

DECISION

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

Ph 1

26479

FILE: B-211474.2; B-212473 **DATE:** October 11, 1983

MATTER OF: Gardner Machinery Corporation

DIGEST:

1. RFP stated that award would be based on "price and other factors." Under GAO decisions, RFP statement reasonably meant that price and technical factors will be considered equal. Nevertheless, agency intended that price would be controlling and awarded on that basis. Procuring agency properly terminated contract and resolicited with RFP which reflected actual selection basis.
2. Procuring agency terminated and resolicited small business set-aside contract because RFP did not reflect actual selection basis. The award had been protested by another offeror, which the SBA--subsequent to the termination--determined was not a small business. Size status of that offeror did not affect propriety of termination.
3. When GAO finds contract award is improper, GAO will consider feasibility of recommending contract termination as a means of promoting the integrity of the contract award process. However, when GAO agrees with procuring agency that award was improper and agency has terminated the contract, GAO will not consider whether the termination was feasible since the agency had already decided that it was feasible to terminate the contract.
4. Terminated contractor protests that five similar contracts were not terminated. Protest against award of those contracts is untimely. Moreover, even if award of those contracts was improper, the erroneous actions do not have binding effect on procuring agency in subsequent solicitation.

026891

Gardner Machinery Corporation (Gardner) protests the Veterans Administration's (VA) termination and resolicitation of its contract for laundry system replacement at the Edward J. Hines, Jr., VA Hospital, Illinois. The contract was awarded pursuant to request for proposals (RFP) No. M6-Q36-83 and is being resolicited as RFP No. M6-Q76-83. The VA determined, in response to a protest by Economy Mechanical Industries (Economy), that it had improperly awarded the contract to Gardner on the basis of the company's submission of the lowest priced, technically acceptable proposal. This method of award was not stipulated in RFP-Q36-83, but VA intended to use this award method. The method is so identified in resolicitation--RFP-Q76-83.

We agree that the award to Gardner was improper. The protest is denied in part and dismissed in part.

Our Office generally will not consider protests of an agency's termination of a contract. But we will consider these protests where, as here, the agency's decision to terminate was based on an alleged impropriety in the original contract award. Our review is for the limited purpose of ascertaining whether the award defects perceived by the agency justify termination. Evergreen Helicopters, Inc., B-202962, September 28, 1981, 81-2 CPD 252.

Six offers were submitted in response to the RFP. Gardner's and Re-Nu Machinery's were determined to be technically acceptable. Washex Machinery's proposal was considered totally unacceptable and not given further consideration. Problems were noted in the proposals submitted by Economy, Evans Incorporated, and Bully & Andrews. Economy's proposal, which was second lowest in price, contained more deficiencies than the other two. No competitive range was established; however, Economy was advised of the deficiencies in its proposal and was asked to submit further technical information. Economy submitted information which rendered its proposal technically acceptable. No other offeror was provided with a similar opportunity to upgrade its proposal.

Gardner was awarded the contract on the basis of having submitted the lowest priced, technically acceptable proposal. The VA and Economy contend the award was improper because the RFP did not stipulate this award method, but rather only incorporated standard form 33A (SF 33A), which states: "[t]he contract will be awarded to that responsible offeror whose offer conforming to the solicitation will be most advantageous to the Government, price and other factors considered." The VA and Economy contend this language requires that price and technical factors be given equal

weight. Economy contends that it expected to receive a higher technical score for its "cost efficient environmental conditioning system" and would have offered a less elaborate and less costly proposal if it had known of VA's actual award method.

Gardner contends that the award was properly made to it on the basis of initial proposals--a basis provided for in SF 33A, as follows:

"The Government may award a contract, based on initial offers received, without discussion of such offers. Accordingly, each initial offer should be submitted on the most favorable terms from a price and technical standpoint which the offeror can submit to the Government."

In response to this contention, the VA states that the award was improper because it conducted discussions with Economy and, therefore, was required to conduct discussions with all other offerors; however, VA did not conduct these other discussions. Gardner responds that Economy's proposal was technically unacceptable and that VA requested clarifications from Economy, but did not conduct discussions; therefore, the award to Gardner was still made on an initial proposal basis.

