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**DECISION**



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

FILE: B-202962

DATE: September 28, 1981

MATTER OF: Evergreen Helicopters, Inc.

**DIGEST:**

1. Although GAO normally will not consider protests of agency decisions to terminate contracts, GAO will consider protest of terminations which are based on an alleged impropriety in the award process.
2. Although original award of one of 45 bid items to protester was not legally erroneous, agency's subsequent decision in course of awarding other items to cancel initial award and instead to award a different item to the protester because of changed circumstances which indicated that the subsequent award would be more advantageous to the Government is not legally objectionable.

Evergreen Helicopters, Inc. protests the cancellation of a contract awarded that firm by the Forest Service, Department of Agriculture, under invitation for bids (IFB) No. 49-81-01, and the subsequent award of a contract for the same requirement to Black Hills Aviation, Inc.

This solicitation, issued December 5, 1980, sought bids to provide air tanker services for use in fighting wildland fires in various regions of the country. There were 45 separate bid items, each representing an air base or region where an air tanker would be stationed during the 1981 fire fighting season. Although the IFB allowed operators to bid on any or all of the 45 items, it also provided that only bids of air tankers approved by the Forest Service would be deemed responsive, and that operators would receive no more than one award for each

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approved air tanker offered. Award was to be made "by item on the basis of the lowest cost of mandatory period availability." Because the agency was aware that, under this bidding scheme, an operator could be the low bidder on more items than it had air tankers (since one tanker could be offered for several items), it decided to evaluate bids by computer to determine which combination of awards would result in the lowest total cost to the Government. The awarding of these items was further complicated by the fact that funding problems made it impossible to award all of the items at one time.

At the January 6, 1981 bid opening, 14 of a possible 16 known air tanker operators offered 68 tankers for the 45 items. Evergreen was the apparent low bidder for the three items on which it bid, including items 7 and 14, the two items in issue here. Although Evergreen offered two approved P2V air tankers<sup>1</sup> for items 7 and 14, the contracting officer learned that one of them (P2V141) had been used to perform a contract for the Office of Aircraft Services (OAS), Department of the Interior during the 1980 fire season, and that the contract had been renewed for 1981, with performance to commence June 15. Since performance of this contract would overlap performance of items 7 and 14, the contracting officer contacted OAS for additional details. OAS responded by letter dated January 30, stating that: "The air tanker that is approved and committed to our contract for the 1981 contract season is Tanker No. 141, a P2V, N202EV."

Based on this information, the contracting officer advised Evergreen that he considered one of its P2V air tankers unavailable and suggested that arrangements be made for a substitute aircraft to perform the OAS contract. Such a substitution was permissible under that contract if an aircraft acceptable to OAS was obtained by June 5. Otherwise, in OAS's view, Evergreen was obligated to perform with P2V141. Evergreen objected to this requirement, assuring the contracting officer that both its P2V air tankers would be made available for the entire performance period. Nonetheless, it began seeking a commitment from other operators for a substitute air tanker to use on the OAS contract.

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<sup>1</sup> The other uninvolved item concerned services to be performed by a different size air tanker.

At about this time a series of computer analyses indicated that if Evergreen had only one P2V air tanker available, it should be awarded item 14 instead of item 7. Award of item 7 to Evergreen was shown to be appropriate only if its second P2V was also available for award under item 14. Thus, while the IFB didn't require that a specific air tanker be bid for a specific item, it became clear to the Forest Service that item 7 could not be awarded to Evergreen unless it found a substitute aircraft to perform the OAS contract. Only then would both of Evergreen's P2V tankers be considered available.

On February 18, Trans-West Air Service agreed to supply Evergreen an air tanker and crew to perform the OAS work. Believing this to be a firm commitment which would be acceptable to OAS, the contracting officer awarded item 7 to Evergreen on February 27. OAS formally approved the substitution on March 6. In late March, however, before item 14 had been awarded and before executing a formal contract with Evergreen, Trans-West announced it was leaving the air tanker business and selling its aircraft. Evergreen was thus again without a substitute air tanker and the contracting officer's concerns regarding the availability of P2V141 were revived. The agency was even more concerned at this juncture since performance of item 7 was scheduled to commence April 13 and time would be needed to prepare and inspect the aircraft.

A computer analysis conducted April 6 again indicated Evergreen should be awarded item 14 rather than item 7 unless it was found to have the two P2Vs available. In a final effort to determine whether Evergreen would have one or two P2Vs available, the contracting officer informed Evergreen by telegram on April 6 that it had until April 8 to produce "positive evidence" that both would be available. On April 7, an Evergreen representative informed the contracting officer that Black Hills Aviation, Inc. had preliminarily agreed to perform the OAS contract. This evidence was considered insufficient, however, and on April 9, based on the availability of a single P2V, the results of the computer analysis, and the fact that performance of item 7 was to commence April 13, the contracting officer determined that item 7 had been "erroneously awarded." He then canceled Evergreen's contract for item 7, awarded it item 14 instead, and reawarded item 7 to Black Hills, the second low bidder on that item.

Evergreen principally contends that both of its P2V air tankers were ready to perform under items 7 and 14 and that cancellation of its contract for item 7 was therefore improper. Evergreen states that its unrelated contractual obligation to OAS had no bearing on its ability or willingness to perform the Forest Service contracts, and thus did not, by itself, constitute sufficient cause for the cancellation. Evergreen notes in this regard that the OAS contract permitted substitution of a different air tanker until June 5, a deadline which Evergreen claims could easily have been met once all the Forest Service contract awards were made and the air tankers of unsuccessful operators became available.

