

**DECISION**

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

**FILE:** B-205450**DATE:** June 18, 1982**MATTER OF:** United States Testing Company, Inc.**DIGEST:**

Agency's failure to take corrective action was improper where erroneous award of a 2-year service contract was discovered within 24 hours of issuance of the first work order and there is no evidence that the disruption and costs of a termination and re-award would have been substantial. Contract should be terminated and awarded to the proper contractor.

United States Testing Company, Inc. (UST), has filed a protest against the award of a contract to Law Engineering Testing Company (Law) by the United States Army Corps of Engineers (Corps), New Orleans District. The Corps concedes that, through error, the contract was improperly awarded to Law, but contends that it would not be in the best interest of the Government to take corrective action. We sustain the protest and recommend that the contract be terminated and awarded to UST.

The contract is a 2-year indefinite quantity contract for engineering and laboratory services for concrete, soils, and instrumentation for lock and dam No. 1 on the Red River Waterway project. The Corps orders services by issuing successive work orders covering 3-month periods. The contract guarantees that a minimum quantity of \$15,000 worth of services will be ordered. Law's current charges appear to be slightly in excess of \$2,000 per day. The contract contains a provision that the Government may use the service of other contractors as well.

The solicitation provided that the contract would be awarded to the technically acceptable offeror proposing the lowest costs based on an estimated workload. As a result of a \$150,000

error by Corps personnel in transcribing Law's proposed costs to a price comparison document, the contract was awarded to Law on September 18, 1981, in the mistaken belief that Law was the low offeror. UST was actually the low offeror by about \$19,000.

The Corps learned of the error on September 29, the day after the first work order was issued, when Law advised the Corps that the completed contract document did not accurately reflect the amount of Law's offer. On September 30, the Corps advised UST of the error and asked UST to extend the acceptance period of its offer, which UST did on October 1, 1981. UST states that on at least two occasions during the next 3 weeks, UST advised the Corps that UST could mobilize and be onsite with permanent personnel within 48 hours of advice of award. During this same period, Law's counsel wrote to the contracting officer in support of the retention of Law as the contractor and, on October 16, traveled with Law's management from Atlanta to New Orleans in connection with the contract.

On October 23, the contracting officer sent UST a letter expressing the opinion that it would not be in the best interest of the Government to terminate Law's contract and award to UST. As described in this letter and in other material submitted by the Corps, the contracting officer's major concerns were:

a. the costs of a termination for convenience would exceed the approximately \$19,000 difference between UST's and Law's offers;

b. the contracting officer might not be able to obtain approval for the award of a new contract until a new appropriation bill had passed (The Corps now concedes that the contracting officer was mistaken in his belief that either a second approval or a new appropriation would be required.);

c. a termination and re-award would result in substantial administrative costs for the Corps to bring in personnel for transitional operations;

d. the transition would be disruptive because Law's personnel, with limited institutional knowledge, would have to train transitional Corps personnel, be

phased out and replaced with Corps personnel, and then the entire transition process repeated again with a new contractor; and

e. because of budgetary constraints and mission reductions, it was likely that no work orders would be issued in fiscal year 1983 because of the possible availability of Government personnel to perform the work; Law's offer was lower if only the first year is considered.

Corps personnel met with UST on October 29, 1981, during which meeting UST expressed its willingness to accept the risk that funds might not be available. The contracting officer appears to have confirmed his decision not to terminate Law's contract during this meeting. UST's protest to our Office followed shortly thereafter.

As a threshold matter, we point out that the question of the propriety of the award of the contract to Law is not in question here because, as we noted above, the Corps concedes that the award was improper. The only question we must consider is whether the contracting officer's determination not to terminate Law's contract and award it to UST was proper. We find that it was not.

Regardless of whether the decision is made by this Office or by the contracting agency, the determination of whether an improperly awarded contract should be terminated and either re-competed or re-awarded involves the consideration of several factors, including the seriousness of the procurement deficiency, the degree of prejudice to other offerors or the integrity of the competitive procurement system, the good faith of the parties, the extent of performance, and impact of a termination on the procuring agency's mission. See System Development Corporation, B-191195, August 31, 1978, 78-2 CPD 159; PRC Information Sciences Company, 56 Comp. Gen. 768 (1977), 77-2 CPD 11. The Corps, citing The Ellinor Corporation, B-182384, August 6, 1975, 75-2 CPD 85; R. A. Jones Company, B-180293, April 26, 1974, 74-1 CPD 218; and Dyneteria, Inc., B-178701, February 22, 1974, 74-1 CPD 90, points out that we have recognized a degree of discretion on the part of contracting officials with respect to the determination of whether to terminate an improperly awarded

contract and suggests that our review is limited to ascertaining whether this determination has a reasonable basis. We have held that in order to satisfy this requirement, the decision must reflect the reasoned judgment of the contracting officer based on the investigation and evaluation of the evidence reasonably available at the time the decision is made. Aerospace Research Associates, Inc., B-201953, July 15, 1981, 81-2 CPD 36; Apex International Management Services, Inc., 60 Comp. Gen. 172 (1981), 81-1 CPD 24. Measured by this standard, we find inadequate justification for the Corps' failure to take corrective action in this case.

