

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest filed by
AT&T with respect to the procurement of
Inmate Telephone Services by the
Department of Correctional Services
Contract Number X160812

Determination
of Bid Protest
SF- 20010182

August 1, 2001

This Office has completed its review of the above-referenced Request For Proposals ("RFP"), the contract awarded by the Department of Correctional Services ("DOCS"), and the bid protest filed by AT&T. As outlined in further detail below, we have determined that the procurement was conducted in accordance with law, and therefore have approved the proposed contract with MCI/WorldCom Communications, Inc. ("WorldCom").

BACKGROUND

Facts

DOCS provides and maintains an inmate telephone system consisting of over 3,000 telephones at approximately 71 correctional facilities available for use by 71,000 inmates. The system allows inmates to place collect-only telephone calls to their families and friends. In the course of a prior contract, DOCS installed all of these devices and now owns all the telephones and associated wiring. On August 15, 2000, DOCS issued an RFP to competitively procure services from telephone companies capable of carrying the calls (intra-lata, inter-lata, interstate and international) for all inmate collect calls regardless of the geographical location of the facility from which the inmate call originates, and which are prepared to offer DOCS a paid commission on the accepted, completed calls processed. The service also includes data circuits from each facility to the Albany Central Office of DOCS as well as "administrative traffic" routed through the dedicated access lines (T1s) from DOCS sites.

Two proposals were received in response to the RFP, one from AT&T and one from WorldCom. The proposals were scored, pursuant to the evaluation system developed by DOCS prior to the receipt of the bids. AT&T received a score that was less than one-point higher than the score received by WorldCom (of a total of 100 possible points). DOCS announced, by letter dated December 12, 2000, that AT&T was the awardee and negotiated a contract with AT&T. On January 18, 2001 the

contract (Contract Number X160805) was forwarded to the Comptroller for approval.

On December 20, 2000, WorldCom wrote to the Comptroller to protest the award to AT&T. The Comptroller reviewed the protest and audited the contract. While the Comptroller did not find the protest grounds convincing, the contract was rejected and returned to DOCS by letter dated February 8, 2001, with instructions to DOCS to either re-score the offers or to re-bid. The Comptroller indicated that both AT&T and WorldCom had taken exceptions to sections of the RFP that DOCS appeared to have designated as "mandatory requirements," and based on these exceptions, DOCS had deducted one point from AT&T and two points from WorldCom. The Comptroller stated that due to confusing wording of the RFP, language allowing for exceptions to non-mandatory deductions could legitimately have led both bidders to believe that they would not be disqualified. Therefore, while DOCS could decide to disqualify both bidders and re-bid this contract, it was permissible for DOCS to give the bidders another chance to understand that these sections were mandatory and that their failure to agree to each mandatory provision of the RFP would result in disqualification. If their exceptions were withdrawn, the points deducted would be restored.

By letter dated March 8, 2001, DOCS notified the bidders that it would seek clarifications of their proposals, giving the bidders a chance to withdraw their exceptions. Both AT&T and WorldCom withdrew their exceptions. DOCS then re-scored the proposals, restoring one point previously deducted for the AT&T exceptions and two points previously deducted for the WorldCom exceptions. This time, WorldCom received a score less than one point higher than the score received by AT&T.

DOCS verbally notified the parties of an award to WorldCom on March 27, 2001. DOCS then signed a contract with WorldCom, and forwarded the contract to this Office for approval. The contract was received in this Office on March 28, 2001. AT&T then wrote this Office on April 10, 2001, with notice of its intent to formally protest the award to WorldCom.

Procedures and Comptroller's Authority

The Comptroller is required by section 112 of the State Finance Law ("SFL") to approve State agency procurement contracts which exceed \$15,000 in amount (SFL §112[2]) and to approve State agency revenue contracts which exceed \$10,000 in amount (SFL §112[3]), before such contracts become effective. The Comptroller has reviewed this protest as part of his review of the contract award.

