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DECISION



L. L. 211
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THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

FILE: B-189430

DATE: July 6, 1978

MATTER OF:

General Telephone Company
of California

DIGEST:

1. Allegations that agency's procurement of telephone equipment was contrary to Office of Management and Budget (OMB) Circular A-76, and to Office of Telecommunications Policy (OTP) Circular No. 13 are not for consideration under GAO Bid Protest Procedures since provisions of Circulars are matters of Executive policy not affecting legality of public expenditures.
2. Agency's determination to purchase telephone equipment and not to consider leasing such equipment is not unduly restrictive of competition where Government ownership and maintenance is necessary for Marine Corps training and combat readiness and where agency otherwise establishes, pursuant to criteria of ASPR 1-317, that leasing would not satisfy its needs.

General Telephone Company of California (GTC) protests request for proposal (RFP) No. N00228-77-R-3142, issued by the Naval Supply Center (Navy), Oakland, California, for the purchase of a 1,400 line electronic automatic branch telephone exchange for the Marine Corps base at Twenty-Nine Palms, California.

GTC maintains that the RFP unduly restricts competition by excluding firms, like itself, which

would offer to lease, rather than sell, the equipment to the Navy. GTC also contends that the Navy's determination to buy the equipment and to operate and maintain the telephone system with its own personnel violates applicable Executive policy as expressed in Office of Management and Budget (OMB) Circular A-76 and Office of Telecommunications Policy (OTP) Circular No. 13.

The solicitation was issued following a two-year period during which GTC, the operating telephone company for the Twenty Nine Palms Marine Corps base area, and the Navy had negotiated on a sole source basis for the lease, maintenance and operation of a telephone system for the Marine Corps base. The various proposals submitted by GTC were rejected and GTC was advised that a Navy cost analysis indicated that Government ownership of the equipment was advantageous to the Government and that the Marine Corps desired to retain a Government-owned and operated system for training and operational readiness reasons.

The RFP was submitted to 27 firms. Only one, however, Stromberg-Carlson Corporation (Stromberg-Carlson), submitted an offer. Award was made to that firm, notwithstanding the protest, in the amount of \$379,233.75 upon the Navy's determination that the proposed price was reasonable as an established catalog price of a commercial item sold in substantial quantities to the general public.

OMB Circular A-76 expresses the Government's general policy of relying upon the private enterprise system, rather than engaging in commercial activity, to supply its needs. The Circular also indicates that "the determination as to whether to purchase or lease equipment * * * involves a determination of the difference in cost under the alternatives, and [that] the principles set forth in * * * [the] Circular should be applied to the extent relevant in making such determinations."

OTP Circular No. 13, establishes the Federal role as a user, rather than a provider, of telecommunications service. It emphasizes the desirability of placing maximum reliance on the private sector for

providing telecommunication service to the Federal Government. This means, according to the Circular, "that all functions normally associated with providing the service [including operation and maintenance] shall be performed by the private sector." Under the Circular, only where operation and maintenance services are unavailable, inadequate or significantly less costly if performed by the Government is the Government authorized to provide its own such services. To be considered "significant" the cost savings involved in performing the services "in-house" must exceed 10 percent of the cost of performance by the private sector, as calculated in accordance with OMB Circular A-76.

The Navy reports that its cost analysis indicates that Government ownership of the system will result in a savings of approximately \$70,000 for the first year and approximately \$13,000 per year thereafter based on a 15-year useful life.

GTC finds this analysis to be legally insufficient for two reasons. First, it believes that the Navy's cost comparison is erroneous in that it is improperly based on GTC's rejected proposals which related to "a far more ambitious program" than that presently contemplated by the Navy. Further, GTC maintains that the cost savings associated with Government ownership of the equipment, as computed by the Navy, average only 8.2 percent per year which it believes is insufficient under OMB Circular A-76 to justify Government ownership and maintenance of the system. GTC also asserts other errors in the analysis in connection with amounts calculated for depreciation and interest on the purchased equipment, and with the use of a 4-year period for cost comparison purposes.

Second, GTC states that the Navy compared only the costs of leasing the equipment from GTC with GTC furnishing maintenance with the cost of the Government's purchasing, operating and maintaining the equipment. GTC contends that a proper evaluation requires two separate cost comparisons--one of lease against purchase and the other of Government maintenance and operation in contrast to contractor maintenance and operation--so that the Navy should

have taken into consideration the cost of leasing the equipment and providing in-house operation and maintenance.

The Navy's position is that its analysis was not defective, but that regardless of what a cost evaluation would indicate its decision to purchase, operate and maintain the base telephone system was not contrary to either Circular.

With regard to OMB Circular A-76, the Navy asserts that its determination to operate and maintain the telephone equipment with its own personnel is authorized under Section 5 of the Circular, because of the training (which is "considered to be vital") and combat readiness requirements of the Marine Corps. The Circular reads as follows:

" * * * A Government commercial or industrial activity may be authorized only under one or more of the following conditions:

" * * * * *

"b. It is necessary for the Government to conduct a commercial or industrial activity for purposes of combat support or for individual and unit retraining of military personnel or to maintain or strengthen mobilization readiness."

Similarly, the Navy views the available commercial services to be "inadequate," as that term is used by OTP Circular 13, because they would adversely impact on the military training and readiness requirements.

