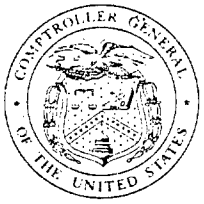
PRO. LAW II
J. LEVER

DECISION



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

8909

FILE: B-192941 DATE: January 22, 1979

MATTER OF: Safemasters Company, Inc.

DIGEST:

1. Although GAO normally will not consider protests of decisions to terminate contracts for convenience of the Government, GAO will consider protest against termination of contract based on an alleged impropriety in the award process.

2. Termination of contract is not justified where purchasing agent prematurely opened all bids in private to ascertain if bids contained necessary papers, low bid was first received and opened, and all bids were kept in purchasing agent's exclusive possession until formal bid "opening", since evidence clearly indicates that no bidder was prejudiced by premature opening.

3. Termination of contract is not justified by improper evaluation of options under invitation for bids in violation of Defense Acquisition Regulation § 1-1504(c)(ii) where there is no evidence that bidders submitted unbalanced bids or that bidders would have submitted lower base bids had options not been evaluated, where no bidder was prejudiced by evaluation, and where awarded contract would result in lowest cost to Government.

DLG00714

Safemasters Company, Inc. (Safemasters), has protested the decision of Defense Supply Service-Washington (DSS-W) to terminate its contract awarded under invitation for bids (IFB) No. MDA 903-79-B-0020 due to the premature opening of all bids and the evaluation of options in violation of Defense Acquisition Regulation (DAR) § 1-1504(c)(ii) (1976 ed.).

DOD: DLG00715

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The IFB was issued by DSS-W on August 21, 1978, for the repair and maintenance of safes and related security services on a yearly basis. The IFB required bidders to submit prices for an initial one year period and for two one-year options. The IFB provided that options would be evaluated in determining the low bid. Bids were to be opened at 10:00 A.M. on September 20, 1978.

Three bids were submitted in response to the IFB. The first bid received was Safemasters' at 8:48 A.M. Safemasters' bid was then taken by the DSS-W purchasing agent to the DSS-W mailroom where it was opened to ascertain whether the bid contained all necessary papers. Safemasters' bid was placed back into its envelope and clocked in at 8:54 A.M. The bid was then placed into the DSS-W purchasing agent's envelope, carried back to the purchasing agent's desk and placed in the DSS-W contract folder where it remained until bid opening.

DLG00716 The second bid to be received was submitted by Mosler Safe Co. (Mosler). Mosler's bid was delivered to the head of the purchasing branch at DSS-W who in turn delivered the bid to the purchasing agent. Mosler's bid was clocked in at 9:02 A.M. by Mosler's representative and was delivered to the purchasing agent sometime between 9:02 A.M. and 9:49 A.M. At 9:50 A.M. the purchasing agent opened Mosler's bid to ascertain whether it contained all necessary papers, after which it was placed back into its envelope and placed into the DSS-W contract folder. Mosler's bid remained in the possession of the purchasing agent until formal bid opening at 10:00 A.M.

DLG00717 The last bid to be received was from A-1 Lock & Safe Service, Inc. (A-1). The bid was clocked in by A-1's representative at 9:18 A.M. and delivered to the purchasing agent at 9:44 A.M. At 9:45 the purchasing agent opened the A-1 bid to ascertain whether it contained all necessary papers after which it was placed back into its envelope and then into the DSS-W contract folder where it remained until bid opening.

Formal bid opening took place as scheduled at 10:00 A.M. on September 20, 1978, in the DSS-W conference room. The three bids were as follows:

Bidder	For Basic Year	First Option Year	Second Option Year	Total Price As Computed By DSS-W
Safemaster	$ 93,343.44	$97,615.47	$102 012.33	$292,971.24
A-1	121,677.75	15% increase	25% increase	436,712.59
Mosler	127,630.30	133,688.17	140,624.37	401,942.14

Bid opening was attended by three representatives from each bidder, the purchasing agent, the purchasing agent's team leader, the contracting officer and the chief of the purchasing office. After all bids were disclosed one of the representatives from Mosler asked whether the procedures for bid opening had changed, since it was apparent that the bids had been opened prior to the scheduled time. The purchasing agent told the Mosler representative that the procedures had not changed but that bids were opened solely to assure that all neccessary papers had been included. No other questions or statements were made regarding the premature opening of the bids.

