

DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES

WASHINGTON, D.C. 20548

80-2 CPD 225

X "But see" on 52 Comp. Gen. 215

FILE: B-197297

DATE: September 25, 1980

MATTER OF: New England Telephone and Telegraph
Company X

DIGEST:

1. Contention that protester was not given opportunity to respond to earlier protest is without merit since record shows that protester met with agency officials after prior protest was filed to discuss protest and protester's contract was not canceled until 2 weeks later.
2. GAO will not question agency decision to make award prior to resolution of protest where decision to do so was made in accordance with applicable regulations.
3. Upon discovery that protester's proposal did not meet mandatory RFP requirement, agency canceled contract erroneously awarded to protester. Protester contends, alternatively, that: (1) RFP requirement was ambiguous; (2) reevaluation using tariff prices for meeting disputed mandatory requirement would still result in award to protester. GAO concludes: (1) RFP requirement was not ambiguous; (2) original award should not have been made to protester.
4. GAO will not decide whether cancellation or termination for convenience was proper method to terminate contract improperly awarded to protester. Appropriate forum for deciding issue is agency board of contract appeals since the facts are in dispute.

PUBLISHED DECISION

59 Comp. Gen. 599 (1980)

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New England Telephone and Telegraph Company (NET) protests against the Internal Revenue Service's (IRS) cancellation of NET's contract (for the lease and maintenance of a Dimension 2000 Private Branch Exchange system at the IRS Service Center in Andover, Massachusetts) and subsequent award of a contract for this requirement to Rolm New England (Rolm)--the only other offeror.

The central issues in this protest are: (1) whether the IRS properly determined that the original award to NET was illegal and, therefore, subject to cancellation rather than termination for convenience; and (2) whether the work in question should have been resolicited rather than awarded to Rolm. For the reasons set forth below, we conclude that the IRS improperly awarded the original contract to NET. However, we do not believe it appropriate for us to decide the question of the correct method of ending NET's contract. We also conclude that the subsequent award to Rolm under this solicitation was proper and, therefore, resolicitation was not required here.

Background

Request for proposals (RFP) No. 79-3 was issued by the IRS on April 9, 1979. The RFP solicited proposals for the acquisition and maintenance of telephone systems for the IRS Service Center in Andover, Massachusetts, and for the IRS National Computer Center in Martinsburg, West Virginia, and stated that one or more contracts would be awarded. The successful offerors would be required to design, install, and maintain the telephone system at the designated IRS facility for a 10-year period. The solicitation indicated that firm-fixed-price contracts would be awarded for lease, lease-to-ownership, or outright purchase of the telephone system. The initial contract was to terminate on September 30, 1979, but since known requirements covered a 10-year period, the contract could be extended for as long as 120 months at the option of the IRS.

The RFP called for fixed prices for the initial contract period and for each option year, and proposals

were to be evaluated on the basis of firm-fixed prices for the total 10-year system's life. Preproposal conferences were held at the Martinsburg facility on May 4, 1979, and at the Andover facility on May 11, 1979. On September 27, 1979, contract No. TIR 79-106 was awarded to NET for the lease and maintenance of a Dimension 2000 Private Branch Exchange system to fulfill the Andover telephone requirement. The initial contract expired on September 30, 1979, and the contract option was exercised to extend the contract until September 30, 1980.

On December 13, 1979, the IRS received a letter from Rolm charging that "insufficient, inaccurate price information was submitted, and that improper equipment was offered" by NET and that there were inconsistencies between the contract awarded to NET and the requirements of the RFP. On December 28, 1979, Rolm filed a protest with our Office against the contract awarded to NET for the Andover telephone requirement. In its protest to us, Rolm alleged, among other things, that the award to NET had been improper because:

1. NET had proposed rotary dial instruments rather than tone dial (i.e., push button) instruments as required by the RFP. Also, NET's proposal omitted line charges for each tone instrument.
2. NET's proposal did not include multi-line equipment charges (specifically, line illumination charges) as required by the RFP.
3. NET had failed to disclose that, under its proposed two-tier rate structure, both maintenance charges (Tier B) and equipment charges (Tier A) could be increased during the 10-year period of the contract. Accordingly, these prices were not fixed as called for in the RFP.

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The IRS issued a "stop work" order to NET on January 2, 1980, while an analysis of Rolm's protest was undertaken. On January 4, 1980, the IRS held a meeting with representatives of NET and the American Telephone and Telegraph Company (AT&T) (NET's parent corporation) to discuss the protest allegations. Rolm's allegations were discussed and responses were elicited from NET's representatives. The award to NET was reexamined by the contracting officer in light of Rolm's protest and the responses given by NET at the January 4 meeting. Subsequently, the IRS concluded that the contract had been illegally awarded to NET.

