Protest of	)	Date: July 15, 1991
	)	
U.S. SPRINT COMMUNICATIONS COMPANY	)	
	)	
Contract No. EAPA-00637-B5	)	P S. Protest No. 91-27

DECISION

U.S. Sprint Communications Company ("U.S. Sprint") timely protests the two year extension of a contract to American Telephone and Telegraph Communication, Inc. ("AT&T") to supply operator-assisted ("0+") telephone service to Postal Service pay phones located in the Eastern Region. The protester alleges that the two year extension of the AT&T contract violates postal regulations concerning noncompetitive procurements.

On April 13, 1989, the Eastern Procurement and Material Management Service Center entered into a two-year agreement with AT&T to provide 0+ dialed calls from already existing pay telephones located on postal premises in the Eastern Region.[1/] In that agreement, AT&T agreed to pay the Postal Service a commission of 16%, with a 4% bonus, on all collect, credit card and billed to a third number calls made from the postal pay phones listed in an attachment. That agreement had no provision for an extension of its term.

On February 25, 1991, a U.S. Sprint representative met with a Postal Service communications specialist to discuss U.S. Sprint's interest in providing non operator assisted ("1+") phone calls to the Postal Service. During the meeting, the U.S. Sprint representative was informed that the AT&T agreement for 0+ calling service was expiring soon. On April 4, 1991, MCI submitted an unsolicited proposal to provide 0+ pay phone long distance service for 21% on a month to month basis. AT&T offered a two year extension of its existing contract at a commission rate of 18.4%, plus a 10% bonus.

The MCI and AT&T proposals were evaluated by the Postal Service communications specialist and the results were adopted by the contracting officer. AT&T's proposal was rated as giving the Postal Service the best commission, so the Postal Service signed an "amendment" for two years to the original two-year contract with AT&T on April 16, 1991. AT&T signed the amendment on April 24. This amendment, like the original agreement, was an AT&T drafted document. No written notification was given to MCI or U.S. Sprint concerning the signing of this amendment.[1/]

U.S. Sprint, through counsel, alleges that during a meeting held on May 1, 1991, one of

[1/] This document was drafted by AT&T and agreed to by the Postal Service.

[2/] MCI alleges that it learned of the two-year extension of AT&T's contract through a conversation with a regional telecommunications specialist after it had submitted its proposal.

its representatives met with a Postal Service communications specialist and was informed that since the Postal Service had had insufficient time to procure competitively 0+ telephone service for approximately 2000 pay phones, it had instead renegotiated a new two-year agreement with AT&T sometime in April, 1991. The protester argues that this renegotiation is in violation of the Postal Service's regulations which require competitive procurements. Further, U.S. Sprint states that the procurement at issue does not fall within any of the exceptions to full and open competition listed in Section 3 of Chapter 4 of the Procurement Manual ("PM"). U.S. Sprint requests that the AT&T contract be terminated and a new competitive procurement be conducted for this requirement.

The contracting officer, in his statement, begins by stating that to his knowledge, agreements for 1+ or 0+ long distance services for our pay telephones have never been formally advertised. Instead, he states that Section 362.6 of the Administrative Support Manual ("ASM") gives Field Office Managers the authority to enter into agreements for the installation of pay telephones.

The contracting officer reports that the initial 1989 AT&T agreement originated from a decision by the field division controllers in the Eastern Region that a single agreement for 0+ dialed calls for the already existing pay phones in that region would be advantageous. The controllers then requested that the procurement office select a long distance carrier for pay phones located on postal premises. The contracting officer states that he then signed a two-year agreement with AT&T on April 13, 1989 to provide 0+ long distance service for pay telephones in the Eastern Region. The basis for this selection was AT&T's commission rates, billing accuracy, payment of commissions, and estimated revenue.

The contracting officer explains that AT&T's proposal was again selected because it gave a higher overall commission than MCI, based upon the fact that AT&T paid commissions on its own calling cards and that AT&T is the 4th largest credit card issuer in the

United States. According to the contracting officer, since 56.8% of the commission revenue received over the past two years from these pay phones was the result of credit calling cards, the Postal Service would receive more commission by selecting AT&T's proposal at an average annual commission rate of 20.5% (18.4% plus a 10% bonus) than by choosing MCI's proposal, which offered a seemingly higher commission rate of 21%. Finally, the report states that due to the recent move of the regional office, the procurement office failed to realize that the two year AT&T agreement was about to expire until March 11, which necessitated the recent award to AT&T.

