DECISION

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

60331

FILE: B-183957 DATE: December 29, 1975

MATTER OF: Dynamic International, Inc.--request for reconsideration

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DIGEST:

1. Recommendation in B-183957, October 6, 1975, 55 Comp. Gen. ____, 75-2 CPD 212, that contract be terminated for convenience of Government is sustained notwithstanding contractor's allegation that termination would be costly to Government since practicalities attendant to termination were considered in arriving at recommendation.

2. Contractor's allegation that there is appearance of affiliation between first and third low bidders so as to jeopardize integrity of competitive bidding system is unfounded since no evidence has been shown to prove that bids were not arrived at independently. The two bids in question did not give either firm an unfair competitive advantage or prejudice Government or other bidders.

3. GAO cannot determine that contract was nullity and contractor should consequently be paid on quantum meruit basis since contractor did not contribute to mistake resulting in award nor was it on direct notice before award that procedures being followed were improper; therefore, award cannot be considered plainly or palpably illegal.

Dynamic International, Inc. (Dynamic), requests reconsideration of our decision Commercial Sanitation Service, B-183957, October 6, 1975, 55 Comp. Gen. ____, 75-2 CPD 212, which sustained the protest of Commercial Sanitation Service (Commercial) against the award of a contract to Dynamic to operate a refuse collection and disposal service for NORAD Cheyenne Mountain Complex and Fort Carson, Colorado, under invitation for bids (IFB) No. DAKF06-75-B-0106, issued by the Department of the Army.

We held that where a prompt payment discount is offered by a bidder in a bid where a bid bond is required, the amount of the bond

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may be calculated on the bid price less the discount, which ruling we found was in keeping with a reasonable interpretation of Armed Services Procurement Regulation (ASPR) § 2-407.3(b) (1974 ed.). We further held that while ASPR §10-102.5(ii) (1974 ed.) gives discretionary authority to the contracting officer to decide whether bid bond deficiencies should be waived, such discretion must have been intended for application within definite rules. Consequently, absent a specific finding that waiver of the bid bond requirement was not in the best interest of the Government, the bid of Commercial should not have been rejected since it fell into one of the stated exceptions. In sustaining the protest we recommended that the contract with Dynamic be terminated for the convenience of the Government and that award be made to Commercial as the low bidder. We have been informally advised that the contract is to be terminated effective December 31, 1975. Dynamic requests that our Office modify that portion of the decision wherein we recommended that the contract be terminated for the convenience of the Government.

Dynamic objects to the recommendation for termination in view of the expense to the contractor who has always acted in good faith and that our earlier decision did not discuss the appropriateness of the recommended corrective action. Secondly, Dynamic alleges that Commercial and Ace Disposal Service (Ace), the third low bidder, were affiliated and that the integrity of the competitive bidding system is jeopardized when affiliated bidders are allowed to bid on the same solicitation. Thirdly, Dynamic requests that if the contract is terminated, then our Office should determine that the contract was a nullity and that payment should be made on a quantum meruit basis.

Where, as here, we conclude that a contract has been improperly awarded, we have always taken into consideration certain factors--good faith of the parties, urgency of the procurement, and extent of performance--in deciding whether the resultant award, or a portion thereof, should be disturbed. These factors were considered in our earlier decision. Upon reconsideration, we find no basis to change our position in this regard. See Dyneteria, Inc., B-178701, February 22, 1974, 74-1 CPD 90. In that case the contract was terminated with termination costs estimated between $70,000 and $175,000.

In regard to Dynamic's claim that Commercial and Ace are so closely affiliated as to jeopardize the integrity of the competitive bidding system, we agree that they are operated out of the same facility and appear to be affiliated.

In considering such contentions, the salient inquiry is whether the submission of multiple bids worked to the prejudice of the Government or other bidders. In Grimaldi Plumbing & Heating Co., Inc., B-183642, May 20, 1975, 75-1 CPD 307, we stated:

> "In 52 Comp. Gen. 886 (1973) we discussed various legitimate reasons that support a decision to submit multiple bids. These include: (1) to compensate for a suspicion that the quote of one's subcontractor was intentionally high so that the subcontractor could submit a low bid as a prime contractor (51 Comp. Gen. [403 (1972)] * * *; (2) to receive partial awards so that each company could perform the amount awarded short of the full quantity (39 Comp. Gen. [892 (1960)] * * * and Informatics, Incorporated, [B-181642, February 28, 1975, 75-1 CPD 121] * * *; (3) to protect a functioning plant's continued operation where the prospective purchase of a new plant was not fully completed at the time of bidding (52 Comp. Gen., supra); (4) to avoid a possible unfavorable preaward survey by both firms offering to perform in the acceptable facilities of the parent firm (B-151459, July 8, 1963)."

Assuming arguendo that Commercial and Ace are closely affiliated, there is no evidence that the submission of the two bids gave either firm an unfair competitive advantage or prejudiced the Government or other bidders nor is there evidence to suggest that the bids were submitted as a subterfuge to restrict competition. Informatics, Incorporated, supra.

Concerning Dynamic's request that if the contract must be terminated our Office should determine that the contract was a nullity and that payment should be on a quantum meruit basis, we stated in 52 Comp. Gen. 215, 218 (1972) that:

> "* * * We are in agreement with the position of the Court of Claims that 'the binding stamp of nullity' should be imposed only when the illegality of an award is 'plain,' John Reiner & Co. v. United States, 325 F. 2d 438, 440 (163 Ct. Cl. 381), or 'palpable,' Warren

> Brothers Roads Co. v. United States, 355 F. 2d 612, 615 (173 Ct. Cl. 714). In determining whether an award is plainly or palpably illegal, we believe that if the award was made contrary to statutory or regulatory requirements because of some action or statement by the contractor (Prestex, Inc. v. United States, 320 F. 2d 367 (162 Ct. Cl. 620), or if the contractor was on direct notice that the procedures being followed were violative of such requirements (Schoenbrod v. United States, 410 F. 2d 400 (187 Ct. Cl. 627), then the award may be canceled without liability to the Government except to the extent recovery may be had on the basis of quantum meruit. On the other hand, if the contractor did not contribute to the mistake resulting in the award and was not on direct notice before award that the procedures being followed were wrong, the award should not be considered plainly or palpably illegal, and the contract may only be terminated for the convenience of the Government. John Reiner & Co. v. United States, supra,; Brown & Son Electric Co. v. United States, 325 F. 2d 446 (163 Ct. Cl. 465)."

Since the contractor did not contribute to the mistake resulting in the award and was certainly not on direct notice before award that the procedures being followed were wrong, the award should not be considered plainly or palpably illegal, and the contract may only be terminated for the convenience of the Government. To resolicit bids as Dynamic suggests would render nugatory the recommendation in our earlier decision that since Commercial's bid had been improperly rejected, award should be made to it as the low bidder. There was no deficiency in the invitation, but rather a misinterpretation by agency personnel of the applicable regulations covering the acceptability of Commercial's bid.

Since Dynamic does not advance any additional facts or legal arguments to show that our earlier decision was in error, our decision of October 6 is affirmed.

R.F. Keller

Deputy Comptroller General
of the United States