



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: LDDS Worldcom

File: B-270109

Date: February 6, 1996

J. Randolph MacPherson, Esq., Sullivan & Worcester, for the protester.
Michael D. Rigg, Esq., Department of the Navy, for the agency.
David A. Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Protest against terms of solicitation for license to furnish personal, unofficial telecommunications services to service members is dismissed where solicitation was issued by a nonappropriated fund instrumentality (NAFI) and there is no showing that in conducting the procurement the NAFI was acting as a conduit for the agency in order to circumvent applicable procurement statutes; GAO's bid protest jurisdiction is limited to procurements by federal agencies, and NAFIs do not meet the statutory definition of federal agencies.

DECISION

LDDS Worldcom protests the terms of request for proposals No. NNA250-95-R-0025, issued by the Navy Exchange Service Command (NEXCOM) for personal, unofficial telecommunications services. LDDS argues that NEXCOM, a Morale, Welfare and Recreation (MWR) activity and a nonappropriated fund instrumentality (NAFI), is seeking to use the solicitation to procure improvements to, and the renovation or repair of, government-owned property, thereby improperly augmenting the Navy's appropriation; according to the protester, the solicited work amounts to military construction services that should be procured by a federal agency with appropriated funds, under the Federal Acquisition Regulation (FAR) and the Defense Federal Acquisition Regulation Supplement (DFARS).

We dismiss the protest.

The solicitation contemplated the award of a non-exclusive, revocable license for a base period of 10 years with 5 option years to furnish personal, unofficial telecommunications services to service members at more than 320 Navy, Marine Corps, and Coast Guard installations. The services to be furnished include bachelor quarters in-room phone service, Navy Lodge in-room phone service, pay phone service, affinity long distance service, over-the-counter and vended prepaid debit

cards, long distance phone centers, military calling card services, and brig/confinement facility pay phone service.

The solicitation generally contemplated that the licensee at its own expense would furnish and install any necessary equipment and facilities, furnish the required services, and pay certain required license fees; the licensee would recover its costs through service charges paid by the service members and other users over the life of the license. Specifically, the solicitation required the licensee to pay an up-front license fee, propose percentage commissions, and guarantee payment of the higher of the proposed commissions or specified minimum monthly commissions. In addition, the solicitation required the licensee to "provide, service, and maintain all equipment, supplies, cabling, wiring, switches, hardware and connectivity required to supply the personal telecommunications services required by this licensing agreement." The solicitation generally provided that:

"the equipment and services required herein will be provided at no cost to [NEXCOM] or the other military activities covered by this solicitation. Consequently, unless this solicitation specifically states otherwise, all charges for the provision of the equipment, including installation and maintenance, and services required herein . . . shall be the responsibility of the successful offeror."

The solicitation specifically provided that "[t]he Licensee shall be responsible for all costs of design, wiring, cable, jacks, software, equipment and installation necessary to provide the services required under this license agreement." The solicitation further provided that:

"[e]xcept as otherwise specifically stated in the body of this agreement, title to all property and materials provided by or on behalf of the Licensee, to include without limitation, switches, wiring, cable, jacks, software, facilities or equipment, shall remain in the licensee throughout the period of the agreement. When the agreement ends, whether by termination, revocation, or at the expiration of the initial term and any authorized extension periods, title to all said property and materials shall automatically vest in the government, unless the Contracting Officer in the sole exercise of discretion shall direct otherwise."

LDDS argues that installing the cabling, wiring and other equipment that will be necessary in order to provide the required personal telecommunications services--the cost of which LDDS estimates to be more than \$120 million--amounts to a renovation or upgrade of government-owned troop housing facilities and thus comes within the statutory definition of military construction, that is, "any construction, development, conversion, or extension of any kind carried out with respect to a

military installation." 10 U.S.C. § 2801(a) (1994). According to the protester, such work therefore must be authorized by law, included in an appropriation, and obtained through an acquisition conducted under the FAR and the DFARS. See 63 Comp. Gen. 422 (1984) (military construction activities, as a general rule, must be financed from funds specifically appropriated therefor); but cf. 10 U.S.C. § 2805(c)(1) (minor military construction).¹

The statutory authority of this Office to decide bid protests of procurement actions is set forth in the Competition in Contracting Act (CICA), 31 U.S.C. § 3551 et seq. (1994). CICA defines a protest as a written objection by an interested party to a solicitation by a federal agency for the procurement of property or services, or a written objection by an interested party to the award or proposed award of a contract. 31 U.S.C. § 3551(1).

Since the passage of CICA, our bid protest jurisdiction has not been based on the expenditure of appropriated funds or on the existence of some direct benefit to the government. Americable Int'l, Inc., B-251614; B-251615, Apr. 20, 1993, 93-1 CPD ¶ 336. Instead, our threshold jurisdictional concern is whether the procurement at issue is being conducted by a federal agency. Id.

In limiting our jurisdiction to procurements by federal agencies, CICA adopted the definition of that term set forth in the Federal Property and Administrative Services Act of 1949, now codified at 40 U.S.C. § 472 (1994). 31 U.S.C. § 3551(3). As defined therein, an executive branch federal agency includes any executive department or independent establishment, including wholly-owned government corporations. NAFIs, such as NEXCOM, do not meet the statutory definition of federal agencies; although NAFIs are government instrumentalities and are generally recognized as being associated with and generally supervised by their respective government entities, NAFIs operate without appropriated funds and are not themselves federal agencies. Military Equip. Corp. of Am., B-253708, June 11, 1993, 93-1 CPD ¶ 455; University Research Corp., B-228895, Dec. 29, 1987, 87-2 CPD ¶ 636. As such, NAFIs are beyond our bid protest jurisdiction and, consequently, we generally will not review procurements conducted by these entities.

One issue we will consider is whether a NAFI, in conducting a procurement, was acting as a conduit for the federal agency in order to circumvent applicable procurement statutes. See generally Compugen, Ltd., B-261769, Sept. 5, 1995, 95-2 CPD ¶ 103; Premiere Vending, B-256560, July 5, 1994, 94-2 CPD ¶ 8; Americable Int'l, Inc., supra. This is not the case here; there is no evidence that NEXCOM is

¹Although LDDS filed its protest prior to the closing date for receipt of initial proposals, NEXCOM proceeded with the competition and ultimately selected another firm for award of a license.

acting as an agent of the Navy to circumvent the procurement statutes. First, the essential purpose of this procurement is to procure personal, unofficial telecommunications services for service members. The record indicates that, as a general matter, the provision of personal, unofficial telecommunications services is arranged by the installation MWR office, billeting fund, or similar NAFL. Indeed, appropriations of an agency are available to pay charges for a long distance call only if necessary for official business. See 31 U.S.C. § 1348(b). Second, LDDS has made no showing of significant and pervasive Navy participation in the selection of the successful licensee which might suggest an agency situation. See Americable Int'l, Inc., supra. Finally, while the Navy (and other military services) may benefit to some extent from the wiring and cabling of some buildings by the licensee, we think any such benefit is only relatively incidental to the fundamental purpose of this procurement—that is, to provide personal, unofficial telecommunications services at more than 320 installations for a period of 10 to 15 years. In these circumstances, we do not believe that the record establishes that NEXCOM has been a mere conduit for the Navy. Without such a showing, and since there is no question that the solicitation was issued by a NAFL, we have no jurisdiction over the procurement. Id.

The protest is dismissed.

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