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DECISION

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

FILE: B-194144

DATE: July 31, 1979

MATTER OF: ^{DLG 02422} Stott Briquet Company, Inc., A Division of
Lakehead Industries

DIGEST:

1. [Cancellation of contract awarded to other than low bidder] due to application of erroneous freight rate to low bidder's bid by Government is not appropriate where Government's error was not due to any action of awardee and awardee was not on notice of such error, since such award is not "plainly or palpably illegal."
2. Termination of contract for convenience of Government is recommended since there is no urgent need for delivery of remaining quantity (70 percent of contract amount) and cost of termination to Government does not outweigh interest of protecting integrity of competitive system. Remaining quantity should be awarded to protester.

Stott Briquet Company, Inc., A Division of Lakehead Industries (Stott) has protested the award of a contract to Husky Industries, Inc. (Husky), by the General Services Administration (GSA) for a quantity of briquettes under invitation for bids (IFB) No. 10PN-HMD-6653. Stott maintains that it rather than Husky was the low bidder. In this regard Stott asserts that GSA applied the wrong freight rates to its bid of \$43,496.25 and that if properly evaluated its bid would have been \$52,111.50, not \$63,341.25 as it was initially evaluated. (Husky's bid was evaluated at \$57,364.50--base bid of \$48,562.50 plus freight rate evaluation factor of \$8,802.)

(GSA acknowledges that ~~Stott~~ ^{Husky} was the low bidder and should have been awarded the contract.) GSA states that when evaluating Stott's F.O.B. origin

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bid of \$43,496.25 it mistakenly applied the higher rate for charcoal briquettes rather than the lower rate for petroleum briquettes. GSA further states that the mistake was caused by its failure to notice that under the IFB the briquettes could be charcoal, lignite or petroleum rather than just charcoal. (Although the IFB was entitled "Definite Quantity Contract for FSC 9110--Briquettes, Charcoal," the specifications stated that the briquettes could be made of charcoal, lignite, or petroleum.) (However, GSA urged that ~~Stott's~~ protest be dismissed as untimely) because notice of the award to Husky was published in the Commerce Business Daily on January 25, 1979, yet Stott did not protest to our Office until February 15, 1979. See 4 C.F.R. § 20.2(b)(2).

CCO (Inasmuch as GSA acknowledges that ~~Stott~~ was the low bidder ~~and~~ should have been awarded the contract, we do not believe the timeliness of Stott's protest ~~is~~ ^{is not} relevant. ~~Consequently~~, the only questions which remain are whether the award was "plainly or palpably illegal" (permitting the contract to be canceled without the Government incurring liability), or if it is not "plainly or palpably illegal," whether it would be in the best interests of the Government to terminate Husky's contract under the termination for convenience provisions of the contract. In this regard we agree with GSA that where, as here, an award was made to other than the low bidder due to the application of erroneous freight rates by the Government without the knowledge of the awardee and was not otherwise due to any action of the awardee, the award is not "plainly or palpably illegal." See 52 Comp. Gen. 215, 218, supra.

A decision to recommend contract termination involves the consideration of several factors, including, but not limited to, the degree of prejudice to other bidders or the integrity of the competitive bidding system, the good faith of the parties, the extent of performance, the cost to the Government, and the urgency of the procurement. See System Development Corporation,

maintained that
 B-191195, August 31, 1978, 78-2 CPD 159, and cases cited therein. In this regard *stated maintained that source* GSA indicates that it has already accepted two out of seven car loads of briquettes and the remaining quantity has been car-loaded and is *were* ready for shipment; *but* GSA, further indicates that based on information supplied to it by Husky, termination costs would total \$14,531. Consequently, GSA believes that termination *for convenience* would not be in the best interests of the Government. We do not agree. *6.2.1*

First, it appears that *there is* no urgent need for delivery of the remaining quantity of briquettes. In fact GSA has held up shipment of the remaining briquettes for over three months while it tested Husky's briquettes to determine whether they were in compliance with the specifications and, after determining the briquettes were not, while it decided whether to terminate Husky's contract for default. (To date no such decision has been made.) Secondly *we do not believe* the cost to the Government to terminate the contract *would* outweigh the interest of the Government in protecting the integrity of the competitive bidding system. Accordingly, we are recommending that GSA terminate Husky's contract for the convenience of the Government and award a contract to *Stott* for the remaining quantity *unless GSA concludes that termination of the contract for default is warranted.* In that case, we are recommending that GSA consider awarding the procurement contract to Stott.

Pro Protest *was* sustained.

R. F. K. III
 Deputy Comptroller General
 of the United States