DCCUMENT BESUME

02092 - [A1252241]

[Protest against Award of Contract for Communication Services]. B-187871. May 2, 1977. 9 pp.

Decision re: Hawaiian Telephone Co.; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).
Contact: Office of the General Counsel: Procurement Law II.
Budget Function: National Defense: Department of Defense - Procurement & Contracts (058).
Organization Concerned: Western Union International, Inc.; Defense Communications Agency.
Authority: B-184315 (1976). B-181539 (1974). B-162403 (1968). B-180292 (1974). 55 Comp. Gen. 60. 55 Comp. Gen. 802. A.S.P.R. 3-410.1(5). A.S.P.R. 7-1700 et seq. A.S.P.R. 22-1002. A.S.P.R. 3-505(a). A.S.P.R. 3-805.4.

The protester alleged that the contract awardee cannot and did not offer to comply with an essential technical performance requirement; that a favorable clause was written into the contract which was not available to other competitors; and that the awardee did not offer to meet and has not met the required service commencement date. The statement by the awardee that it intended to comply could reasonably be construed by the contracting officer as satisfying agency requirements. The agency's negotiation of the contract language did not provide the awardee with an unfair advantage. Although the agency should have issued an amendment relaxing an impossible requirement, the deficiency did not result in prejudice. (Author/SC)

Richard Feldman
Proc.II

02092

DECISION THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-187871 DATE: May 2, 1977

MATTER OF: Hawaiian Telephone Company

DIGEST:

1. Where offeror, in response to question if it "guaranteed" to meet solicitation performance requirement, states that it "intends" to comply, statement, when read in context of negotiations, could reasonably be construed by contracting officer as satisfying agency requirement, even though "intent" is ordinarily defined as goal without guarantee that goal will be met.

2. Where regulations do not provide for inclusion of termination for default provision in contract, but instead provide generally for inclusion of termination for convenience provisions, agency's negotiation of contract language, with offeror selected for award, providing for negotiation concerning obligations and liabilities in event of contract termination because of inadequate performance, did not provide awardee with unfair advantage, since language operates to Government's advantage rather than to contractor's.

3. Where agency determines no offeror can meet service commencement date, agency should have issued amendment relaxing requirement instead of accepting proposal not firmly offering to meet requirement. However, disturbing award is not warranted since deficiency did not result in prejudice.

Hawaiian Telephone Company (HTC) has protested the award of a contract for communication services to Western Union International, Inc. (WUI) by the Defense Commercial Communications Office (DECCO), Defense Communications Agency (DCA), Scott Air Force Base, Illinois. HTC asserts that WUI cannot and did not offer to comply with an essential technical performance requirement, that a favorable clause was written into WUI's contract which was not available to other competitors, and that WUI did not offer to meet and has not met the required service commencement date.

The procurement was initiated by TWX request for proposals (RFP) No. DCA 200-R-200 which solicited proposals to provide full period, full duplex, 1.544 megabit satellite communication circuits between the Continental United States and Hawaii. The proposal submitted by HTC was regarded as technically unacceptable. Award was made to WUI as the low acceptable offeror.

First, HTC argues that WUI did not offer to meet the RFP requirement for a 10-minute restoral time because it merely stated that it "intends" to comply with the requirement. HTC argues that

a statement of intention is not a contractually binding commitment. Second, HTC asserts that WUI cannot meet the requirement because it uses only one antenna and thus does not provide the redundancy HTC considers essential for meeting the requirement.

DECCO's position on this issue is set forth as follows:

" * * * In order to be responsive to the ten minute restoral requirement, a system must provide for replacement within ten minutes of all probable failure items. WUI's totally redundant system (with the exception of the antenna and waveguide) has this capability. When asked if they guaranteed the ten minute restoral time, WUI stated that their company 'intends to comply with the ten minute restoral time requirement except in the case of catastrophic failure.' * * * WUI stated that American Satellite Corporation, WUI's subcontractor, would control this service through continuous monitoring of the earth stations by their facility at Vernon, New Jersey. This continuous monitoring ability permits WUI to detect any degrading conditions in the signal path before these conditions could inhibit satisfactory performance. Should the service degrade to the point of unsatisfactory performance, WUI can automatically substitute the faulty portion of the earth station within seconds. Therefore, considering this restoral guarantee and WUI's responsiveness to the BER and 99% availability requirements contained in Sections 1.2, 4.1, and 4.2 of their proposal respectively, the technical evaluation team concluded that WUI met and exceeded the required performance specifications.

