

DECISION

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

EATON

FILE: B-208189.3 DATE: May 20, 1983

MATTER OF: Twehous Excavating Co., Inc. -
Reconsideration

DIGEST:

Because only 2 weeks' work remains until contract will be completed, GAO modifies prior recommendation to terminate contract for the convenience of the Government. Instead GAO recommends that protester be awarded bid preparation costs and that agency head take steps to prevent future improper solicitation cancellation.

The Department of Agriculture's Soil Conservation Service (SCS) requests reconsideration of our decision on the protest of Twehous Excavating Company, Inc., B-208189.2, March 17, 1983, 83-1 CPD _____. We modify the recommendation contained in that decision.

This is our third decision concerning Twehous' protest. In the initial one, Twehous Excavating Company, Inc., B-208189, January 17, 1983, 83-1 CPD 42, we found that SCS had improperly canceled a solicitation for reconstruction of an abandoned strip mine in Randolph County, Missouri. The agency believed that its solicitation, No. SCS-4-MO-82, had not fully explained how bids would be evaluated. We found, however, that an award under the solicitation would have served the Government's needs and would not have prejudiced any bidders. We therefore sustained the protest.

We requested the Secretary of Agriculture to issue an immediate stop work order to Magruder Construction Company, the awardee under a revised solicitation, No. SCS-5-MO-82, and to determine whether Twehous, the low, responsive bidder under the canceled solicitation, would be willing to complete the project at its original bid prices.

At the time of the initial decision, SCS had advised us that costs associated with termination of Magruder's contract would be approximately \$162,000. Because this

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seemed high, particularly in light of a November 1982 estimate of \$5,000, and because the amounts involved had not been documented, we also requested SCS to provide us with a precise, written estimate of termination costs. All parties were notified of these requests on the day our decision was issued.

Although we anticipated receiving a response within 5 days, delays occurred while SCS surveyed and attempted to determine the type and extent of work remaining and met with Twehous concerning it. Magruder, which had temporarily stopped work, was ordered by SCS to resume, apparently in an attempt to mitigate damage to the mine site that was occurring because of wind, rain, and exposed surfaces.

By letter dated February 18, 1983, Twehous advised us that it "stood ready" to complete the contract. Despite SCS's arguments to the contrary, in our decision of March 17, 1983, we therefore recommended that Magruder's contract be terminated for the convenience of the Government; that the original solicitation be reinstated; and that an award be made to Twehous under it.

We were not persuaded by SCS's estimates of potential delays and environmental damage that would result from a change of contractors. Although the agency contended, for example, that it would need to take protective measures, such as temporary seeding and mulching, and to remove and store materials already delivered to the mine site, we saw no reason why Magruder could not leave the site one day and Twehous begin work the following day.

As for costs, although SCS stated that Magruder would be owed \$66,000 for labor and materials (in addition to \$118,626 that it already had been paid), we believed that the Government would be obligated to pay this amount regardless of who the contractor was. Since SCS did not discuss the cost of the heavy construction equipment that Magruder was operating under Government supervision at set hourly rates, we assumed that its impact on the termination settlement would be insignificant.

There was no indication that Twehous would require time or incur additional costs for mobilization. In fact, since SCS informally had advised us that Magruder was leasing most of its equipment, it appeared that Twehous might simply assume these leases. And, since SCS expected to take title to materials already delivered to the mine site and to furnish them to Twehous, we recommended that their cost be deducted from Twehous' bid prices for these items.

The only additional cost to the Government, it appeared, would be \$37,000, to be incurred because Twehous' prices under the original solicitation were higher than Magruder's on the resolicitation. This amount was not, in our opinion, a termination cost, but rather one that SCS would have had to pay if it had not improperly canceled the solicitation.

Since issuing the March 17, 1983 decision, we have received SCS's request for reconsideration, held a conference on the matter, requested that the agency contact Twehous with updated information on the amount of work remaining, and sought additional information on the manner in which termination costs would be calculated.

Although SCS, in its request for reconsideration, repeats its original arguments that the canceled solicitation was unclear and did not represent its minimum needs, the agency has not shown that our initial decision was based on any errors of fact or law, as required by our procedures, 4 C.F.R. § 29.9 (1983). We therefore reaffirm our finding that the cancellation was improper.

SCS's reasons for seeking reconsideration of our recommendation to terminate Magruder's contract for the convenience of the Government include (1) the cost to the Government; (2) other, unpriced impacts of termination; and (3) Twehous' apparent refusal to assume the remainder of the work unless it is paid \$20,000--double its original \$10,000 bid price--for mobilization.