The Forest Service believes the contracting officer's conclusion that Evergreen had only one P2V air tanker available represented a reasonable exercise of his authority to determine the responsibility of prospective contractors. The agency notes that Federal Procurement Regulations (FPR) § 1-1.1203.1(b) requires that the contracting officer consider "existing business commitments" in determining whether a contractor will be able to meet the performance schedule. It reasons that the OAS contract commitment was properly taken into consideration. The agency concludes that since Evergreen had only one P2V air tanker available, the cancellation of its contract for item 7 and subsequent award of item 14 was proper, both to assure that all awards were consistent with the award clause in the IFB and to obtain the lowest possible price for the Government.

Our Office generally will not consider protests of an agency's termination of a contract for the convenience of the Government. Safemasters Company, Inc., 58 Comp. Gen. 225 (1979), 79-1 CPD 38. We have recognized a limited exception to this rule, however, and will consider such protests where the decision to terminate was based on alleged improprieties in the original contract award. Our review in such cases is for the limited purpose of ascertaining whether award defects perceived by the agency in fact justify termination. Safe-masters Company, Inc., *supra*. We apply these same guidelines where, as here, the protest is against an agency's cancellation of a contract. New England Telephone and Telegraph Company, 59 Comp. Gen. 746 (1980), 80-2 CPD 225.

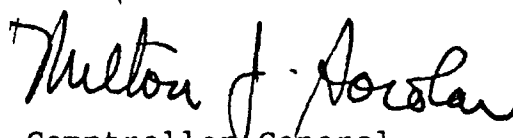
The agency throughout its report characterizes its action as a "cancellation" rather than a termination under the termination for convenience clause of the contract.

In most cases where, as here, there is no evidence that the contractor was on notice of the alleged illegality of the award or contributed to it, the contract is terminated for the convenience of the Government, thereby possibly entitling the contractor to termination costs. See New England Telephone and Telegraph Company, supra. The agency does not explain why it chose to cancel Evergreen's contract; perhaps it is the agency's view that since performance had not begun, and thus no costs were incurred, the choice of cancellation versus termination for convenience was of little import. In any event, we will not consider the agency's choice of method of ending its contract with Evergreen, but will limit our review to the propriety of the action taken.

The Forest Service maintains it canceled Evergreen's contract for item 7 because the February 27 award was erroneous under the solicitation's award clause. We do not think the record supports such a finding. Following bid opening, the agency reports, the only question to be resolved as to Evergreen's eligibility for award of items 7 and 14 was whether, in view of its existing commitment to OAS, both of Evergreen's P2V air tankers would be available. The contracting officer framed his concern in terms of whether Evergreen was a responsible prospective contractor. On February 27, based on Evergreen's preliminary agreement with Trans-West, the contracting officer determined that both P2Vs were available and that item 7 could therefore be awarded to Evergreen (item 7 was to be awarded Evergreen only if both P2Vs were available). At the time of this award then, the contracting officer necessarily found that Evergreen was a responsible contractor as to both items 7 and 14. See FPR § 1-1.1202; Environmental Container Systems, Inc., B-201739, February 9, 1981, 81-1 CPD 83. In view of this determination and the fact that the February 27 award was not specifically conditioned on a later award to Evergreen under item 14, the February 27 award of item 7 was proper from a responsibility standpoint at the time it was made. Furthermore, responsibility being exclusively a pre-award consideration, the subsequent changed circumstances here did not relate back and render this responsibility determination improper. Potomac Documentation and Design, Inc., B-197347, B-197349, September 19, 1980, 80-2 CPD 211. Thus, the award of item 7 to Evergreen was valid and proper, and it must follow that the cancellation could not be based on irregularities in the award of item 7.

In view of the prior award of item 7 to Evergreen, we think that firm's commitment to also perform the OAS contract was a proper and relevant consideration in determining whether Evergreen was a responsible contractor for item 14. See FPR § 1-1.1203.1(b). Although it is true, as Evergreen contends, that it could substitute aircraft for performing both item 14 and the OAS contract, an agency has a considerable degree of discretion in determining whether a prospective contractor's other commitments constitute a prohibitive risk that it will not have the capacity to perform the required services. See Julian A. McDermott Corporation, B-187705, B-188197, April 18, 1977, 77-1 CPD 266. In light of this discretion, the Forest Service could have rejected Evergreen's bid for item 14 on the basis that Evergreen was not responsible due to that firm's commitment to OAS.

Instead, however, the agency chose to cancel its award of item 7 to Evergreen to permit that firm to use its one available air tanker on item 14, which award represented the lowest cost to the Government in the event of a single award. We do not see anything legally objectionable in this course of action. The agency was still in the process of completing its air tanker services procurement, the circumstances which led to the award to Evergreen of item 7 had changed, and it believed an award to Evergreen for item 14 rather than item 7 would be more advantageous to the Government. Under these circumstances, and given the very broad authority of agencies to terminate a contract for the convenience of the Government, Colonial Metals Co. v. United States, 495 F. 2d 1355 (Ct. Cl. 1974) (where the agency terminated a contract because the goods were available at a lower cost from another source), we believe the agency acted reasonably and without violating any procurement statute or regulation. Consequently, the protest is denied.



Acting Comptroller General  
of the United States