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DECISION

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

FILE: B-219136 **DATE:** October 22, 1985

MATTER OF: Washington National Arena Limited Partnership

DIGEST:

1. Where Congress authorizes the collection or receipt of certain funds by an agency and has specified or limited their use or purposes, the authorization constitutes an appropriation, and protests arising from procurements involving those funds are subject to GAO bid protest jurisdiction.

2. Where a contract for visitor reservation services has expired, the contractual relationship which existed is terminated and the issuance of an amendment 4 months after the expiration date to retroactively extend and modify the contract as if it had not expired amounts to a contract award without competition, contrary to the requirements of the Competition in Contracting Act. A protest challenging the amendment is sustained, therefore, and GAO recommends that a competitive procurement for the requirement be conducted.

3. Protester is entitled to recover the costs of pursuing its protest, including attorneys' fees, where agency, in effect, made an improper sole-source award; GAO considers the incentive of recovering the costs of protesting an improper sole-source award to be consistent with the Competition in Contracting Act's broad purpose of increasing and enhancing competition on federal procurements.

Washington National Arena Limited Partnership (TicketCenter) protests the issuance by the National Park Service (NPS), Department of the Interior, of amendment 3 to contract No. CX-0001-3-0046 with Ticketron Corporation (Ticketron), which added the sale of performance tickets for the Carter Barron Amphitheatre in Washington, D.C., to the contract requirement for campsite reservation services. TicketCenter argues that NPS was required to conduct a competition for the added services. We sustain the protest.

On November 10, 1982, NPS issued a request for proposals (negotiation authority being based on visitor reservation contracting authority in 16 U.S.C. § 460L-6a(f) (1982)) to develop and operate a reservation system to permit the public to make advance reservations for the use of various campground facilities. The solicitation contemplated award of a 1-year contract with four 1-year options for exercise by the government. Award was made to Ticketron on January 28, 1983. NPS extended the original contract to January 25, 1985, by amendment 2, but never exercised an option prior to that new expiration date to further extend the contract. Instead, NPS allowed the contract to expire. NPS thereafter issued a request for proposals for Carter Barron ticket sales, but canceled it on May 20. On June 10, 1985, NPS issued amendment 3 purporting to extend Ticketron's expired contract to January 25, 1986, and adding the Carter Barron ticket sales to the contract.

TicketCenter protests the extension of Ticketron's contract on two grounds. First, it argues that the Carter Barron ticket sales were outside the scope of the original contract, which covered campsite reservation services. TicketCenter believes the two types of reservation services are sufficiently different to warrant a separate competitive procurement of the Carter Barron services. Second, TicketCenter maintains that since Ticketron's original contract expired in January 1985, NPS could not retroactively extend the term of that contract and add other services by an amendment issued more than 4 months later. It is TicketCenter's position that NPS instead was required to conduct a competitive procurement for the award of a new contract covering all of the required ticket reservation services, and that NPS's failure to do so contravened the competition requirements of the Competition in Contracting Act of 1984 (CICA), 41 U.S.C. § 253, et seq. (West Supp. 1985).

NPS responds only to TicketCenter's first argument, arguing that the Carter Barron ticket sales were within the scope of Ticketron's contract since that contract contained a provision allowing NPS to add further reservation services to the contract as they would be identified by NPS during the contract term. NPS does not comment on TicketCenter's position that, once Ticketron's contract expired, it could not be extended and services could not be added. NPS does argue, however, that this protest is not subject to the Federal Acquisition Regulation (FAR) or to review by our Office since the contract does not involve the expenditure

of appropriated funds (contractor payment is through commissions deducted from the ticket sale proceeds before the proceeds are turned over to the government), and because we have held in our prior decisions that contract modifications and amendments are matters of contract administration outside the purview of the General Accounting Office.

We do not agree that the funds received in connection with visitor reservation services are not appropriated funds. We have held that where Congress has authorized the collection or receipt of certain funds by an agency and has specified or limited the purposes of those funds, the authorization constitutes an appropriation, and protests arising from procurements involving such funds are subject to our review in accordance with the provisions of the FAR. See Fortec Constructors--Reconsideration, 57 Comp. Gen. 311 (1978), 78-1 C.P.D. ¶ 153; Monarch Water Systems, Inc., B-218441, Aug. 8, 1985, 85-2 C.P.D. ¶ ___.

Here, section 460l-6a(b) of Title 16 authorizes federal agencies to "provide for the collection of daily recreation use fees" in furnishing outdoor recreation facilities and services. Section 460l-6a(f) provides that fees collected by agencies are to be "covered into" a special account in the United States Treasury and administered in conjunction with, but separate from, revenues in the Land and Water Conservation fund. In view of NPS' authority to collect the funds and the limitation on the use of the funds, the funds received by NPS for visitor reservations constitute appropriated funds,and procurements for visitor reservation services therefore fall within the scope of the FAR and GAO's bid protest jurisdiction. See Monarch Water Systems, Inc., B-218441, supra.

