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B-116427, August 20, 1953, 33 Comp. Gen. 90

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B-116427, AUGUST 20, 1953, 33 COMP. GEN. 90

CONTRACTS - RENEWAL OPTIONS - ADVERTISING REQUIREMENTS WHILE IT IS NOT COMPATIBLE WITH THE ADVERTISING FOR BID REQUIREMENTS OF SECTION 3709, REVISED STATUTES, AS AMENDED, TO EFFECT NEW CONTRACTS BY RENEWALS UNDER OPTION PROVISIONS WITHOUT OBTAINING COMPETITION FOR THE PERIOD OF RENEWAL, ADVERTISING IS NOT REQUIRED IN A CASE WHERE IT OBVIOUSLY CAN ACCOMPLISH NO USEFUL PURPOSE, AND THEREFORE, THE GENERAL ACCOUNTING OFFICE WILL NOT OBJECT TO THE RENEWAL OF A CONTRACT FOR TRUCKING SERVICE WHERE UNUSUAL DIRECT AND INDIRECT COSTS TO THE GOVERNMENT ARE INVOLVED IN A NEW SOLICITATION OF BIDS AND PROSPECTS SEEM REMOTE FOR A MORE ADVANTAGEOUS OFFER THAN AVAILABLE UNDER THE PRESENT CONTRACT. THE FACT THAT THE PERIOD OF AVAILABILITY OF AN AGENCY'S OBLIGATED APPROPRIATION IS EXTENDED SPECIFICALLY BY STATUTE DOES NOT LIMIT THE PRINCIPLE THAT FISCAL YEAR APPROPRIATIONS MAY PROPERLY BE OBLIGATED ONLY FOR BONA FIDE NEEDS ACTUALLY EXISTING WITHIN THE FISCAL YEAR SOUGHT TO BE CHARGED SO THAT A TRUCKING SERVICE CONTRACT ENTERED INTO FOR SATISFYING A NEED FOR CURRENT SERVICES CANNOT BE EXTENDED BEYOND THE FISCAL YEAR EVEN THOUGH THE PERIOD OF AVAILABILITY OF THE APPROPRIATION HAS BEEN EXTENDED BY SPECIFIC LEGISLATION.

ACTING COMPTROLLER GENERAL MORROW TO THE CHAIRMAN, ATOMIC ENERGY COMMISSION, AUGUST 20, 1953:

REFERENCE IS MADE TO YOUR LETTER DATED JULY 24, 1953, REQUESTING A DECISION AS TO THE PROPRIETY OF ACCEPTANCE OF A PENDING OFFER OF CENTRAL BUS LINES, INCORPORATED, TO EXTEND, FOR A FURTHER PERIOD OF ONE YEAR, AT REDUCED RATES, CONTRACT NO. AT/40-1/-1449, FOR INTERPLANT TRUCKING SERVICE BETWEEN THE OAK RIDGE, TENNESSEE, AND PADUCAH, KENTUCKY PLANTS.

YOU STATE THAT THE EXISTING CONTRACT WAS ENTERED INTO FOR A PERIOD OF 1 YEAR BEGINNING NOVEMBER 7, 1952, AFTER SOLICITATION OF 183 FIRMS AND CONSIDERATION OF 33 PROPOSALS RECEIVED, THE ORIGINAL INVITATIONS HAVING REQUESTED QUOTATIONS FOR SERVICE FOR A SECOND YEAR ALSO, AND THE CONTRACT HAVING INCLUDED AN OPTION FOR RENEWAL BY THE GOVERNMENT UPON NOTICE IN WRITING 60 DAYS PRIOR TO THE EXPIRATION DATE. BY LETTER DATED JUNE 4, 1953, THE CONTRACTOR HAS PROPOSED, AS AN INDUCEMENT FOR THE EXECUTION OF A RENEWAL CONTRACT FOR A SECOND YEAR, A REDUCTION IN THE UNIT PRICE PER ONE- WAY TRIP FROM $103, THE RATE NOW IN EFFECT AND AVAILABLE UNDER THE EXISTING OPTION FOR THE SECOND YEAR, TO $100 FOR THE FIRST 1,300 TRIPS AND LOWER RATES FOR ADDITIONAL TRIPS, WITH A MINIMUM GUARANTY OF 1,150 TRIPS IN LIEU OF THE EXISTING GUARANTY OF 1,050. ALSO, UPON EXECUTION OF THE RENEWAL CONTRACT THE RATE UNDER THE CURRENT CONTRACT WOULD BE REDUCED TO $99 FOR THE REMAINING PERIOD OF THE CONTRACT.

ACCEPTANCE OF THIS PROPOSAL WAS RECOMMENDED BY THE SUPERINTENDENT OF PRODUCTION

FOR CARBIDE AND CARBON CHEMICALS COMPANY, THE CONTRACTOR OPERATING THE OAK RIDGE PLANT, AND YOU STATE THAT IT HAS BEEN DETERMINED BY THE COMMISSION, FOR REASONS ENUMERATED IN YOUR LETTER, THAT SUCH ACTION WOULD BE IN THE BEST INTEREST OF THE GOVERNMENT. IT IS RECOGNIZED, HOWEVER, BY THE COMMISSION THAT THE PROPOSED ACTION, WITHOUT COMPETITION,"RAISES QUESTIONS OF CONSISTENCY WITH THE COMMISSION'S POLICY PROCUREMENT OF SUPPLIES AND SERVICES BY CONTRACT BE EFFECTED BY ADVERTISING AS WELL AS WITH THE TERMS OF SECTION 3709 OF THE REVISED STATUTES.

