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DECISION



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

FILE: B-199183

DATE: June 19, 1978

**MATTER OF: Pacific Architects and Engineers
Incorporated**

DIGEST:

1. GAO will not review 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 since decisions to terminate contracts concerning matters of contract administration are 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.
2. Protest not filed in GAO within 10 working days after formal notification of initial adverse action by agency is untimely, and not for consideration on the merits. 4 C.F.R. § 20.2(a) (1976).

Pacific Architects and Engineers Incorporated (PAE) has protested the partial termination of its contract with the Department of the Air Force (DAF) to provide base maintenance and support services at Athenai Airport, Iraklion Air Station, Greece. PAE was awarded the contract on March 22, 1974, for services during the period of July 1, 1974, through June 30, 1978. The contract was modified, effective May 1, 1975, to provide for the operation, supervision, administration and management of the Visiting Officer's Quarters (VOQ), Athenai Airport, Athens, Greece. On August 31, 1977, PAE received modification number M110 which terminated the contract for the VOQ services.

PAE protests that the partial termination of its contract was improper for three reasons. First, PAE contends that its contract was terminated for the sole purpose

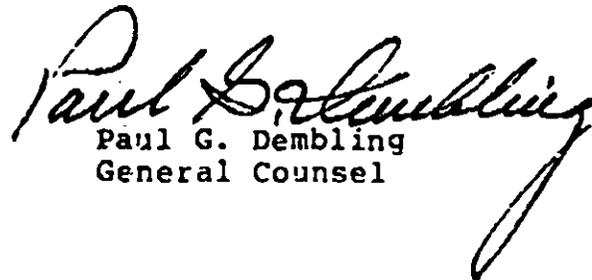
of having the services provided by the Hellenikon Officer's Open Mess, and that this use of the contract's termination clause is illegal. Our Office does not generally review terminations for convenience as this is a matter of contract administration and is within the responsibility of the procurement activity. E. Walters & Company, Inc., et al., B-180381, May 3, 1974, 74-1 CPD 226. PAE argues, however, that this case falls within the one exception to this rule, stated in Kaufman De Dell Printing, Inc. - Reconsideration, B-188054, October 25, 1977, 77-2 CPD 321, that we consider cases when 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 by the contract. National Factors, Inc., et al. v. United States, 492 F.2d 98 (Ct. Cl. 1974). In Kaufman, supra, however, we stated that we consider cases under this exception where the termination was based on an agency's determination that the initial contract award was improper. In this case, as in Kaufman, the termination was not based on an impropriety in the award process, but rather on a determination by DAF that the services could be provided in-house at lower cost. The termination of a contract because the Government believes it can save money by providing the services in-house is recognized as a valid exercise of the contracting officer's discretion. Kaufman, supra. Although PAE does not agree that the in-house services will be less expensive, we do not view PAE's assertions as raising the possibility of a breach of contract situation in connection with the termination of the PAE contract. Consequently, we will not review DAF's decision to terminate PAE's contract.

Second, PAE protests that there has been no showing through a proper cost comparison that such action will result in a lower total cost to the Government, as required by Air Force Regulation 26-12, January 29, 1974, which implements Office of Management and Budget (OMB) Circular A-76 which expresses policy guidance with respect to whether services should be provided in-house or purchased from commercial sources. OMB Circular A-76 is a matter of Executive policy. This Office passes on the legality of Government expenditures which would be

contrary to law or regulation. As OMB Circular A-76 is not a regulation having the force and effect of law, but is a policy statement of the Executive branch, 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.

And third, PAE argues in the alternative that the Hellenikon Officer's Open Mess is not an in-house activity. PAE therefore contends that the contract has been improperly awarded on a sole-source basis. In this regard, the initial issue is whether this aspect of the protest is timely. On August 26, 1977, PAE protested to DAF that it had received verbal notification from the contracting officer that the operation of VOQ would be assumed by the Hellenikon Officer's Open Mess. PAE argued that this partial termination of its contract was not in the best interest of the Government. PAE received formal notification of termination for the convenience of the Government on August 31, 1977. Our Bid Protest Procedures require that protests be filed, defined as received in our Office, within 10 working days of formal notification of initial adverse agency action. 4 C.F.R. § 20.2(a) (1976). It is clear in this case that the formal notification of termination on August 31, 1977, constitutes adverse agency action. PAE's protest was not received in our Office until September 26, 1977, 18 working days after PAE received notification of termination. Therefore, PAE's protest on this issue is untimely and will not be considered by our Office.

Accordingly, the protest is dismissed.


Paul G. Dembling
General Counsel