The contract was awarded to Safemasters on September 20, 1978, and shortly thereafter A-1 filed a protest with our Office. On September 21, 1978, the Deputy Director for Acquisition directed the chief of the purchasing office to terminate Safemasters' contract due to the premature bid opening and the improper evaluation of options under the solicitation. On September 22, 1978, the contracting officer notified Safemasters by telephone that DSS-W intended to terminate Safemasters' contract for the convenience of the Government.

On September 25, 1978, Safemasters protested to our Office the proposed termination of its contract and at the same time filed a motion for a temporary restraining order and a preliminary injunction in the United States District Court for the District of Columbia. On

September 26, 1978, Safemasters' motion for a temporary restraining order was denied but a hearing was not held on the preliminary injunction. Thereafter DSS-W terminated Safemasters' contract and A-1 withdrew its protest with our Office. On October 24, 1978, Safemasters and DSS-W filed a stipulation of dismissal dismissing Safemasters' complaint without prejudice, which was approved by the court on October 25, 1978.

Safemasters alleges that DSS-W's decision to terminate Safemasters' contract due to the premature bid opening was unjustified in light of our decisions which hold that cancellation of a solicitation is not proper where bids have been prematurely opened but no bidder has been prejudiced. See, e.g., Boyd Lumber Corporation, B-189641, October 21, 1977, 77-2 CPD 315 and cases cited therein; 34 Comp. Gen. 395 (1955). Safemasters asserts that DSS-W's decision to terminate rather than suspend performance, as provided by DAR § 2.407.8(c), in order to allow Safemasters to pursue its protest against the proposed termination with our Office, constitutes an abuse of discretion. Safemasters further asserts that it is a well established rule of administrative law that an administrative decision based on an erroneous interpretation of law cannot stand. Accordingly, Safemasters requests that we rule that DSS-W acted improperly in terminating its contract and that DSS-W should reinstate the terminated contract rather than resolicit its needs.

DSS-W, on the other hand, argues that while no bidder was actually prejudiced by the premature opening, preservation of the integrity of the competitive bidding system required that Safemasters' contract be terminated and DSS-W's needs resolicited. DSS-W characterizes the premature opening circumstances here as more "suspicious" than those in Boyd Lumber Corporation, supra, where the bidders, after the premature opening, were given an opportunity to confirm or revise their bids prior to bid opening; here no such opportunity was given to the bidders and DSS-W personnel did nothing after becoming aware of the premature opening. DSS-W states that it believes

termination of Safemasters' contract was the only course of action which would erase any suspicion of irregularity undoubtedly raised in the minds of the bidders.

DSS-W also asserts that termination was proper since the solicitation provided that option year prices would be evaluated in making award in violation of DAR § 1-1504(c), which provides:

> "The option quantity may be considered in the evaluation for award of a firm fixed-price contract, a fixed-price contract with economic price adjustment provisions, or such other types of contracts as may be approved by Departmental procedures, if, before issuance of the solicitation, it has been determined by the Chief of the Purchasing Office that:
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> (i) there is a known requirement which exceeds the basic quantity to be awarded, but either (A) the basic quantity is a learning or testing quantity and there is some uncertainty as to contractor or equipment performance, or (B) due to the unavailability of funds, the option cannot be exercised at the time of award of the basic quantity; provided that in this latter case there is reasonable certainty that funds will be available thereafter to permit exercise of the option; and
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> (ii) realistic competition for the option quantity is impracticable once the initial contract is awarded and hence it is in the best interests of the Government to evaluate options in order to eliminate the possibility of a "buy-in" (1-311). This determination shall be based on factors such as, but not limited to, substantial startup or phase-in costs, superior technical ability resulting from performance of the initial contract, and long preproduction lead time for a new producer.
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> In such cases, the solicitation shall contain an Evaluation of Options provision substantially as set forth in 7-2003.11(b)."

