DECISION

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

60193

FILE: B-178701 DATE: November 20, 1975

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MATTER OF: Tombs & Sons, Inc.--Request for Reconsideration

DIGEST:

1. July 15 decision, holding that contract was improperly awarded, is sustained notwithstanding contention that case cited, Prestex, Inc. v. United States, is inapplicable, since read as a whole, case enunciates rule of law that contract awarded must be contract advertised. Air Force postaward contract modification to reflect higher wage determination issued approximately 3 months before award, was tantamount to awarding different contract than one advertised because Air Force knew it would apply new wage rate to contract performance.

2. Proper way to determine effect of new wage rates is to recompete rather than assume new rates would affect bidders equally and, therefore, failure to resolicit using new wage rates issued after bid opening and before award with intention of adjusting contract price after award to reflect wage rate changes was improper notwithstanding contention that wage rate changes would not affect competition.

3. Option exercised 4 days before decision holding it should not be exercised, should be terminated for convenience despite termination costs and reprocurement time entailed since such action is deemed necessary to maintain the integrity of the competitive bid system.

Tombs & Sons, Inc. (Tombs), has requested that we reconsider our decision, Dyneteria, Inc., 55 Comp. Gen. ___ (B-178701, July 15, 1975), 75-2 CPD 36. While the decision discussed several issues, Tombs questions the basis for our recommendation that the option to its contract not be exercised.

The July 15 decision dealt with an invitation for bids (IFB) for full food services at Lowry Air Force Base, which incorporated by reference the provisions of the Service Contract Act of 1965 (41 U.S.C. § 351 (1970)), as required by Armed Services Procurement

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Regulation (ASPR) § 7-1903.41(a) (1974 ed.). The IFB also contained the Department of Labor's (DOL) Service Contract Act wage determination No. 73-311 (Rev. 2).

Bids were opened on April 30, 1974. On May 16, 1974, DOL issued revision 3 to wage determination No. 73-311, which provided higher minimum wages to reflect the new collective bargaining agreement (cba) reached on April 30, 1974, between the predecessor contractor (Dyneteria, Inc., the protester in the above decision) and the local union. As a result of protracted negotiations among the Air Force, Small Business Administration and Tombs concerning Tombs' responsibility (i.e., capability to perform), a contract was not awarded to Tombs as low bidder until August 14, 1974. The contract was awarded on the basis of the wage determination contained in the IFB.

On those facts we stated:

> "The rule that the contract awarded should be the contract advertised is well established. See Prestex, Inc. v. United States, 320 F.2d 367, 112 Ct. Cl. 620 (1963). Competition is not served by assuming that the new wage rates would affect all bids equally. It may well be that another bidder was already paying wages at or above those in the new determination so that his prices would not have increased at all. Thus, it is possible that the contract as amended no longer represents the most favorable prices to the Government. Speculation as to the effect of a change in the specifications, including a new wage determination, is dangerous and should be avoided where possible. See B-177317, supra. [December 29, 1972]. The proper way to determine such effect is to compete the procurement under the new rates."

In support of the request for reconsideratiion, Tombs questions the applicability of the Prestex case to the instant situation. Primarily, it is Tombs' position that there is no evidence indicating that all bidders were not using the same wage rates in determining their bids. Moreover, the fact that Tombs provides meals at $0.84, when Dyneteria, the then-incumbent, contractually obtained $1.05 represents, in Tombs' view, prima facie evidence that the Government was substantially benefitted by the bids received under the instant IFB.

The Air Force has submitted its views pointing out when the new wage determination was issued by DOL, it chose not to amend the IFB to reflect the new determination because: (1) a new round of bidding after prices had been exposed would have encouraged an auction atmosphere; (2) only the incumbent contractor (Dyneteria) could control the timing of collective bargaining negotiations; and (3) since the new determination was a result of the incumbent's actions, to require another pricing opportunity when the incumbent was aware after bid opening that it was not the low bidder would encourage other incumbent contractors to use the same device to force another bidding opportunity.

It is one of the Air Force's basic assumptions that in procurements of this type (food service contracts), a new contractor does not plan to bring in a new work force with a new collective bargaining agreement. Rather, it contemplates hiring the existing work force. Thus, the Air Force states that no bidder would bid on the basis of paying less than the rate in the collective bargaining agreement applicable to the incumbent contractor. Similarly, no bidder would plan to pay more than the collective bargaining agreement rate and still be competitive. Therefore, the Air Force asserts, competition existed only in the areas of material, indirect expense and direct labor efficiency. Moreover, it is stated that even though the incumbent contractor was aware of the new rates being negotiated, it would not have established a reserve in its bid to cover the increased rates since it was possible to adjust the contract price after award. In the Air Force's view, such an adjustment was available to any successful contractor.