In our view, when the improper award of a 2-year service contract is discovered within 24 hours of the issuance of the first work order, the Government's strong interest in the preservation of the integrity of the competitive procurement system virtually requires that the contract be terminated and re-awarded unless there are substantial and convincing reasons why it is not in the best interest of the Government to do so. In less compelling circumstances than are present here, we have not, for instance, considered the mere likelihood of termination costs to justify a failure to terminate, see, e.g., Telex Computer Products, Inc., B-197081, April 30, 1980, 80-1 CPD 308; Stott Briquet Company, Inc., A Division of Lakehead Industries, B-194144, July 31, 1979, 79-2 CPD 65; Computer Sciences Corporation, 57 Comp. Gen. 627 (1978), 78-2 CPD 85, unless the incremental costs of the termination, exclusive of those costs which the Government would incur whether there were a termination or not, see Datapoint Corporation, B-186979, May 18, 1977, 77-1 CPD 348, were substantial or "far exceeded" the possible cost savings to the Government which the re-award of the contract might produce. Shockley Construction Co., B-200125, November 10, 1980, 80-2 CPD 352; Logistic Systems, Incorporated, 59 Comp. Gen. 548 (1980), 80-1 CPD 442, aff'd B-196254, October 24, 1980, 80-2 CPD 313. Similarly, we have expressed the opinion that the preservation of the integrity of the competitive system outweighs the possible administrative inconvenience and disruption which might accompany corrective action, see, e.g., Las Vegas Communications, Inc. B-195966, July 22, 1980, 80-2 CPD 57; The Department of the Army, Request for Modification of GAO Recommendation, B-191003, January 9, 1979, 79-1 CPD 9; Datapoint Corporation, supra,

unless there would be a substantial adverse impact in the mission of the agency. See, e.g., Vega Precision Laboratories, Inc., B-191432, June 30, 1978, 78-1 CPD 467; Phoenix Power Systems, B-204038, November 2, 1981, 81-2 CPD 374; System Development Corporation, supra.

On the record before us, we do not find adequate justification for the Corps' failure to take corrective action here. As an initial matter, we note that the contracting officer was in error both with respect to the need for approval to make a new contract award and with his apparent concern with the need for a new appropriation bill (the funds used for this contract were not fiscal year funds), and yet we find no evidence that any action was taken to verify these concerns during the 3 to 4 weeks it took to arrive at a decision. We also find no evidence that the likely termination costs in the first few weeks of the contract would have substantially exceeded the \$19,000 difference between UST's and Law's offers. And, given UST's assurances that it could be onsite within 48 hours of notice of award and the fact that the contract was barely underway, we find no persuasive evidence that the termination of Law's contract and its award to UST could have seriously impacted the Corps' activities. In sum, we believe the Corps' justification for its failure to take corrective action lacks a reasonable basis.

The only question remaining, then, is whether corrective action would be appropriate now. We find that it would be.

In response to our inquiry, the Corps provided our Office an estimate of termination costs if Law's contract were terminated at this time. If we omit consideration of those costs which the Government will incur regardless of whether there is a termination--the earnings provided in the orders for work performed--the remaining costs are not substantial in view of the more than \$1.5 million value of the contract. Furthermore, since the value of the orders placed under the indefinite quantities contract has already exceeded the minimum dollar threshold of the contract, we find the Corps' estimate of termination costs, particularly the inclusion of precontract and mobilization items,

to be questionable. See Coastal States Petrochemical Co. v. United States, 559 F.2d 1 (1977); Unified Engineering, Inc., ASBCA 21565, 81-1 BCA 14940 (1981); Radionics, Inc., ASBCA 20796, 77-1 BCA 12448 (1977); Okaw Industries, Inc., ASBCA 17863, 17864, 77-2 BCA 12793 (1977). We also believe that any potential disruption and inconvenience may be minimized by effective management. We therefore recommend that Law's contract be terminated for convenience on the ending date of the work order current on the date of this decision and that the contract be awarded to UST effective with the next work order, which we understand UST stands ready to perform at its offered prices.

By letter of today, we are advising the Secretary of the Army of our recommendation.

This decision contains a recommendation for corrective action to be taken. Therefore, we are furnishing copies to the Senate Committees on Governmental Affairs and Appropriations and the House Committees on Government Operations and Appropriations in accordance with section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1976), which requires the submission of written statements by the agency to the committees concerning the action taken with respect to our recommendation.

for *Harry R. Van Cleave*  
Comptroller General  
of the United States