In addition, DAR § 1-1502(b) provides that:

> "Option clauses shall not be included in contracts, and option provisions shall not be included in solicitations, if:
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> "(i) the supplies or services being purchased are readily available on the open market;
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> "(ii) the contractor would be required to incur undue risks (e.g., the price or availability of necessary materials or labor is not reasonably foreseeable);
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> "(iii) an indefinite quantity contract or requirements contract is appropriate except that options for continuing performance may be used in such contracts.
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> "(iv) market prices for the supplies or services involved are likely to change substantially; or
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> "(v) the option quantities represent known firm requirements for which funds are available unless (A) the basic quantity is a learning or testing quantity and there is some uncertainty as to contractor or equipment performance, and (B) realistic competition for the option quantity is impracticable once the initial contract is awarded."

DSS-W states that a determination under DAR § 1-1504(c) allowing the evaluation of options cannot be made because realistic competition for the option quantities would be practical. DSS-W notes that the very nature of the safe maintenance business is such that it would not require substantial startup or phase-in costs, or superior technical ability resulting from performance of the initial contract.

Finally, DSS-W asserts that a contracting officer may terminate a contract whenever he determines that

termination is in the best interest of the Government and that the termination is valid absent a showing of bad faith.

Generally, we do not consider protests against determinations to terminate contracts for the convenience of the Government. However, where an alleged impropriety in the award process is the basis of the Government's decision to terminate, our Office will review whether the contract award was valid and proper. Electronic Associates, Inc., B-184412, February 10, 1976, 76-1 CPD 83. In so doing, we are not limited to a consideration of whether the termination was the result of bad faith. (In this regard, we point out that bad faith is not the only basis upon which a termination for convenience may be challenged. For example, a termination may be regarded as an abuse of discretion. See National Factors, Inc. v. United States, 492 F.2d 1383, 1385 (Ct. Cl. 1974); see also Art Metal - U.S.A., Inc. v. Solomon, et al., Civil Action No. 78-1660, (D.D.C., October 6, 1978)). Rather, our review under these limited circumstances is for the purpose of determining whether the termination was justified given the facts of the original contract award.

We do not believe that DSS-W's termination of Safemasters' contract was justified. As Safemasters argues, our decisions clearly indicate that resolicitation of the Government's needs is not required nor justified when bids have been prematurely opened but no bidder has been prejudiced. See Boyd Lumber Corporation, supra and 34 Comp. Gen. 395, supra. In the instant case, it is clear that no bidder was prejudiced. Safemasters' bid was the first submitted and did not leave the possession of the DSS-W purchasing agent. It was therefore impossible for Safemasters, the low bidder, to have obtained any advantage by the premature opening of the other bids. DSS-W's argument that termination was necessary to protect the integrity of the competitive bidding system since the bidders were not given the opportunity to revise or confirm their bids is misdirected. Whether a bidder was given an opportunity to confirm or revise its bid prior to bid opening is merely a factor in determining whether a bidder has been prejudiced. Where the facts clearly

indicate that no bidder has been prejudiced we do not believe that a failure to ask bidders to confirm or revise their bids justifies resolicitation. Furthermore, we think that the competitive system is normally better protected by making an award once bids have been opened, rather than resoliciting, where there has been an irregularity which did not result in prejudice to any bidder. See Spickard Enterprises, Inc. et al., 54 Comp. Gen. 145, 147 (1974), 74-2 CPD 121; GAF Corporation et al., 53 Comp. Gen. 586, 592 (1974), 74-1 CPD 68.

With regard to DSS-W's assertion that the improper evaluation of options justified termination of Safemaster's contract, we note the following. When a solicitation requires the submission of option prices which are not to be evaluated in determining the low bidder, a bidder might attempt to "buy in" to the total procurement by submitting a low basic quantity price in hope of recovering its costs upon the Government's exercise of significantly higher priced options. See, e.g., R&R Inventory Service, Inc., 54 Comp. Gen. 206, 209 (1974), 74-2 CPD 163. Additionally, since a bidder must guarantee an option price without assurance that the option will be exercised, a bidder might submit a higher item price for an option than it would if bidding on a firm basic quantity instead. See, e.g., 1 R. Nash & J. Cibinic, Federal Procurement Law 743 (3rd ed. 1977). On the other hand, if the solicitation provides that options will be evaluated, a bidder might submit an unbalanced bid in order to obtain a disproportionately high price for the basic contract period, thereby obtaining, in effect, use of Government funds more properly allocated to the option periods, or in order to benefit from a high basic price in the event the Government fails to exercise the options. See Mobilease Corporation, 54 Comp. Gen. 242 (1974), 74-2 CPD 185.

