



Decision

Matter of: OLCR Inc.; Revolutionize

File: B-401575; B-401575.2

Date: September 24, 2009

Tracy Bogans for OLCR Inc.; and Vernell E. Kenner for Revolutionize, the protesters. James E. Hicks, Esq., Drug Enforcement Administration, for the agency. Pedro E. Briones, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protests that agency improperly rejected protesters' proposals for satellite television service are denied where agency solicited basic cable service.

DECISION

OLCR Inc. of Chester, Pennsylvania, and Revolutionize of Las Vegas, Nevada, protest the rejection of their proposals under request for proposals (RFP) No. DJD-09-R-0017, issued by the Drug Enforcement Administration (DEA), Department of Justice, for basic cable television service at DEA's Training Academy in Quantico, Virginia. OLCR and Revolutionize, which provide satellite television service, argue that the RFP did not require the contractor be a cable service provider.

We deny the protests.

The RFP was issued as a combined synopsis/solicitation for commercial items under Federal Acquisition Regulation Subpart 12.6 for "basic cable service" at DEA's training facility. Offerors were informed that the contractor would "be responsible for providing and maintaining basic cable television service and any associated equipment including, but not limited to all cable lines, repairs, and maintenance necessary to receive basic cable service for an estimated 149 outlets" RFP at 1-2. In this regard, the contractor would be required to provide, at a minimum, basic cable service for a number of television channels identified in the RFP and "all other channels in its basic cable service line-up." *Id.* at 2. Offerors were also informed that the DEA would add an additional six audiovisual signals to the incoming basic cable service for internal programming and distribute the combined signals throughout the training facility on DEA's closed circuit cable system. The

RFP also provided that the contractor must abide by customer service standards as required by the Federal Communications Commission (FCC). The RFP included North American Industry Classification System (NAICS) code 517110, “Wired Telecommunications Carriers.”¹

The agency received a number of proposals, including OLCR’s and Revolutionize’s. Agency Report (AR) at 2. The agency asked OLCR and Revolutionize to clarify whether the firms provided satellite service, and both firms informed DEA that they would provide satellite television services. DEA rejected the protesters’ proposals, and this protest followed.

The protesters argue that the RFP does not require that the contractor be a cable service provider and that the solicitation simply defines the agency’s requirement for basic cable service as a list of television channels that the protesters can provide. The protesters contend that they can satisfy the agency’s requirements with satellite service. In this regard, the protesters state that both cable and satellite television companies receive television signals that originate from a satellite. The protesters also note that the RFP included NAICS code 517110, which includes satellite television service.

The agency responds that the RFP sought proposals for “basic cable service” and that this does not include satellite service. In this regard, DEA states that relevant communications statutes and FCC regulations, as well as the telecommunications industry in general, recognize a distinction between cable and satellite television services. The agency also contends that there are a number of solicitation requirements that a satellite service provider could not provide, including, for example, “cabling to the building,” providing and maintaining “cable lines,” furnishing and installing “cable and cable assemblies,” or maintaining “line and equipment maintenance and repair” service to a “cable feed.”² See AR at 5; RFP at 2. Finally, the agency acknowledges that the NAICS code (for Wired Telecommunication Carriers) identified in the RFP includes satellite services, but explains that the NAICS code also distinguishes between cable and satellite service and includes satellite service within this classification “by exception.” AR at 5.

¹ NAICS code 517110, “Wired Telecommunications Carriers,” is defined at the NAICS website, as including establishments that use wired telecommunications network facilities “to provide a variety of services, such as wired telephon[e] services, including VoIP [Voice over Internet Protocol]; wired (cable) audio and video programming distribution; and wired broadband Internet services. By exception, establishments providing satellite television distribution services . . . are included in this industry.” See <http://www.naics.com/censusfiles/ND517110.HTM>.

² DEA notes that although the word “cable” is used 19 times in the RFP, there are no references to “satellite” in the solicitation.