In determination of this protest, the following correspondence/submissions from the parties were considered: From AT&T, correspondence and attachments dated: June 1, 2001 and June 13, 2001; From DOCS, correspondence dated June 8, 2001;

From WorldCom, correspondence dated June 8, 2001.

Protesting Party

The protestor, AT&T, is one of the two vendors that submitted a proposal in response to the RFP issued by DOCS.

ANALYSIS OF BID PROTEST

Protestor's position

The AT&T protest is made on the following grounds:

- The original procurement, resulting in the selection of AT&T for an award, was conducted legally and properly.
- All bidders understood the meaning of the mandatory and non-mandatory requirements since the same procurement document was utilized in 1995 as was used here. Taking exceptions to certain "requirements" in 1995 did not result in disqualification of proposals.
- The Procurement Guidelines contemplate reduction in scores, as well as disqualification, as legitimate agency responses to failing to meet "mandatory" requirements of an RFP.
- The Comptroller's determination to reject the contract with AT&T was arbitrary and capricious.
- The Comptroller was without the authority to allow, and DOCS was without the authority to seek, post-award clarification of mandatory requirements. State Finance Law, Section 163(9)(c) allows for clarifications or revisions only "from all offerers determined to be susceptible of being selected for contract award, prior to award."
- The post-award clarification approach utilized by DOCS violated both the letter and the spirit of the Procurement Stewardship Act (State Finance Law, Section 163) and the Procurement Guidelines.
- By debriefing WorldCom prior to seeking clarifications from both bidders, WorldCom had an advantage over AT&T; WorldCom knew that accepting all "mandatory" requirements would result in its victory.

Agency's response to protest

The DOCS response to the protest is as follows:

- AT&T was properly made the initial awardee, since DOCS did not consider

- AT&T's deviations from the RFP to be "exceptions" to mandatory requirements.
- While DOCS does not agree with the grounds cited by the Comptroller in rejecting the original contract award to AT&T, DOCS believes the Comptroller had the authority to make the decision to reject the contract.
 - The Comptroller's remedy of either requiring a re-bid, or of offering both bidders the ability to clarify their proposals, was fair and evenhanded.

The winning bidder's response to the protest

The WorldCom response to the protest is as follows:

- The Comptroller and DOCS acted in accordance with applicable State law and regulations.
- DOCS conducted the clarification process fairly and impartially.
- AT&T waived its right to complain about procedures in which it voluntarily participated, i.e., by submitting a clarification of its proposal.

Applicable Statutes and Guidelines

The requirements for competitive bidding of contracts for the purchase of services or commodities are set forth in section 163 of the SFL. SFL section 163(9) states "where provided in the solicitation, state agencies may require clarification from offerers for the purposes of assuring a full understanding of responsiveness to the solicitation requirements." However, section 160 of the SFL defines "commodities" as being items "which are the subject of any purchase or other exchange," and defines "services" as performance "which is the subject of any purchase or other exchange." Thus, section 163 only applies to purchase or exchange contracts and not to "revenue contracts."

This contract is a revenue contract and not a procurement contract because the State is not expending its moneys for goods or services. Rather, the contractor pays the State a formula-based fee, which is a portion of the moneys it receives from the charges it imposes on phone calls placed by the inmates and their families.

In reviewing competitively-bid revenue contracts, the Comptroller utilizes a standard similar to that contained in SFL §163, even though section 163 does not directly apply, particularly where the procurement has, like the one at issue, been conducted in a manner generally tracking the requirements of section 163. The Comptroller's review standard incorporates the elements of fundamental fairness and the opportunity to compete on an equal footing, in accord with New York case law. It is the same standard utilized by the Comptroller prior to the adoption of the current section 163 as part of the Procurement Stewardship Act of 1995. While section 163 is

not applicable, the principles which underlie section 163 provide guidance to the Comptroller in his review of revenue contracts. In this case, nevertheless, we believe the determination would be the same even if the technical requirements of section 163 were to be applied.

