The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: American Shipbuilding Company

File: B-231845

Date: November 8, 1988

DIGEST

1. Although Anti-Assignment Act, 41 U.S.C. § 15 (1982), generally prohibits the assignment of government contracts, this statute is intended solely for the protection of the government and the government may recognize an assignment as the circumstances in a particular case may warrant notwithstanding the Act.

2. Contracting agency acted reasonably in approving assignment of a government contract where agency thereby assured continued performance of contract for urgently needed supplies under essentially the same material contract terms.

3. Assignment of a government contract is not inconsistent with the provisions of the Competition in Contracting Act of 1984, 10 U.S.C. § 2304(a) (Supp. IV 1986), generally requiring agencies to obtain full and open competition in conducting procurements.

DECISION

American Shipbuilding Company protests the Department of the Navy's decision to permit the assignment by Pennsylvania Shipbuilding Company (PSC) of its contract for construction of two T-AO 187-Class fleet oilers to Avondale Industries, Inc. American asserts that the assignment was contrary to the Anti-Assignment Act, 41 U.S.C. § 15 (1982), and that the Navy instead was required to recompete the requirement for the two ships. We deny the protest.

The Navy awarded a fixed-price incentive contract to PSC in 1985 for the construction of two T-AO fleet oilers, with options for two additional fleet oilers; the Navy subsequently exercised the options in February 1986 and February 1987. In late 1987, however, PSC informed the Navy

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that it was experiencing financial difficulty as a result of significant cost increases and that the amount of past due debts owed subcontractors was increasing. Concerned that PSC would be unable to continue operation and might file for protection under the bankruptcy statutes, the Navy suggested that the firm consider alternative solutions, including the possibility of transferring the contracts for the two option ships to another contractor. PSC then contacted known potential suppliers, including Avondale, which already was under contract to build seven fleet oilers, and American. These discussions resulted in a tentative agreement between PSC and Avondale to assign PSC's contract for the two option ships to Avondale.

The Navy participated in the final negotiations with the two shipyards to set the conditions under which it would acknowledge an assignment. As a result of these negotiations, by means of modifications of the agency's contracts with the shipyards, the contracts for the two option ships were assigned to Avondale for completion at a firm, fixed-price under the delivery schedule in the PSC contract. PSC agreed to a firm, fixed-price for completion of the remaining two ships under its original contract, and also agreed to replacement of a restrictive default clause in its original contract with a standard default clause more favorable to the government. The total cost to the government for completion of the contract assigned to Avondale and the two ships retained by PSC will not exceed the government's expected total liability prior to the assignment.1/

American first argues that the assignment was contrary to the provisions of the Anti-Assignment Act, which generally prohibits the transfer of government contracts. American acknowledges that the courts have previously held that the government, if it chooses to do so, may recognize an assignment outside of the specific provisions of the Act, see, e.g., Tuftco Corp. v. United States, 614 F.2d 740 (Ct. Cl. 1980); American Financial Associates, Ltd. v. United States, 5 Cl. Ct. 761 (1984), aff'd, 755 F.2d 912 (Fed. Cir. 1985), but asserts that these rulings are distinguishable from the facts here on the basis that they turned on government conduct that estopped the government from disavowing the assignment. Moreover, American asserts

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1/ In calculating the agency's total expected liability prior to the assignment, the Navy added to the contract ceiling price the anticipated sums above the ceiling to which the contractor will be entitled to under the escalation terms of the contract.

that the prior caselaw is inconsistent with, and has been superseded by, the provisions of the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2304(a) (Supp. IV 1986), which generally requires agencies to obtain full and open competition in conducting procurements. According to the protester, the assignment of the two oilers constituted an improper sole-source procurement not justified by any of the exceptions to the requirement for full and open competition.

We find that American has provided no support for its contention that waiver of the anti-assignment provisions of the Act is permitted only where the government is otherwise estopped from disavowing the assignment. On the contrary, as has been repeatedly recognized, the government may waive the statute and recognize an assignment as the circumstances in a particular case may warrant because the general prohibition on the transfer of government contracts is intended solely for the protection of the government. See Tinker & Scott v. United States Fidelity & Guaranty Co., 169 F. 211 (C.C.D. Or. 1909); Intercontinental Mfg. Co., Inc., ASBCA No. 18218, 74-1 BCA ¶ 10,470; see also In-Vest Corp., GSBCA No. 6365, 83-1 BCA ¶ 16,502 (statute was enacted to prevent persons of influence from buying up claims against the United States and to avoid conflicting demands for payment and chances of multiple liability).

