



GAO

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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Sprint Communications Company LP; Global Crossing Telecommunications, Inc.--Protests and Reconsideration

File: B-288413.11; B-288413.12

Date: October 8, 2002

David S. Cohen, Esq., and John J. O'Brien, Esq., Cohen Mohr, for Sprint Communications Company LP, and John G. Horan, Esq., and Jason A. Carey, Esq., McDermott, Will & Emery, for Global Crossing Telecommunications, Inc., the protesters.

Carl L. Vacketta, Esq., Kevin P. Mullen, Esq., and David E. Fletcher, Esq., Piper Rudnick, for MCI WorldCom Communications, Inc., an intervenor.

William L. Mayers, Esq., Department of Defense, for the agency.

Henry J. Gorczycki, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protests alleging material misrepresentation of an offeror's financial information submitted to the agency for the purposes of determining the offeror's responsibility is dismissed where the totality of circumstances make it inappropriate for the General Accounting Office to review this matter.

DECISION

Sprint Communications Company LP and Global Crossing Telecommunications, Inc. protest an award to MCI WorldCom Communications, Inc. under request for proposals (RFP) No. DCA200-01-R-5008, issued by the Department of Defense, Defense Information Technology Contracting Organization (DITCO), for the Defense Research Engineering Network (DREN). Global Crossing alternatively requests reconsideration of our decision, *Global Crossing Telecomms., Inc.*, B-288413.6, B-288413.10, June 18, 2002, 2002 CPD ¶ 102, in which we denied Global Crossing's earlier protest of the award to MCI. The protesters allege that the agency relied upon a material misrepresentation by the awardee in making award.

We dismiss the protests and the request for reconsideration.

The agency awarded a contract to MCI on April 4, 2002. In the months prior to that award, the agency had twice selected Global Crossing's proposal for award. The first

selection resulted in a contract award that was canceled following protests by competitors, including Sprint and MCI. Upon reevaluation, the agency again selected Global Crossing for award and, based on a pre-award survey, determined that the firm was responsible. However, at the request of Global Crossing, the agency delayed the award, and soon thereafter Global Crossing announced that it was filing for reorganization under Chapter 11 of the Bankruptcy Act. The agency updated its pre-award survey to consider Global Crossing's most recent financial conditions, and subsequently determined that the firm was nonresponsible.¹

The agency also performed a pre-award survey on MCI, whose proposal was considered next in line for award. MCI asked the agency to rely on the financial position of the firm's parent corporation, WorldCom, Inc. Following submission of a corporate guarantee by WorldCom, the agency consented to MCI's request and conducted the pre-award survey, based on WorldCom's financial statements for the previous 3 years. The pre-award survey determined that WorldCom's financial data indicated that the firm had satisfactory financial performance, generally favorable trends of key financial indicators, and a very unlikely chance of bankruptcy, which did not expose the Government to significant risks in issuing a contract to MCI with WorldCom serving as guarantor. In determining MCI responsible, the contracting officer determined, based on the information submitted by WorldCom, that the firm had adequate capacity to meet financial commitments, though it may be subject to adverse economic conditions.

The protests of Global Crossing, Sprint and another firm that followed the award to MCI challenged in part the agency's responsibility determination. After receiving a report from the agency addressing all of the protest allegations, Sprint and the other firm withdrew their protests. Global Crossing's protest was limited to challenging the agency's responsibility determination concerning Global Crossing and alleging that the agency treated the firms unequally in analyzing their financial information in determining responsibility.

In denying Global Crossing's protest on June 18, we reviewed the agency's pre-award surveys of both firms. The record reasonably supported the agency's determination of nonresponsibility for Global Crossing. The record also did not support a finding that the agency treated Global Crossing and MCI unequally in reaching opposite conclusions about the financial capabilities of each firm resulting in different responsibility determinations.

¹ Essentially, the updated pre-award survey of Global Crossing and the nonresponsibility decision determined that poor financial performance, unfavorable trends of key financial indicators, and legal consequences associated with bankruptcy and possible liquidation exposed the Government to significant, unacceptable risks in entering into any contracts with Global Crossing.

On June 25, WorldCom publicly announced that it had made accounting transactions that were not in accordance with generally accepted accounting principles, which resulted in the firm overstating earnings before interest, taxes, depreciation and amortization (EBITDA) by \$3.055 billion for 2001 and \$797 million for first quarter 2002. WorldCom Press Release (June 25, 2002). On June 26, the Securities and Exchange Commission (SEC) publicly announced that the “accounting improprieties” confirmed by WorldCom’s announcement were of “unprecedented magnitude,” and filed a complaint against WorldCom alleging that WorldCom had defrauded its investors. SEC Press Release (June 26, 2002); Complaint, SEC v. WorldCom, Inc. (S.D.N.Y.). The present protests, filed July 3 and 5, followed.

Sprint and Global Crossing essentially allege that the agency’s responsibility determination, based on a material misrepresentation of WorldCom’s financial information, was unreasonable, which rendered the contract award void.² Global Crossing alternatively references the alleged misrepresentation to request reconsideration of our prior decision denying its allegation of unequal treatment in the agency’s responsibility determinations.³

The agency responds to the protests by arguing that the telecommunications industry is in economic turmoil, that restatement of WorldCom’s financial statements does not compare unfavorably with other telecommunications firms, that WorldCom’s financial condition is typical of the industry, and that a review of WorldCom’s financial information would not necessarily result in a nonresponsibility determination.

