



The Comptroller General  
of the United States

Washington, D.C. 20548

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## Decision

Matter of: Age King Industries, Inc.--Reconsideration

File: B-225445.3

Date: July 29, 1987

### DIGEST

Recommendation that contract be terminated is withdrawn on reconsideration where agency continued performance because it was notified of the protest more than 10 calendar days after award, and agency now establishes that termination is not in the government's interest. Protester, however, is entitled to bid preparation and protest costs.

### DECISION

The Defense Logistics Agency (DLA) requests reconsideration of the recommendation for corrective action made in our decision in Age King Industries, Inc., B-225445.2, June 17, 1987, 87-1 CPD ¶ \_\_\_\_\_. We withdraw the recommendation contained in that decision. However, we find the protester is entitled to costs.

Briefly, the protester, Age King Industries, Inc., was the low bidder under invitation for bids (IFB) No. DLA500-86-B-2090, issued by DLA as a small business set-aside for 6,000 crank handles. The contracting officer determined that Age King was not a responsible, prospective contractor and referred the matter to the Small Business Administration (SBA), the agency authorized by statute (15 U.S.C. § 637(b)(7) (1982)) to certify conclusively as to all elements of a small business concern's responsibility by issuing a certificate of competency (COC). Federal Acquisition Regulation (FAR), 48 C.F.R. § 19.601 (1986).

Unless the SBA and the contracting agency agree to a longer period, the SBA must take specific action in response to a COC referral within 15 business days. FAR, 48 C.F.R. § 19.602-2(a). The contracting officer is authorized to

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proceed with the acquisition and award a contract to another offeror, if the SBA fails to issue a COC within 15 business days or within such longer time as may have been agreed upon by the agency and the SBA. FAR, 48 C.F.R. § 19.602-4(c).

Here, DLA and SBA agreed to a deadline of January 23, 1987 for SBA to give notice to DLA of its intent to issue a COC to Age King. The SBA missed this deadline but informed DLA of the issuance of the COC on February 2, 1987 before DLA took any contract action in reliance on the missed deadline (F&H Manufacturing Corporation, the awardee, was told to resume performance of its contract on February 3, 1987, after DLA knew that a COC would be issued to Age King).<sup>1/</sup>

We held that if an agency, after the SBA misses its deadline, has no notice of the issuance of a COC, it can proceed with award action to the responsible bidder that is eligible for award. However, where, prior to making an award, the agency is informed of the issuance of a COC albeit after the deadline is missed, the agency cannot thereafter knowingly award a contract to other than what it knows to be the low, responsive, responsible bidder as certified by the SBA. We therefore sustained the protest and recommended that the contract with F&H be terminated for the convenience of the government, and that a contract be awarded to Age King.

DLA does not challenge our conclusion that F&H was improperly directed to resume work after DLA was notified of SBA's issuance of the COC to Age King or that Age King was improperly denied the contract award. Rather, DLA requests that our recommendation for corrective action be withdrawn because work under the F&H contract is 93 percent complete. Further, F&H expects to complete delivery of all items by August 1, 1987. DLA did not suspend performance pending our decision because Age King filed its protest more than 10 calendar days after the award. See 31 U.S.C. § 3553(d)(1) (Supp. III 1985).

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<sup>1/</sup> Contract performance by F&H had earlier ceased as a result of a prior protest. Thus, while the contract had been initially awarded to F&H prior to DLA's referral of Age King's responsibility to SBA, all parties treated SBA's consideration of Age King's responsibility as the equivalent of a pre-award COC proceeding, especially in view of the stop-work order that had been issued to F&H as a result of the prior protest. In our initial decision, we adopted this view.

In determining the appropriate corrective action on an improperly awarded contract when the agency is not required to suspend performance, we consider all the circumstances surrounding the procurement, such as the seriousness of the procurement deficiency, the degree of prejudice to other interested parties or to the integrity of the competitive procurement system, the good faith of the parties, the extent of performance, the cost to the government, the urgency of the procurement, and the impact of the recommendation on the contracting agency's mission. 4 C.F.R. § 21.6(b) (1986).

Based on the information submitted by DLA on reconsideration, we do not believe that termination of F&H's contract is in the best interest of the government. In similar situations, we have found that the advanced stage of the procurement and high termination costs support a finding that termination is not feasible. See NI Industries, Inc.-- Reconsideration, B-218019.2, Aug. 8, 1985, 85-2 CPD ¶ 145. Therefore, we withdraw our recommendation.

We find, however, that the protester is entitled to protest and bid preparation costs. The reasonable costs of filing and pursuing a protest, including attorney's fees, may be recovered where the agency has unreasonably excluded the protester from the procurement, except where our Office recommends that the contract be awarded to the protester and the protester receives the award. 4 C.F.R. § 21.6(e). Additionally, the recovery of costs for bid preparation may be allowed where the protester was unreasonably excluded from the competition and no other practicable remedy is available. Id.; Consolidated Construction, Inc., B-219107.2, Nov. 7, 1985, 85-2 CPD ¶ 529. Our previous finding that Age King was improperly deprived of the award has not been challenged by DLA. Accordingly, by separate letter of today, we are advising the Director of DLA of our determination that Age King be allowed to recover its costs of filing and pursuing its protest, including attorney's fees, and its bid preparation costs. See Computer Data Systems, Inc., B-218266, May 31, 1985, 85-1 CPD ¶ 624. Age King should submit its claim for such costs directly to DLA. 4 C.F.R. § 21.6(f).

*Milton J. Fowler*

for

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