

DECISION



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

FILE: B-218019.2 **DATE:** August 8, 1985
MATTER OF: NI Industries, Inc.--Reconsideration

DIGEST:

Where GAO has no basis to question contracting agency's finding that it is not feasible to terminate an existing contract for the convenience of the government and make award to the protester, the protester, who GAO previously determined was unreasonably excluded from the competition, is, alternatively, entitled to its costs of filing and pursuing the protest at GAO, including attorney's fees, and also its proposal preparation costs.

NI Industries, Inc. (NI), challenges the Department of the Army's (Army) determination that it would not be in the government's best interest to follow the recommendation for corrective action made in our decision in NI Industries, Inc., B-218019, Apr. 2, 1985, 85-1 C.P.D. ¶ 383. We find no basis to question the Army's determination. However, since, in our decision, we found that the protester was unreasonably excluded from the competition, we find the protester is entitled to costs.

In our prior decision, we found that the Army improperly departed from the evaluation plan described in the subject solicitation without informing the offerors and giving them an opportunity to structure their proposals in accordance with the new evaluation scheme. We further determined that the agency action prejudiced the protester because the improper evaluation had the effect of displacing NI as the low offeror. We therefore sustained NI's protest against award to Engineering Research, Inc. (ERI). Since the NI protest was filed at GAO more than 10 days after the Army had awarded the contract to ERI, the Army was not required to suspend performance of the contract. See Competition in Contracting Act of 1984, 31 U.S.C.A. § 3553(d)(1) (West Supp. 1985). We therefore recommended that the Army consider the feasibility of terminating the awardee's contract for warheads for the convenience of the government and awarding the contract to NI.

The Army has advised us that it is not feasible to terminate ERI's contract for the convenience of the government because (1) the cost to the government of terminating is estimated to be \$1,200,000; (2) the awardee has performed more than 30 percent of the contract; and (3) the awardee has informed the Army that it has ordered all materials necessary for the performance of the contract, and has received "a major portion" of them. In view of the advanced stage of the procurement and the high costs that would be associated with the termination of the existing contract, the Army believes that it is not feasible, that is, it would not be in the best interest of the government, to terminate ERI's contract. The Army states that steps have been taken to insure that the problem found in this case does not occur again. Furthermore, the Army has agreed not to exercise any options under the current contract.

Although not in a position to dispute the Army's representations concerning the costs of termination, NI argues that it filed a timely protest and did all it could to obtain a prompt decision, and that the Army's "dilatatory actions" have permitted the high termination costs. Under these circumstances, NI asserts that we should require termination of the contract and award to NI, notwithstanding the advanced stage of performance. NI suggests that it would work with the Army to minimize the costs of termination and specifically offers to take the contractor's materials already procured and reduce its contract price accordingly.

However, we have no basis to question the Army's determination that termination is not feasible. In similar circumstances, we have found that the advanced stage of the procurement (initial deliveries are scheduled for August) and high termination costs support a finding that termination is not feasible. See Twehous Excavating Co., Inc.--Reconsideration, B-208189.3, May 20, 1983, 83-1 C.P.D. ¶ 541. Furthermore, there is no assurance that the contractor would agree to make the material available to the protester and that a prompt and orderly settlement could be made that would insure the timely completion of the contract.

Since we cannot disagree with the Army's conclusion that termination is not feasible, we determine that the

protester is entitled to costs. This determination is based on the finding in our decision that the Army unreasonably excluded NI from award by not following the stated evaluation plan. Accordingly, by separate letter of today, we are advising the Secretary of the Army of our determination that NI be allowed to recover its costs of filing and pursuing the protest at GAO, including attorneys' fees, and also its proposal preparation costs. See 4 C.F.R. § 21.6(d),(e) (1985); Computer Data Systems, Inc., B-218266, May 31, 1985, 85-1 C.P.D. ¶ 624. NI should submit its claim for such costs directly to the Army. 4 C.F.R. § 21.6(f).

for 
Comptroller General
of the United States