

118023

21403

Melody

DECISION



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

FILE: B-201558

DATE: April 5, 1982

MATTER OF: Tex-La Cable T.V., Inc.

DIGEST:

1. Whether offeror can provide cable television service at its offered prices is a question of the offeror's responsibility as a prospective contractor; contracting officer's affirmative determination of responsibility will not be reviewed by GAO absent exceptions not applicable here.
2. GAO will not review the qualifications of agency technical evaluation board members absent allegations of fraud, bad faith or conflict of interest.
3. Allegation that award of cable television franchise agreement was improperly made to other than the low offeror is denied where the record indicates that the evaluation scheme used by the agency was proper, all proposals were evaluated on an equal basis, and award was made to the low offeror.

Tex-La Cable T.V., Inc. protests the award of a cable television (CATV) franchise agreement to Tele-national Communications, Inc. (TCI) under solicitation No. DAKF48-80-R-0112, issued by the Department of the Army, Fort Hood, Texas. Tex-La raises three objections to the award: TCI cannot perform profitably under the terms of the agreement; members of the Army evaluation board were not qualified to conduct a technical review; and TCI's proposal will not result in the lowest cost to subscribers. For the reasons explained below, the protest is dismissed in part and denied in part.

The solicitation, issued pursuant to Army Regulation (AR) 105-20 (which sets forth the acquisition policy for CATV systems on Army installations), contemplated a ten-year franchise agreement under which a civilian contractor was to furnish CATV service to residents of Fort Hood. Price was the most significant evaluation factor under the solicitation, although a higher priced proposal could be accepted for award if it was materially superior in certain specified areas. Eight proposals were received and while the evaluation board found all to be technically acceptable, it determined that, because of the prices offered, only the Tex-La and TCI proposals were in the competitive range. TCI offered to furnish basic cable service to all installation residents at no cost for the life of the franchise agreement, and offered premium service (the so-called home movie channels such as Home Box Office) at \$13.00 per month. Tex-La offered the basic service for \$4.75 and the premium service for \$6.95.

Negotiations were conducted with Tex-La and TCI. In addition to discussions with each offeror, the evaluation process entailed visits by the chairman of the evaluation board to Fort Polk, Louisiana and Fort Riley, Kansas for the purpose of viewing, first-hand, the existing CATV facilities of Tex-La and TCI, respectively. Both firms were found to be technically qualified and capable of providing satisfactory CATV service to Fort Hood, although, based on the site visits, TCI's equipment was considered superior to Tex-La's equipment. The evaluation board ultimately recommended that award be made to TCI and the Source Selection Authority adopted this recommendation. It awarded the franchise agreement to TCI on December 11, 1980 based primarily on its lower evaluated total cost.

Tex-La contends principally that TCI cannot possibly remain economically viable if it offers basic cable service at no charge for the full ten-year term of the agreement. Tex-La offers in support of this view various CATV industry statistics. It thus suspects that TCI intends to seek approval to impose a monthly charge for basic service through one of the rate adjustment "loopholes" in the contract.

Whether TCI is capable of providing CATV services at its offered price is a matter of TCI's responsibility as a prospective contractor. TCI was found responsible at the time of award based both on the contracting officer's estimate that TCI would make a profit if 40 percent of the residents subscribed to premium service, and his expectation of at least that level of participation. Our Office will not review a protest against an affirmative responsibility determination, which is largely a business judgment, unless there is a showing of possible fraud or bad faith or the solicitation contains definitive responsibility criteria which allegedly have not been applied. Environmental Container Systems, Inc., B-201739, February 9, 1981, 81-1 CPD 83. Neither exception appears to exist here. There also is no evidence that TCI intends to impose a basic service rate under the terms of the contract. In fact, TCI has executed as part of the agreement a promise to provide free basic service for the life of the agreement. This portion of the protest is therefore dismissed.

Tex-La next alleges that the chairman of the evaluation board was not technically qualified to evaluate the technical aspects of the proposals. Tex-La's conclusion is based on its view that the chairman's report on Tex-La's Fort Polk CATV operations contained several errors which led the evaluation board to find that Tex-La's equipment was inferior to that used by TCI. We note, however, that Tex-La's proposal was not found technically unacceptable based on this report, and that the award was primarily based on TCI's lower evaluated cost, not the perceived superiority of its equipment. Thus, even if we assume, as Tex-La alleges, that the chairman's evaluation was erroneous in some respects, this fact would not render the award to TCI improper. In any event, we will not review the qualifications of agency technical evaluation board members absent allegations of fraud, bad faith or conflict of interest. University of New Orleans, B-184914, May 26, 1978, 78-1 CPD 401. Tex-La advances no such allegations. Thus, we see no need to further consider this basis of protest.

Tex-La finally claims that its proposal, not TCI's, would represent the lowest cost to subscribers in the

event that 80 percent or more of the installation's residents subscribe to premium service. The Army concedes that Tex-La's calculations in this regard are correct, but points out that the evaluation of premium service rates was not based on an estimate of 80 percent participation. Indeed, the Army explains that no estimate was used to evaluate premium service rates since Fort Hood had no prior experience offering premium service and thus had no data on which it believed a reasonably accurate estimate could be based. It instead evaluated premium rates on a reasonableness basis with reference to the rates charged for premium service in neighboring areas.

In this connection, although the solicitation indicated that award would be based on the lowest cost for basic and premium service, as well as other charges, no estimate was provided for premium service, and a statement at the end of the schedule of prices (Schedule A) advised offerors that "quotes for premium service will be considered in the final selection process." In light of the absence of subscriber estimates for the premium service rate categories (such estimates were set forth for basic service), we think this statement clearly indicated that extended prices and total evaluated cost would be calculated for basic service but not for premium service, which would merely be considered on some other basis. Although the solicitation did not explicitly provide that the standard would be one of reasonableness, the record indicates that this standard was uniformly applied to all proposals.

Thus, because TCI's basic service was free and its \$13.00 monthly premium service fee was in line with other area rates, its proposal was evaluated as reasonable and less costly than Tex-La's, while Tex-La's premium service fee of \$6.95 also was deemed reasonable, but its basic service charge of \$4.95, was evaluated higher than TCI's.

An agency's evaluation of competing cost proposals involves the exercise of informed judgment which we will disturb only if we find that judgment was clearly without a rational basis. Crey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD 325; New York University, B-195792, August 18, 1980, 80-2 CPD 126. Here, the method of evaluation used was reasonable considering the Army's inability to formulate accurate premium service subscriber estimates. Further, it appears from the record that this evaluation scheme was adhered to and that all proposals were evaluated on an equal basis. We conclude that the Army properly determined that TCI's proposal would result in the lowest cost to subscribers. The award thus was rationally founded.

The protest is dismissed in part and denied in part.

for Milton J. Rowland
Comptroller General
of the United States