MCI, through counsel, comments that the contracting officer's decision and procurement methods in awarding a two-year contract to AT&T violate the PM. MCI argues that the contracting officer failed to use required advance planning per PM 2.1.1. and 2.1.3,[1/]

[3/] PM 2.1.1 a. reads: "Procurement planning, including market research, must be done to ensure that the Postal Service's needs are met in the most effective, economical, and timely manner. The detail and formality of the planning process will vary with the cost and complexity of the requirement."

PM 2.1.3 a. states: 'Requisitioners normally should plan their purchasing requirements on a fiscal year basis, as part of developing budgets."

failed to solicit information from bidders on an equal basis, which resulted in an unfair price analysis, and failed to utilize the preferred method of contracting, a written solicitation.[1/] MCI alleges that these PM violations resulted in the Postal Service entering into an agreement for these services which does not meet its needs in the most effective and economical manner.

MCI adds that the 21% commission rate it proposed was based upon an understanding that the contracting officer sought a month-tomonth agreement with no extended term commitment. MCI offers an affidavit from its National Account Branch Manager which states
that had the Postal Service issued a request for proposals with a one or two-year commitment, MCI would have offered an even higher
commission rate. MCI views this offer as proof that the procurement method utilized by the contracting officer did not result in the highest commission rate for the Postal Service. MCI adds that PM 1.7.1[1/] requires that appropriate competitive procedures be utilized to insure adequate price competition. MCI concludes with a request that AT&T's contract be terminated and a full competition held for this requirement. MCI argues that the standard[1/] used by our office for determining whether to terminate a contract has been met.

MCI, at its conference, remarked that it initially thought the 1991 AT&T agreement was an interim one until a full competition could be held and a new award made. MCI reiterated that procurement procedures were not followed and that the AT&T agreement does not adhere to the regulations which require competitive procurements. MCI notes that other Postal Service regions which use AT&T for its 0+ carrier have obtained a much higher commission than 20.5%. MCI also stated that it does pay commissions to its pay phone customers on regional AT&T calling cards.

In later comments, MCI emphasizes that the pay phone services at issue here are services which should be procured competitively. It adds that there is nothing in the PM that excludes such services from being procured competitively. MCI lists a Comptroller General decision and several Postal Service protest decisions to support its argument that this type of service should be procured competitively.[1/] MCI reiterates its request for

[4/] MCI points to PM 4.2.2 b.1., which states that "[b]ecause written solicitations provide a clearer understanding of the requirement, they should be used whenever practicable."

[5/] PM 1.7.1 a. states that "[p]urchases must be made on the basis of adequate competition whenever feasible."

[6/] "[W]hether to require termination of the contract 'depends on consideration of such factors as the seriousness of the procurement deficiency, the degree of prejudice to unsuccessful offerors or to the integrity of the competitive procurement system, the good faith of the parties, the extent of performance, the cost to the Government, the urgency of the requirement, and the impact of termination on the accomplishment of the agency's mission'". Cummins-Allison Corporation, P.S. Protest No. 91-18, June 4, 1991, quoting Inforex Corporation, et al., P.S. Protest No. 78-12, June 26, 1978.

[7/] MCI cited New York Telephone Co., et al, B-236023, B-236097, 69 Com. Gen. 61 (1989), Denis Copy Company, P.S. Protest No. 90-61, November 26, 1990, E-Z Copy, Inc., P.S. Protest Nos. 89-63, 89-64, 89-68, September 28, 1989 and Canteen Service, Inc., P.S. Protest No. 90-68, November 15, 1990.

termination of the AT&T contract and recompetition with all offerors supplied with the same criteria for award.

U.S. Sprint also comments on the contracting officer's statement. The protester, like MCI, alleges that the contracting officer was required, per the PM, to use competitive procedures to award the AT&T contract. U.S. Sprint points out that the contracting officer's statement failed to establish any of the reasons listed in PM 4.3.1 and 2 for exclusions to the general rule of competitive procurements. It adds that the PM requires that all noncompetitive procurements must be justified in writing and approved in accordance with Management Instruction AS-710-89-8. The protester calls the AT&T agreement a "sole-source award."

In addition, U.S. Sprint discounts the contracting officer's reliance upon ASM '362.6, arguing that that section deals with the installation of pay phones, not with providing long distance service to postal owned or leased pay phones. The protester also disagrees with the contracting officer's remark that he did not have time to procure competitively, since it contends that it was notified of the expiration of the AT&T agreement by the communications specialist during its February 25 meeting. Lastly, U.S. Sprint alleges that the contracting officer's evaluation of the two proposals it did receive was flawed since MCI's proposal was based on a month to month basis and AT&T offered a commission based upon a two-year agreement. U.S. Sprint asks this office to direct the contracting officer to procure this service competitively and terminate the sole-source award to AT&T.

