom's quotes responded to all stated TSR requirements and took no exceptions. Consequently, on September 20, DITCO issued service orders to Alascom under the TSRs.

Following the awards, on October 18, DITCO discovered from Alascom's draft tariff to be filed with the Federal Communications Commission that Alascom's quotes were based upon providing the T-1 service utilizing compression technology.² Alascom's quotes did not mention that they were based on compression technology, nor did the TSRs state that noncompressed service was required or that compressed service was not acceptable. DITCO then advised Alascom that the compressed service did not satisfy the agency's requirements. While Alascom maintained that the TSRs did not indicate that compression technology could not be used to provide the T-1 service and that compressed service

¹A T-1 circuit is a digital transmission link with a transmission capacity of 1.544 megabits per second which normally can accommodate 24 voice conversions and is used to connect communication networks across remote distances.

²Compression technology is a method for reducing the bandwidth or number of bits needed to encode information or a signal, typically by eliminating long strings of identical bits or bits that do not change in successive sampling intervals. If compression technology is used with T-1 circuits, the entire 1.544 megabits per second transmission capacity need not be used.

should satisfy the agency's requirements,³ Alascom offered to provide noncompressed T-1 service at an increased price.

On November 14, DITCO canceled the awards in order to resolicit the requirements. The revised TSRs, issued November 17, expressly specified that compressed service was not acceptable. On November 29, six quoters responded to the revised TSRs. Alascom again had the lowest quotes on each of the TSRs for a total price of \$582,284. Thus, on December 9, DITCO issued service orders to Alascom under the TSRs for the noncompressed T-1 service.

Meanwhile, on November 22, General Communication, Inc. (GCI), which submitted quotes under both set of TSRs, filed an agency-level protest with DITCO, arguing that the cancellation of the first set of TSRs was improper, and that DITCO was required to reject Alascom's quotes as technically unacceptable and make awards to the next lowest-priced, technically acceptable quoters. On December 14, DITCO denied GCI's protest, advising GCI that the first TSRs were reasonably canceled because of "(1) an apparent ambiguity in the solicitation[s] and (2) an inability to determine that the next lowest [quotes] represented a fair and reasonable price for the services." On December 20, GCI then protested the cancellation of the first TSRs to our Office. On December 22, GCI withdrew its protest based upon DITCO's agreement to terminate Alascom's awards under the second TSRs, cancel the second TSRs, and make awards to the next lowest quoter under the first TSRs.⁴ DITCO canceled Alascom's awards on the same date. On December 30, Alascom filed an agency-level protest against DITCO's actions, which DITCO denied on January 9, 1995. Alascom then protested to our Office on January 13. No awards have been made under the TSRs pending our decision.

³Alascom asserted that it intended to use compression technology on the undersea fiber IXC portion of the route without degrading the service specifications and that this would provide the government with the most cost effective service.

⁴The second lowest quoter on the first TSRs is GCI. However, another firm, United Native American Telecommunications, Inc. has claimed preference as a small disadvantaged business (SDB) concern, which DITCO has referred to the Small Business Administration (SBA). If the SBA upholds United Native American's SDB status, that firm would be in line for award under the first TSRs, instead of GCI; however, United Native American's SDB preference is insufficient to overcome Alascom's low price.

Alascom essentially contends that DITCO acted reasonably in issuing the second TSRs--which specifically required noncompressed service--because Alascom's quote on the first TSRs--which did not preclude compressed service--was acceptable, although it may not have satisfied the agency's actual requirements, and that reinstatement of the first TSRs after receiving quotes and making award to Alascom on the second TSRs was not proper.⁵ We agree.

In a negotiated procurement, an agency has broad discretion in deciding whether to cancel a solicitation; the agency need only have a reasonable basis to cancel as opposed to the cogent and compelling reason required for cancellation in sealed bidding, unless the prices of all offerors have been disclosed. See General Projection Sys., 70 Comp. Gen. 345 (1991), 91-1 CPD ¶ 308; Brisk Waterproofing Co., Inc., B-256183.3, June 30, 1994, 94-1 CPD ¶ 394.

As indicated, this protest concerns the cancellation of the second TSRs after award to Alascom, the low-priced, technically acceptable quoter. Here, DITCO canceled the second TSRs because it believed that it had improperly canceled the first TSRs. DITCO argues that when it became aware that Alascom would not satisfy the agency's requirement for noncompressed service under the first TSRs, it should not have resolicited the requirement, but should have rejected Alascom's technically unacceptable quotes and made award to the next low quoter under the first TSRs.

⁵DITCO argues that the issues presented in Alascom's protest are confined to the question of whether the agency properly rejected Alascom's quote on the first TSRs as technically unacceptable, and such a protest is untimely under the Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (1995), since it was filed more than 10 working days after DITCO canceled Alascom's orders under the first TSRs. However, when Alascom's protest is read as a whole, it clearly challenges the agency's cancellation of Alascom's awards under the second TSRs because its proposal under the first TSRs was acceptable under the terms of those TSRs, and this protest was timely filed within 10 working days of when Alascom received the denial of its agency-level protest of this matter. See 4 C.F.R. § 21.2(a)(3). DITCO and the interested parties also claim that Alascom is actually protesting in an untimely manner that the first TSRs were ambiguous. However, as indicated, Alascom's protest is that it is entitled to retain the awards it received under the second TSRs; it was the agency that asserted that the first TSRs may be ambiguous.