DISCUSSION

The questions presented on this protest are:

- (1) Was the Comptroller's determination rejecting the initial award to AT&T erroneous?
- (2) Did the Comptroller have the authority to allow DOCS to re-score the proposals rather than conduct a re-bid?
- (3) Was the decision by DOCS to re-score the proposals rather than conduct a re-bid supported by law?
- (4) Did DOCS offer any undue advantage to WorldCom over AT&T?

The Comptroller's determination rejecting the initial award to AT&T

The initial award by DOCS to AT&T was not in accord with the RFP nor with case law. Both AT&T and WorldCom took exceptions to sections of the RFP¹. AT&T and DOCS both claim that AT&T did not take exceptions, but rather announced differences with certain parts of the RFP and that those differences were resolved (one by AT&T yielding and one by DOCS and AT&T reaching a compromise), subsequent to the submission of the AT&T proposal.² We do not agree.

Section 2.1 of the RFP stated, "[t]he use of the words 'shall', 'must', and 'will' denote mandatory requirements throughout the RFP and Agreement and are non-negotiable." Section 4.8 of the RFP stated, "[e]xceptions to mandatory requirements will result in a proposal being disqualified from further review."

The record indicates that AT&T, in its proposal, took exception to two mandatory requirements of the RFP, which could have led to its being disqualified:

- Paragraph 2.5.d of the RFP stated, "[p]ayments shall cover normal monthly calendar periods beginning with 4/1/01 through 4/30/01, and every month thereafter. AT&T, in response to this mandatory requirement, stated in its proposal, "Read With Exception... AT&T Consumer Sales Division Agent

¹ WorldCom took exception to section 3.17.d. AT&T took exception to sections 2.5.d and 2.16.b.

² We believe this assertion by DOCS is unfounded, considering the fact that DOCS reduced the AT&T scoring due to the exception.

commission cycles are the 16th of the month to the 15th of the following month. AT&T understands the importance of this specification from a reporting and auditing perspective and is willing to discuss alternatives that would be acceptable to both parties... AT&T runs it (sic) commission cycles from the 16th to 15th of the following month to ensure consistency in the commissioning process. Using these set commission dates enable AT&T to ensure integrity in monthly run of commissions by avoiding the variable time-frames of months throughout the year (e.g., 28 days in February, 31 days in August, 30 days in September) and to avoid any potential problems caused by the leap year. AT&T will still meet the deliverable time-frames outlined in specification 2.5.E, and as such, should not be penalized for having different commission cycles..."

In reply to this response, DOCS stated: "[w]ill AT&T remove this exception? DOCS already advised in the September 21, 2000 memo to all potential bidders that we would not allow any variation to the payment year." In response to the DOCS reply, AT&T stated, "[y]es, AT&T will remove it's (sic) exception to 2.5[d]."

- Paragraph 2.16.b of the RFP stated (regarding basis for termination due to material breach, where DOCS "shall give written notice specifying the material breach"), "[i]f such written notice of material breach is given and the provider does not correct the breach to the Department's satisfaction within ten (10) days after receipt of the written notice, DOCS shall have the right to unilaterally and immediately terminate the Agreement and seek a replacement provider in order to maintain 0+ telephone service to the inmates and administrative service to DOCS without penalty to DOCS." AT&T, in response to this mandatory requirement, stated in its proposal, "Read With Exception... AT&T respectfully requests a 30-day cure period. This timeframe falls with in (sic) a more reasonable time frame to resolve a material breach on a contract the magnitude of the NYS-DOCS. Considering the time it takes to receive notice, identify the problem, take action to fix the problem and all communications required during this process, 30 days represents a more reasonable and traditional time requirement."