By letter dated January 17, 1980, the contracting officer notified NET that its contract was canceled because of "material misrepresentations, mistakes and omissions" contained in NET's proposal. NET protested to our Office against the cancellation of its contract on January 28, 1980. On February 1, 1980, during the pendency of NET's protest, the IRS awarded a contract for acquisition and maintenance of a Dimension 2000 Private Branch Exchange system at the Andover facility in accordance with a lease-to-ownership plan proposed by Rolm in response to RFP 79-3. On February 11, 1980, Rolm withdrew its protest in our Office.

Procedures Attending Rolm Award

NET argues that the IRS never gave NET an opportunity to respond to the allegations raised by Rolm in its earlier protest. Instead, NET contends that the IRS simply adopted Rolm's unsubstantiated allegations and prematurely canceled NET's contract. Furthermore, NET argues that the award of a contract to Rolm prior to resolution of NET's protest by our Office was improper under our Bid Protest Procedures, 4 C.F.R. part 20 (1980), and section 1-2.407-8(b) of the Federal Procurement Regulations (FPR) (1964 ed. amend. 68).

Under section 20.3(a) ^{4 C.F.R.} of our Bid Protest Procedures and section 1-2.407-8(a)(3) of the FPR (1964 ed. amend. 139), parties having a clear interest in a protest should be notified by the contracting agency that a protest has been filed in our Office and given the bases therefor, so that they may have an opportunity to submit their

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views and any relevant information on the protest to the contracting officer and our Office. In the present case, the IRS convened a meeting with NET representatives on January 4, 1980, and discussed the bases of Rolm's protest with them. NET was given an opportunity to respond to Rolm's allegations at that meeting, and there is no indication that the IRS failed to furnish NET with the written materials concerning Rolm's protest. Since NET's contract was not canceled until January 17, NET had sufficient time to comment and submit any relevant documentation on the matter before cancellation was effected. Thus, the IRS complied with the policy goals of these provisions.

Regarding the award to Rolm during the pendency of NET's protest, FPR § 1-2.407-8(b)(4)(iii) (1964 ed. amend. 68) provides that an award may not be made prior to resolution of a written protest unless the contracting officer determines a prompt award will be advantageous to the Government. The contracting officer made such a determination on January 31, 1980, obtained approval at a higher level within the IRS, and notified our Office on February 1, 1980, of his intention to award to Rolm pending resolution of NET's protest in accordance with FPR § 1-2.407-8(b)(3) (1964 ed. amend. 68). Therefore, since the contracting officer acted in accordance with applicable regulations, the decision to proceed with award in spite of NET's protest is not subject to objection by our Office. Moreover, even if these procedural requirements were not met, the legality of the award to Rolm would not be affected. SAI Comsystems Corporation, B-196163, February 6, 1980, 80-1 CPD 100. Accordingly, this point of NET's protest is denied.

Propriety of Cancellation

Section "F" of the RFP contained the mandatory requirements for the phone system to be installed. In the solicitation as originally issued, offerors were given the option of providing either rotary dial instruments or tone dial instruments. Section F.2.13 of the RFP originally stated:

"Unless otherwise stated herein, provide tone or rotary dial switching equipment.

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and instruments, whichever is the least cost to the Government. If a rotary dial system is proposed, then unless otherwise stated herein, provide enough switching equipment to process calls from at least 20 lines equipped for tone dialing."

Amendment No. 1, issued May 23, 1979, "removed" the above provision and "inserted" new paragraph F.2.13 which reads:

"Provide tone switching equipment and instruments."

NET admits that it offered rotary dial instruments, but argues that the RFP did not specify that tone dial rather than rotary dial instruments were required. Specifically, NET contends that the RFP must be considered ambiguous as to a mandatory requirement for tone dialing because it did not contain the phrases "touch tone" or "tone dial."

There are admitted technical differences between rotary and tone instruments. Rotary instruments operate on an electrical impulse system while tone instruments operate through tone generated frequencies. All parties agree that tone instruments are more expensive than rotary instruments. Moreover, it is clear that the original and new paragraphs F.2.13 were to cover the same technical areas of the RFP; also, all offerors were aware that the original paragraph F.2.13 contained the phrase "tone dial."