The Navy considered the transfer here an appropriate option under the circumstances because the oilers are urgently needed to replace ships approaching the end of their useful service life. The ships to be replaced are, on average, approximately 40 years old; they are more expensive to operate and maintain, and are less capable than the 187-Class oilers. The agency states that the time required for termination of PSC's contract, overcoming any delays caused by the consequent bankruptcy of PSC, preparing a solicitation package for the partially-constructed ships, conducting a competitive reprocurement, and securing completion by a new contractor (other than Avondale), would have delayed delivery of the oilers by at least 4 to 6 years. While the Navy has indicated that a short delay in delivery would be acceptable, it maintains that a delay of this magnitude would have had an adverse effect on operational capabilities. In this regard, we note that American has not claimed that it can deliver the ships according to the delivery

schedule in PSC's contract as agreed to by Avondale and at a price lower than or equal to Avondale's.2/

Further, we do not agree with American that the agency was required to conduct a competitive procurement in order to obtain a completion of the contract work. CICA does not apply to a transfer of work from one contractor to another where, as here, the transfer is intended to assure continued performance of the contract under essentially the same material terms (same items, cost and delivery) upon which a competition had already been conducted. We find nothing unreasonable or in violation of statute in the agency's approach here.

American argues that the assignment involves the use of appropriated funds unavailable for this purpose. The protester cites prior decisions of our Office (Tacoma Boatbuilding Co., 66 Comp. Gen. 625 (1987); 60 Comp. Gen. 591 (1981)), in which we stated that in reprocurements after the voluntary modification or termination for convenience of a contract, as distinguished from a termination for default, the appropriated funds obligated for the original contract are not available to fund a replacement contract if the period of availability for the appropriation had otherwise expired. It contends that under this rule, the appropriated funds originally obligated for the four oilers are no longer available and that the Navy instead should have relied on then current fiscal year 1988 appropriations. In addition, American points out that while the Navy has notified Congress of its intent to reprogram additional funds, that is, shift funds within a lump sum appropriation from other accounts for use in building the four oilers, Congress has not yet approved the proposed reprogramming.

The Navy, however, reports that the funds obligated for the 1985 award of two ships and the subsequent exercise in 1986 and 1987 of the options for two additional ships were fiscal year 1985, 1986 and 1987 "Shipbuilding and Conversion, Navy" appropriations with a 5-year period of availability.

With respect to the use of reprogrammed funds, we note that in the absence of specific statutory limitations, agencies

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2/ Moreover, we note that American has in fact contended in another protest filed with our Office (B-231923.2, concerning a subsequent procurement for additional oilers) that as a result of Avondale's prior experience in constructing 187-Class oilers, no other shipyard can offer a price as low as Avondale's.

are generally legally free to reprogram, even though to do so may be inconsistent with informal understandings with Congress or with budget estimates on which an appropriation was based. See generally B-215002, Aug. 3, 1987. We are aware of, and the protester has cited, no applicable statutory provision requiring advance congressional approval for reprogramming of the funds in question. Furthermore, although Department of Defense (DOD) instructions on reprogramming impose certain non-statutory restrictions on reprogramming, see DOD Directive 7250.5, Jan. 9, 1980 and DOD Instruction 7250.10, Jan. 10, 1980, such limitations are matters of internal executive policy and therefore do not provide our Office with a basis to object to an expenditure. LTV Aerospace Corp., B-183851, Oct. 1, 1975, 75-2 CPD ¶ 203; see generally Interscience Systems, Inc., 60 Comp. Gen. 331 (1981), 81-1 CPD ¶ 222.

American also contends that in converting PSC's contract from a fixed-price incentive to a firm fixed price contract, the agency violated the provisions of 10 U.S.C. § 2405 (1982), which prohibits DOD from adjusting any price under a shipbuilding contract "for an amount set forth in a claim, request for equitable adjustment, or demand. . . arising out of events occurring more than 18 months before the submission of the claim, request, or demand." According to the protester, PSC's current financial difficulties (the impetus for the assignment) resulted in part from a renovation of its shipyard begun after PSC purchased the facilities in 1982.

PSC's assignment of the contract does not constitute a "claim, request or demand" as defined under the statute; the arrangement reached in no way appears to represent the settlement of an actual or potential claim by PSC. Furthermore, as indicated above, the total cost to the government for completion of the four ships will not exceed the government's expected total liability under the contract in effect prior to the assignment when sums to which the contractor would be entitled under the escalation provisions of the contract are taken into consideration.

The protest is denied.

James F. Hinchman
General Counsel