"Essentially everything except the passive antenna and waveguide is redundant and automatically switchable. There is nothing probable that would cause antenna/waveguide failure. Intentional damage, extremely high winds or earthquakes could damage an antenna/waveguide. In the event of such catastrophic failures severe damage to redundant antennas is probable unless they were separated by great distances in which case their effective redundancy becomes questionable.

"HTC invented a number of problems in the earth station auto tracking control that would prevent a ten minute restoral. WUI's system includes the Westar satellite which employs a Reaction Control System (RCS) which compensates for drift and maintains the spacecraft at its assigned orbital position (within ± 0.1 degree in latitude and inclination), and maintains altitude stability to better than ± 0.1 degree in response to commands from the ground. The thirteen meter antenna to be used by AMSAT has an average 0.4 degree beamwidth on receive and an average 0.27 degree beamwidth on transmit. Accordingly although AMSAT provides an auto tracking mode on their earth stations, they have disabled it when using Westar. The combination of Westar's stability and the design of the antenna enables AMSAT to maintain quality communications without auto track mode. This feature is included in the earth station only because future requirements may use a less stable satellite.

"HTC alleges that a transponder or satellite failure will prevent a ten minute restoral. Westar has not experienced any satellite or transponder problems since the launch of Westar I on 13 April 1974 and the complete loss of a satellite or transponder would be considered as a catastrophic failure. However, should a satellite fail AMSAT has the ability to slew the antenna to look at the backup satellite, Westar II, at a 0.13 degree/second rate. Thus, AMSAT has the ability to slew to Westar II in less than ten minutes (plus travel time for the maintenance man) since the two satellites are 67 degrees apart in space. We understand a tranponder loss is automatically switchable within ten minutes, although we have requested additional information on this point."

DECCO further states that the protester's interpretation of WUI's response regarding its intention to be bound to the 10-minute restoral requirement "is inconsistent with a reading of the whole contract."

HTC, in turn, points out that there is nothing else in the contract which could constitute a "guaranteed contractual commitment" and asserts that, despite DECCO's explanation, WUI could not

in all circumstances guarantee a 10-minute restoral time so long as it uses a single antenna and in fact does not claim to do so in cases of "catastrophic failure." In this regard, HTC states that while a system failure due to some catastrophe might be excusable, it does not agree that a complete satellite failure may properly be regarded as catastrophic. In HTC's view, a catastrophic failure is one involving an act of God such as an earthquake or high winds, but not one involving a physical, electrical or mechanical malfunction of an integral part of the WUI system. HTC further disagrees with DECCO's exclusion from the restoral time computation of the travel time needed by a maintenance man to reposition the antenna in case of a satellite failure.

The dispute over this issue appears to be one of degree: HTC asserts that offerors had to absolutely guarantee that they would provide a restoration time of not more than 10 minutes and that DECCO had to determine that it was technically feasible for offerors to meet the time limitation in every instance of system failure but those resulting from an act of God. DECCO, on the other hand, views the requirement as one going only to "probable failure items" and as one with which compliance is to be measured on the basis of reasonable probability rather than any absolute terms.

We find no basis for concluding that DECCO's approach is inconsistent with the RFP or was prejudicial to any offeror. We note that the 10-minute restoral time requirement does not arise from any detailed, elaborate specification provisions which might, when read in their entirety, suggest the interpretation argued for by HTC. The requirement results only from the following questions and answers which in effect were made a part of the RFP:

> --"Are there any further specifications * * * for * * * restoral time limitation? 10 minutes."
>
> --"What restoration time will be allowable for (a) the 1.544 MBPS service, * * *? A. Ten minutes."

We think DECCO could properly evaluate compliance with this requirement on the same basis as that used to evaluate many other offers to comply with Government technical requirements, that is, the reasonable likelihood that an offeror can and will meet them. See, e.g., RAI Research Corporation, B-184315, February 13, 1976, 76-1 CPD 99; PRC Computer Center, 55 Comp. Gen. 60 (1975), 75-2 CPD 35.