The Air Force concludes by noting that the first of two 1-year contract options had already been exercised by the time our decision was issued. (We note here that we were unaware that the option had been exercised 4 days before the date of our decision.) Consequently, the Air Force believes Tombs should be permitted to finish the first option year to avoid unnecessary disruption of food services occasioned by the reprocurement lead-time and termination costs.

Assuming, arguendo, that bidders do not plan to bring in new work forces and will hire the existing force, it does not necessarily follow that bids were formulated only on the basis of the wage rates contained in the IFB. The Air Force acknowledges that one of the areas of possible competition is "direct labor efficiency." Conceding this, it is wholly plausible that a bidder could formulate its bid on the basis of wages higher than those contained in the wage determination in the IFB as an incentive to encourage higher labor efficiency. There may be other reasons as well for paying wages higher than the minimum.

Our decision did not state as a certainty that some bidders were bidding on the basis of higher wage rates. We did say that it was a possibility, in which case that bidder might not have had to increase its bid for a resolicitation. Thus, we could not be sure that the contract as awarded (knowing that wages higher than those advertised would have to be paid during contract performance) would be most advantageous to the Government. (See 10 U.S.C. § 2305(a) (1970).)

The Air Force fears that to have amended the IFB and called for new bids would have encouraged an "auction" atmosphere. There is another consideration present which we believe is to be of greater significance: the requirement that the contract be awarded in the form advertised to the low responsive and responsible bidder. This requirement relates not only to the equality of the bidding, but to the ultimate determination of lowest price. Of course, to reject all bids and cancel an IFB after bids have been opened tends to inhibit and prejudice competition in that bidders have expended time and money to prepare bids without a prospect of receiving an award. On the other hand, we are greatly concerned that the integrity of the competitive bid system be maintained by conducting procurements in accordance with applicable statutes and implementing regulations. The possibility that a contract may not reflect true competition on the basis of actual performance has a greater effect on the overall integrity of the competitive bid system than the fear of an auction atmosphere necessitated by an action taken to assure full equality of competition.

On this point, we believe that the Prestex case presents applicable law. Prestex submitted a sample with its bid that did not conform to the specifications. As low bidder, Prestex was awarded the contract which contained a provision requiring the submission of a preproduction sample to the contracting officer for approval. Upon receipt of an analysis of the preproduction sample, the contracting officer determined that it did not conform to the specification and rejected it. Prestex was requested to provide new, conforming material and the contracting officer refused to accept the old material tendered. Prestex sued for breach of contract. The Government maintained that the contract was void because the contract as awarded must be the contract advertised since a contracting officer is not authorized to bind the Government to a bid submitted on a basis other than advertised. In deciding that the contract was void, the court stated:

> "* * * [The] rejection of irresponsive bids is necessary if the purposes of formal advertising are to be attained, that is, to give everyone an equal right

> to compete for Government business, to secure fair process, and to prevent fraud. Indeed, where the specifications in the invitation to bid are at variance with the contract awarded the successful bidder, the resulting contract may be 'so irresponsive to and destructive of the advertised proposals as to nullify them.' Such a contract in effect would be one issued without competitive bidding and therefore invalid."

The language can be fairly read to hold that the contract awarded should be the one advertised. We recognize in this case that the contract was awarded on the basis of the specifications advertised. However, in view of (1) the short timeframe (just 1 month after award) in which the Air Force modified the contract to include the higher wage determination issued by DOL; (2) the length of time the Air Force knew that the higher DOL wage determination would apply to the contract (May 16 - August 14, 1974); and (3) the modification of the contract to reflect the higher wages on December 10, 1974, retroactive to September 1, 1974, we think such actions are tantamount to awarding a contract different from the one advertised. In this light, we believe our reliance on the Prestex case, as illustrative of the point of law, to have been appropriate.

The Air Force has also pointed out that an incumbent contractor, by timing its collective bargaining, may be able to force a new round of bidding after bids are opened upon learning that the bid submitted is not low. In this case, bids were opened on April 30, 1974, and the new cba was also signed on April 30, 1974. While the record does not show which event came first, it is possible that the cba was signed after the incumbent learned that it was not low. By signing the new cba, which DOL subsequently adopted as the revised minimum wage, the Air Force urges that, under our July 15 decision, the incumbent can get a new chance to bid.