We will not resolve these issues relating to the requirements of and the alleged noncompliance with the Circulars. We have previously stated that we do not consider it our function, under our Bid Protest Procedures, 4 C.F.R. Part 20 (1977), to

review determinations made pursuant to OMB Circular A-76. American Federation of Government Employees Local No. 3347, AFL-CIO, B-183487, July 3, 1975, 75-2 CPD 12. On the contrary, we regard the directives contained in Circular A-76 as matters of Executive policy, rather than of statutory or regulatory requirements, which are not within the decision functions of the General Accounting Office. See American Telephone and Telegraph Company, B-179285, February 14, 1974, 74-1 CPD 72 (regarding a disputed OMB Circular A-76 analysis which indicated that Government operation of a telecommunications system was less expensive than leasing from a telecommunications common carrier); North American Telephone Association, B-187239, December 15, 1976, 76-2 CPD 495, and Kasper Brothers, B-188276, February 8, 1977, 77-1 CPD 99, and cases cited therein.

GTC suggests that our cases regarding Circular A-76 should not be controlling with respect to OTP Circular 13 because Circular A-76 is "enforced" by OMB while Circular 13 is not "enforced" by any other agency. We cannot agree. Our consideration of bid protests is based on our statutory duty to pass on the legality of the expenditure of public funds. See 31 U.S.C. 71, 74 (1970). We therefore consider an agency's adherence to procurement policies which are prescribed by law and implementing regulations. However, the legality of expenditures is not dependent upon adherence to statements of Executive Branch or departmental policy; questions concerning such adherence are for consideration by the Executive Branch or department concerned. 43 Comp. Gen. 217 (1963); Comten, Inc.--Request for Reconsideration, B-186983, March 9, 1977, 77-1 CPD 173. Accordingly, we have declined to consider, under the Bid Protest Procedures, complaints regarding not only OMB Circular A-76, but also Executive Branch policy statements such as OMB Circular A-54, Bureau of the Budget Circular A-61, and Federal Management Circulars 74-5 and 74-7. See PRC Computer Center, Inc., et al., 55 Comp. Gen. 60, 67-8 (1978), 75-2 CPD 35; Comten, Inc., B-186983, December 8, 1976, 76-2 CPD 468; Planning Research Corporation Public Management Services, Inc., 55 Comp. Gen. 911 (1976), 76-1 CPD 202. We have also declined to review OTP's exercise of its policy making function. See Communications Satellite Corporation, B-191233,

March 2, 1978, 78-1 CPD 163. Accordingly, since OTP Circular 13 merely expresses policy guidance with respect to whether telecommunications services should be provided in-house or purchased from commercial sources, compliance therewith by the Navy is not properly for consideration under our Bid Protest Procedures.

GTC's remaining issue is that the provisions of the solicitation which limit the procurement to the purchase of the equipment is unduly restrictive and therefore in violation of Armed Services Procurement Regulation (ASPR) 1-300.1 (1976 ed.), which states that all procurements must be made on a competitive basis to the maximum practical extent. GTC states that telecommunications equipment is primarily obtained by lease, rather than purchase, in the United States and worldwide, that a number of firms, including GTC, only lease such equipment and are prohibited by their charters from selling it, and that in this procurement only one offer was received.

It is true that the Navy is required to secure the maximum practicable competition on its procurements. However, the determination of its minimum needs and the methods of accommodating them are matters for the Navy, and are not subject to legal objection by this Office unless it is clear that the agency's judgment is unreasonable and resulted in an undue restriction on competition. See General Telephone Company of California, B-150142, February 22, 1978, 78-1 CPD 148.

Here, the Navy determined that a Government-owned system was needed, primarily for Marine Corps operational and readiness reasons. In this respect, our file contains a statement from Headquarters, United States Marine Corps, that retention of telephone system ownership is needed "for the purpose of maintaining a training and mobilization base for maintenance and operational personnel." The statement explained that the failure to provide that base would result in undesirable personnel transfer actions and would "eliminate a skilled manpower base upon which to draw in the event of a mobilization."

With regard to the Navy's leasing the equipment under an arrangement permitting it to perform its

own maintenance and operations, the Navy reports that this type of arrangement would not be satisfactory because it would reduce flexibility and because of a "history of marginal service reliability associated with any dual maintenance responsibility." While the record does not indicate precisely what specific problems the Navy is alluding to, we believe the overall decision that it would be beneficial to own, rather than lease, equipment on which in-house maintenance is to be performed is not one that is legally objectionable under the circumstances.

In this regard, ASPR 1-317 sets forth the following criteria for use in determining on a case-by-case basis, whether equipment should be rented rather than purchased:

"(a) the Government requirement is of short duration, and purchase would be costlier than rental (generally, long-term rentals should be avoided in the absence of compelling circumstances);

"(b) the probability that the equipment will become obsolete and that replacement within a short period will be necessary.

"(c) the equipment is special or technical, and the lessor will provide the equipment, as well as maintenance and repair services, at a lower cost than would otherwise be available to the Government."

Since the Government requirements for telephone equipment are not of short duration and since it is not likely that the equipment will become obsolete so as to need replacement within a short period, we consider the Navy's decision to purchase the equipment as conforming to the ASPR criteria.

Accordingly, we do not find that the Navy unduly restricted competition. The fact that GTC was precluded from competing because it does not sell equipment does not warrant a contrary conclusion. We have often stated that the preclusion of one or more potential offerors from a particular competition does not render a particular competition unduly restrictive if the specifications represent the legitimate needs of the Government. See Memorex Corporation, B-187497, March 14, 1977, 77-1 CPD 187.

Moreover, although GTC emphasizes that only one offer was received and claims that only that offeror could comply with the Navy's specifications, we do not agree that the Navy conducted a noncompetitive, sole-source procurement. The record shows that the procurement was competitively solicited, although only one offer was received, and award was made upon the determination that the price proposed was reasonable. The record also indicates that from a mailing list of 27 sources, the agency identified five potential sources for this procurement. One potential source, during the course of the protest, indicated that it did not submit an offer because the equipment was to be installed outside its service area, not because of a problem in complying with the specifications.

The protest is denied.


Deputy Comptroller General
of the United States