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

27578

FILE: B-211167.3 **DATE:** March 2, 1984

MATTER OF: Central Texas College

DIGEST:

1. GAO believes that a contracting officer's decision to terminate an improperly awarded contract was reasonable where (1) there was a serious deficiency in the procurement which resulted in award to a firm which had not submitted the low proposal, (2) the firm submitting the low proposal was prejudiced, (3) the contracting officer was, at the time, unaware of any significant costs connected with the terminated contract, and (4) an interim contract awarded to the awardee of the terminated contract mitigated any potential termination costs and minimized any potential interruption of services.

2. While it is recognized that as a result of a termination of a contract certain administrative inconveniences will be experienced, in the absence of any indication of substantial adverse impact on the mission of the procuring agency, the preservation of the integrity of the competitive system outweighs the possible administrative inconvenience and disruption which might accompany the corrective action.

3. Even though a protest is pending before GAO, a contracting officer may review grounds of protest and, if necessary, correct mistakes.

4. Where amendment to RFP changed security clearance requirements, contracting officer's waiver of offeror's failure to acknowledge amendment was proper since solicitation requirement relates to responsibility which may be established at any time prior to award.

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Central Texas College (CTC) protests the termination for convenience of contract No. N00612-83-D-0135, awarded to CTC by the Naval Supply Center (NSC), Charleston, South Carolina, and the subsequent award of a contract for the same requirements to City Colleges of Chicago (CCC).

The protest is denied.

Request for proposals (RFP) No. N00612-82-R-0430, for the program for afloat college education (PACE) for the Pacific fleet, was issued on August 27, 1982, with a scheduled closing date of October 12, 1982. On September 29, 1982, amendment No. 0001 was issued which, among other things, extended the date for receipt of offers to October 22, 1982, and required that the contractor's administrative staff performing services under the contract have a security clearance of "Confidential." The amendment also made changes in specifications which allowed the contractor two consultation trips for the base year and each of the 2-option years for a total estimated value of $10,500.

According to the contracting officer, CCC failed to acknowledge amendment No. 0001 and the contracting officer determined that its offer was unacceptable. Amendment No. 0002, requesting best and final offers, was issued on December 17, 1982, with the closing date scheduled for December 29, 1982. CTC submitted the lowest best and final offer while CCC's best and final offer was second low. However, CCC, while acknowledging receipt of amendment No. 0002, apparently did not acknowledge receipt of amendment No. 0001 and the contracting officer, once again, determined that this made CCC's offer unacceptable. In this regard, it appears that some time between the issuance of amendment No. 0002 and consideration of best and final offers discussions were held with CCC who was advised that acknowledgment of amendment No. 0002 had not been received but no mention was made of amendment No. 0001. CCC in its protest letter of April 1, 1983, to our Office indicates that it was not until February 9, 1983, that it was advised that the contracting activity did not have CCC's acknowledgment of amendment No. 0001.

Contract No. N00612-83-D-0135 was awarded to CTC on February 23, 1983, after a preaward survey determined that CTC was a responsible offeror. By letter of March 1, 1983, CCC protested the award to CTC, pointing out that its cost of $390 per course hour was lower than CTC's cost of $397. CCC also argued that acknowledgment of amendment No. 0001

was not required. By letter of March 29, 1983, the contracting officer denied CCC's protest. On April 1, 1983, CCC protested to our Office.

A reevaluation of the proposals revealed that the contract negotiator, in the evaluation of CTC's offer, failed to include the government's estimate for travel, per diem and consultation trips. When these costs were added to CTC's offer, it was disclosed that CCC's offer was the low offer. As a result, the contracting officer determined that there had been an erroneous award to CTC and that the appropriate course of action would be to terminate the contract with CTC and award a contract to CCC as the low offeror. A preaward survey, dated April 22, 1983, was conducted on CCC and a complete award to CCC was recommended. Due to a delay in obtaining security clearances for CCC's administrative personnel, award was not made until September 29, 1983. On September 20, 1983, the contracting officer waived CCC's failure to acknowledge amendment No. 0001, finding that the effect of the amendment actually reduced the obligations of the offeror rather than increased them and, therefore, CCC gained no competitive advantage.

CTC argues that the termination is not in the best interest of the government since services under contract No. N00612-83-D-0135 have already started and CTC has made a substantial commitment of resources to provide educational services under the contract. CTC contends that termination of the contract will cause interruption of services to Navy personnel and that termination costs will exceed the cost of leaving the contract in effect for 1 year.

