

**DOCUMENT RESUME**

01647 - [A1051852]

[Protest to Award of New Contract Prior to Termination of Existing Contract]. B-187457. March 31, 1977. 4 pp.

Decision re: Cosmos Engineers, Inc.; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).

Contact: Office of the General Counsel.

Budget Function: National Defense: Department of Defense - Procurement & Contracts (058).

Organization Concerned: Department of the Army.

Authority: B-187726 (1977). E-186657 (1976). 52 Comp. Gen. 732. 52 Comp. Gen. 736. A.S.P.R. 7-203.3.

Protester contended that the Army, awarded a new contract rather than continuing an existing contract, attempted to exclude protester from competition, and precluded effective competition by providing vague specifications. GAO would not decide on appropriateness of award of a new contract. The contention that protester was excluded from competition was not sustained. Bidders were not precluded from bidding on a common basis. Protest was denied. (DJH)

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**DECISION**



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

**FILE: B-187457**

**DATE: March 31, 1977**

**MATTER OF: Cosmos Engineers, Inc.**

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**DIGEST:**

1. Protester's argument that a new contract should not have been entered into to perform work contained in protester's untermiated contract is not for resolution by GAO where protester has appealed contracting officer's settlement of its earlier contract to Armed Services Board of Contract Appeals.
2. Contention that agency attempted to exclude protester from competition is not sustained. Although agency did not respond to questions raised by protester after it received IFB amendment only a few days prior to bid opening, answers to questions were obtainable from IFB or were reasonably within protester's knowledge.
3. While bidders must be apprised of the extent of work which will be required under an advertised contract, bidders were not precluded from bidding on a common basis where agency provided them with estimates of work, even though agency disclaimed responsibility for such estimates. GAO recognizes that it is not always feasible for agency to state its needs precisely and that in such situations reasonable alternatives may be adopted.

Cosmos Engineers, Inc. (Cosmos) has protested the Department of the Army's (Army) actions regarding its awarding of contract DAEA18-76-C-0228, for upgrading, repairing, cleaning, and painting five antenna towers in the Washington, D. C. area. Cosmos contends that the Army (1) awarded a new contract, when continuing an existing contract with Cosmos for the same work would have been in the best interest of the Government; (2) attempted to exclude Cosmos from the competition; and (3) precluded any effective competition by soliciting bids to meet a vague specification.

On August 25, 1976 the Army invited bids for performing the work mentioned above. Much of the same on-site work requirements had been part of a cost-plus-fixed-fee contract (DAE08-75-C-0042) awarded to Cosmos on June 30, 1975. Also included in the earlier contract was the requirement that Cosmos prepare inspection reports on the condition of the various towers, presumably to form the basis for determining the cost and extent of the upgrading and repair work. After a portion of the earlier contract (including all of the inspection reports) was completed, the contracting officer ordered Cosmos on November 18, 1975, to stop work under the "Limitation of Cost" clause of the contract (Armed Services Procurement Regulation (ASPR) § 7-203.3 (1975 ed.)). By May 1976 the Army invited bids to do the remaining work, but the solicitation was canceled, because there was a question at that time as to whether the Army had the right to use Cosmos' inspection reports in its solicitation.

The instant solicitation was issued on August 25, 1976 and bid opening was scheduled for September 17, 1976. The Cosmos inspection reports, as well as similar reports prepared by another contractor, were included in the IFB package, although the Army specifically disclaimed responsibility for their accuracy. Cosmos received a copy of the solicitation and attended the Pre-Bid Conference/Site Survey held on August 31-September 2, 1976. The firms attending the conference received copies of amendment 0001. At the conference, the firms present were also advised that other questions would be answered by an amendment to be issued later. Amendment 0002 was issued on September 10, 1976, but Cosmos reports that it did not receive it until September 16, 1976. The amendment extended the bid opening date to September 20, 1976. However, Cosmos did not bid on the project but protested on September 20 any award of a contract. Award was made on September 30, 1976, based on the contracting officer's determination that performance could not be delayed due to the already hazardous condition of the towers.