DITCO argues that the first TSRs could not reasonably be interpreted to permit compression technology because T-1 service under normal commercial standards means usage of the full T-1 circuit.⁶

Here, the TSRs did not, as they could have, mention compressed or noncompressed service. Moreover, the TSRs encouraged quoters to propose alternate methods to meet the agency's transmission needs. While it appears that the most reasonable reading of the first TSRs does not contemplate compressed T-1 service, but that the full T-1 circuit was required, the agency previously conceded the possibility that the TSRs may be ambiguous in this regard and that Alascom was apparently reasonably misled as a result.⁷ Moreover, in canceling the first TSRs, DITCO found that in view of the significantly low price of Alascom (the incumbent contractor which could undoubtedly satisfy the agency's requirements), it was not clear that award under the first TSRs would be in the government's best interests. Indeed, on the resolicitation, Alascom's price for the noncompressed T-1 service was significantly lower priced than the other quoters. A reasonable basis to cancel exists when a new solicitation presents the potential for increased competition or cost savings, or where the specifications give rise to an interpretation not intended. See Brisk Waterproofing Co., Inc., supra; MLC Fed., Inc., B-254696, Jan. 10, 1994, 94-1 CPD ¶ 8.

While DITCO now asserts that Alascom's quotes were technically unacceptable on the first TSRs and should have been rejected as such, the record shows that Alascom's quotes took no exception to the stated requirements in the TSRs.⁸ Even if Alascom's quotes could be considered technically unacceptable, an agency has the discretion to reopen the competition, through discussions or otherwise, to allow a technically unacceptable offeror to become acceptable so long as prices have not been disclosed and

⁶As indicated, the agency in canceling the first TSRs stated that the TSRs may be ambiguous in this regard.

⁷The record does not belie Alascom's assertion that it legitimately believed that compressed service satisfied the requirements of the first TSRs as well as the agency's actual requirements.

⁸It was only during contract administration that DITCO discovered that Alascom's quotes were for compressed service on the T-1 circuits, which did not satisfy the agency's requirements.

there is no technical leveling.⁹ See Research Analysis and Management Corp., B-218567.2, Nov. 5, 1985, 85-2 CPD ¶ 524; Power Dynatec Corp., B-236856, Dec. 6, 1989, 89-2 CPD ¶ 522.

GCI argues that it was prejudiced by the agency's reopening of the competition to allow Alascom to submit a quote based on the agency's actual requirements. However, GCI and all previous quoters were permitted to and did submit quotes under the second TSRs, and there is no evidence that any prices, other than Alascom's, were disclosed.¹⁰ The only parties that would have been prejudiced if the second TSRs had not been issued were Alascom, whose quote was predicated on a misapprehension on the government's actual requirements, and the government, which did not necessarily obtain the lowest quote for the T-1 services. Indeed, Alascom was the low quoter on the second TSRs and the government will be obtaining the T-1 service at the lowest price.

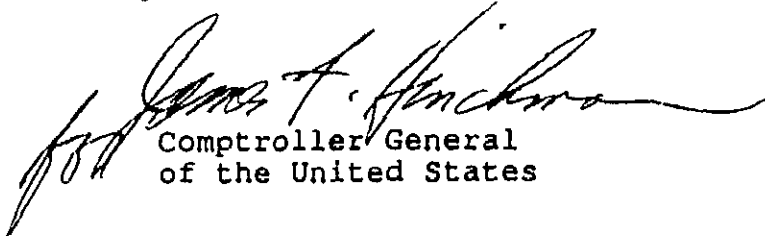
Since DITCO's actions respecting the cancellation of the first TSRs and issuance of the second TSRs were reasonable and proper, DITCO had no reasonable basis to cancel the second TSRs after proposals were received and awards made.

⁹GCI contends that reopening discussions to allow Alascom to offer noncompressed service constituted technical leveling. This argument lacks merit, inasmuch as technical leveling only occurs if "successive rounds of discussions" are conducted. See Federal Acquisition Regulation § 15.610(d). DITCO asserts that allowing Alascom to change its proposal from compressed to noncompressed service constituted a major rewrite of Alascom's proposal and should not have been permitted. However, as indicated, Alascom's proposal was not unacceptable on its face and we fail to understand how this change in service over the same T-1 circuits could reasonably be considered a major proposal rewrite. While it may be that the agency could have elected to exclude Alascom from the competition after ascertaining that it would not meet the agency's requirements, the agency, acting within the reasonable exercise of its discretion, instead elected to reopen the competition to clearly state its requirements and to provide Alascom an opportunity to compete.

¹⁰Although GCI maintains that Alascom was afforded an advantage because it discovered its price standing in relationship to the other quoters, GCI and the other quoters were aware of Alascom's prices and were provided the opportunity to submit revised quotes.

We recommend that DITCO reinstate the second TSR awards to Alascom. In addition, the protester is entitled to recover the costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d). The protester should submit the detailed and certified claim for such costs directly with the agency within 60 days after receipt of this decision. 4 C.F.R. § 21.6(f).

The protests are sustained.



James F. Hendon
Comptroller General
of the United States