

DECISION



2802
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-209543.2

DATE: April 19, 1984

MATTER OF: Space Age Engineering, Inc.

DIGEST:

1. GAO will review a protest against a termination for convenience where the termination is based on an alleged deficiency in the initial contract award.
2. Refusal on grounds of administrative convenience to recalculate estimate of in-house costs for operating base maintenance facilities (which failed to account for an IFB amendment) does not constitute a cogent or compelling reason for reprocurring the requirement, but rather constitutes a breach of the government's obligation to evaluate the bid fairly and honestly.

Space Age Engineering, Inc. protests the termination of its contract, No. DAKF03-82-C-0043, awarded by the Department of the Army to operate base maintenance facilities at Fort Ord. Award was based on an Office of Management and Budget (OMB) Circular A-76 comparison of Space Age's price with the Army's estimate of the cost of performing the services in-house. The Army terminated the contract for convenience shortly after award because of perceived defects in the solicitation and the cost comparison. We sustain the protest.

The Army awarded the contract to Space Age, the only bidder, on September 1, 1982. During a post-award "prework conference" between the parties, however, it was discovered that Space Age's interpretation of the contract differed from the Army's understanding with respect to which party had to pay for National Stock Number (NSN) parts. As originally issued, the solicitation provided that the

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contractor would pay for NSN parts; the government had prepared the in-house estimate on that basis. On the other hand, Space Age had not allowed for the cost of NSN parts in its price because the solicitation had been amended to delete the NSN parts provision. Once this was discovered, the Army adjusted the estimated contract price to account for government payment for NSN parts, determined that the in-house cost would be approximately \$25,903 less than the cost of contracting, and terminated the contract.

Space Age immediately challenged the Army's action. After reviewing the calculations, the Army agreed with Space Age that the prompt payment discount Space Age had bid had not been taken into account, and that if it had been, Space Age's bid would be lower than the in-house cost by approximately \$1,600. The Army, however, refused to reinstate Space Age's bid because it:

"determined that due to the ambiguous specifications [Space Age's bid and the in-house cost estimate] were not based on the same interpretation of the scope of work. To remedy this error would result in additional costs to the government, and therefore was not in its best interest. A determination was made to allow the termination to stand and to rewrite the specifications and resolicit."

The protester basically contends that, notwithstanding the Army's position, the procurement and cost comparison demonstrated Space Age can perform the work at a price lower than the government's in-house cost. Space Age argues that the Army has undermined the integrity of the competitive bidding system by refusing to allow the protester to perform a contract it fairly won.

Initially, we note that our Office generally will not review a protest that a contract was improperly terminated, since that involves a matter of contract administration to be decided under the contract disputes procedure and the Contract Disputes Act of 1978, 41 U.S.C. § 601 (Supp. IV 1980). We will, however, consider a protest against a termination for convenience where, as here, the basis

for the agency's action stems from an alleged deficiency in the initial contract award. Advanced Energy Control Systems, Inc., B-201249, May 20, 1981, 81-1 CPD 392. Moreover, although our Office will not ordinarily review agency decisions to perform work in-house rather than to contract for the services, because we regard them as policy matters within the executive branch, we will review whether an agency followed announced procedures in comparing in-house and contract costs, where the government used a competitive procurement to aid it in making its decision. RCA Service Company, B-208204.2, April 22, 1983, 83-1 CPD 435.

We believe it was incumbent on the Army either to finalize the cost comparison with respect to the cost of furnishing NSN parts or to award the contract to Space Age based on the calculation that showed the contract cost as \$1,600 less than the in-house cost. We do not see why what basically was an initial error in the cost comparison could not have been corrected. In Satellite Services, Inc., B-207180, November 24, 1982, 82-2 CPD 474, the Air Force, after similarly using the procurement system as an aid in decision-making, decided that specifications regarding the need for holiday service, and thus holiday pay, were inadequate and canceled the solicitation. Pointing out that Defense Acquisition Regulation (DAR) § 2-404.1(a) (1976 ed.) states that award must be made once bids have been opened (unless there is a compelling reason to reject all bids), we concluded that cancellation of the IFB was unjustified. Although the in-house estimate and bids were not prepared on a common basis, the fault lay in preparation of the in-house estimate, which we decided should have been adjusted to include a proper amount of holiday premium pay.

Here, the Army's decision not to reinstate Space Age's contract essentially reflected concern on its part with the accuracy of the estimate of NSN parts costs, an estimate needed because the solicitation did not provide that the contractor would pay for NSN parts but the in-house cost estimate assumed he would. The record indicates that at the time of the Army's decision it was unsure of the exact breakdown of NSN and non-NSN parts costs. Historical data was maintained on a computer system for the Fort Ord Maintenance Division as a whole, and the cost of parts pertaining to the contract would have had to be segregated

before a completely accurate cost comparison could be completed. To have remedied the problem, as the contracting officer found, would have required that the government incur additional administrative costs.

To the extent the Army's refusal to reinstate Space Age's contract reflects an unwillingness to rely on the estimate that led to the conclusion that contracting with Space Age would save \$1,600, coupled with a belief that the estimate nevertheless was the best one possible, we point out that OMB Circular A-76 only requires estimates. So long as an estimate reflects the government's best effort, we do not believe it should be discounted as an element of a cost comparison.

Alternatively, if the contracting officer stopped short of seeking a better estimate because, as the Army stated, "[t]o remedy the error would result in additional costs to the government," the Army, by soliciting Space Age's offer, undertook an obligation to evaluate it fairly. Morgan Business Associates, Inc. v. United States, 619 F.2d 892 (Ct. Cl. 1980). Administrative costs always are incidental to A-76 cost comparisons; the costs which the Army would have had to have incurred here would not have had to have been excessive since the Army could have revised its estimate by segregating only a statistical sample of NSN and non-NSN parts. We do not believe, however, that the Army's desire to avoid such costs justifies a failure to take a cost comparison to its conclusion, since in using a competitive procurement to aid in deciding whether to contract for a service, the Army was obliged to apply the ground rules under which the offer was invited. Serv-Air, Inc.; AVCO, 60 Comp. Gen. 44 (1980), 80-2 CPD 317.

Accordingly, we do not believe the Army has justified its decision to terminate Space Age's contract. We sustain the protest.

Ideally, we would recommend that the Army reopen consideration of this matter, complete its in-house cost estimate as necessary, and take appropriate action based upon the results obtained. We recognize, however, that it is unlikely, in view of the passage of time since the events in question occurred, that reinstatement of Space Age's contract is feasible. Alternatively, the cost of preparing a bid can be recovered where the government acted arbitrarily and capriciously and the bidder otherwise

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would have had a substantial chance of receiving award. M. L. MacKay & Associates, Inc., B-208827, June 1, 1983, 83-1 CPD 587. We recognize that award initially was made to Space Age, and that this case is arguably distinguishable from those where the protester receives no award. We would emphasize form over substance, however, if we did not acknowledge that the award amounted to an award in name only. In the circumstances, therefore, we believe that Space Age may elect to be reimbursed for the cost of preparing its bid in response to the Army's solicitation and that its costs should be paid unless the Army conducts an appropriate sampling of NSN and non-NSN parts costs and on that basis establishes that Space Age would not have been entitled to award had the A-76 cost comparison been carried to its logical conclusion.

Milton J. Fowler
for Comptroller General
of the United States