Cosmos first contends that it was improper to award a new contract for the work when Cosmos' pre-existing contract covered essentially the same work. It states that the contract has never been terminated, and, therefore, it is "highly inappropriate to procure the work from a source other than Cosmos." As indicated, Cosmos was ordered to stop work on the earlier contract. On September 10, 1976, the contracting officer issued a final decision to settle payment for services rendered by Cosmos, and this decision has been appealed to the Armed Services Board of Contract Appeals. Clearly the appropriateness of the stop work order and the settlement are matters to be resolved by the Board. Under the circumstances, we do not believe our office should decide whether or not it is appropriate to award a new contract for the work.

Cosmos' charge that it was consciously and deliberately excluded from the competition arises primarily with regard to its receiving Amendment 0002 late. Cosmos also argues that by not extending the bid opening date and answering only three of eighteen questions it posed to the Army on September 17, after receiving Amendment 0002, the Army engaged in a course of conduct evidencing its deliberate attempt to exclude Cosmos.

In reply, the Army denies there was any intention to deliberately exclude Cosmos from the competition. It points to the fact that Cosmos received a copy of the IFB; that it attended a pre-bid conference and received Amendment 0001; and that it received a copy of Amendment 0002 by TWX message of September 15. On the other hand, the Army feels that the failure of Cosmos to compete for this procurement "was a deliberate attempt on its part to interfere with the Government's procurement action because of its dispute with the Government under the earlier contract."

Based on the record we are unable to sustain either contention. We do not find that the Army deliberately attempted to exclude Cosmos from the competition or that Cosmos' failure to compete stemmed from a desire on its part to interfere with the Government's procurement. We believe, however, that Cosmos was in a position to lessen much, if not all, of any prejudice resulting because of its late receipt of Amendment 0002 and the Army's alleged failure to answer all of its questions. Regarding the initial twelve questions raised by Cosmos, we concur with the Army that the answers thereto were obtainable from the solicitation and amendments or were reasonably within Cosmos' particular knowledge. Of the remaining six questions, the only change in the specifications made by Amendment 0002 concerned the material to be used when bundling the coaxial cable. We would assume that the bundling and materials could be in accordance with the custom of the trade and would not pose a problem to a bidder. All other questions regarding the specifications were such that Cosmos could have sought answers thereto at any time after having received the initial specifications. We cannot conclude, therefore, that Cosmos was prevented from bidding.

Finally, Cosmos argues that the specifications were so vague so as to preclude bidding on a common basis. Cosmos contends, in effect, that while it has greater knowledge of the extent to which the bolts need to be replaced and tightened under the specification for towers which it inspected, it does not know the extent of such tightening and replacement.

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We have held that bidders should be apprised of the extent of work which will be required under an advertised contract. Elrich Construction Company, B-187726, February 14, 1977, 77-1 CPD 105. We have also recognized, however, that it is not always feasible for an agency to state its needs precisely and that in such situations the agency may adopt reasonable alternatives. Michael O'Connor, Inc., B-186657, November 30, 1976, 56 Comp. Gen. \_\_\_\_\_, 78-2 CPD 456; 52 Comp. Gen. 732, 736 (1973). Here it appears that the Army could not have determined precisely how many and which bolts needed to be tightened and replaced without making its own time-consuming, costly, physical inspection of the towers. In our opinion the Army adopted a reasonable alternative by providing bidders with the reports furnished to the Army by its prior contractors. Although the Army would not vouch for the accuracy of these reports, nevertheless, the opportunity for on-site inspection gave each bidder the opportunity to judge for itself whether to rely on them. There is no indication in the record that any of the potential bidders attending the on-site inspection were prevented from inspecting the towers in order to make informed decisions as to the reports' reliability. While it is true that all bidders were asked to assume the risk of more bolts to tighten and replace than shown on the inspection reports, we do not agree with Cosmos that the specifications were such that bidders were precluded from bidding on a common basis.

Accordingly, the protest is denied.

*J. W. K. H. H.*  
Deputy Comptroller General  
of the United States

