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**DECISION**



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

**FILE:** B-214079.2

**DATE:** February 12, 1985

**MATTER OF:** The Department of the Army--  
Reconsideration

**DIGEST:**

1. It is not in the government's interest to terminate a \$6 million, improperly awarded contract where termination costs are estimated to be more than \$1.6 million.
2. Where bid has been improperly excluded from award and, as a consequence of exclusion, bidder's responsibility has never been formally assessed, appropriate approach is to assess bidder's responsibility based on the most current information available to the contracting officer. Although this approach is valid, it will not be applied in protested procurement since termination of existing contract is not feasible.

The Department of the Army requests reconsideration of our decision in Space Ordinance Systems, a Division of Transtechnology Corporation, B-214079, July 18, 1984, 84-2 C.P.D. ¶ 61, where we sustained Space Ordinance Systems' (SOS) protest against the rejection of its telegraphic modification as late under request for proposals (RFP) No. DAAA09-83-R-4606, for M206 infrared flares which were awarded to two other concerns. We affirm our previous decision, but we conclude that the protested awards should not be disturbed.

The Army states that it does not "challenge the decision on the basis of the late modification issue" but that it does challenge the propriety of our remedy for the improper award and our request that the Army now determine SOS's present responsibility preparatory to any possible award to SOS.

As a remedy, we advised the Army to evaluate the present responsibility of SOS and, if SOS were determined to be responsible, to consider the feasibility of terminating the current contracts for the convenience of the government and awarding SOS the remaining requirement(s).

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The Army reports that the M206 infrared flare is a mobilization base item, that mobilization considerations mandate that more than one supplier be kept in an active status in case of a national emergency and that, therefore, only one contract--held by the Bermite Division of Whittaker Corporation (Bermite) (the third lowest offeror)--would be considered for termination. Further, the Army estimates that it would have to pay Bermite \$1.6 million in termination costs for costs incurred under the contract's first article testing procedure if it terminated Bermite's \$6 million contract. Also, the Army reports that "any delay in delivery [of the flare] would have an adverse impact on national readiness."

SOS argues that the termination cost figure is overstated because Bermite has yet to pass the first article test. SOS also cites Therm-Air Mfg. Co. Inc., Armed Services Board of Contract Appeals Nos. 15842, 17143, Aug. 21, 1974, reprinted in 74-2 BCA ¶ 10,818 (CCH 1974), for the proposition that costs associated with production--as distinct from first article testing--cannot generally be recovered before first article approval by the government. Also, SOS advises that some of the contractor's raw materials may be recovered by the government and used as an offset against any termination costs owed to Bermite. The Army responds, however, that the terms of the contract permit Bermite to recover up to 25 percent of the contract price for first article costs and that on December 17, 1984, Bermite's first article was approved. Further, the Army insists that:

"Although the Government may take title to certain raw materials upon a termination for convenience, the price of these materials cannot be considered as a savings to the Government in determining possible termination for convenience costs with Bermite since the Government may not have a need or use for such materials. Also, the Government has no way of determining whether the items are of such a quality as to meet its standards and thus could not accept them for use as Government-furnished material on any subsequent contract."

We have no basis to question the Army's analysis or the Army's estimate of the cost of terminating Bermite's contract given that Bermite has passed first article testing and has commenced production; therefore, the cost of terminating Bermite's contract would likely exceed \$1.6 million. Although SOS argues that the Army should be precluded from including in its potential termination costs any cost incurred under the contract since from July 1984, because the Army allegedly did not take steps to reduce costs incurred under the contract after that date, these costs may be considered since it would have been premature for the Army to have considered taking these steps given that the Army's reconsideration request was still pending before our Office. Therefore, it is not in the government's interest to terminate Bermite's contract in view of the high cost.

In view of the above conclusion, we consider Army's additional argument about SOS's responsibility to be academic as far as this procurement is concerned. Nevertheless, given the Army's concern that our treatment of this issue will improperly affect the conduct of future procurements, we will discuss the Army's argument.

The Army states that the effect of the recommendation in our July decision that SOS's present responsibility be assessed is to "create a right on the part of a particular protester that would not have existed if the procurement were conducted properly." This position is based on the Army's view that at the time award was made, the facts indicate that SOS was nonresponsible and ineligible for award, whereas now the facts indicate that SOS may in fact be determined responsible. Assuming the Army is correct in its assessment, the fact is that SOS's responsibility was never formally made the subject of a determination by the contracting officer. Therefore, in order to cure this formal defect, and given the Army's improper exclusion of SOS's low bid, we considered it appropriate for the Army to determine SOS's responsibility based upon current information in accordance with the general principle that responsibility determinations are to be based upon the most current information available to the contracting officer at the time the determination is made. We consider this approach to be appropriate for future procurements where, but for the procuring agency's improper exclusion of the bid or offer entitled to acceptance, the bidder's responsibility has not been formally assessed.

We do not think our approach will "encourage protests for improper motives," as the Army fears, because the principle will apply only if the protest is sustained. Further, we do not understand how application of this principle will significantly "add delays and uncertainty to the procurement system" over and above those delays and uncertainty inherent in the general consideration of protests. But to the extent some additional "delay and uncertainty" flow from application of this principle, we consider these effects unavoidable in the interest of fairness to the bidder or offeror whose bid or offer was improperly rejected and whose responsibility was never formally assessed.

Therefore, our prior decision is affirmed. However, we conclude that the awarded contracts should not be disturbed.

*for* Milton J. Rowland  
Comptroller General  
of the United States