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DECISION



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

FILE: B-188054

DATE: October 25, 1977

MATTER OF: Kaufman DeDell Printing, Inc.-Reconsideration

DIGEST:

"Protest" based on allegedly improper termination of contract for convenience of the Government and on alleged agency violation of Office of Management and Budget Circular A-76 was properly dismissed since decisions to terminate contracts are matters of contract administration not generally reviewable by GAO under its Bid Protest Procedures and compliance with Circular A-76 is policy matter for Executive branch not affecting legality of agency actions.

Kaufman DeDell Printing, Inc. (Kaufman) requests reconsideration of our decision B-188054, August 8, 1977, 77-2 CPD 86, dismissing its protest against the termination for the convenience of the Government of contract No. 68-01-3298 by the United States Environmental Protection Agency (EPA).

In that decision we stated that "[t]he determination of whether a contract should be terminated for the convenience of the Government and the proper payment due as a result thereof are matters of contract administration and are not for resolution under our Bid Protest Procedures." Kaufman maintains that this Office should review these matters of contract administration as part of our "watchdog" function and requests that we reconsider our policy as it applies to Kaufman's case.

It appears that Kaufman misunderstands the function of this Office in considering matters under the Bid Protest Procedures, 4 C.F.R. Part 20 (1977). Pursuant to those procedures, we consider whether an award, or proposed award, of a contract complies with statutory, regulatory and other legal requirements. See SMI (Water town), Inc., B-188174, February 8, 1977, 77-1 CPD 98; Dyneteria, Inc., B-186828, July 22, 1976, 76-2 CPD 72. We do so in accordance with our statutory obligation under 31 U.S.C. 71 & 74 (1970) to rule on the legality of an expenditure or proposed expenditure of appropriated funds.

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However, once a contract is properly awarded, the regulations and usually the contract itself provide that the administration of that contract--including the rendering of decisions as to whether the contract should be terminated--is the responsibility and within the authority of the cognizant procurement officials rather than this Office. The contract also usually provides that any dispute arising out of contract performance or out of the Government's unilateral termination for convenience settlement determination may be appealed in accordance with the "Disputes" clause of the contract. See Federal Procurement Regulations 1-8.209-7(f), 1-8.701, and 1-8.705. For that reason this Office does not generally rule upon matters cognizable under the "Disputes" clause or upon other contract administration matters. E. Walters & Company, Inc., et al., B-180381, May 3, 1974, 74-1 CPD 226; Columbia Van Lines, Inc., et al., 54 Comp. Gen. 955, 961 (1975), 75-1 CPD 295; Hugh Brasington Contracting Company, B-187022, September 14, 1976, 76-2 CPD 243.

The one exception to this rule is where there are allegations that a termination for convenience resulted from bad faith or from a clear abuse of discretion. We consider cases involving such allegations because a "bad faith" termination constitutes a breach of contract and entitles the contractor to breach of contract damages instead of the termination settlement remedy provided for by the contract. National Factors, Inc., et al. v. United States, 492 F. 2d 98 (Ct. Cl. 1974). Accordingly, we have reviewed terminations for convenience where they were based on agency determinations that the initial contract award was improper. See Michael O'Conner, Inc., et al., B-183381, July 6, 1976, 76-2 CPD 8; Electronic Associates, Inc., B-184412, February 10, 1976, 76-1 CPD 83; Service Industries, Inc., et al., 55 Comp. Gen. 502 (1975), 75-2 CPD 345.

In this case, the termination was not based on an impropriety in the award process but rather on a determination by EPA that it could perform the services in-house at lower cost. In general, the termination of a contract because a better price is available elsewhere has been recognized as a valid exercise of contracting officer discretion. Colonial Metals Co. v. United States, 495 F. 2d 1355 (Ct. Cl. 1974); B-152486, December 6,

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1963; Jets Services, ASBCA 19841, 76-1 BCA 11,668. Although the cited cases involved the availability of lower prices from other contractors, the rationale would seem to apply equally to a situation where the Government believes it can save money by providing the services in-house. Thus, although Kaufman does not agree that EPA can perform the services more cheaply, we do not view Kaufman's assertions as raising the possibility of a breach of contract situation in connection with the termination of the Kaufman contract.

Kaufman also asserts that because EPA understated its in-house costs, the resultant contract termination was in violation of Office of Management and Budget (OMB) Circular A-76 which expresses policy guidance with respect to whether certain services should be provided in-house or purchased from commercial sources. Kaufman recognizes that we regard the provisions of Circular A-76 as "matters of Executive policy which do not establish legal rights and responsibilities and which are not within the decision functions of the General Accounting Office," but questions why this Office does not rule on and enforce that Executive policy.

As indicated above, this Office passes on the legality of Government expenditures. That means that we consider whether the expenditures were or would be contrary to law or regulation. OMB Circular A-76 is not a regulation having the force and effect of law. It is a policy statement of the Executive branch, and an agency's failure to comply with it would not render the agency's action illegal. Thus any contention that agency action is in violation of the Circular is not properly for consideration under our Bid Protest Procedures. See General DataComm Industries, Inc., B-182556, April 9, 1975, 75-1 CPD 218.

Our prior decision is affirmed.


Acting Comptroller General
of the United States