Given these circumstances, we conclude that the wording of the amendment reasonably conveyed the IRS's intent that tone dial instruments were required and that rotary dial instruments would not be acceptable. Accordingly, the original award to NET was in error since that determination was based on the assumption that NET had, in fact, complied with the material RFP requirement concerning the mandatory use of tone dial instruments.

Further, we agree with the IRS's argument that it had no way of reasonably discovering the error prior to award since the error could have been discovered only by asking NET whether its proposed price

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covered tone dial instruments or by asking appropriate regulatory authorities for NET's tone dial prices. We agree that the IRS was under no duty to pursue these inquiries in light of the RFP requirement for tone dial instruments which reasonably led the IRS to assume that NET's price, in fact, covered these instruments.

When this award error became obvious in light of Rolm's protest, the IRS reevaluated the proposals using NET's tariff rates (as fixed under Massachusetts law) for tone dial instruments and related line charges. The IRS reports that, when NET's proposal price is increased for "tone dial corrections," Rolm rather than NET is the successful offeror under the RFP's award provision, which stated that price would count 80 percent of the award decision. NET's failure to comply with the tone dialing requirement, according to the IRS, lowered its proposed price by approximately \$62,000 over the projected 10-year life of the system. Considering the total evaluated proposed prices of Rolm (\$758,933) and NET (\$808,343) it is clear that the pricing effect of the tone charges was material and, as noted above, affects the relative standing of the offerors. NET has not challenged these calculations which were set forth in a May 22, 1980, IRS report, made available to NET. Accordingly, and recognizing that NET has the burden of showing that these calculations were erroneous, we conclude that the original award should have been made to Rolm.

NET argues that, even if the IRS improperly awarded NET's contract, the IRS could not legally cancel that contract rather than terminate it under the Termination for Convenience clause of the contract. Accordingly, NET contends that it is entitled to appropriate termination costs.

The Court of Claims has held that "the binding stamp of nullity" should be imposed only when the illegality is "plain" or "palpable." John Reiner & Co. v. United States, 325 F.2d 438, 440 (163 Ct. Cl. 381 (1963)).⁴ In determining whether an award is plainly or palpably illegal, we believe that if the award was made contrary to statutory or regulatory requirements because of some action or statement by the contractor, or if the contractor was on direct notice that the procedures

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being followed were violative of such requirements, then the award may be canceled without liability to the Government except to the extent recovery may be had on the basis of quantum meruit. On the other hand, if the contractor did not contribute to the mistake resulting in the award and was not on direct notice before award that the procedures being followed were wrong, the award should not be considered plainly or palpably illegal, and the contract may only be terminated for the convenience of the Government. See 52 Comp. Gen. 215, 218 (1972), and cases cited therein.

The IRS argues that the contract awarded to NET was plainly or palpably illegal under the Reiner standard. In support of its cancellation of the contract, the IRS argues that NET contributed to the erroneous award in several ways and that NET was on direct notice that the contract awarded was not in accordance with the RFP requirements.

The IRS alleges that NET submitted its proposal in bad faith, offering rotary dial instruments even though NET knew from the face of the solicitation that tone dial instruments were required. The IRS also argues that NET knew about the tone dialing requirement by means other than the RFP. IRS insists an NET representative and a representative of AT&T were informed at preproposal conferences that all references to rotary dialing had been eliminated and that tone dial instruments would be required. However, the NET representative states that he has no recollection of any such IRS statement and denies that any representative of AT&T informed him of the IRS requirement for tone dialing.

The IRS also argues that the contract should be viewed as void because of NET's failure to quote "line illumination charges" for the work. NET replies that it reasonably omitted these charges because the RFP did not stipulate the number of lines on which the charges were to be based (a prerequisite, in NET's view, for an informed price for these charges) but instead indicated that the "exact selection of equipment" would not take place until after award--thus suggesting that decisions as to the final number of lines and corresponding charges were to be postponed until after award. In reply, the IRS insists

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that NET should have submitted charges based on the assumption that "at a minimum, 270 lines would require line illumination and the associated charges."

The IRS also insists that NET improperly failed to inform the IRS that the company's Tier "A" (equipment charges) prices were subject to a unique escalation factor set forth under applicable Massachusetts tariff rates. The IRS notes that the RFP provided a common escalation factor for evaluation purposes only for Tier "B" (maintenance charges). Because NET knew that its Tier "A" prices were also subject to escalation, the IRS argues that NET should have informed the IRS of this fact so that an additional 7-percent pricing evaluation factor could have been added to NET's proposed price. The IRS insists that NET knew that the IRS was not aware of NET's Tier "A" escalation circumstance and that NET, therefore, because of its superior knowledge, had a duty to disclose this unique escalation factor. NET argues that it clearly informed the IRS in its proposal that it had to use a two-tier tariff plan under Massachusetts law and that, therefore, its prices were not truly "fixed" as required by the RFP. NET points out that, on September 27, 1979, the contracting officer signed a "Memorandum of Understanding" which recognized that NET's prices were subject to increase if mandated by appropriate regulatory agencies.