We find that the RFP, read as a whole, reasonably apprised offerors that the requirement for basic cable service did not include satellite television service. In this regard, we agree with DEA that relevant law and regulations distinguish between basic cable service and satellite television service and that the RFP requirement for basic cable service does not encompass services provided by satellite television providers.³

The Communications Act of 1934, as amended, separately defines the terms “basic cable service,” 47 U.S.C. § 522(3) and “direct-to-home satellite services,” 47 U.S.C. § 303(v). That Act also distinguishes cable and satellite television providers.⁴ Compare 47 U.S.C. § 522(5) (“cable operator”) with 47 U.S.C. § 338(h)(4) and 17 U.S.C. § 119(d)(6) (“satellite carrier”). Statutes governing copyright also distinguish cable and satellite television providers. See, e.g., 17 U.S.C. §§ 111, 122.

Further, FCC’s regulations define television programming delivered without a wire via satellite or other facilities to not be “cable television.” See, e.g., 47 C.F.R. § 76.5(a)(2) (2008); see also FCC Fact Sheet, Cable Television, June 2000, at 3. Satellite and cable television are subject to different requirements under FCC regulations. See generally 47 C.F.R. part 76 (FCC Multichannel Video and Cable Television Service regulations). For example, unlike satellite providers, cable providers must abide by FCC and local customer service standards. See 47 U.S.C. § 552; 47 C.F.R. §§ 76.309, 76.972, 76.1602–1603. Also, cable providers must obtain franchising licenses from local governments because cable service uses public rights-of-way⁵ to transmit multichannel video programming (MVP) signals; satellite

³ The agency is incorrect, however, when it argues that satellite providers could not satisfy solicitation requirements, such as cabling to the building or maintaining and repairing cable assemblies; the record shows that both satellite and cable television service providers ultimately deliver multichannel video programming (MVP) signals to their subscribers’ television or other video equipment using some form of cable. See, e.g., 47 C.F.R. § 76.802; OLCR Proposal (proposing to complete all needed wiring.) See also infra n. 5.

⁴ The term that encompasses both types of providers is “multichannel video programming distributor.” See 47 U.S.C. § 522(13); 47 C.F.R. § 76.1000(e). See also National Cable & Telecomm. Assoc. v. FCC, 567 F.3d 659, 661–62 (D.C. Cir. 2009).

⁵ Cable television service transmits MVP signals to subscribers through a local network of coaxial or fiber optic cables laid under city streets or along utility lines that directly connect to the subscriber’s television or video equipment. See, e.g., FCC v. Beach Commc’n, Inc., 508 U.S. 307, 311 (1993), citing In re Definition of a Cable Television System, 5 F.C.C.Rcd. 7638, ¶ 12 (1990); Satellite Broad. and Commc’n Assoc. v. FCC, 275 F.3d 337, 344–45 (4th Cir. 2001); see also FCC Fact Sheet, Cable Television, June 2000, at 3–4. Satellite service transmits television signals over the air from satellites directly to a satellite dish located on the

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providers are not required to obtain franchise agreements. See 47 U.S.C. § 541(b)(1). Moreover, cable and satellite providers are subject to different requirements for the transmission of local commercial and non-commercial television broadcast signals. Compare 47 U.S.C. § 534-35 and 47 C.F.R. § 76.56 with 47 U.S.C. § 338 and 47 C.F.R. § 76.66. See generally “Localism”: Statutes and Rules Affecting Local Programming on Broadcast, Cable, and Satellite Television, Congressional Research Service Report for Congress, No. RL32641, Jan. 9, 2008.

In sum, we conclude that the protesters knew, or should have known, that satellite service would not be permitted under this RFP for basic cable service. In this regard, we do not agree with the protesters that the inclusion of NAICS code 517110 indicated that satellite service providers would be permitted to compete under this RFP. Although the NAICS code does include both cable and satellite television services, it also includes other types of services such as telephone, broadband Internet, and Voice over Internet Protocol services that are not being solicited here. As the agency explains, the RFP did not solicit proposals for a wired telecommunications carrier generally, which could include any number of the services listed under the code, but specifically solicits cable video programming. Apart from the reference to satellite service in the NAICS code, the RFP, read as a whole, reasonably informed vendors that the agency was seeking basic cable service, not service from satellite providers.

To extent that the protesters’ arguments suggest that the solicitation was ambiguous, their protests are untimely. Our Bid Protest Regulations contain strict rules for the timely submission of protests. They specifically require that a protest based upon alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of initial proposals be filed before that time. 4 C.F.R. § 21.2(a)(1) (2009).

The protests are denied.

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subscriber’s premises; the signal is then retransmitted from the satellite dish to the subscriber’s television or other video equipment using coaxial cable. See id.