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DECISION

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

FILE: B-202031 DATE: August 26, 1981

MATTER OF: ROLM Corporation and Fisk Telephone Systems, Inc.

DIGEST:

1. Agency making sole-source award cannot rely on statement attributed to awardee telephone company that its competitors would require difficult-to-obtain interface devices to connect their equipment to its lines. Statement was self-serving and agency could easily have determined that statement was false.

2. Noncompetitive order placed with local telephone company cannot be justified by agency's belief that awardee is best qualified to meet uncertain future emergency needs. Record does not show that need for flexibility in emergency clearly precludes award to other potential suppliers.

3. Rule allowing disqualification of offeror due to deliberate misrepresentation does not apply where record is not clear as to source of misrepresentation and offeror disavowed agent's alleged statement upon learning agency had relied on it.

4. Telephone company's installation charges should be evaluated in reprocuring telephone system, notwithstanding that charges have been incurred, because purpose of requiring reprocurement is to restore integrity of competitive system by rescinding, insofar as practical, the effect of what was improperly done.

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ROLM Corporation and Fisk Telephone Systems, Inc. protest a noncompetitive order placed by the Nuclear Regulatory Commission (NRC) with Southwestern Bell Telephone Company to install a Dimension 400 PBX (in-house telephone exchange) at NRC's Region IV Office in Arlington, Texas. The protesters are interconnect companies which market competing PBX systems which they say the NRC should have considered. The agency has not clearly shown that only Southwestern Bell is capable of meeting its needs. We therefore sustain the protests.

On January 26, 1981, after a period of discussion with Southwestern Bell and after obtaining procurement authority from the General Services Administration (GSA) permitting the NRC to acquire and install a PBX at Arlington, the NRC Region IV Office awarded a letter contract (denominated as a letter of intent) to Southwestern Bell. Work was suspended by the NRC Director of Contracts on February 18, after the NRC was advised of the protests by our Office. On March 12, 1981, the Director of Contracts executed a determination and findings purporting to justify a sole-source award to Southwestern Bell. Thereafter, work was resumed.

At the time the Director of Contracts reviewed and ratified the letter contract, NRC recognized according to its initial report to our Office, that it was acting outside the scope of the GSA delegation of procurement authority (DPA). The DPA expressly states that the NRC was not authorized to make award on a sole-source basis. This, the DPA explained, placed on NRC:

> "the responsibility * * * to comply with the requirements of the Federal Procurement Regulations in seeking competition to the maximum extent practicable in procuring the required communication services or equipment."

The DPA further stated that it was voidable if this condition was not met.

The record also shows that the NRC had actual knowledge before January 26, 1981, that PBX equipment could be furnished by at least one interconnect company (ROLM) and that the NRC knew before March 12, 1981,

that both ROLM and Fisk believed their equipment would meet the NRC's needs. However, at no time does it appear that the NRC contacted any interconnect company to determine what it might be capable of providing. There is also no indication of an effort to publicize the requirement in the Commerce Business Daily.

As explained in the NRC's initial report to our Office, the Director of Contracts based his decision to ratify the Southwestern Bell agreement on two principal conclusions. He believed interconnect companies could not meet the NRC's urgent requirement for improved service at Region IV in a timely manner. He also thought the presence of non-Bell equipment at Region IV might create difficulty in augmenting emergency telephone service.

Regarding the first point, the NRC states that it believed:

> "If the equipment to be furnished * * * [was to be] provided by a party other than Bell, it would be considered 'Customer Provided Equipment.' This [would mean] that certain interface devices between this 'Customer Provided Equipment' and the Bell System would be required. The NRC was informed on March 11, 1981 by a representative of Southwestern Bell that these devices have an estimated minimum delivery time of sixteen weeks. This time could be extended further depending on the configuration of the 'Customer Provided Equipment' which would be provided by a Bell competitor. The NRC view[ed] the deficiencies at Region IV to be so severe that a minimum delay of sixteen weeks in remedying the problem [could] not be accepted * * *."

However, as the NRC now admits, its belief that an interface device would be necessary was false. No special equipment is necessary except for commonly available compatible plugs. Moreover, Southwestern Bell in a letter filed with our Office states that the alleged March 11 conversation regarding interface devices on which NRC relied was taken out of context.

Nevertheless, the NRC maintains that its action was proper because: (1) it reasonably believed at the time that an interface device was necessary, even if it was wrong, and

(2) only by acquiring Southwestern Bell furnished equipment can NRC meet its need for maximum flexibility should it have to augment telephone service in an emergency.

