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P. J. Jammes
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DECISION



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

FILE: B-190225

DATE: May 5, 1978

MATTER OF: Chemical Technology, Inc.

DIGEST:

1. As general rule, GAO will not consider whether contracting agency should have exercised option where contract is renewable at sole discretion of Government. However, where question is whether subsequent procurement was in derogation of option allegedly exercised, that is matter ordinarily for consideration by GAO.
2. Where protester and contracting officer disagree whether option was exercised and enter into mutual agreement terminating option, protester's contention that procurement of same services is in derogation of alleged option is academic.
3. Incumbent contractor's protest that Air Force compromised its competitive position on solicitation for follow-on contract by allowing competitor to view protester's facilities is without merit where contract reserved to Government right to conduct site visits at contractor operated facilities in conjunction with solicitation of offers for follow-on contract.
4. Protester who alleges improprieties in negotiation procedures leading up to eventual awards to it, from which it benefits, will not be heard to complain of procedures.

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Chemical Technology, Inc. (CTI), filed a protest with our Office against the award of a contract for custodial services pursuant to solicitation No. F11623-77-B-0066 issued by Scott Air Force Base (Scott AFB).

CTI was the contractor on the previous contract to provide custodial services for Scott AFB. Essentially, CTI is protesting because it alleges that the contracting officer exercised an option under that contract binding both CTI and the Government to an extension of the custodial services through September 30, 1978. CTI contends that the solicitation of offers for the same custodial services as are covered by the option is improper.

The circumstances leading to the protest are as follows. Contract No. F11623-77-90102, a 100-percent small business set aside, with CTI provided for the performance of custodial services at Scott AFB covering the period through September 30, 1977, with an option to provide such services for the period from October 1, 1977, through September 30, 1978, at the election of the Government. The option clause provided that the Government could require CTI to continue to perform any or all services under the contract by giving written notice to that effect. By letter dated August 1, 1977, the contracting officer informed CTI:

"Pursuant to paragraph 4 of Section J on page J-1, you are hereby advised that the Government intends to exercise the option set forth on page E-1 for the period 1 Oct 77 through 30 Sep 78."

CTI contends that the contracting officer's statement amounted to an exercise of the Government's rights under the option clause of the contract and that Scott AFB was bound to have the custodial services performed by CTI through September 30, 1978. The Air Force does not agree. Apparently, the Air Force is of the opinion that the option was never exercised and that the August 1, 1977, letter was merely a preliminary notification of the Government's intention to exercise the option at a future time.

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In the agency report, the Air Force indicates that, during the latter part of August 1977, it received complaints from employees of CTI concerning the adequacy of funds in CTI's bank account to cover payroll checks. As a result of the complaints, the contracting officer decided that a preaward survey on the financial capability of CTI should be undertaken by the Air Force before actually exercising the option with CTI. On September 13, 1977, the surveying activity advised the contracting office that CTI was not financially responsible and recommended that the option not be exercised.

CTI indicates that on September 23, 1977, its manager at Scott AFB reported that CTI's competitors were touring the building, taking notes, and interviewing CTI employees. CTI inquired of the contracting officer and was informed that a negative determination had been reached on the preaward survey, that the option with CTI would not be exercised, and that the Air Force had decided to resolicit the requirement for the following year. The contracting officer also informed CTI that, since its contract was about to expire, the Air Force was negotiating a contract with another firm so as not to disrupt the performance of custodial services in the interim between expiration of CTI's contract and the award of a new contract. The contracting officer indicated that negotiations would not be conducted with CTI for the interim contract and that CTI would not be invited to submit an offer on the follow-on contract because of the Air Force's negative determination on the financial status of CTI. CTI requested that the matter be referred to the Small Business Administration for a certificate of competency (COC).