In this regard, we have held that in the absence of arbitrary acts, we will not disturb the purely technical judgments made by the procuring activities in the course of establishing specifications and determining compliance therewith, B-162403, February 2, 1968, since the overall determination of the relative merits of proposals is the responsibility of the contracting agency which must bear the major burden of any difficulties incurred by reasons of a defective evaluation. Training Corporation of America, Inc., B-181539, December 13, 1974, 74-2 CPD 337.

In the instant case, while HTC believes that WUI did not firmly commit itself to meeting the restoral time requirement and could not meet it in certain instances, DECCO, in the exercise of its good faith judgment in evaluating proposals, believes that WUI does intend to meet the requirement and that WUI can meet it in all but a few instances of failure which DECCO considers to be remote. We find nothing arbitrary or capricious with respect to this evaluation, and do not believe that it can be said that DECCO waived the requirement for WUI as asserted by HTC. Although "intent" is ordinarily defined as a goal, without any guarantee that the goal will be met, we think WUI's statement in this case must be read in the context in which it was made, and as such we believe the contracting officer could reasonably construe WUI's response as satisfying its requirement.

HTC also objects to the inclusion of "highly advantageous" language in paragraph 5 of the Communication Service Authorization (CSA) issued to WUI. (The award was made in the form of a CSA, which is not a contract by itself, but is written against a General Contract previously entered into by DCA and WUI. This General Contract, we are informed, is essentially a basic agreement. See Armed Services Procurement Regulation (ASPR) § 3-410.1.) Paragraph 5 states:

"5. Cancellation/Termination

Any failure by WUI to provide this service, as ordered, to maintain technical end-to-end sufficiency * * *, to maintain the DCA Standard of Performance for the periods specified in paragraph 8 and enclosure 5 to DCA-DECCO Instruction 300-70-5, dated 15 Nov. 73 may be basis for cancellation/termination and reaward of this service. In any such event, WUI will negotiate with DECCO concerning all remaining liabilities and obligations." /Underscoring supplied./

HTC contends that the underscored language promises "a complete 'bailout'" of WUI even if WUI fails to perform and that offerors were not treated equally since this provision was neither offered nor made available to HTC or other competitors. HTC further asserts that WUI's cost proposal was not properly evaluated because this provision was not taken into account.

The provision was written into the contract as a result of negotiations between DECCO and WUI. In response to the RFP requirement that cost proposals include a "/t/ermination liability amount and period, if applicable," WUI proposed a termination charge of $540,000 (less $9,000 for each month of service in which a recurring charge of $35,900 was paid) along with the following clause:

> "II D - Termination. In the event DCA terminates the contract after it is signed but prior to the service commencement date, DCA shall be liable to WUI for all costs incurred to date of termination plus a reasonable profit. Any termination by DCA after the service commencement date shall result in termination liability to DCA in accordance with the schedule set forth in the accompanying Pricing Section." (Emphasis supplied.)

DECCO believed this language to be in conflict with the WUI General Contract, which provides, in the event of contract cancellation or termination, for the reimbursement of nonrecoverable costs in accordance with applicable tariffs or, in the absence of an applicable tariff, in accordance with certain described "settlement procedures." DECCO, after the selection of WUI for award, issued a CSA with the following language:

> "Any failure by WUI to provide this service as ordered, to maintain technical to end sufficiency * * *, to maintain the DCA Standard of Performance for the periods specified in paragraph 8 and Enclosure 5 to DCA-DECCO Instruction 300-70-5, dated 15 November 1973, may be the basis for cancellation/ termination and reaward of this service at no cost to the Government."

WUI refused to accept that language and shortly thereafter DECCO and WUI agreed to the compromise language that "WUI will negotiate with DECCO concerning all remaining liabilities and obligations."

The "reasonable profit" language of WUI's proposed section II D was also changed to "any reasonable profit charged by WUI's suppliers."