ROLM has not submitted separate detailed arguments in support of the protest.

Fisk has commented in detail and objects to the selection of Bell on a sole-source basis on the grounds that it is well qualified to provide PBX equipment to meet the needs of Region IV and that it could have provided the equipment within the time frame required by NRC. In this regard, Fisk points out that even the agency admits that there are no special interface devices needed to connect the Fisk equipment to the Bell System. The protester thus maintains that any such representation by Bell was false and as such was an improper ground upon which to base a sole-source justification. Further, the protester argues that it is a large well established firm which is capable of augmenting its services and coordinating with the Bell System should an emergency arise. Fisk argues that NRC's requirements for emergency argumentation are vague and undefined and seem to be drawn primarily to justify an award to Southwestern Bell. Fisk notes that for a sole-source procurement to be upheld, the agency must show that only one firm can meet the requirement, not that the agency believes that one firm most likely will perform better than the other. It is protester's view that the evaluation of competing proposals in a competitive procurement is the only proper manner in which to choose the best firm and objects to the agency's refusal to allow it to compete for this requirement.

Because of the general requirement that procurements be conducted on a competitive basis to the maximum practical extent, Federal Procurement Regulations (FPR) § 1-3.101(d) (1964 ed. amend. 194), agency decisions to procure on a sole-source basis must be adequately justified and are subject to close scrutiny. R&E Cablevision, B-199592, February 19, 1981, 81-1 CPD 110. Such decisions, however, will be upheld if there is a reasonable basis for them. Winslow Associates, 53 Comp. Gen. 478 (1974), 74-1 CPD 14.

For example, our Office has stated that noncompetitive awards are justifiable where the work or supplies required can only be furnished by one source. We have

observed that there may be only one source for any of several reasons -- because the items or services needed are unique; time is of the essence and only one source can meet the Government's needs within the time available; data which would be needed to permit a competitive procurement is unavailable and cannot be obtained within the time available; or only a single source can provide an item which must be compatible or interchangeable with existing equipment. Precision Dynamics Corporation, 54 Comp. Gen. 1114 (1975), 75-1 CPD 402.

As indicated above, the NRC says that it relied on representations by Southwestern Bell personnel that interface devices would be needed if non-Bell equipment were installed and that those devices were difficult to obtain. It cites our decision, Informatics, Inc., 57 Comp. Gen. 217 (1978), 78-1 CPD 53, for the proposition that in making award a contracting officer may reasonably rely on a vendor's representations. To hold that the Government could not rely on Southwestern Bell's statement, the NRC says, would impose an impossible duty on a contracting officer to independently verify every statement upon which he may rely.

A protest against an allegedly improper award should be denied if the award was proper when made. We believe, therefore, that an agency may justify a sole-source award by showing that it reasonably believed at the time of award that there clearly was but one possible source of supply, notwithstanding that the information on which its decision was based can be later shown to have been incorrect. In this respect, we concluded in D. Moody & Company, Inc., 56 Comp. Gen. 1005 (1977), 77-2 CPD 233, that an Army decision that it would be impracticable to obtain competition for a particular manufacturer's parts was reasonable because the Army did not know of an additional source and it would not have been reasonable to have expected the Army to solicit all surplus parts dealers before buying the part which was available under a basic ordering agreement.

However, we sustained the D. Moody protest because the Army failed, as did the NRC in this instance, to synopsize its procurement in the Commerce Business Daily as required by the Defense Acquisition Regulation. Likewise, we believe the NRC would stretch its argument too far in this case.

First, there is no evidence that the contracting officer knew of the interface requirement at the time the January 26 letter contract was issued. The alleged Southwestern Bell statement was not made until March 11, 1981, and was first raised to support the Director of Contract's March 12 determinations and finding. By that time the protests had been filed and the NRC was fully aware the protesters believed they could meet its needs.

Second, the NRC's reliance on the Informatics decision is misguided. While we stated there that an agency has a right to rely on statements made by offerors during negotiation of a contract, we referred to an offeror's duty to respond honestly. We concluded that an offeror's lack of candor and misrepresentations could require that a proposal be disqualified from further consideration to protect the integrity of the competitive system. We did not determine whether the contracting agency's reliance on the disqualified offeror's representations, which were discovered to be false by a GAO audit, was reasonable; nor did we examine under what circumstances contracting personnel should verify statements made during the course of a procurement.

