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DECISION

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

[Protest Against Issuance of Change Order]

FILE: B-197829 DATE: October 21, 1980

MATTER OF: Tricentennial Energy Corporation

DIGEST: DLG 05378

1. Contract for estimated requirement of fuel oil was not so substantially changed by modification extending time for performance that contract for which competition was held is essentially different from contract to be performed.

2. Since (1) there is no showing of competitive prejudice relating to contract modification which may have been intended at time contract was awarded; (2) modification served only to restore validity of fuel oil estimate on which competition was based; and (3) award under defective IFB, as modified, is serving procuring agency's actual needs, modification cannot be questioned.

Tricentennial Energy Corporation (TEC) has protested the issuance of a January 25, 1980, change order by the Government of the District of Columbia (D.C.) to D.C. contract No. 0443-AA-91-1-9-MC, awarded to Tri-Continental Industries, Inc., on January 23, 1980. TEC contends that the issuance of the change order--which extended the end of the contract from September 30, 1980, to January 31, 1981--contravened basic principles of procurement law such that our Office should direct D.C. to "cancel the amendment." Based on our analysis, we deny the protest. DLG 05379

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Background

The requirement giving rise to the contract in question is for No. 6 fuel oil to be delivered to various D.C. facilities. The original solicitation for the requirement was issued in July 1979; however, that solicitation was canceled. The requirement was resolicited in November 1979 based on an estimate of approximately 9.2 million gallons of the fuel oil to be ordered and delivered from the period "December 1, 1979, or as soon thereafter as award is made through September 30, 1980."

After bid opening on November 21, 1979, protests concerning the submitted bids were filed with D.C. only. Because of these protests, D.C. reports, TEC's current year 1979 fuel oil contract had to be extended approximately 4 months pending resolution of these protests in order to meet continuing requirements.

D.C.'s explanation as to why it significantly modified the contract awarded to Tri-Continental, the low bidder under the November IFB, within 2 days of the award date is, as follows:

> "It is true that the contract period was changed. The contract period was originally for the period October 1, 1979 through September 30, 1980. Circumstances prevented the award as planned because of the three (3) protests filed, one of which was filed by (TEC). Therefore, in fairness to the successful bidder, Tri-Continental, the contract period was changed from date of award through September 30, 1980, to date of award through January 31, 1981. Since Tri-Continental's bid price was based upon supplying an estimated 9.2 million gallons of fuel oil to the District during the term of contract, it was necessary that the contract be extended over a period so that the requirements would still remain estimated at 9.2 million gallons."

The contract, as modified, must be essentially the contract on which competition was achieved. See 37 Comp. Gen. 524 (1958). As we stated in Webcraft Packaging, Division of Beatrice Foods Company, B-194087, August 14, 1979, 79-2 CPD 120:

> "* * * our Office will review such a matter when it is alleged, as here, that the modification went beyond the scope of the contract and should have been the subject of a new procurement, since the execution of the modification could be viewed as an attempt to circumvent the competitive procurement statutes. * * *
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> "* * * the question * * * is whether the original purpose or nature of the contract has been so substantially changed by the modification that the contract for which competition was held and the contract to be performed are essentially different. In other words, was the field of competition materially changed due to the modification. See American Air Filter Co., Inc., supra."

Analysis

Competition here was achieved on a fuel oil estimate of approximately 9.2 million gallons over a 10-month delivery period; the contract as modified continued the same fuel oil estimate but provided for deliveries over a 12-month period.

D.C. apparently considers the extension proper because the fuel oil estimate was not changed and the contract was extended only to insure that there would be a reasonable expectation that the estimate would be attained.

TEC contests D.C.'s position that the extension was made only to ensure the attainment of the fuel

oil estimate. The company contends that the months of the extension--October 1980 through January 1981--are months of "high usage of fuel oil, making the contract awarded much more attractive than the contract initially advertised."

There is no question that the delay in the award of the contract from December 1, 1979, to January 21, 1980, must have had a downward effect on the fuel oil to be required since the delay came in the middle of the heating season. Thus, it seems beyond question that some extension of the contract would have served only to restore the fuel oil estimate to the original level of approximately 9.2 million gallons--an estimate which apparently was not questioned by any prospective bidder. To the extent the extension in question caused only a restorative effect to the estimate, the extension cannot be considered to have violated the above precedent since the extension would not have changed the estimated basis on which competition was obtained.