It is a fundamental principle of Federal procurement that offerors be treated equally and be provided a common basis for the preparation and evaluation of their proposals. Where, as here, the RFP states that award will be based on "price and other factors," without explicitly stating the relative importance of price to technical factors, it must be presumed that cost and technical factors will be considered approximately equal. Medical Services Consultants, Inc.; MSH Development Services, Inc., B-203998; B-204115, May 25, 1982, 82-1 CPD 493. Offerors therefore could reasonably conclude from this statement that price might not be controlling as between technically acceptable proposals and that technical superiority would be considered along with the prices. See A.R.&S. Enterprises, Inc., B-196518, March 12, 1980, 80-1 CPD 193. This case is identical, in all significant respects, with A.R.&S. Enterprises, Inc., *supra*, in which we sustained a protest against the award of a contract on the basis of price alone in departure from the RFP's "price and other factors" evaluation standard.

If the offerors had been informed of the VA's concern with price, they might have altered their proposals to reflect this fact. For example, Economy may not have offered its environmental conditioning system as a cost efficient feature. Other offerors may have made similar revisions. Although Gardner may still have been awarded the contract, this is not certain. We accordingly find that there was prejudice because the VA did not obtain competition on the basis of its true needs.

In view of this conclusion, we need not consider Gardner's positions that Economy's proposal should have been rated unacceptable and that VA never conducted discussions with Economy.

Gardner protests that the VA should not have terminated its contract in response to Economy's protest because the procurement is a small business set-aside and Economy is not a small business. The VA responded to Gardner's protest by requesting a size determination from the Small Business Administration (SBA). As a result of Economy's failure to submit requested information, the SBA determined on July 29, 1983, that Economy was other than small.

The VA's June 1983 termination preceded both Gardner's size protest (dated June 23) and the SBA's decision. The VA had no reason at the time it considered Economy's protest to question Economy's self-certification as a small business and, therefore, could accept the self-certification at face value. Putnam Mills Corporation, 61 Comp. Gen. 667 (1982), 82-2 CPD 301. Moreover, the VA on its own motion could properly have taken corrective action even in the absence of a protest.

As a separate argument, Gardner also protests that the termination was not in the government's best interest and penalized Gardner and its suppliers because the contract, allegedly, had been substantially completed. Gardner cites several of our decisions where we sustained protests against the VA, but declined to recommend termination as corrective action because the contracts had been completed or substantially completed. Finally, Gardner argues that if its contract was properly terminated, then five other VA contracts allegedly awarded pursuant to the same procedures, and which are also substantially completed, should also be terminated.

This argument is not based on the alleged impropriety of the contract award, but rather on whether it is in the government's best interest to terminate. This is a contract administration issue which is not for our consideration, but

rather for consideration by the VA and the Board of Contract Appeals. J & J Maintenance--Reconsideration, B-208966.2, January 17, 1983, 83-1 CPD 46. Our bid protest function is to determine the propriety of contract awards and not contract administration. When we decide that a contract award is improper, we will recommend corrective action, including termination (if it is feasible), as a means of promoting the integrity of the contract award process. We have found that the VA's award to Gardner was improper; however, we need not consider the propriety of termination because the VA has acknowledged its error and taken corrective action. Insofar as the contract termination promotes the integrity of the contract award process, it will not be questioned by our Office. See Schindler Haughton Elevator Corporation, B-208461.2, June 16, 1983, 83-1 CPD 660, where we said that "there is no bar to a contracting agency proposing corrective action" if the agency has acknowledged "all facts necessary" to establish the validity of a protest.

We can appreciate Gardner's concern that it should not be treated differently than other contractors. However, we will not consider the propriety of the awards of the five other contracts (awarded in 1981 and 1982) because a protest against the awards is untimely. See 4 C.F.R. § 21.2(b)(2) (1983). We further note that, even if those contracts were, as here, improperly awarded, each contract is a separate transaction, and erroneous actions taken in a prior procurement do not have a binding effect on a procuring agency in a subsequent solicitation. See Kings Point Mfg. Co., Inc., B-204981, March 4, 1982, 82-1 CPD 196.

The protest is denied in part and dismissed in part.

for 
Comptroller General
of the United States