Contrary to NPS's belief that the propriety of modifying Ticketron's contract is a matter of contract administration not for review by GAO, we will review allegations such as TicketCenter's that a modification constituted a cardinal change outside the scope of the original contract. Wayne H. Coloney Co., Inc., B-215535, May 15, 1985, 85-1 C.P.D. ¶ 545. The fact that we will review such matters is inapposite here, however, since we agree with TicketCenter's second argument that Ticketron's expired contract could not be extended or otherwise modified.

The record shows, as TicketCenter alleges, that the original contract term was extended to January 25, 1985, by issuance of amendment 2 to the contract. While there

remained options under the contract which could be exercised by NPS to extend the contract term further, neither NPS nor the record indicates that NPS ever exercised another option before the contract ended on the amended January 25, 1985, expiration date. NPS states in its report that it did extend the contract term to January 25, 1986, and that it added the Carter Barron ticket sales by the same modification. NPS neglects to state in its report, however, that this modification, in the form of amendment 3 showing a January 25, 1985, effective date, was not executed by NPS and Ticketron until June 10, 1985, more than 4 months after Ticketron's contract had expired. In other words, amendment 3 appears to have been an attempt by NPS to revive Ticketron's expired contract by retroactively extending and modifying it.

We agree with TicketCenter that this attempt was improper. Upon expiration of Ticketron's contract, neither the government nor Ticketron was obligated by any of the contract terms; Ticketron no longer was bound to provide visitor reservation services, and the government no longer was bound to pay Ticketron commissions for such services. The unexercised option provisions were part of the contract and, thus, necessarily expired when the contractual relationship was terminated. Thus, the attempted retroactive extension of Ticketron's contract was not an extension at all--there was no contract to extend--but the noncompetitive creation of a new contractual relationship with Ticketron.

Under CICA, agencies are required to "obtain full and open competition through the use of competitive procedures" in procuring property or services. 41 U.S.C. § 253. Certain exemptions from the competition requirement are listed, but it does not appear from the record, and NPS does not argue, that any of these exemptions would apply to justify a noncompetitive award to Ticketron under the circumstances here. Consequently, we sustain the protest on the ground that NPS should have conducted a competitive procurement for these visitor reservation services.

Interior notes in its report that the 1983 contract was awarded to Ticketron pursuant to section 460L-6(f) of Title 16, which provides that the agency may "contract with any public or private entity to provide visitor reservation services" under terms and conditions it deems appropriate. As for the applicability of this provision to the extension

of the contract, the legislative history of the section indicates that it was intended to clarify the authority to contract for reservation services by permitting the contractor to deduct a commission from the proceeds of sales to the public. S. Rep. No. 93-745, 93d Cong., 2d Sess. 8 (1974). Although the section authorizes Interior to enter into this type of contract with any public or private entity under the terms and conditions it deems appropriate, we do not interpret the section as permitting the agency to enter into these contracts without obtaining competition. Indeed, Interior has not argued that the section exempts these contracts from the requirement for competition.

By separate letter to the Secretary of the Interior, we are recommending that Ticketron's contract be terminated for convenience and that NPS's requirement for these services be satisfied through a competitive procurement.

In addition, we are advising the Secretary that we find TicketCenter is entitled to recover the costs of filing and pursuing its protest, including attorneys' fees. Our Bid Protest Regulations, implementing CICA, provide for the recovery of these costs by a protester where the agency unreasonably has excluded the protester from the procurement, except where our Office recommends that the contract be awarded to the protester, and the protester ultimately receives the award. 4 C.F.R. § 21.6(d)-(e) (1985). We have not recommended an award to TicketCenter, and NPS' improper extension of Ticketron's expired contract,a de facto sole-source award, clearly had the effect of precluding TicketCenter from competing for or receiving the contract awarded to Ticketron in June.

We previously have denied recovery of protest costs where we recommend recompetition of a procurement under which the protester's proposal improperly was rejected. In our decision, The Hamilton Tool Co., B-218260.4, Aug. 6, 1985, 85-2 C.P.D. ¶ 132, for example, we concluded that while other potential contractors benefitted from resolicitation, the protester's interest was sufficiently protected so that there was no need to allow protest costs. Here, however, the protest does not involve the rejection of a proposal but, rather, the improper award of a sole-source contract. It was the broad purpose of CICA to increase and enhance competition on federal procurements, and we consider

the incentive of recovering the costs of protesting an improper sole-source award to be consistent with this purpose.

The protest is sustained.

Milton J. Socolar

for Comptroller General
of the United States