Moreover, we reject the NRC's position that, in effect, a contracting officer may justify a sole-source decision without verifying a self-serving statement which relates to what the awardee's potential competitors can do where, as here, it would have been a relatively easy matter to have determined that the representation was false.

The NRC in this instance could have asked GSA or any interconnect company whether an interface device was needed. GSA has developed model PBX specifications for use by Government agencies (see FPR § 1-4.1203 (Temp. Reg. 51)) and provides technical expertise to Government agencies in this area (41 C.F.R. § 101-37.111). Had the NRC asked an interconnect company, it would have learned that under established Federal Communications Commission (FCC) procedures interface devices cannot be required for equipment registered with the FCC (which includes 71 types of PBXs, 34 registered by firms other than Bell system affiliates).

Regardless of the sufficiency of an agency's justification of a sole-source selection at the time that justification is made, we will not object to a sole-source award if in fact the totality of the circumstances that existed at the time the action was taken shows that it would have been futile to seek competition. Tosco Corporation, B-187776, May 10, 1977, 77-1 CPD 329; EMI Medical, Inc.; Picker Corporation, B-195487, February 6, 1980, 80-1 CPD 96. It is in this light that we turn, therefore, to consider the NRC's argument that nevertheless only Bell can meet its minimum needs.

According to the NRC, it needs the quickest, most effective available capability to augment service in an emergency. The NRC points out that it is charged with the responsibility of protecting the public health and safety and the environment from the hazards of nuclear activities and with safeguarding the common defense and security by assuring adequate controls over the custody and use of nuclear material. In the event of an accident or emergency involving any of its activities (the NRC refers repeatedly to the Three Mile Island accident), the NRC must be prepared to respond anywhere in the country with, in its words, "the utmost achievable speed."

This, we are told, requires at minimum that the NRC have the best possible emergency telephone service capability. The best service, the NRC says, is available only from AT&T and its Bell System subsidiaries, because AT&T: (1) is the largest and most sophisticated supplier of telecommunications equipment in the world, (2) covers a large portion (but not all) of the area which must be served, (3) treats the NRC as having a national account, and consequently, (4) through the Bell Independent Relations unit can provide a single point of contact and liaison with all Bell and independent operating companies whose activities may have to be coordinated to meet emergency needs.

Fisk, on the other hand, labels the NRC's defense as "extraneous", since the procurement calls for one PBX and associated equipment for a single NRC office and does not involve the installation of a nationwide telephone network, or nationwide coordination of the NRC telecommunications system. According to Fisk: (1) the

NRC is not prevented from augmenting emergency service through an AT&T national account, even if Fisk furnished the Arlington PBX, (2) the NRC has contracted for the protested PBX with Southwestern Bell, not AT&T, and (3) therefore, any comparison of Fisk's capabilities should be made with those of Southwestern Bell. In this respect, Fisk says, it could provide equivalent emergency service within the Southwestern Bell service area, if that were what the NRC wanted, but that this is not what the NRC ordered. Furthermore, Fisk says, the NRC needs only adequate emergency service, not emergency service to the exclusion of all other considerations.

Preliminarily, we note that the NRC's arguments regarding the necessity of limiting NRC procurements to Bell system affiliates bear little relation to what the record indicates were NRC's original concerns in obtaining improved telephone service. The NRC sought to overcome difficulty in obtaining telephone access which had resulted from increased staff at its Arlington facility, from the need to share PBX facilities with other Government agencies, and from reliance on low priority Federal Telecommunications System (FTS) lines leased by GSA from Bell system companies. Acquisition of an in-house PBX (which is still tied to the FTS system) represents only a partial solution of these problems, although it does permit the NRC to control its own system in an emergency without disrupting other Government agencies' telephone systems.

We need not decide whether only the best emergency capability would meet the NRC's minimum needs because even if such capability is a legitimate need, the NRC has not clearly shown that it would have been futile to have competed its requirement in order to evaluate whether such service is available from a firm other than a Bell system affiliate.

The NRC insists that acting through AT&T to coordinate with Bell system affiliates in an emergency is inherently the most efficient approach possible because

Bell system affiliates have day-to-day working relationships and an established chain of command. However, by excluding ROLM- and Fisk-furnished equipment without examining it, the NRC has disregarded whatever potential advantages which this equipment (which does offer unique technical features) would give it in dealing with emergency situations. By focusing solely on emergencies which might be national in scope, the NRC has not evaluated what services ROLM or Fisk may be able to provide to meet local contingencies. The NRC concedes that even if emergency services are coordinated through a national AT&T account, AT&T would have to coordinate its activities with independent organizations (including independent telephone companies serving affected sites) as well as with Bell system affiliates. Nor has NRC rebutted Fisk's contention that it can support its equipment as well as or better than Southwestern Bell would support a Bell system PBX, that it too has day-to-day working relationships with the communications carriers (whose lines it uses) and that its services can be directed through AT&T in an emergency, should its equipment be involved.

