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DECISION

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

FILE: B-187671 DATE: February 22, 1978

MATTER OF: Government Contractors, Inc.--Reconsideration

DIGEST:

Prior decision holding that contract awarded was different from contract bids were solicited on due to revised Service Contract Act wage determination is affirmed. However, recommendation that contract be terminated is no longer practicable due to contract timeframe and GAO now recommends that option under contract not be exercised.

The Naval Facilities Engineering Command has requested reconsideration of our decision in the matter of Government Contractors, Inc., B-187671, September 29, 1977, 77-2 CPD 240.

As this procurement has been the subject of numerous decisions by our Office, the following recitation of the factual background, contained in our September 29, 1977, decision, is helpful:

"When bids were opened on September 3, 1976, the low bid of $612,000 was submitted by GCI. ECPS [E.C. Professional Services] was the fifth low bidder at $751,680. GCI alleged an error in its bid and its request for correction was denied by the Navy and its bid was rejected.

"GCI protested this action by the Navy and in our decision in Government Contractors, Inc., B-187671, January 31, 1977, 77-1 CPD 80, we questioned the reasonableness of the denial of GCI's request. Furthermore, we noted that

from the worksheets submitted by GCI to support its request for correction, it had based its bid on 141,700 man-hours, whereas the IFB required 169,000 man-hours. We stated that this called into question the responsibility of GCI and recommended that a determination of GCI's responsibility be made prior to any award.

"By letter of February 8, 1977, the Navy requested reconsideration of our decision contending that the compliance with the man-hours requirement was a matter of responsiveness rather than responsibility, and that GCI's bid could be disregarded without a responsibility determination. On March 3, 1977, we affirmed our prior decision as the bid of GCI was responsive on its face and it was only after bid opening, through a review of the worksheets, that the man-hour discrepancy was discovered. See Government Contractors, Inc. - Reconsideration, B-187671, March 3, 1977, 77-1 CPD 159.

"By letter of March 23, 1977, the Navy requested clarification of our prior decisions in view of the possibility that award to GCI, even at its corrected bid price, could be unconscionable. Further, the Navy argued that if it made a negative responsibility determination on GCI, when the matter was submitted to the Small Business Administration (SBA) for consideration of the issuance of a certificate of competency (COC), a COC was likely to be issued because GCI did possess the capacity and credit to perform the contract but was not intending to utilize the required man-hours. Therefore, if SBA issued a

> COC, the Navy would have to award to GCI, knowing GCI did not intend to comply with the man-hours.
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> "The same day, April 29, 1977, our Office issued its decision, which reaffirmed our prior decisions and answered the Navy's latest allegations, the Navy made an urgency determination under section 2-407.8(b)(3)(iii) of the Armed Services Procurement Regulation (1976 ed.) and awarded the contract to ECPS as the only bidder who stated it would comply with the man-hours requirement."

GCI protested this award and in our decision of September 29, 1976, we sustained the protest based on the fact that the contract awarded to ECPS contained an improper wage determination under the Service Contract Act (41 U.S.C. § 351 (1970)) and recommended the ECPS contract be terminated for the convenience of the Government and the requirement resolicited.

The Navy request for reconsideration of the September 29 decision contains the following argument:

> "Your decision cites Dyneteria Inc., 55 Comp. Gen. 97 (1975) and High Voltage Maintenance Corp., 55 Comp. Gen. 160 (1976) as being the rationale to be applied to this decision. Both of these decisions involve situations in which the wage determination was changed post bid but prior to award.
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> "In this regard the Department of Labor issued revised regulations in 41 F.R. 26, now contained in 20 C.F.R. Part 4 and ASPR § 12-1005.3(a)

which recognize that the successor contract principle as applied to the Service Contract Act has resulted in service contractors being entrapped by last minute collective bargaining agreements. Accordingly, the revised regulations provide that the terms and conditions of a collective bargaining agreement will not be given effect when a contracting agency receives notice thereof less than 10 days before the date of opening of bids upon a finding that there is not a reasonable time to notify bidders or incorporate a new wage determination. In those pre-bid cases, under these circumstances, the revised wage rate is ignored.

"In the case of revisions in wage rates post-bid, such as is the case in your decision cited above, your present decision suggests a remedy which is both more stringent than pre-bid cases and more radical than recommended by the Department of Labor in their letter of 18 August 1977 which you cite. The anomaly of the differing remedies based on whether a revised wage rate is issued pre-bid or post-bid is particularly made pointed when you appear to support the recommendation of termination for convenience by reference to the statement in Dyneteria, supra, that speculation as to the effect on competition of a change in wage rates is dangerous and should be avoided. Certainly, speculation as to change in wage rates is even more rife pre-bid and the pre-bid time is the only one when bids could be affected by the speculation. The facts in the present decision showing

a bid opening on 3 September 1976 and an award on 29 April 1977 provide a sufficiently long period as to avoid even the bare possibility of speculation by prospective bidders.

"Under all these circumstances, it is submitted that the remedy of termination for convenience is excessively harsh, unnecessary to achieve the results deemed necessary by the Department of Labor and inconsistent with the desire to eliminate speculation as to the effect of revised wage rates. Additionally, termination for convenience would involve additional expenditures of public funds, which are avoidable by merely adjusting the present contract for the effects of the new wage determination."

We believe there is equal speculation as to the effect of a revised wage determination both before and after bid opening. In both instances, the contract awarded, if subsequently modified to incorporate a new wage determination, is not the contract upon which bidders based their bids.

While the Department of Labor has revised its regulations since the Dyneteria decision, supra, we considered the proposed regulation and a substantially similar provision in ASPR § 12-1005.3(a)(ii) (1974 ed.). Our Office has continued to follow the reasoning of that decision in order to protect the equality of competition. See E.I.L. Instruments, Inc., B-188667, May 6, 1977, 77-1 CPD 321; Minjares Building and Maintenance Company, B-184263, March 10, 1976, 76-1 CPD 168, and Suburban Industrial Maintenance Co., B-189027, September 16, 1977, 77-2 CPD 198.

As we stated in Dyneteria, supra:

> "* * * If the cba [collective bargaining agreement] rates did not have to be incorporated into the contract, we see no basis for the contract modification; if the cba rates had to be incorporated, they were available well before award and the IFB should have been canceled and a new IFB issued with the cba rates."

Accordingly, we affirm our prior decision. However, in view of the current timeframe in the contract with ECPS, our prior recommendation that the contract should be terminated is no longer practicable. Therefore, we recommend that no options be exercised after the original ECPS contract, which expires in May 1978, and that the requirement be resolicited competitively.

Because our decision contains a recommendation for corrective action, we have furnished a copy to the congressional committees referenced in section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1970), which requires the submission of written statements by the agency to those committees concerning the action taken with respect to our recommendation.

R.F.K.11

Deputy Comptroller General
of the United States