In reply to this response, DOCS stated: "[w]ill AT&T remove this exception? DOCS has every intention of working closely with the successful vendor to identify and resolve all problems as soon as possible. Should DOCS determine that an unresolved problem culminates in a breach of contract, DOCS feels a 10-day notification is sufficient." In response to the DOCS reply, AT&T stated: "...AT&T believes that NY DOCS and AT&T are in agreement regarding the need to cooperate in the event problems arise that need to be resolved... [W]e suggest... a '20-day cure' period. If this proposal is accepted and is then taken in conjunction with section 2.16 as originally written in the RFP, then AT&T will

not take an exception to this specification. " DOCS responded by accepting AT&T's proposal to modify the RFP mandated 30-day cure period to a 20-day cure period.

The record also indicates that WorldCom, in its proposal, took exception to a mandatory requirement of the RFP, which could have led to its being disqualified:

- Paragraph 3.17.d of the RFP stated, "[p]rovider will be responsible for all charges incurred by DOCS for interruptions of service determined to be caused by the provider." WorldCom, in response to this mandatory requirement, stated in its proposal, "Read and Agreed... WorldCom has read, understands and will comply with the clarification that neither party shall be liable to the other for any incidental, consequential, special, punitive or exemplary damages arising out of this Agreement or the provision of service hereunder, even if such party has been advised of the possibility of these damages. The foregoing limitation applies to all causes of actions and claims, including without limitation breach of contract, breach of warranty, negligence, strict liability, misrepresentation and other torts."

In reply to this response, DOCS stated: "[y]our response is not acceptable. Provision 3.17.d will remain as stated in the RFP without modification. Please respond 'Read and Agreed.' In response to the DOCS reply, WorldCom stated: "WorldCom respectfully reiterates its initial response to Paragraph 3.17 and notes that the State of New York has accepted insertion of this provision into prior contracts with WorldCom. WorldCom is unable to accept liability for other than direct damages that the State might incur as a result of a WorldCom's (sic) failure to perform the terms of the contract. Additionally, WorldCom hereby clarifies that the limitation of liability language proposed applies to all performance, not only to the the (sic) occurrence of service interruptions specified in subparagraph 3.17.d."

In light of the above, it is clear that neither the WorldCom proposal nor the AT&T proposal was responsive to the RFP. The fact that DOCS chose to negotiate with AT&T and accept a compromise solution does not make the AT&T proposal responsive. To the contrary, this would constitute the waiver of a material variation, something not allowed by the law (see discussion regarding materiality of variances, *infra*). Rather than find both proposals non-responsive, DOCS subtracted one point from AT&T and two points from WorldCom.³

³ The two point penalty was assessed against WorldCom due both to its response to Section 3.17.d, and to its response to Section 2.18, which stated that the agreement would be governed by the laws of the State of New York and required all disputes between the parties to be pursued in the Court of Claims for the State of New York. WorldCom agreed to this but (correctly) reminded DOCS that it and other telecommunications carriers were subject

A governmental agency may decline bids which fail to comply with the literal requirements of the specifications or may waive a technical non-compliance with the bid specifications if the deviation is minor or not substantial, but a bid must be rejected if the non-compliance is material or substantial (Le Cesse Bros. Contracting, Inc. v Town Board of the Town of Williamson, 62 AD2d 28, 403 NYS2d 950 [4th Dept, 1978], *affd* 46 NYS2d 960, 415 NYS2d 413 [1979]). Non-material variances may be disregarded in awarding bids; material variances may not. Entering into a contract which materially varies from the bid specifications would have the effect of altering the specifications after the bidding process and would give the successful bidder an unfair advantage (see, e.g. Progressive Dietary Consultants v Wyoming County, 90 AD2d 214, 457 NYS2d 159 [4th Dept, 1982]).

A variance is material or substantial when it would impair the interests of the agency, place the successful bidder in a position of unfair economic advantage, or place other bidders at a competitive disadvantage (Cataract Disposal, Inc. v Town of Newfane, 53 NY2d 266, 440 NYS2d 913 [1981]; Application of Glen Truck Sales & Service, Inc. v Sirigano, 31 Misc 2d 1027, 220 NYS2d 939 [1961]).