The contracting officer responds to U.S. Sprint's comments by stating that the selection of the carrier for 0+ dialing from postal pay phones has always been made utilizing a competitive procurement process. The contracting officer states that even though a formal solicitation was not issued, this was not a noncompetitive procurement.

The contracting officer adds that the telecommunications branch attempted to evaluate the AT&T and MCI proposals and that the AT&T selection was based upon the best overall return to the Postal Service. The contracting officer ends his response by arguing that since no procurement regulations have been violated in acquiring this service, the protest should be denied.

Discussion

The first issue here is what, exactly, is being procured. The contracting officer initially points to ASM '362.6 for guidance on the procedures for purchase of the item that is the subject of this protest. That section, however, is inapplicable to this procurement because it concerns the buying or leasing of the actual pay phone itself. The AT&T agreement at issue here was for the provision of operated assisted long distance telephone service for already existing postal owned or leased pay phones.[1/]

Since the ASM does not provide guidance on the purchase of this item, the PM is the controlling regulation.

[8/] This service is exactly analogous to the coin-operated photocopier contracts solicited and awarded competitively using structured contracting procedures. See PM 8.6.1; Handbook AS- 707E, Contracting for Coin-Operated Photocopiers, November 1990. In the coin-operated photocopier solicitations, award is given to the contractor offering the highest commission to the Postal Service.

PM 1.7.1 a. states that "[p]urchases must be made on the basis of adequate competition whenever feasible." That rule is modified by PM 4.3.1 b. which states that "noncompetitive purchasing methods may be used only when competitive purchasing is not feasible or appropriate." Section c. of 4.3.1 lists thirteen exceptions to the rule of competitive purchasing. PM 4.3.2 6.b. further states that "[e]very noncompetitive purchase must be justified in writing and approved in accordance with Management Instruction AS-710-89-8."

The purchase of 0+ telephone services for pay phones is not one of the thirteen exceptions listed in 4.3.1 c. Moreover, since there does not appear to be a noncompetitive purchase justification and approval in the file, this service should have been acquired using a competitive purchasing procedure. Although the contracting officer contradicts himself by stating in his latest comments that this service was procured competitively, we find that it was not.

Clearly, this was not a competitive procurement. For instance, no solicitation, either written or oral, was issued to prospective offerors in this procurement. Even the use of a simplified purchasing process entails giving all offerors the same information concerning the requirement. That was not done here. Instead, the contracting officer made a de facto sole-source award to AT&T.

Sole-source awards (formally called noncompetitive purchasing in the PM) and the justification for their use are described in PM 4.3.2. Sole-source procurements, while subject to close scrutiny, will be upheld if there is a rational or reasonable basis for them. For example:

> [N]oncompetitive awards may be made where the minimum needs of an agency can be satisfied only by items or services which are unique; where time is of the essence and only one known source can meet the agency's needs within the required time frame; where data is unavailable for competitive procurement; or where only a single source can provide an item which must be compatible and interchangeable with existing equipment. . . . In addition, noncompetitive awards may be made where the minimum needs of an agency can be satisfied by only one firm which reasonably could be expected to produce the required item within the required time frame without undue technical risk. (Citations omitted).

Chase Econometrics/Interactive Data Corporation, P.S. Protest No. 83-73, April 27, 1984.

In the particular circumstances set forth in this case, the contracting officer has failed to offer a reasonable basis for the sole-source contract to AT&T. He was aware of the upcoming end to the previous AT&T contract, yet chose to accept a two-year extension of the contract rather than compete the service among possible vendors.[1/] Since his

[9/] There does not appear to be any dispute as to whether MCI or U.S. Sprint would be capable of providing the required service.

decision was not in accordance with applicable regulatory provisions and is not grounded upon a reasonable basis, the two-year extension of AT&T's contract was improper and the protest is sustained.

We now turn to the relief available. There may have been a basis for a temporary extension of AT&T's contract while a competitive procurement of these services was issued and awarded. See Chase Econometrics/Interactive Data Corporation, supra. However, the two-year period that AT&T's contract was extended here goes far beyond whatever temporary period may have been appropriate. Therefore, we direct the contracting officer to issue a competitive solicitation for the provision of 0+ telephone services and to award a contract to the offeror whose offer is most advantageous to the Postal Service, in accordance with the evaluation criteria set forth in the solicitation. If AT&T is the successful offeror, the resulting award will replace the existing AT&T contract; if another offeror is successful, AT&T's contract should be terminated when the new contract begins. The present AT&T contract may continue until the above competition is completed.

The protest is sustained to the extent indicated.

[Signed]

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[Compared to original 5/15/95 WJJ]