

DECISION



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

*Reverts
P2-11
7885*

FILE: B-192307

DATE: October 3, 1978

**MATTER OF: Velda Farms, Division of
The Southland Corporation**

DIGEST:

1. Review of procurement procedures leading to award of terminated contract is within GAO jurisdiction even though termination of contract for convenience of the Government is matter of administrative discretion.
2. Where multiple awards are not prohibited by the solicitation and result in the lowest overall cost to the Government, separate awards to different bidders who are low as to the item each is awarded, is proper.
3. Agency which errs in failing to properly evaluate the bids under unambiguous IFB may terminate the improperly awarded contract for the convenience of the Government and reaward to the offeror or offerors which should have received the award initially.

On June 29, 1978, a protest was received from Velda Farms (Velda), against the Defense Logistics Agency's (DLA) partial termination of Velda's contract No. DLA13H-78-D-V980 (for various milk and ice cream products) for the convenience of the Government. The termination was effective on June 27, 1978.

The Invitation for Bids (IFB) No. DLA13H-78-B-8813, issued April 24, 1978, divided the items solicited into two groups. Group I consisted of 34 items of milk and milk products, while Group II consisted of 12 items of ice cream. The protest relates only to Group I.

Velda was one of four bidders on the items in Group I. It bid on 30 of the 34 items and was the low bidder on 15 items, with a tie bid on one other. The bids were evaluated, and although Velda was low bidder on only 15 of the solicited items, an initial award was made to Velda for all 30 items on which it bid. Following the award, two other bidders questioned the evaluation procedures utilized in the award.

Upon reconsideration, DLA determined that an improper award had been made. The contracting officer had awarded the contract on an "all or none" basis, but it was subsequently determined that the contract should have been awarded on an "item by item" basis. Consequently, DLA made a partial termination for the convenience of the Government of the 14 items on which Velda was not the low bidder. Velda protests the authority of DLA to partially terminate the contract, and further challenges the propriety of awarding the terminated items without a resolicitation.

It is generally recognized that the determination whether a contract should be terminated for the convenience of the Government is a discretionary administrative decision which does not rest with our Office. E. Walters & Company, Inc., Dynamit Nobel A G, Nico Pyrotechnik K G, B-180381, May 3, 1974, 74-1 CPD 226. There is an exception to this rule when termination is based on an impropriety in the award process. Electronic Associates, Inc., B-184412, February 10, 1976, 76-1 CPD 83. Under this exception, our Office will not review the validity of the termination per se. However, we will review the validity of the award procedures which underlie the termination action. See Michael O'Conner, Inc., et al., B-183381, July 6, 1976, 76-2 CPD 8; Electronic Associates, Inc., supra; Service Industries, Inc., et al., 55 Comp. Gen. 502 (1975), 75-2 CPD 345.

The resolution of this protest depends on the proper interpretation of the applicable provisions of the IFB. Clause D-2 of the IFB provided that:

"Offers will be evaluated on the basis of 'all or none by group.' It is the intent

of the Government to obtain all of the Government's requirements set forth therein, however, low bids on individual items from bidders who fail to bid on all items in a group may be accepted if it is determined to be in the best interest of the Government."

Under this clause, DLA states that it will consider separately bids for individual items within a group from bidders, such as the protester, who fail to bid on all items in a group. In this regard, we note that the specific qualification in the evaluation clause gives the agency the option to make multiple awards when it is determined to be in the best interests of the Government. Since none of the bidders (including Velda) bid on all the items in the group, we agree with the agency's interpretation that award of this contract may appropriately be made on an "item by item" basis rather than by group.

As noted previously, the determination whether a contract should be terminated for convenience of the Government is a matter of administrative discretion which does not rest with our Office. Pacific Architects and Engineers Incorporated, B-190183, June 19, 1978, 78-1 CPD 444. In this connection, however, we note that the Court of Claims held in National Factors, Inc., et al. v. United States, 492 F. 2d 98 (Ct. Cl. 1974), 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." See E. Walters and Company, Incorporated, supra. We fail to see any showing of abuse of discretion or bad faith in connection with DLA's determination to terminate the contract. After DLA recognized the irregularity in the evaluation procedures utilized, it was proper for the agency to terminate the contract in the best interests of the Government. See KeopCo, B-187472, April 27, 1977, 77-1 CPD 287. Accordingly, there is no basis for our Office to question DLA's determination to terminate the contract.

Velda also contends that the terminated portions of its contract cannot be awarded without a resolicitation. This is based upon the allegation that the

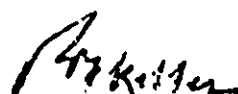
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evaluation clause (D-2) of the solicitation is ambiguous and consequently a resolicitation is required to maintain the integrity of the competitive bid system.

Where an agency errs in failing to properly evaluate the bids, it is appropriate to terminate for the convenience of the Government the improperly awarded contract and reaward to the offeror or offerors who should have received the award initially. Electronic Associates, supra; The Ellnor Corporation, B-182384, April 23, 1975, 75-1 CPD 254. Because no bidder bid on all items within the group, we believe the clause permitted evaluation of all bids and award on an item by item basis. We therefore perceive no need for a resolicitation. See Chemical Technology, Inc., B-190619, May 9, 1978, 78-1 CPD 349. However, we are recommending to the agency that the clause in question should be revised to clarify whether a bid for all items within a group may be evaluated on an item by item basis.

Accordingly, the protest is denied.


Deputy Comptroller General
of the United States