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**DECISION**



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

FILE: B-194580

DATE: July 31, 1979

MATTER OF: St. Joseph Telephone &  
Telegraph Company

DLG 02436

**DIGEST:**

1. Allegation that agency's proposed purchase of telephone equipment is contrary to Office of Management and Budget (OMB) Circular A-76, Office of Telecommunications Policy (OTP) Circular No. 13 and Department of Defense Directive 4100.15 is not for consideration under GAO Bid Protest Procedures because determination is matter of Executive policy.
2. Agency's determination to purchase telephone equipment and not to consider lease of equipment is not unduly restrictive of competition where Government ownership and maintenance is necessary in case of natural disaster (flood conditions) or national emergency.

St. Joseph Telephone & Telegraph Company (St. Joseph) protests any award of a contract under invitation for bids (IFB) DACW01-79-B-0085, issued by the Corps of Engineers. The IFB requested bids for the purchase of a Private Automatic Branch Exchange (PABX) Telephone System for the Jim Woodruff Powerhouse, Florida. Bid opening has been postponed pending resolution of this protest.

St. Joseph maintains that the IFB unduly restricts competition by excluding firms, like itself, which would offer to lease and maintain, rather than sell, the equipment to the Corps. St. Joseph also contends that the Corps' determination to buy the equipment (Corps ownership) is inconsistent with the policy requirements of Office of Management and Budget (OMB) Circular A-76, Department of Defense (DOD) Directive 4100.15, and Office of Telecommunications Policy (OTP) Circular No. 13. For the following reasons we dismiss the objection based on the policy requirements of the referenced circulars and directive and deny the remainder of the protest.

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[ALLEGATION THAT IFB Unduly  
RESTRICTS COMPETITION]

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OMB Circular A-76, DOD Directive 4100.15 and OTP Circular No. 13 establish Government policy outlining when the Government should rely on the private sector to provide supplies and services which the Government might otherwise provide itself. In this connection, the Corps argues that this case falls within an enumerated exception to OMB Circular A-76 which mandates that "Government functions" such as the regulation of "navigable rivers and other natural resources" must be performed by Government personnel. We have repeatedly held that determinations made under these authorities, such as, to operate and maintain equipment with Government personnel, are matters of Executive policy which are outside the scope of the bid protest decision-making process. Rand Information Systems, B-192608, September 11, 1978, 78-2 CPD 189. This portion of the protest, therefore, is dismissed.

We will consider, however, whether the IFB limiting the procurement to purchase of equipment was unduly restrictive. See General Telephone Company of California (GTC), B-189430, July 6, 1978, 78-2 CPD 9. While the Corps is required to secure the maximum practicable competition on its procurements, the determination of its minimum needs and the methods of accommodating them are matters for the Corps, and are not subject to legal objection by this Office unless the protester clearly shows that the agency's judgment is unreasonable and resulted in an undue restriction on competition. GTC, supra.

Here, the Corps determined that it was essential that the Government own rather than lease the equipment. The Corps explains that in times of national emergency or natural disaster (flood control periods), the Government must have exclusive access to and control over this facility and equipment because the facility will serve as a disaster control command post at such time. Therefore, the Corps specifically required that the bidder train Government personnel in the operation and maintenance of the equipment. The Corps advises that in a leasing situation, the Government would have no supervisory control over the lessor's employees and these employees might refuse to come to the facility. Although the operating facilities will be accessible to escorted non-Federal employees, under no

circumstances will non-Federal employees be permitted in the radio and microwave facilities. In this connection, the Corps states that if a non-Federal employee needed a Government escort, this would, especially in times of national emergency, take Government personnel away from other important duties. Therefore, the Corps requires Government personnel to operate and maintain the equipment.

The protester cites Peninsula Telephone and Telegraph Co., B-192171, March 14, 1979, 58 Comp. Gen.\_\_\_\_, 79-1 CPD 176 as controlling. In that case, the agency requested offers for the purchase of a new communications system. We held that a solicitation which did not permit consideration of offers to lease equipment needed for an entirely new system was unduly restrictive where the agency's determination to preclude a leasing arrangement was based solely on an earlier analysis of comparative cost to upgrade an existing system. We stated that:

"\* \* \* anticipated pricing may not be asserted as a defense to a restrictive specification where at least one offeror asserts that he can and will offer a lower price if permitted to do so."

Unlike the situation in Peninsula, the Corps does not rest its decision on an inconclusive comparative cost analysis of purchasing or leasing the equipment. Rather, the Corps relies on the need to maintain complete control over the facility and equipment in performing a Governmental function during times of national emergency and natural disaster.

We have previously held that an agency's desire to own rather than lease telephone equipment is not legally objectionable when it is based on a need to maintain a corps of Government personnel trained in the operation and maintenance of such equipment in case of an emergency (combat readiness). General Telephone Company of California, supra. St. Joseph proposes only to use its own personnel rather than allow Government personnel to maintain the system. Under the circumstances of this case, therefore, we must conclude that the Corps has a legitimate basis upon which to restrict this procurement to a purchase only procurement.

Although the protester states that it could meet the on-call maintenance and security requirements of the Corps, St. Joseph has not shown that the Corps' determination to purchase rather than lease the equipment based on its need to maintain complete control over the equipment including maintenance by Government personnel is unreasonable.

Precluding one or more potential offerors from a particular competition does not render the competition unduly restrictive if the specifications represent the legitimate needs of the Government. Memorex Corporation, B-187497, March 14, 1977, 77-1 CPD 187. We believe the agency has stated a reasonable basis for requiring direct control of the equipment.

The protest is denied.



Deputy Comptroller General  
of the United States