The determination of whether an improperly awarded contract should be terminated involves the consideration of several factors other than cost, including the seriousness of the procurement deficiency, the degree of prejudice to other offerors or the integrity of the competitive procurement system, the good faith of the parties, the extent of performance, and the impact of a termination on the procuring agency's mission. DSI Computer Services, Inc., B-207423, August 24, 1982, 82-2 CPD 173. While we recognize that all of the parties involved acted in good faith, there was a serious deficiency in the procurement which resulted in an erroneous award. As a result of this award, CCC was prejudiced by an award to another firm even though CCC submitted the lowest proposal. The contracting officer concluded that termination of the erroneous award was the only

remedy which would preserve the integrity of the competitive procurement system. We have held that the preservation of the integrity of the competitive system may outweigh the cost to the government of termination. Mitchell Construction Company, Inc.; Bill Strong Enterprises, Inc., B-205246.2; B-205246.3, August 18, 1982, 82-2 CPD 148. In the present case, we believe that the contracting officer's conclusion concerning the necessity of termination was reasonable, especially in light of the fact that the contracting officer was, at the time, unaware of any significant costs connected with contract No. N00612-83-D-0135. An interim contract was awarded to CTC which should have not only mitigated any potential termination costs, but also minimized any potential interruption of services. Thus, at the time, it appeared that the termination would have a minimal impact on the agency's mission. While it is recognized that as a result of a termination certain administrative inconveniences will be experienced, we have held that in the absence of any indication of substantial adverse impact on the mission of the procuring agency, the preservation of the integrity of the competitive system outweighs the possible administrative inconveniences and disruption which might accompany the corrective action. Mitchell Construction Company, Inc., et. al., supra.

It is generally recognized that the determination of whether a contract should be terminated for the convenience of the government is a discretionary administrative decision which does not rest with the GAO. The exception to this rule is when the termination is based on an impropriety in the award process. Under this exception, our Office will not review the validity of the termination per se. Our Office's review will be limited to the validity of the award procedures which underlie the termination action. Velda Farms Division of the Southland Corporation, B-192307, October 3, 1978, 78-2 CPD 254. CTC cites National Factors, Inc., et al., v. United States, 492 F.2d 1383 (Ct. Cl. No. ___, 1974), in which the Court of Claims held that "the termination of a contract for the convenience of the government is valid only in the absence of bad faith or a clear abuse of discretion" to support its position. We fail to see any showing of abuse of discretion or bad faith in connection with the contracting officer's determination to terminate the contract. After the contracting officer recognized the mistake made by the contract negotiator in evaluating the offers, it was proper for the contracting officer to terminate the contract in the best interest of the government. See Velda Farms Division of the Southland Corporation, supra. Accordingly, there is no basis for our Office to question the contracting officer's determination to terminate the contract.

Also, CTC argues that (1) the contracting officer acted prematurely in authorizing the termination since the responsibility of CCC had not yet been established and (2) the contracting officer had given preferential treatment to CCC by not conducting a preaward survey of its facilities. A preaward survey of CCC's facilities was conducted on April 22, 1983, prior to the termination of the contract, and complete award was recommended. On April 28, 1983, the contracting officer asked the Defense Investigative Service (DIS) to conduct a facility security clearance on CCC. DIS advised the contracting officer that the facility clearance would take about 60 days. In the meantime, an interim contract for 30 days was negotiated with CTC with options to extend on a month-to-month basis. According to the contracting officer, there was no reason to believe that CCC would not be found to be a responsible offeror or that DIS would take almost 5 months to complete the security clearance. Under the circumstances we do not believe that the contracting officer acted prematurely in authorizing the termination.

CTC also protests award to CCC on the basis that the contracting officer did not have authority to withdraw his determination of March 29, 1983, which denied CCC's protest and held in part that CCC's offer was unacceptable because of failure to acknowledge amendment 0001, and substitute his opinion of September 20, 1983, which waived CCC's failure to acknowledge amendment 0001.

The rationale given by CTC for this aspect of its protest is that under our Bid Protest Procedures once a contracting officer denies a protest, it then goes to the GAO and the contracting officer no longer has any authority to rule on the protest. Under our Bid Protest Procedures, after CCC lodged its protest with our Office on April 1, 1983, and we requested a report from the Navy, the contracting officer was not only authorized, but obligated, to review the grounds for his earlier denial of CCC's protest. We are unaware of any prohibition in either our or the Navy's bid protest procedures against the contracting officer correcting a mistake made in a procurement, even though a protest is pending before our Office. A review of the issues raised by CCC's protest to our Office led to the discovery that the award to CTC was erroneous and, eventually, to the waiver of CCC's failure to acknowledge amendment No. 0001.

In regard to the waiver, CTC appears to be of the view that the contracting officer's waiver, given on the basis

that the effect of the amendment on the overall solicitation was insignificant or negligible and would have no effect on the relative standing of the offerors, was improper because the security clearances referred to in the amendment had more than a negligible effect on performance of the services since without the security clearances CCC could not perform the contract. We have held that solicitation requirements for security clearances in the performance of contracts relate to responsibility and, as such, may be established at any time prior to award, which was done in this case. See Ameriko Maintenance Co., B-208485, August 27, 1982, 82-2 CPD 184. We have also held that a reasonable time may be allowed to obtain the security clearances even if this action delays performance of the contract. See Career Consultants, Inc., B-200506.2, May 27, 1981, 82-2 CPD 414. In this regard, the contracting officer states that action to process a security clearance will not be taken by DIS until an award is pending. In the present case, the process was not started until it was determined that CCC was, in fact, the low offeror and the delays in obtaining the clearance were not the fault of the contracting officer.

Accordingly, the protest is denied.

for Milton J. Socolar
Comptroller General
of the United States