As our Office was developing these protests, information and events related to WorldCom’s prior and current financial condition continued to change. On July 21, WorldCom and MCI filed for reorganization under Chapter 11 of the Bankruptcy Act. WorldCom Press Release (July 21, 2002). On July 29, WorldCom announced that, based on the firm’s bankruptcy action and pending restatement of its financial statements, NASDAQ had determined that WorldCom and MCI stock would be de-listed from the NASDAQ Stock Market. WorldCom Press Release (July 29, 2002). On August 8, WorldCom announced additional overstatements of EBITDA for 1999, 2000, 2001, and the first quarter of 2002 totaling \$3.3 billion, and of other non-EBITDA pre-tax income for the same periods totaling \$500 million, bringing the

² Sprint alternatively relies on the alleged misrepresentation to protest the agency’s evaluation of risk associated with MCI’s technical and management proposals. However, the alleged misrepresentation does not concern the information included in, or the agency’s evaluation of, MCI’s technical and management proposals; it relates solely to the agency’s responsibility determination.

³ Since the request for reconsideration rests upon the alleged misrepresentation, we find no distinction between the protest and the request for reconsideration.

total overstatement to over \$7.6 billion. The announcement also stated that, when the firm releases its revised financial statements, WorldCom anticipates writing off all of its existing goodwill and other intangible assets recorded as \$50.6 billion. WorldCom's August 8 announcement also stated that, until an audit of its prior financial statements is completed, the total impact of improperly reported income and the ultimate amount of the write-offs cannot be known. WorldCom Press Release (Aug. 8, 2002).

Legal events also unfolded as a result of WorldCom's announced accounting improprieties. As indicated, on June 26, the SEC filed a civil complaint against WorldCom in federal district court alleging securities fraud. Soon thereafter, several congressional inquiries were conducted and WorldCom officers, both former and current, received subpoenas to testify. In August, a federal grand jury indicted two former WorldCom executives in part for false statements and conspiring with others, known and unknown, to commit fraud.

Here, it is clear from WorldCom's public announcements that the agency relied on grossly inaccurate financial information in making a determination that WorldCom was a responsible contractor. However, as discussed below, we conclude that the matter protested is inappropriate for resolution by our Office.

We have recognized that an offeror's material misrepresentation could provide a basis for disqualification of a proposal and cancellation of the contract award based upon the proposal. A misrepresentation is material where an agency has relied upon the misrepresentation and that misrepresentation likely had a significant impact upon the evaluation. AVIATE L.L.C., B-275058.6, B-275058.7, Apr. 14, 1997, 97-1 CPD ¶ 162 at 11. Here, the allegations of material misrepresentation do not arise from representations made in MCI's proposal, but rather arise from information submitted by WorldCom during the pre-award survey. As such, those allegations more closely relate to a challenge to the agency's affirmative determination of responsibility than they do to a protest alleging misrepresentation of information in a proposal. See Universal Techs. Inc.; Spacecraft, Inc., B-248808.2 et al., Sept. 28, 1992, 92-2 CPD ¶ 212 at 13-16 (GAO reviewed merits of alleged misrepresentation of responsibility information included in a proposal, but declined to review affirmative determination of responsibility). Under our current regulations, we will not consider challenges to an affirmative determination of responsibility absent a showing of possible bad faith on the part of government officials or that definitive responsibility criteria in the solicitation were not met, which showing has not been made here. 4 C.F.R. § 21.5(c) (2002).⁴

⁴ We are currently revising our regulations and have issued a proposed rule revising our standard for reviewing affirmative determinations of responsibility. 67 Fed. Reg. 61542, 61544-45 (2002).

Indeed, far from possible acts of bad faith on the part of government officials, it appears that the agency had no knowledge of the inaccuracies in WorldCom's financial statements until after award, thus making this matter more one of contract administration (a matter beyond our bid protest authority, 4 C.F.R. § 21.5(a)), rather than a protest of the agency's award decision. While we recognize that the protests were timely filed within 10 days of WorldCom's initial public disclosure, we nevertheless have reservations in the unusual circumstances present here about the appropriateness of our Office considering a protest filed well after award and after contract performance has begun, particularly where, as here, the agency has authority to address the alleged impropriety as part of contract administration.⁵

Moreover, the facts surrounding the inaccurate financial information are in flux and, due to the actions pending in other forums, some of those facts are unavailable to our Office during the short time frame under which these protests must be resolved. We hesitate to judge the degree of relevance or importance of such facts—such as the nature of culpability for acts causing the inaccuracies—before the other forums determine them. Thus, although the precise matter being protested here (the award of the DREN contract) is not the subject of litigation before a court of competent jurisdiction (which if had been our Office would have promptly dismissed the protest, see 4 C.F.R. § 21.11(b)), we do not believe it is appropriate for our Office to “get ahead” of this process in the context of this protest.

In sum, the total weight of the concerns presented above causes us to conclude that the matter is not appropriate for review by our Office.

The protests and request for reconsideration are dismissed.

Anthony H. Gamboa
General Counsel

⁵ In this regard, given the circumstances, DITCO may wish to consider whether it needs to take further action to protect the government's interests in connection with this procurement.