As to TEC's apparent positions that the extension will necessarily mean that quantities of fuel oil substantially in excess of the estimate will inevitably be ordered and that D.C. knew, or should have known, of this effect when the extension was ordered, we must conclude that the company has not carried its burden of proof to establish the accuracy of these positions. On this score, it is well settled that the protester carries the burden of proving its case. Cook Inlet Cablecom, B-197458, May 5, 1980, 80-1 CPD 324. Therefore, we cannot question D.C.'s position that the extension was granted only to ensure that the "requirements would still remain estimated at 9.2 million gallons"--the critical statement on which competition was obtained. Thus, we must conclude that the original contract has not been so substantially changed by the extension that the contract for which competition was held and the contract to be performed are essentially different.

TEC also contends that the modification contravened another basic principle of procurement, namely: a

contracting officer may not award a contract under a given specification with the intention of changing the specification after award. A&J Manufacturing Company, 53 Comp. Gen. 838 (1974), 74-1 CPD 240.

The cited case involved a situation where award was made to the low offeror based on the lower of its two alternate offers. After award, the contracting officer amended the contract to accept the contractor's higher priced alternate offer for a higher quality unit exceeding the specifications on which competition was had; the higher priced alternate was considerably higher in price than the second lowest acceptable offer submitted by another company. We held that the change was improper especially since there was a possibility the change had been contemplated prior to award. See A&J Manufacturing Company, supra, at page 840.

In the present case, the record suggests the strong likelihood that D.C. awarded the contract with the intent to issue the change since the change was issued only 2 days after the award. Unlike the cited case, however, there is no prejudice evident in the record stemming from the change. The only prejudicial effect argued by TEC, as noted above, relates to the fuel oil estimate, not the extension itself. Stated otherwise, TEC does not accept D.C.'s position that the extension only allows a reasonable chance for the fulfillment of the estimate; TEC does not argue, however, that the extension prejudiced the November competition if the estimate of fuel is held to have been restored, not effectively changed, by the extension. In the absence of a showing of prejudice relating to the extension itself, as distinct from the fuel oil estimate, we cannot question the validity of the change from the perspective of competitive prejudice.

To hold otherwise would mean D.C. would have been compelled to cancel the November IFB and readvertise merely because the lapse of time had rendered defective the fuel oil estimate on which the competition was based. We cannot conclude D.C. was required to cancel in the circumstances of this case. As we said in Hild Floor Machine Company, Inc., B-196419, February 19, 1980, 80-1 CPD 140:

> "Federal Procurement Regulations § 1-2.404-1(a) (1964 ed. circ. 1) provides that the preservation of the integrity of the competitive bid system dictates that once bids have been opened, award must be made to the low responsive, responsible bidder, unless there is a compelling reason for cancellation. The primary basis therefor is that the rejection of all bids after opening tends to discourage competition because it publicly discloses bids without award and causes bidders to have expended manpower and money in bid preparation without the possibility of acceptance. A&C Building and Industrial Maintenance Corporation, B-193047, April 13, 1979, 79-1 CPD 265, at p. 11. Accordingly, absent a showing of competitive prejudice the cancellation of a defective IFB after bids have been opened may be inappropriate if award would serve the Government's actual needs. [Emphasis supplied.] GAF Corporation; Minnesota Mining and Manufacturing Company, 53 Comp. Gen. 586 (1974), 74-1 CPD 68."

Here, there is no question that the award is serving D.C.'s actual needs; therefore, the modification, which served to correct the defective IFB fuel oil estimate by restoring the validity of that estimate, cannot be questioned.

Finally, in Colonial Ford Truck Sales, Inc., 59 Comp. Gen. 61 (1979), 79-2 CPD 295, we held that an agency could not make an award that went beyond what was included in the original solicitation. There a contracting agency terminated an existing contract approximately 8 months after award in order to award the remaining 4 months to a successful protester. However, the protester contended that the agency acted improperly in only offering the 4-month contract rather than a contract for the full period of 12 months. In response, we pointed

out that the agency could only offer the 4-month contract since award of the full year contract (in addition to the 8-month contract) would go beyond the original solicitation. In other words, the solicitation only called for a 12-month contract, not a 20-month contract.

Here, of course, the contract as extended is substantially the same as the contract contemplated by the solicitation. The extension was granted only to ensure that the requirements would remain estimated at 9.2 million gallons. Thus, we do not find Colonial Ford Truck Sales, Inc., above, controlling. Moreover, we do not think that the extension was unfair to the other bidders since they all competed on the basis of the 9.2 million gallon estimate.

We conclude that D.C. could properly modify the contract.

Milton J. Socolar

For the Comptroller General
of the United States