In short, the agency contends that Southwestern Bell can meet all its emergency requirements but it has not convincingly shown that other firms could not fulfill its need for PBX equipment while also proposing an arrangement with the Bell System which could fulfill the NRC's needs for emergency capability. The agency has merely assumed, without consulting anyone other than Southwestern Bell, that only Southwestern Bell can meet its needs.

Since the NRC has not shown that a competitive procurement was not feasible under the circumstances, we conclude that NRC's requirement should have been competed. See Las Vegas Communications, Inc., B-195966, July 26, 1980, 80-2 CPD 57, aff'd. on reconsideration, B-195966.2, October 28, 1980, 80-2 CPD 323.

Regarding corrective action, the record indicates that the Southwestern Bell equipment has been installed and continues to be used on a month-to-month basis. Installation costs amounted to approximately $ 20,000.

In view of the circumstances of this case, we believe protection of the integrity of the competitive procurement system requires that interconnect companies be afforded an opportunity to compete for the NRC requirement. Before framing our recommendation, however, we must consider two related issues raised by Fisk.

First, Fisk says that Southwestern Bell should not be permitted to compete for this requirement, in view of its alleged misrepresentation concerning the need for interface devices. Fisk relies on our decision in Informatics, Inc., supra, where, as indicated, we concluded that an offeror should be barred from further participation in a negotiated procurement because its deliberate misrepresentation demonstrated a lack of candor. However, we do not believe such action would be appropriate in this instance because: (1) Southwestern Bell has disavowed the statement; (2) it is not clear whether the misleading statement regarding interface devices actually originated with Southwestern Bell or was the result of misinterpretation by NRC personnel of a general statement by Southwestern Bell; and (3) consequently, Southwestern Bell's veracity, unlike that of the affected offeror in the Informatics decision, has not been undermined.

Second, Fisk argues that Southwestern Bell's installation costs should be evaluated in the event it participates in a competitive procurement notwithstanding that those costs already have been incurred. We agree, provided Southwestern Bell chooses to offer the same equipment and thus would otherwise obtain an advantage by virtue of its improperly attained incumbency. The purpose of requiring competition in cases such as this is to restore the integrity of the competitive procurement system by rescinding insofar as practical the effect of what was improperly done.

Accordingly, we recommend that the NRC's requirement be reprocured on a competitive basis and that, if an offer from a company other than Southwestern Bell is evaluated as most advantageous to the Government, that use of the Southwestern Bell equipment be

discontinued. By separate letters we are today bringing our decision and recommendation to the attention of the Chairman of the Nuclear Regulatory Commission and the Administrator of General Services.

The protests are sustained.

Milton J. Socolar

Acting Comptroller General
of the United States

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

B-202031

August 26, 1981

The Honorable Joseph M. Hendrie
Chairman, Nuclear Regulatory Commission

Dear Mr. Chairman:

Enclosed is a copy of our decision of today sustaining the protests of the ROLM Corporation and Fisk Telephone Systems, Inc. of the award of a sole-source contract to the Southwestern Bell Telephone Company to install a private branch exchange (PBX) at NRC's Region IV Office.

We direct your attention to the conclusion that the sole-source award was improper and our recommendation that NRC conduct a competitive procurement for this requirement and terminate the contract with Southwestern Bell if another firm wins the competition.

Please advise us of any action taken in connection with this recommendation.

Sincerely yours,

Milton J. Socolar

Acting Comptroller General
of the United States

Enclosure

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

B-202031 August 26, 1981

The Honorable Gerald P. Carmen
Administrator of General Services

Dear Mr. Carmen:

Enclosed for your information is a copy of our decision of today sustaining the protests of the ROLM Corporation and Fisk Telephone Systems, Inc. of the award of a sole-source contract to the Southwestern Bell Telephone Company to install a private branch exchange (PBX) at the Nuclear Regulatory Commission's (NRC) Region IV Office at Arlington, Texas.

The Director, Agency Planning Division, of your Automated Data and Telecommunications Service granted the NRC a delegation of procurement authority on January 16, 1981, for the acquisition and the installation of the PBX.