Conclusion

Ordinarily, the determination whether a contract should be terminated for the convenience of the Government is an administrative decision which rests with the contracting agency and is not subject to review by our Office. However, it is appropriate for us to review the validity of the procedures leading to award of the contract to the terminated contractor. See Electronic Associates, Inc., B-184412, February 10, 1976, 76-1 CPD 83, and cases cited therein. Accordingly, we have reviewed the procedures leading to the award to NET and, as indicated above, we find the award to have been made improperly. On the other hand, however, deciding whether cancellation or termination for convenience was the correct method to rectify the improper award here is a matter for resolution under the contract disputes procedures in this case.

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Even though we decided whether a contract had been properly canceled on the basis of illegality in 52 Comp. Gen. 215, *supra*, we do not think such a decision would be appropriate here. First, 52 Comp. Gen. 215 was decided before the enactment of the Contract Disputes Act of 1978, Pub. L. No. 95-563, 92 Stat. 2383, which gives NET the right to be heard on this issue by the agency board of contract appeals. Moreover, on this matter, in the present case, there is a factual dispute as to whether an NET representative was told at the preproposal conference that rotary dial instruments would not be accepted. We believe that the proper forum for resolving such factual disputes is the agency board of contract appeals.

That NET has a forum for resolving the propriety of the cancellation and this factual dispute is implicit in section 8(d) of the Contract Disputes Act of 1978 which reads: 41 USC 607

"* * * the agency board is authorized to grant any relief that would be available to a litigant asserting a contract claim in the Court of Claims."

As stated by the Armed Services Board of Contract Appeals in Starlite Services, Inc., ASBCA No. 22894, March 9, 1979, 79-1 BCA 13,743:

"* * * To the extent that the appellant seeks to recover for a breach attributable to defective specifications * * * the Board lacks jurisdiction to award such relief under an appeal filed prior to 1 March 1979. However, under the provisions of the Contract Disputes Act of 1978, P.L. 95-563, the Board has been vested with authority to render such latter relief with respect to claims filed or pending before a contracting officer on or after 1 March 1979."

Accordingly, we believe the issue of cancellation versus termination for convenience to be a contract administration problem, and thus, NET must be left to its remedy under the act for resolving the propriety of the cancellation.

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Resolicitation

NET argues that the IRS should have resolicited the work in question rather than making an award to Rolm once NET's contract ended. NET bases this argument on the controversies regarding line illumination charges and Tier "A" escalation. These controversies, NET asserts, raise "questions [as to] whether * * * IRS * * * [had] definite standards against which it could measure NET and the other bidder."

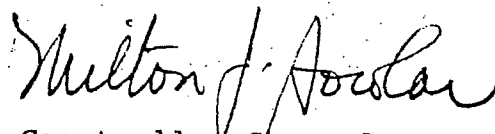
We cannot conclude that the IRS was required to resolicit in this circumstance. In an analogous area, we have held that an agency is not required to cancel an advertised solicitation merely because of defective specifications. See Hild Floor Machine Company, Inc., B-196419, February 19, 1980, 80-1 CPD 140, wherein we stated that cancellation of a defective IFB after bid opening may be inappropriate when award will serve the Government's actual needs and there is no showing of competitive prejudice. We see no reason why this reasoning should not apply here, even though the procurement was negotiated.

NET has not shown how it was prejudiced concerning the line illumination charges controversy since Rolm's evaluated price including these charges is lower, as noted above, than NET's evaluated price without these charges. However NET would price these charges--including even a "no-cost" for the service--would not affect the relative standing of the offerors. Also, we do not see how NET could have been prejudiced concerning the Tier "A" escalation controversy since the IRS evaluated (as shown in the IRS's May 22 report) NET's proposal based on the Tier "A" price proposed by NET without taking into account possible future Tier "A" increases. Moreover, it is clear that the award to Rolm is serving the Government's actual needs since all required, priced services are being furnished. Therefore, we conclude that the IRS was not required to resolicit the services in question.

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The protest is denied in part and dismissed in part.

A handwritten signature in cursive script, reading "Milton J. Fowler".

For the Comptroller General
of the United States