In the case of AT&T Communications v County of Nassau, 214 AD2d 666, 625 NYS2d 592 [2nd Dept, 1995], AT&T's bid was rejected in part based upon a clause inserted into the bid which provided for the payment of a termination charge in the event that the contract was terminated on grounds other than AT&T's own material default. The county found this to be a material deviation from the bid proposal. The court held that this termination clause provided AT&T with protection not afforded to other bidders and had the county accepted a bid with this clause, the other bidders would have been disadvantaged since they did not know at the time that they submitted their bids that they, too, could have included such a clause in their bids. The court

to the Federal Communications Act of 1934 and that, in case of federal pre-emption, such law, the tariffs governed by such law, and the rulings of the Federal Communications Commission, could not be ignored. After the Comptroller rejected the initial contract and returned it to DOCS, DOCS agreed that WorldCom had not taken an exception to the RFP on this issue, and both parties agreed to language which would clarify what the other had intended. At that time, DOCS restored the point previously deducted on this issue.

concluded that the determination by the county that this additional clause was a material variation was rational and also that AT&T could not withdraw the termination clause in post-bid negotiations so that it might become the lowest responsive and responsible bidder, since this would have been unfair to the other bidders.

Here, the three paragraphs to which the bidders, respectively, took exceptions, are material, because the RFP indicated that exceptions to those clauses would result in disqualification. This could have impacted other potential bidders who did not submit bids, due, in part, to the mandatory language that DOCS was subsequently willing to waive or negotiate. For this reason, AT&T's argument that both it and WorldCom understood, from prior procurements, the consequences of taking exceptions to "mandatory requirements" must fail. Even if these two bidders could have determined the true meaning of the DOCS language, other potential bidders who chose not to bid may have relied, to their detriment, on such language. Accordingly, the Comptroller was within his authority to reject the proposed contract with AT&T and there was clear authority to require a re-bid, since neither of the two bidders submitted a responsive proposal.⁴

The Comptroller's authority to allow re-scoring and the DOCS decision to re-score rather than re-bid.

Rather than requiring a re-bid, the Comptroller gave DOCS the option of allowing both bidders to fully comply with the RFP mandatory requirements, and assuming full compliance, adding back the points deducted by DOCS for the exceptions taken.⁵

The Comptroller determined that the RFP had language which conflicted with the language quoted above, which could have confused the bidders and led them to the belief that their proposals would not be disqualified.⁶ Under these circumstances, principles of fairness were not violated, and no potential bidder who did not bid was

⁴ AT&T correctly notes that the NYS Procurement Council, in its Procurement Guidelines (section VII, p. 17), states that an "[o]fferers assume that failure to respond to a mandatory requirement could result in disqualification of the proposal or a low evaluation score." Emphasis Added. However, we note that the Guidelines do not have the force and effect of law. Indeed, the case law cited above makes it clear that material defects in proposals may not be waived. More importantly, this RFP, cited above, states clearly that failure to meet mandatory requirements will result in disqualification.

⁵ Normally, if a bid is non-compliant with a material RFP provision, disqualification and not deduction of points is required and if a bid is fully compliant, the points previously deducted must be restored.

⁶ Section 4.1.d of the RFP stated, "DOCS reserves the right to negotiate with one or more Bidders responding to the RFP in order to reach an Agreement that best serves the needs of the Department and the State." Section 4.8.j of the RFP stated, "...[i]f the bidder does not agree with a requirement, the bidder must clearly state its exception to the requirement and a proposed solution to the problem caused by its exception." Section 5.5 required the bidders to list their exceptions in a separate section of their proposal, explain them in narrative form, and "provide a recommendation that the bidder believes can resolve the difference."

prejudiced by allowing DOCS to have AT&T and WorldCom clarify their bids and provide them the opportunity to comply with mandatory requirements of the RFP.⁷