Sincerely yours,

Milton J. Socolar

Acting Comptroller General
of the United States

Enclosure

19383

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

B-194445 September 9, 1981

The Honorable Louis F. Oberdorfer
The United States District Court
for the District of Columbia

Dear Judge Oberdorfer:

We refer to your order dated June 29, 1981 regarding Aero Corporation v. Department of the Navy, Civil Action No. 79-2944, asking us to review requests for reconsideration filed by the Navy and Lockheed Corporation in response to our letter of June 5, 1981.

Essentially, the Navy and Lockheed seek correction of what they state are factual and conceptual errors reflected in our June 5 opinion. They ask for a conference in order to explain their position to us more fully. As explained below, we affirm our earlier views.

Our June 5 letter dealt with the Navy's plans to order the overhaul of additional C-130 series aircraft from Lockheed in connection with the Navy's C-130 Service Life Extension Program (SLEP).

We concluded that the Navy had not justified placing additional noncompetitive SLEP installation orders with Lockheed; that the Navy should attempt to compete SLEP installation for as many of the remaining aircraft as possible, and that further orders should be placed with Lockheed only on an individual airplane-by-airplane basis as necessary to meet specific, urgent schedule requirements. In this connection, we found that the record did not support the Navy's assessment of the time which would be required to prepare so-called Military Specification (Mil. Spec.) kits which would be used if SLEP installation were performed by a firm other than Lockheed. The Navy contended that use of kits would be essential if SLEP were performed by a contractor other than Lockheed in order to control risk and to assure that the Navy receives a uniform, standardized product.

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Our conclusion that the Navy had not adequately justified continued sole-source SLEP installation awards was based on findings: (1) that, in light of the Navy's examination of initial SLEP performance at Lockheed, the record did not show that three to four years would be required to design, assemble and validate kits tailored for use by experienced C-130 maintenance contractors such as Aero, but showed at most that one to one and one-half years might be needed, and (2) that the time required to obtain parts for the kits was not a factor precluding competition.

We also noted, in response to a question asked in your February 26 order, that the Navy has an express regulatory duty under Defense Acquisition Regulation (DAR) § 3-101(d) to take appropriate steps to avoid noncompetitive follow-on procurements, where as here it has made an initial noncompetitive award, if competition for its follow-on requirements is possible. While such steps could include the acquisition of parts, data, and tooling, we did not express an opinion regarding specific steps which should be taken, it being our view that it was for the Navy to determine in the first instance how it can best meet its legal responsibilities.

In its request for reconsideration, the Navy insists that its determination that kits would require a minimum of three years to develop was rationally founded and that by disagreeing with it we substituted our judgment for that of cognizant Navy technical and program personnel. According to the Navy, availability of needed parts remains a controlling factor in determining the time required to prepare kits. With respect to the time required to design and assemble kits once parts are available, the Navy argues that even though it has now identified much of the data, parts and problems it will encounter with SLEP: (1) this knowledge cannot be simply translated into suitable specifications for inclusion in kits, (2) Lockheed has only developed drawings and instructions for use by it, and (3) these drawings are far less detailed than would normally be provided with a kit.

Further, the Navy says we misinterpreted its position by failing to recognize that the objective of its monitoring study of work done by Lockheed to perform SLEP was to determine whether competition was possible, which it says is not the same thing as determining whether competition is feasible once time constraints are taken into consideration. Competition may be possible in the abstract, the Navy says, but not feasible within the time available.

Regarding the sequence in which kit development work would have to be performed, and therefore, the time needed to complete kit development, the Navy and Lockheed say that unless the Navy first completes kit design, then orders parts and assembles the kits, and fully verifies and validates the kit design with trial installations, the initial kits may be defective and delay would ensue while the kits are modified. The Navy says:

> "To assemble kits in a piecemeal fashion from raw data in the Navy's and Lockheed's possession, include parts on an ad hoc basis as they become available, and concurrently validate and verify that kit would not only undermine the very purpose of a kit, but would jeopardize the objectives which the imposition of a kit requirement is designed to accomplish."

Moreover, the Navy says, its contractor has "a right to expect the kit (as Government furnished equipment) to be complete, including all parts and instructions needed to successfully perform the installation."

Alternatively, the Navy argues that only Lockheed can assure that the SLEP schedule will be met because only Lockheed can meet unexpected parts needs by diverting parts from its production line should the need arise. It contends that such parts could in fact include long leadtime items. While it admits that 30 percent of the nonscheduled parts used during the SLEP monitoring study were drawn from Navy stocks, it says that some of these items are not presently identified or stocked in the Government supply system.