Termination costs, as provided by Magruder to SCS, would be as follows:

Direct costs, including labor, materials, and ownership, operation, and maintenance of equipment:	\$147,000
Indirect costs:	23,500
Profit	22,200
Remaining mobilization	4,500
Temporary fencing	<u>100</u>
Subtotal	\$197,300
Already paid to Magruder	<u>144,500</u>
Total	\$ 52,800

SCS states that the direct costs appear to be reasonable and to accurately represent Magruder's total costs to perform to date, including both operating and idle time for equipment. While under its contract Magruder is not entitled to payment for idle time, SCS states that the various payment limits contained in the contract (such as payment only for the hours that equipment is operated and nonpayment for suspensions due to bad weather) would not be effective in a termination for convenience. The agency contends that application of Federal Procurement Regulations (FPR) § 1-18.802-3(b) (amend. 48, September 1968), which requires that a total cost basis of settlement be used for complete termination of construction contracts, would convert Magruder's basis of payment from firm fixed price to total actual costs.

Magruder's indirect costs, which equal 16 percent of direct costs, and profit, which equals 13 percent of total costs, appear slightly higher than normal, SCS states; however, the agency believes these amounts also may be shown to be reasonable. Although Magruder would not be entitled to the balance of its bid price for mobilization, SCS further states, the \$4,500 still due on this item could be claimed as a direct cost of departing from the mine site. Temporary fencing would be needed if the site is left vacant for even 1 day, the agency continues.

Under this analysis, it appears that the \$52,800 claimed by Magruder would be an actual cost of termination, rather than an amount covering labor, materials, and equipment that the Government would be required to pay in any event. This is contrary to our prior assumption that cost of labor and materials would not be duplicated and that the cost of equipment would not have a significant impact on a termination settlement.

We note, however, that SCS contributed to this erroneous assumption by failing to provide, prior to our March 17, 1983 decision, any specific information as to how it had calculated the amounts that would be due Magruder in case of termination. While our Office will give weight to the judgment of experienced contracting officers in estimating termination costs, we expect substantiation as to the factual and legal bases for such a judgment, particularly when, as here, such information has been specifically requested. See Defense Supply Agency Contract No. DAS100-76-1280, 56 Comp. Gen. 296 (1977), 77-1 CPD 58.

In addition, as noted above, SCS advised us that most of Magruder's equipment was leased. At our conference, we asked SCS to review the terms of these leases with a view to assumption by Twehous. SCS now advises us that Magruder owns most of its equipment (thus permitting it to include ownership costs in its estimate of direct costs of termination) and would neither lease it to Twehous nor allow assumption of any leases that it does hold.

This obviously would affect both the cost and the time required for Twehous to mobilize and/or lease equipment in order to complete performance. We could not, however, sanction payment of more than Twehous' original bid for mobilization. If the canceled solicitation were reinstated, any attempt by Twehous to increase its bid price for this item would constitute an unacceptable, late modification of its bid. See FPR § 1-2.303-3.

Although we have considered all these facts and circumstances, our primary reason for modifying our recommendation to terminate Magruder's contract is the amount of work accomplished during the 3 months it has taken to obtain an indication of whether Twehous wished to complete performance and a precise estimate of termination costs.

On March 30, 1983, at our conference on SCS's request for reconsideration, the agency advised us that the project was approximately 4 weeks from completion. SCS's final submission to our Office, indicating that it was proceeding with the work as contracted to Magruder, was not received until April 12, 1983, when only about 2 weeks' work remained.

We believe our prior decisions were correct, given the record before us at the time they were issued. Due to delays attributable in part to both parties, however, it is now neither practicable nor in the best interest of the Government to terminate Magruder's contract, and our decision of March 17, 1983, is modified in this regard. Compare Computer Network Corporation, et al., 56 Comp. Gen. 694, 709 (1977), 77-1 CPD 422 (involving a similar request for reconsideration of a recommendation to terminate).

Instead, we are recommending that Twehous be awarded its bid preparation costs, and that the Secretary of Agriculture review and take steps to prevent in the future the actions that led to SCS's improper cancellation of the original solicitation. As noted in our decision of January 17, 1983, the cancellation in this case permitted Magruder, a nonresponsive bidder, to become responsive on resolicitation and created an auction situation. The effect of the improper cancellation was therefore to undermine the integrity of the competitive system. In addition, we are recommending that the Secretary take appropriate action to ensure that when a protest is sustained and the possibility of termination is raised, the agency provide us with all information necessary for a decision in a more expeditious manner than SCS has done in this case.

Since our decision of January 17 contained a recommendation for corrective action, copies were sent to the congressional committees referenced in 31 U.S.C. § 270, as adopted by Pub. L. 97-258. Each of those committees has been apprised of the change in our recommendation. See Dyneteria, Inc. (reconsideration), B-184321, July 14, 1976, 76-2 CPD 42.

for Harry R. Van Cleave
Comptroller General
of the United States