We are of the opinion that the underscored language of paragraph 5 did not afford WUI an unfair competitive advantage. We base that conclusion on the fact that paragraph 5 is not contrary to any provisions of the RFP or of the General Contracts held by the competing offerors or to any applicable regulations and thus does not represent a change in the "ground rules" of the procurement. Compare Union Carbide Corporation, 55 Comp. Gen. 802 (1976), 76-1 CPD 134. We note that the ASPR provisions applicable to contracts entered into with communications common carriers do not provide for a termination for default clause. See ASPR § 7-1700 et seq. Rather, ASPR § 7-1702.12 provides only for the inclusion of the clause set forth therein captioned "Cancellation or Termination of Orders - Common Carriers", and ASPR § 22-1002 defines "cancellation" as "the discontinuance of a requirement subsequent to the placing of an order but prior to initiation of service" and "termination" as "the discontinuance of a service for the convenience of the Government after the service has been initiated." DECCO did include by reference in the RFP the "Reaward" provision of DCA-DECCO Instruction 300-70-5, November 15, 1973, entitled DECCO International Leasing Procedures, but that provided only for termination and reaward in the event that one or more circuits did not meet DCA's "Standard of Performance" over an extended period of time. The reaward provision, moreover, does not deal with the cost consequences of a termination in such circumstances; rather, it is concerned essentially with reaward procedures (such as when reaward would be appropriate without competitive bidding).

It appears, therefore, that the RFP, the General Contract, and the DECCO standard provisions all contemplate termination for the convenience of (and with possible costs to) the Government regardless of whether the reason for termination arises out of changed Government needs or inadequate performance by a contractor. Furthermore, in this regard, we note DECCO's statement that the language it used in the CSA originally issued to WUI represented "the first time the 'no cost' termination language was given to a carrier." In light of these circumstances, we fail to perceive how WUI's competitors could have been prejudiced by the inclusion in WUI's contract of the challenged language. Rather than giving WUI an advantage, it appears to give to the Government a right it otherwise would not have--the right to negotiate a termination settlement with WUI that could result in no cost to the Government

or at least less cost than might otherwise be the case. In other words, the compromise language incorporated into the contract gives to WUI a clause more advantageous than that proposed by DECCO but potentially less advantageous than the cancellation/ termination provisions contemplated by the RFP. Accordingly, we fail to see how the negotiation of paragraph 5 of the CSA after the selection of WUI for award in accordance with the evaluation criteria provided WUI with any advantage not afforded other offerors.

With regard to the cost evaluation, the RFP provided for evaluation of proposals on the basis of the total discounted life cycle costs over a 5-year period. There was no provision for taking into account termination costs that might be incurred in the event of a termination in less than 5 years from the date of award, and in view of the speculative nature of such costs we think such a provision would have been questionable. Therefore, since under WUI's proposal a termination at the end of 5 years would result in no charge to the Government ($540,000-/$9,000 X 60 months/), the evaluation based on a 5-year contract term properly did not take into account any cost liability to the Government resulting from an early termination.

Finally, HTC contends that WUI did not offer to meet the January 3, 1977, service commencement date. In its proposal, WUI stated that it would "make its best effort to meet the tentative service date specified * * * dependent upon the timely grant by the FCC of requisite permits and authorizations. We will require approximately 60 days from date of grant by the FCC of Construction Permits in order to install and test the earth stations and related facilities." Nonetheless, the CSA specifies that "/t/he Government's required service date is 3 January 1977."

DECCO does not now contend that WUI's proposal constituted a firm commitment to the January 3 date. However, DECCO explains the acceptability of WUI's offer with regard to the service date as follows:

> "* * * no carrier could meet both the performance specifications and the initial service date. This is because every proposal provided for some special construction, requiring FCC approvals. In light of the requirement for construction permits, WUI's response to the service date (60 days after approval) was realistic and as responsive as the other offerors."

The general rule is that a firm delivery or service commencement date set forth in a solicitation is a material requirement, precluding acceptance of any proposal not offering to meet that date. See, e.g., DPF Incorporated, B-180292, June 5, 1974, 74-1 CPD 303. Here, once DECCO discovered that it could not realistically insist on the January 3 date, although that apparently remained the desired date, it should have amended the RFP to relax the service date requirement, see ASPR § § 3-505(a) and 3-805.4, and awarded a contract on that basis. What was done here was technically improper because award was made on the basis of a requirement that the awardee did not strictly offer to meet.

Under the circumstances of this case, however, this does not provide a basis for disturbing the award. The record shows that none of the three technically acceptable offerors proposed to meet the January 3 date; they therefore could not have been materially prejudiced by DECCO's acceptance of the WUI proposal. Furthermore, while the protester asserts that it could have met that date (and indeed offered to do so), its proposal was technically unacceptable for other reasons so that it too cannot successfully assert prejudice here.

The protest is denied.

R. F. Keller

Deputy Comptroller General
of the United States