

Protest of ) Date: December 1, 1989  
E-Z COPY, INC. )  
Solicitation No. 059991-89-A-0135 ) P.S. Protest No. 89-85

### DECISION

E-Z Copy, Inc. protests the termination of a contract awarded to it under Solicitation No. 059991-89-A-0135 for coin-operated photocopying services in the Alhambra area of southern California. E-Z Copy alleges the termination is without factual basis and is a breach of the government's implied covenants of fair dealing and good faith.

This solicitation was issued by the Procurement and Materiel Management Service Office, Bell, California on May 2, 1989. E-Z Copy's bid was found to be most advantageous and it was awarded a contract. A protest by a competitor, alleging that E-Z Copy was nonresponsible and would provide nonconforming equipment was dismissed in part and denied in part. Applied Copy Technology, Inc., P.S. Protest No. 89-62, October 10, 1989, aff'd on reconsideration, November 7, 1989.

Simultaneously with this solicitation, six other areas in southern California were the subject of solicitations for coin-operated photocopying services. E-Z Copy was awarded three of these other six solicitations and other bidders were awarded three. E-Z Copy successfully protested the award of the three solicitations on which it did not receive award on the basis that the successful bids were materially unbalanced. E-Z Copy, Inc., P.S. Protest Nos. 89-63, 89-64, 89-68, September 28, 1989. In sustaining its protests, our office ordered the following relief:

The [successful] bids are to be rejected and the contracting officer is to take further action with regard to these procurements as appropriate.

In response to the decision on E-Z Copy's protests, the contracting officer terminated all seven contracts which had been awarded, pursuant to the contract provisions which stated that "[t]his contract lasts three years but you or USPS may terminate all or part of it at any time, without liability, after 60-days notice." E-Z Copy then timely protested the termination of its contract for the Alhambra area.<sup>1/</sup>

<sup>1/</sup>While seven solicitations were originally at issue, the present protest deals only with the Alhambra area solicitation, and our decision is limited solely to that solicitation.

E-Z Copy protests the cancellation of the solicitation as violating the integrity of the competitive bidding process. It alleges that the contracting officer lacks the cogent and compelling reasons sufficient to justify cancellation of the advertised solicitation, citing Garden State Copy Company, et al., P.S. Protest No. 82-84, September 1, 1983, and has used the contract's termination provision to get around this difficulty. E-Z Copy argues that there is no significant problem with any portion of the solicitation and that award thereunder would still meet the needs of the Postal Service. It characterizes the termination as a subterfuge and a poorly disguised attempt to circumvent the Postal Contracting Manual protections against arbitrary solicitation cancellations, which amounts to a breach of the implied covenant of good faith and fair dealing which the Postal Service enters into with bidders. E-Z Copy requests that the solicitation be reopened and award be made under it.

The contracting officer notes that the solicitations were not canceled; rather, all seven contracts were "canceled"<sup>1/</sup> after our decision in E-Z Copy, Inc., supra. The contracting officer states that this confusion may stem from the fact that, because of the protests which were filed after award, the contract was never mailed to E-Z Copy, but it was entered into the computer system and letters were sent to the unsuccessful bidders. He further states that resolicitation is required because a new format for procuring coin-operated photocopying has just been issued which varies in a couple of significant areas from the prior solicitation format. The contracting officer indicates that the fairest alternative to all bidders is to resolicit based on the revised format so that all parties have an equal opportunity to receive award.

E-Z Copy retorts that the contracting officer's report is merely a facade which disguises the lack of adequate justification for his actions and is designed to eliminate the ability of a prospective bidder to challenge his improper actions. It restates its belief that termination of a contract prior to its receipt and any performance thereunder is improper and that the matter should be treated for what it actually is: a cancellation of a solicitation. E-Z Copy also states that there is no substantial justification for the cancellation and that the timing of the termination is highly suspicious and in retaliation for its earlier successful protests.<sup>1/</sup>

We must dismiss E-Z Copy's protest, which is against the termination of a contract.<sup>1/</sup> In

<sup>2/</sup>We assume that the contracting officer meant that the contracts had been terminated pursuant to the contract provision which allowed termination of the contract by either party without liability upon 60 days notice. Cancellation of a contract has a specific legal significance: ending a contractual relationship because of a plain or palpable illegality in award due to some action or statement of the contractor, or if the contractor was on direct notice that the procedures being followed violated required procedures. See FWH Motor Transit, Inc., P.S. Protest No. 84-30, May 21, 1984 and cases cited therein. There is nothing in the record to indicate that procurement improprieties of this nature occurred in the present case.

<sup>3/</sup>Two bidders on the solicitation have offered comments which support the position taken by the contracting officer.

<sup>4/</sup>The contracting officer's unambiguous statement that EZ Copy was awarded a contract is sufficient to establish the existence of a contract, notwithstanding EZ Copy's allegation that it was never mailed a

addition to allowing termination upon 60 days notice, the contract also provided that all disputes under the contract would be decided pursuant to the Contract Disputes Act of 1978.

We will not consider protests against matters of contract administration which are amenable to decision pursuant to the Contract Disputes Act of 1978, 41 U.S.C. ' 601 et seq. Cf. Jacobs & Son Painting and Decorating, Comp. Gen. Dec. B-204105, August 6, 1981, 81-2 CPD & 103; Jack Yanks Construction Co., P.S. Protest No. 75-56, August 13, 1975.

M.L. Halle Oil Service, Inc., P.S. Protest No. 85-76, November 26, 1985. This limitation on our bid protest jurisdiction arises because we are precluded from providing a second level of administrative review when a complaint is resolvable under the Disputes clause. Jack Yanks Construction Co., supra, citing S&E Contractors Inc. v. United States, 406 U.S. 1 (1972). Indeed, our bid protest regulations state that our office has jurisdiction over protests, defined as "a written objection by any interested party concerning the terms of a solicitation, the award or proposed award of a contract, or any other action related to the solicitation or award of a contract." Procurement Manual 4.5.2 a. The action of which E-Z Copy complains is the termination of its contract for the Alhambra area. This issue does not deal with the solicitation or award of a contract and is subject to resolution pursuant to the Contract Disputes Act of 1978. Therefore, it is beyond the scope of our bid protest jurisdiction.

The several arguments raised by E-Z Copy to the effect that the termination action is a sham and was only taken because the contracting officer could not adequately justify cancellation of the solicitation do not affect our decision. These are all arguments that the termination of E-Z Copy's contract was improper, and it is that action which is outside our jurisdiction to review. Because of the Contract Disputes Act and the Claims and Disputes clause of its contract, E-Z Copy is entitled to have certain forums review the propriety of the contracting officer's action with regard to its contract. This office is not one of them.

The protest is dismissed.

William J. Jones  
Associate General Counsel  
Office of Contracts and Property Law

**[checked against original JLS 5/26/93]**

copy of the contract.