

**DECISION**



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

FILE: B-184247

DATE: August 5, 1976

MATTER OF: Midland Maintenance, Inc.

**DIGEST:**

Procuring agency's failure to anticipate that Government-owned bulldozer and crane-shovel used by prior contractor in operation of landfill might be needed by awardee of contract for next fiscal year's services led to making of award on basis of the contractor furnishing all equipment with intention of modifying contract immediately thereafter to provide Government-owned equipment at fraction of commercial rental rates. However, protester does not appear to have been prejudiced since its bid would not be low even if commercial rental rates had been paid by low bidder,

Midland Maintenance, Inc. (Midland) protests an award by the Procurement Division, Fort Knox, Kentucky (Army), to Tollie H. Elder, Jr., d.b.a. Knight Sanitation (Knight), of a fixed price contract for refuse collection at Fort Knox, excluding family housing, but including operation of the Fort Knox sanitary landfill (IFB DABT 23-75-B-0093).

Midland's primary contention is that the circumstances surrounding the Army's acceptance of Knight's bid are tainted with impropriety, that Knight was given an unfair competitive advantage, and that the Army should have informed all potential bidders that certain Government-owned equipment which Knight has been permitted to use was available.

The solicitation for refuse collection and operation of the landfill from July 1, 1975, through June 30, 1976, included specifications divided into two parts. The portion of the specifications which was for refuse collection required the contractor to furnish all necessary labor, material, and equipment, except for certain Government-owned items which were described and for which the rental was set out. The portion of the specifications governing operation of the landfill did not indicate that any Government-owned equipment was available for that purpose.

The three bids received by the scheduled bid opening on May 9, 1975, compared with the Government estimate as follows:

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Knight	\$289,200
Government estimate	331,500
Midland	508,800
RAS Sanitation, Inc.	541,800

Award was made to Knight on May 28, 1975.

This protest was filed immediately after Midland learned that on June 4, 1975, the subject contract was modified, making available to Knight the following described equipment which had not been listed in part II, section E, of the IFB:

1. DFAE 146 -- "Crane, shovel, crawler, Bucyrus Eire, 121/2 ton, Model 22 BM 3/4 C/Y, boom extension 30'." (Crane-shovel)
2. DFAE 110 - "Tractor, full track, Caterpillar, Model D-8 w/bulldozer, cable, tilt, power control unit cable, front, 1 drum." (bulldozer)

The crane-shovel and bulldozer were leased to Knight at rentals of \$220 and \$279 per month, respectively.

The Army admits that a crane-shovel and bulldozer are required to perform the contract, and that, in the contracting officer's words, the protester's:

"\* \* \* contention that rental rates were approximately 10% of standard commercial rates is correct. This avenue was never considered however \* \* \* since the Government is not in the business of renting equipment. A test of the market was made 14 July 1975 to confirm this contention and it was found that [a local] rental rate for the Bulldozer is \$3500.00 per month for less than a 1 year period and \$2500.00 per month for 1 year or more. The rate quoted for the Crane-Shovel is \$2500.00 per month for less than a 1 year period and \$1850.00 per month for 1 year or more."

Therefore, not only did Knight obtain the use of Government-owned equipment, the availability of which was not mentioned in the IFB, but it received a favorable rental rate.

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The Army contends that the Government may negotiate to modify a contract when it is determined that it is in the Government's best interest to do so, a point which Midland does not deny. However, Midland relies upon our decision in A & J Manufacturing Co., 53 Comp. Gen. 838, 839-840 (1974), 74-1 CPD 240, wherein we indicated that although a contracting officer may have the right to make changes within the general scope of a contract, "the competition to be achieved in the award of Government contracts must be held to the work actually to be performed," and that "a contracting officer may not award a contract competed under a given specification with the intention to change to a different specification after award." (Emphasis added.)

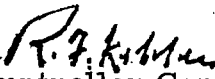
In this regard, the contracting officer maintains that Knight did not make a pre-award request for use of the crane-shovel or bulldozer. While it may be true that Knight made no such formal request before that date, the record discloses that a week prior to award, the contracting officer requested that engineering personnel determine whether the Army could make available "any additional equipment such as containers, trucks, crane, bulldozer for rental in case [the] proposed contractor has any problem getting this equipment due to our late awarding of [the] contract." On the date of award, May 28th, (1) the contracting officer was informed that the crane-shovel and bulldozer were available at the stated rents; (2) she was in oral contact with Knight personnel, to confirm its price; and (3) Knight prepared its letter formally requesting that the crane-shovel and bulldozer be made available to it. Approval was given by letter dated May 30, 1975.

It appears to us from these facts of record that in order to avoid a lapse in services at the end of the fiscal year the contracting officer was placed in the position of awarding the contract when it was clear that the specifications would be changed immediately thereafter. It would have been preferable for all prospective bidders to have been advised of the availability of the crane-shovel and bulldozer prior to the submission of their bids. In this connection, we note that this equipment had been made available to the protester, or an affiliate thereof, at the same rental rates for performance of the prior fiscal year's contract. The incumbent had returned this equipment to the Government some time prior to the expiration of that contract. If the procuring agency had anticipated during preparation of this IFB that the equipment might be needed again, and had mentioned its

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availability in the IFB, this protest would have been obviated. We are bringing our views on this point to the attention of the Secretary of the Army.

However, we do not believe the protester was prejudiced by what occurred. Using the rates quoted above, we calculate that Knight rented the bulldozer and crane from the Army for approximately \$46,000 per year less than the commercial rental for that equipment. Since Midland's bid was \$219,600 higher than Knight's, it appears that Knight would have been the low bidder by a substantial amount even when commercial rental rates are taken into account.

  
Deputy Comptroller General  
of the United States