According to CTI, it was informed later the same day by the contracting officer that, although it would not be allowed to negotiate on the interim contract, it would be allowed to submit an offer on solicitation No. F11623-77-B-0066 for the follow-on contract. The solicitation was issued in late September 1977 and CTI was furnished a copy. However, CTI refused

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to submit an offer since it believed it had a firm commitment with the Air Force as a result of the August 1 notice of intent to exercise the contract -90102 option. CTI then protested to our Office. As a result of CTI's protest, the Air Force decided to request current financial information from CTI and to review CTI's financial responsibility again. The Air Force also began to negotiate with CTI regarding the interim contract which was to be awarded for the month of October 1977. The Air Force concluded that CTI was financially responsible for the month of October and that CTI's price was the lowest on the interim contract. Accordingly, an agreement was reached between the Air Force and CTI on September 30, 1977, regarding the option clause of CTI's contract and the dispute as to whether it was exercised. This agreement extended the CTI contract to October 31, 1977. It stated, in pertinent part, as follows:

"a. Pursuant to agreement between the parties the Government extends the contract for the period 1 Oct 77 thru 31 Oct 77. All terms and conditions of the basic contract will remain in full force and effect. The extension shall be at the monthly price of \$11,200.00 which includes Addendums 4, 5 and 6 and Wage Determination No. 70-138 (Rev. 11) dated July 29, 1977, consisting of 2 pages, attached hereto. This effectively terminates any options contained in the contract."

Since the procuring activity was unable to award a contract pursuant to solicitation -0066 prior to the end of October, the contracting officer negotiated a purchase order under a separate number with CTI for the month of November 1977. Subsequently, the Air Force awarded the solicitation -0066 follow-on contract.

The bases alleged by CTI for its protest are:

1. The Air Force failed to honor the option commitment to CTI under contract -90102.

2. The Air Force intentionally failed to notify CTI that the option would not be exercised.
3. The Air Force failed to submit the question of CTI's financial capability to the Small Business Administration for a COC before deciding not to exercise the option. Moreover, CTI contends that it was not allowed an opportunity to defend against the Air Force's negative determination on its financial capability.
4. The Air Force compromised CTI's competitive position by allowing competitors to view CTI's operation prior to bidding on solicitation -0066.
5. The Air Force secretly negotiated with Best Way Services in an effort to procure the required custodial services for the month of October 1977.
6. The negotiations with Best Way Services on the interim contract were improper since Best Way's offered price for the month of October 1977 was higher than the price offered by CTI under the option clause.
7. The Air Force orally solicited quotations and improperly negotiated to procure custodial services for the period between the expiration of CTI's contract and award of the follow-on contract.

The first three bases for CTI's protest are related to the dispute as to whether the Air Force exercised the option under CTI's contract. The Air Force contends that the determination as to whether a contracting agency should exercise an option is primarily the responsibility of the contracting agency and not subject to review by our Office.

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As a general rule, our Office will not consider whether a contracting activity should have exercised an option where the contract is renewable at the sole discretion of the Government. See C.G. Ashe Enterprises, 56 Comp. Gen. 397 (1977), 77-1 CFD 166. However, in the present case, the question is not whether the Air Force should have exercised the option, but whether the subsequent procurement of services was in derogation of the option allegedly exercised. That question relates to the propriety of the subsequent procurement actions and ordinarily is a matter for consideration by our Office. In our view, that aspect of the protest is academic in this case inasmuch as on September 30, 1977, CTI entered into a mutual agreement with the contracting officer which "effectively terminates any options contained in the contract." The agreement speaks in terms of ending any options. CTI argues that the contested option had already ripened into a binding agreement. However, the contract provided for no other options and, therefore, the parties must have intended to terminate the contested option, including any purported agreement which could have resulted from it. Since the option was mutually terminated, no procurement of the services contained in the option by any other means is in violation of the option. Therefore, the first three bases of the protest were settled under the terms of the September 30, 1977, agreement and will not be considered on the merits.

Regarding allegation number 4, we find no impropriety in the Air Force's actions in allowing CTI's competitors to view the site before bidding on the solicitation for the follow-on contract. The contract with CTI contained Additional General Provision No. 44, entitled "Contractor Changeover," which reserved to the Government the right to conduct site visits at all contractor-operated facilities in conjunction with the solicitation of offers for the follow-on contract, and there is no evidence that the site visit made by one of CTI's competitors was improperly conducted.

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Allegations 5, 6 and 7 deal with award of the short-term contract for custodial services between expiration of CTI's contract on September 30, 1977, and commencement of services under the follow-on contract. Whatever improprieties are alleged to have occurred with respect to the interim contracts, the fact remains that the interim awards eventually were made to CTI. It agreed to an extension of the contract for the month of October and was awarded a contract under a separate purchase order for the month of November. It accepted the benefits of the interim agreements. Therefore, it will not be heard to complain of the procedures that led up to the awards. Cf. 49 Comp. Gen. 761, 764 (1970).

The protest is denied.


Deputy Comptroller General.
of the United States