In making our determination, we are cognizant of the AT&T assertion that the law prohibits a state agency from seeking post-award clarifications from vendors. AT&T is correct that SFL §163(9) contains language that expressly allows for pre-award clarifications, but is not correct that its failure to expressly authorize post-award clarifications renders them illegal.⁸ To the contrary, post-award clarifications are common, especially in the contract negotiation process. What is prohibited in such clarifications is any change that would represent a material deviation from the RFP. Here, no such deviation occurred. Here the opportunity for clarification offered to both bidders brought both proposals into full accord with the mandatory requirements of the RFP. Furthermore, even if AT&T were correct that section 163(9) prohibits post award clarifications, the characterization of these clarifications as post-award clarifications is erroneous. In fact, these clarifications were actually pre-award clarifications, i.e., the Comptroller rejected the first award and DOCS, prior to making a second award was seeking clarifications, as contemplated by Section 4.3 of the RFP, which stated, “[o]nce submitted, proposals may not be modified unless the Department specifically requests such modification or explanation.”

In summary, we believe it is clear that the process allowed by the Comptroller and utilized by DOCS was in accord with the principles of fundamental fairness, did not prejudice any bidder or potential bidder, and “fostered honest competition,” and, therefore, it was squarely within their respective discretion. Conduit and Foundation Corp. v. Metropolitan Transportation Authority, 66 NY2d 144 (1985).

An undue advantage for WorldCom over AT&T.

AT&T claims that the post-award clarification process gave WorldCom an undue advantage. We strongly disagree. Both bidders were on a level playing field. Contrary to the AT&T assertion, WorldCom had no advantage. Both bidders were held to the same rules. Each was given the opportunity to correct material defects in their proposals. Each was given the opportunity to amend their cost bid. AT&T alleges that WorldCom learned in a debriefing of its first proposal the respective scores of both bidders, and that this information affected its clarification strategy. There is no evidence, however, that WorldCom received such debriefing.⁹ Even if one had been

⁷ Both bidders were informed that if such compliance with the mandatory requirements of the RFP resulted in their costs increasing, they were welcome to submit amended cost proposals. Neither bidder amended its cost proposals.

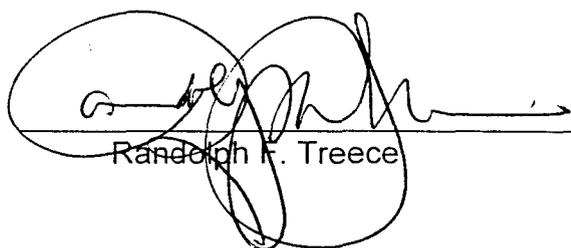
⁸ See above discussion of the applicability of SFL §163. For the purposes of our analysis, however, we will apply the section 163 requirements.

⁹ At a minimum, agencies should offer unsuccessful bidders a summary of the outcome, including the ranking of the bids, the composite scores, and an opportunity to understand the evaluation of their own proposals (See SFL, §163[9] and Procurement Guidelines, Section 7[VI][A][2]). In an appropriate case, the Comptroller could refuse to

received, however, we do not believe that this would have given WorldCom an unfair advantage.¹⁰ A debriefing in which they would receive the ranking of the bids, the composite scores, and the strengths and weaknesses only of their own proposal, could not give WorldCom information that would indicate how many exceptions AT&T took to the RFP and how many points AT&T would gain by withdrawing such exceptions. Therefore, even theoretically we see no undue advantage here to WorldCom.

CONCLUSION

We find that the determinations herein were in accord with the law and with principles of fundamental fairness. Therefore, the protest is denied and the contract with WorldCom is being approved.



Handwritten signature of Randolph K. Treece, written over a horizontal line. The signature is cursive and stylized, with a large loop at the end.

Randolph K. Treece

approve a contract until such a debriefing has occurred.

¹⁰ Furthermore, nothing prevented AT&T from requesting a de-briefing at such time and thereby having access to the same information it presumes WorldCom had access to. Again, though, we find no evidence that WorldCom received a debriefing.