We agree that the situation described may arise. However, we attribute this undesirable result to the lack of clarity in the controlling regulations. The proposed revision mentioned in our July 15 decision would alleviate the problem by establishing a cut-off date for applicability of new cba rates and thereby avoiding "* * * serious disruption of collective bargaining." 40 Fed. Reg. 16082, April 9, 1975. We believe the problem should be cured by adopting the proposed regulation rather than by selecting a contractor on one basis with the intention of having him perform on another.

Tombs asserts that there is no evidence to indicate that all bidders were not using the same wage rates in determining their bids. We think our response above to the Air Force's contention a partial answer. Additionally, this assertion misplaces the burden of proof. In the discharge of our bid protest function, we are concerned with the integrity of the competitive bid system to insure that contracts are awarded in accordance with the applicable statutes and regulations.

We have interpreted the controlling statute (10 U.S.C. § 2305(c) (1970)) to mean that there must be reasonable certainty that the award as made is most advantageous to the Government. In the absence of such certainty, one cannot say the requirements have been met. Therefore, it is not necessary to prove all bidders were not using the same wage rates in determining their bids. Rather, when we cannot be reasonably assured that a contract award comports with the statute and regulations we believe that it is appropriate to recommend corrective action.

Finally, the Air Force requests that Tombs be permitted to continue performance until the option already exercised expires. The Air Force supports this request in terms of termination costs and reprocurement time. The lead-time necessary to readvertise the requirement is projected to be 150 days, or about one-half of the option period. Also, the termination costs are estimated in the vicinity of $25,000. In addition, administrative costs for the reprocurement and the likelihood of receiving higher prices for the resolicitation due to inflationary pressures (estimated at up to $200,000) indicate that the best interests of the Government would be served by resoliciting the requirement after the present option expires. Finally, it is alleged that the proposed course of action would not prejudice the interests of other bidders.

We do not believe the foregoing arguments justify changing our earlier recommendation. We have considered similar arguments by the Air Force in conjunction with an earlier procurement by the Air Force of these very food services for Lowry Air Force Base. In 53 Comp. Gen. 434 (1973), we recommended that the contract awarded as a result of a total small business set-aside be terminated for the convenience of the Government, predicated on our conclusion that the contractor was ineligible for award as a small business concern and the procedures followed in making the award were in derogation of the authority of the Small Business Administration to make size determinations which are conclusive on the executive branch of the Government. The Air Force proposed to permit the contract as awarded to continue until completion. In support of its request, the Air Force noted that it would take approximately 153 days to resolicit the procurement, which

would only have left 2-1/2 months of performance outstanding under the contract. Termination costs were estimated between $70,000 and $175,000. Disruption of food services and a pending request for reconsideration with our Office were also mentioned as reasons to permit the contract to expire by its own terms.

We believe our response to those issues (Dyneteria, Inc., B-178701(1), February 22, 1974) equally pertinent to those raised here. We stated in part:

> "* * * When our decision was issued we were aware that some time would be required to resolicit the procurement. The 153 days estimated for resolicitation is supported by evidence * * *. Since the Small Business Act * * * and implementing regulations were thwarted by the award to an inelgible bidder, we expected that the Air Force would cooperate by making every effort to immediately expedite the resolicitation. We believe, in view of the serious deficiency noted in the original procurement, that steps can and should be taken to accelerate the schedule for the resolicitation by every means possible. While the Government may have to incur termination costs as a result of the improper award, we believe termination action in this case is necessary to maintain confidence in the integrity of the competitive bid system. Where, as here, we conclude that a contract has been improperly awarded, we have always taken into consideration certain factors--good faith of the parties, urgency of the procurement and extent of performance--in deciding whether the award should be disturbed. We considered those factors in arriving at our earlier decision. Upon reconsideration, we find no basis to change our position in this regard."

While there are certain differences between the present situation and that quoted above, we do not believe such differences are significant. It is important, however, that in both cases the integrity of the competitive bid system has been subjected to question by the Air Force's action. Thus, we are of the same view now as expressed in our decision of February 22, 1974. Therefore, we are modifying our recommendation to the extent that the option should now be terminated for the convenience of the Government and the requirement solicited again.

This decision does not affect the Department of the Air Force's obligation to report pursuant to the Legislative Reorganization Act of 1970, 31 U.S.C. § 1172, on the basis of our decision of July 15, 1975.

Deputy Comptroller General
of the United States