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A. K. McKinzie
Proc I

DECISION

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

FILE: B-190273 DATE: February 9, 1978

MATTER OF: Transcomm Inc.

DIGEST:

In regard to rejection of offer to provide expert witness services on basis of unacceptable impeachment risk--matter of judgment in which agency's determination is entitled to considerable weight--protester's disagreement with agency over its role in prior administrative proceeding does not show agency's judgment concerning impeachment risk clearly had no reasonable basis. However, GAO agrees with agency that future solicitations should contain specific provision to deal with problem.

This is our decision on a protest by Transcomm Inc. concerning the award of a contract to Technical Associates, Inc. (TAI), under request for quotations (RFQ) No. DCA100-77-Q-0096, issued by the Defense Communications Agency (DCA). DCA awarded the contract to obtain assistance in a case pending before the Federal Communications Commission (FCC) involving American Telephone and Telegraph Company (AT&T) rates. The contractor, among other things, is to perform an economic analysis of AT&T's case, prepare testimony, and appear as a witness on behalf of the Department of Defense (DOD).

Six prospective offerors were solicited. Offers submitted by Transcomm, TAI and another offeror were determined, in DCA's words, to be "responsive."

However, DCA determined there was an unacceptable risk that Transcomm could be impeached as an expert witness in the FCC proceedings because of Transcomm's role in a prior FCC case. DCA states that in the earlier case Transcomm filed an affidavit and an evaluation of an AT&T filing which

took a position on issues directly contrary to the DOD position. Moreover, the agency believed that the present case involves similar issues. DCA believed that impeachment of its expert witness would have a devastating effect on its current FCC case, which involves "$4.5 million." DCA proceeded with an award to TAI, the next low offeror, after determining that TAI was not involved in any similar conflicting position with respect to past FCC cases.

The protester strongly disagrees with DCA's views. Primarily, Transcomm maintains that DCA has misinterpreted the relationship between a factual technical report which Transcomm prepared in the prior FCC case and the legal pleading submitted by the petitioner in that case, the Independent Data Communications Manufacturers Associations (IDCMA). The protester believes DCA has mistakenly equated the objective Transcomm technical report with the legal pleading filed by IDCMA. Transcomm therefore maintains it would not be in an impeachable position with regard to the present FCC proceedings and was unreasonably precluded from receiving the award.

It is not for our Office to evaluate the risk involved in whether Transcomm would be impeached; rather, the issue is whether DCA's conclusion that an unacceptable risk existed is clearly shown to have no reasonable basis. In view of the difficulties inherent in estimating such risks--involving the trial attorney's forecasting whether impeachment would be attempted, whether it could be successfully completed, and the overall effect on DOD's case--we believe that the agency's determination in this regard is entitled to great weight.

Transcomm's position is apparently based on the contention that because it was not offering legal conclusions in the prior FCC case, it is not now subject to impeachment. However, to our knowledge the possibility of impeachment does not turn solely

on a witness's having previously asserted certain legal conclusions. Impeachment might be attempted simply on the basis of a witness's prior inconsistent statements, or on other grounds. Moreover, while Transcomm disputes DCA's characterization of its role in the prior FCC case, it does not contest DCA's factual description of the circumstances involved--i.e., that IDCMA (the party assisted by Transcomm) and DOD took contrary positions on, among other things, the issue regarding AT&T's rate of return. In the judgment of the DCA trial attorney, the present case--though it concerns different AT&T rates--involves a similar issue, the proper rate of return.

In these circumstances, we are unable to conclude that DCA's position has been clearly shown to have no reasonable basis. We note that DCA does, however, appear to concede that the RFQ could have been better written. DCA states that as the impeachment problem encountered here was a case of first impression for the agency, the RFQ did not include any specific provision for dealing with it.

In this regard, we see no basis for objection to the agency's view that cancellation of the RFQ and a resolicitation including a specific provision addressing this problem was not practicable in the circumstances. DCA states that resolicitation would have been a useless act since the agency already knew the relative positions of the responsive offerors on this issue, and there was also an element of urgency involved. This case, thus, represents the type of situation where even if the solicitation had been structured in a manner the protester now asserts would have been more desirable, the protester would not in any event have been eligible for award. See Cemsco, Inc., B-180335, June 3, 1974, 74-1 CPD 295.

We note for the record that CR has stated its future solicitations for this type service will contain a specific statement, tailored to the individual procurement in question, calling attention to the fact that award will not be made to a firm which has recently and substantially taken a position upholding a point point of view conflicting with the position the DOD trial staff must represent. We believe this is a desirable step.

The protest is denied.

Deputy Comptroller General
of the United States