These potential problems are dealt with to some extent by DAR Part 15, which places limitations on the use and evaluation of options. For example, DAR § 1-1505 provides that options should not be exercised unless "exercise of the option is the most advantageous method of fulfilling the Government's needs, price and

[other] factors considered." Additionally, DAR § 1-1504 (c)(ii) provides that options may be evaluated in making award only if (1) there is a "known requirement" which exceeds the basic quantity but either the basic quantity is a learning or testing requirement or due to the unavailability of funds the option cannot be exercised at the time of award and (2) realistic competition for the option quantity is impracticable once the initial contract is awarded.

In light of DSS-W's statement that it can obtain realistic competition for its subsequent needs, we agree that the solicitation should not have provided that options would be evaluated in making an award. Furthermore, in view of DSS-W's statement, it does not appear that the solicitation should have contained option provisions at all. See DAR § 1-1502(b). However, we do not believe that the improper evaluation of options in this instance justifies termination of Safemaster's contract. It does not appear that the evaluation or use of option periods had any effect on the award. Examination of the three bids submitted does not indicate that any of the bidders submitted unbalanced bids, or otherwise attempted to benefit in the event the Government failed to exercise the options. As noted above, the three bids were evaluated by DSS-W as follows:

Bidder	For Basic Year	First Option Year	Second Option Year	Total Price As Computed By DSS-W
Safemasters	$ 93,343.44	$ 97,615.47	$102,012.33	$292,971.24
A-1	121,677.75	15% increase	25% increase	436,712.59
Mosler	127,630.30	133,688.17	140,624.37	401,942.14

As can be seen, each bidder submitted a bid which provided for a basic year price and higher prices for the option years. Although each bidder increased the option year prices by different percentages, each bidder increased the second option year price by approximately the same percentage that it increased the first option year price. There is no indication that any

bidder attempted to "front load" its bid in order to benefit in the event the Government failed to exercise the options. Additionally Safemasters' bid is low whether evaluated on the basic year, the basic year plus the first option year, or the basic year plus both option years.

Although in Mobilease Corporation, supra, we held that an award under a solicitation which did not comply with DAR § 1-1504(c)(ii) was improper we do not believe our holding is directly applicable to this situation. In Mobilease, the Government issued an IFB for the rental of relocatable office buildings for a two-year period with three one-year options while a permanent facility was being constructed. Under the IFB, which required evaluation to be on the total five year period, Mobilease was not the low bidder. However, Mobilease was the low bidder on the initial two year period and remained low when evaluated on the first two one-year options (3 and 4 year periods). It was only after the evaluation of the third one-year option (5 year period) that Mobilease was no longer the low bidder. Mobilease protested the award alleging that the awardee's bid was unbalanced.

In considering Mobilease's protest, we determined that the question implicitly raised was whether options could be properly evaluated under the then applicable Armed Services Procurement Regulation (ASPR) § 1-1504(d)(ii). We held that the evaluation of options and subsequent award were improper since the Government had failed to make the requisite findings under ASPR § 1-1504(d)(ii). Specifically, the Government had failed to determine that there was a "known requirement" for the full five year period and failed to determine with a reasonable certainty that funds would be available to permit the exercise of the options. Since there was no "known requirement" for the full five year period, it was not clear that award to someone other than Mobilease would result in the lowest cost to the Government.

In this case, Safemasters is the low bidder under all possible situations, award to Safemasters will result in the lowest cost to the Government, and no bidder was prejudiced by the option evaluation.

Based on the foregoing, we do not believe that termination of Safemasters' contract was justified. Accordingly, we believe that DSS-W should reinstate Safemasters' terminated contract. However, since it appears that the option provisions should not have been included in the solicitation, we believe that the options in the reinstated contract should not be exercised.

R. F. Keller

Deputy Comptroller General
of the United States