

Mr. Japiske

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DECISION



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

FILE: B-202031

DATE: October 9, 1981

MATTER OF: Southwestern Bell Telephone Co. -- Request
for Reconsideration

DIGEST:

Prior decision is affirmed where request for reconsideration questions decision holding that agency should evaluate previously accrued installation charges when telephone system is reprocured. Rule that Government is not required to compensate for natural advantage of incumbency does not apply where incumbency resulted from improper award which reprocurement is intended to correct.

Southwestern Bell Telephone Company requests reconsideration of a portion of our decision in ROLM Corporation and Fisk Telephone Systems, Inc., B-202031, August 26, 1981, 81-2 CPD 180, in which we sustained protests complaining of a noncompetitive order placed with Southwestern Bell by the Nuclear Regulatory Agency (NRC). The award called for the installation of a Dimension 400 PBX (in-house telephone exchange) at NRC's Region IV Office in Arlington, Texas, the cost of which included a one-time installation charge of \$20,000.

Southwestern Bell objects to that part of our decision where, in recommending that NRC reprocure its requirement, we stated that NRC should evaluate any applicable installation charges which had already been incurred if Southwestern Bell would otherwise obtain a competitive advantage by virtue of its incumbency. Southwestern Bell says that the order which the NRC improperly placed did not result from its wrongdoing. It believes we should recognize that any advantage it may enjoy is simply the result of its incumbency, since the Dimension 400 PBX has been installed and the charges for installing it have been paid. Thus, Southwestern Bell indicates, we should allow award to

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be based strictly on lowest cost paid under the replacement contract which would exclude its normal installation charges, a result it suggests is required in any event under 41 U.S.C. § 253(b)(1976).

We recognize as Southwestern Bell points out that we have often held that the Government is not required to equalize competition for a particular procurement by taking into account the competitive advantage a firm derives from its incumbency. The cases on which Southwestern Bell relies do not apply, however, where the advantage gained is the result of improper Government action. Fox & Company, B-197272, November 6, 1980, 80-2 CPD 340; Wismer and Becker Contracting Engineers and Synthetic Fuel Corporation of America, A Joint Venture, B-191756, March 6, 1979, 79-1 CPD 148.

As indicated, our prior decision sustained the protesters' contention that the NRC improperly ordered the Southwestern Bell Dimension 400 PBX on a sole-source basis. This action, of course, improperly favored Southwestern Bell.

Further, concerning Southwestern Bell's argument that it was not at fault, we point out that we do not view its conduct as material to our recommendation that NRC evaluate installation costs in connection with its reprocurement. Nor do we agree with Southwestern Bell that it is somehow "penalized" by our recommendation. To have been penalized, Southwestern Bell would have to be denied something to which it was entitled, whereas the purpose of our recommendation was to prevent the protesters from being penalized in the exercise of their right to compete for the NRC's business. As indicated in our prior decision, our recommendation simply sought to rescind, insofar as practical, the effect of that which had been improperly done.

Southwestern Bell nevertheless cites 41 U.S.C. § 253(b) as supporting its belief that it is entitled to have its proposal considered without regard to installation costs. Section 253(b) requires award in advertised procurements to that responsible bidder whose bid is most advantageous to the Government, price and other factors considered.

We do not believe § 253(b) prevents the Government from electing to evaluate an element of cost where that cost was paid under an improperly awarded contract and the requirement is being reprocured. Assuming for purposes of discussion that the NRC reprocurement would be advertised (we have no knowledge of this), § 253(b) does not require agencies to base award solely on lowest unevaluated ("raw") price. Other factors including transportation and administrative costs are commonly included and evaluated in determining which of several bids is most advantageous to the Government.

Likewise, where as here the procurement is conducted to restore the integrity of the competitive system, an incumbent's one-time costs, such as installation costs, are factors which we believe may be considered in selecting an offer which is most advantageous to the Government. Any other result would be inappropriate if the cost which otherwise would be ignored is part of the total price which the Government will have paid the incumbent for the goods or services being acquired. The only question which arises is whether such action is in the Government's interest in view of the possible increased costs it may have to pay. This question we answered in the affirmative in reaching our prior decision since we believed as we still do that the importance of protecting the integrity of the competitive procurement system outweighed the costs involved.

In the circumstances, we see no basis to alter our initial decision, which is affirmed. Jack Roach Cadillac -- Request for Reconsideration, B-200847.3, August 28, 1981, 81-2 CPD 183.



Acting Comptroller General
of the United States