IT HAS BEEN HELD BY THIS OFFICE THAT IT IS NOT COMPATIBLE WITH THE INTENT OF SECTION 3709, REVISED STATUTES, AS AMENDED, TO EFFECT NEW CONTRACTS BY RENEWALS UNDER OPTION PROVISIONS WITHOUT OBTAINING COMPETITION FOR THE PERIOD OF THE RENEWAL. 20 COMP. GEN. 572; 19 ID. 980. IT HAS ALSO BEEN HELD, HOWEVER, THAT ADVERTISING IS NOT REQUIRED IN A CASE WHERE IT CAN OBVIOUSLY ACCOMPLISH NO USEFUL PURPOSE--- SEE 28 COMP. GEN. 470; AND, INASMUCH AS NO PARTICULAR FORM OF ADVERTISING IS REQUIRED BY THE STATUTE (15 OP. ATTY. GEN. 226), THIS OFFICE HAS IN CERTAIN INSTANCES ACCEPTED PROPER SURVEYS OR INFORMAL SOLICITATIONS AS ADEQUATE COMPLIANCE WITH THE REQUIREMENT OF ADVERTISING. 16 COMP. GEN. 931. ALSO, SEE B-105387, JANUARY 4, 1952.

AS YOU RECOGNIZE, IT IS OFTEN DIFFICULT TO POINT TO ANY ONE FACTOR OR GROUP OF FACTORS AS SUFFICIENT JUSTIFICATION FOR DISPENSING WITH ADVERTISING. ORDINARILY OF COURSE, THE BEST WAY TO MAKE SURE THAT A PROFFERED PRICE IS THE LOWEST OBTAINABLE IS TO ADVERTISE FOR BIDS. HOWEVER, IN THE INSTANT SITUATION THERE MAY--- IN FACT SHOULD--- BE TAKEN INTO CONSIDERATION THE RATHER UNUSUAL DIRECT AND INDIRECT COSTS TO THE GOVERNMENT INVOLVED IN A NEW SOLICITATION OF BIDS. AND THE PROSPECTS FOR A MORE ADVANTAGEOUS OFFER DO SEEM REMOTE. UNDER ALL THE CIRCUMSTANCES SET FORTH IN YOUR LETTER, THERE APPEARS TO BE REASONABLE GROUND FOR THE VIEW THAT RENEWAL OF THE CONTRACT ALONG THE LINES PROPOSED WOULD BE IN THE BEST INTERESTS OF THE UNITED STATES, AND ACCORDINGLY, THIS OFFICE WOULD NOT BE REQUIRED TO OBJECT THERETO.

HOWEVER, YOUR ATTENTION IS DIRECTED TO THE FACT THAT THE EXECUTION OF THE CONTRACT FOR THE FURNISHING OF SERVICES FOR A PERIOD OF ONE YEAR FROM NOVEMBER 7, 1952, WAS APPARENTLY IN VIOLATION OF SECTIONS 3679 AND 3732 OF THE REVISED STATUTES, AS AMENDED (31 U.S.C. 665 AND 41 U.S.C. 11), IN THAT THE APPROPRIATIONS FOR OPERATIONS OF THE COMMISSION FOR THE FISCAL YEAR 1953 APPEAR TO HAVE BEEN AVAILABLE ONLY FOR SERVICES RENDERED IN THAT YEAR. IT HAS BEEN SETTLED FOR MANY YEARS THAT APPROPRIATIONS FOR SERVICE OF A GIVEN FISCAL YEAR CANNOT BE USED FOR ANY OTHER PURPOSE THAN THE PAYMENT OF THE EXPENSES INCURRED FOR THE SERVICE OF THAT YEAR--- SEE WILDER V. UNITED STATES, 16 C. CLS. 528; MCCOLLUM V. UNITED STATES, 17 C.1CLS. 92; SMOOT V. UNITED STATES, 38 C.1CLS. 418; LETTER V. UNITED STATES, 271 U.S. 204--- AND THIS OFFICE IS NOT AWARE OF ANY SPECIAL PROVISION OF LAW APPLICABLE TO YOUR COMMISSION WHICH LIMITS THE APPLICATION OF THAT PRINCIPLE. SECTION 19 OF THE ATOMIC ENERGY ACT OF 1946, 60 STAT. 775, PROVIDING THAT FUNDS APPROPRIATED TO THE COMMISSION SHALL, IF OBLIGATED BY THE CONTRACT DURING THE FISCAL YEAR FOR WHICH APPROPRIATED, REMAIN AVAILABLE FOR EXPENDITURE FOR FOUR YEARS, MERELY EXTENDS FROM TWO OR FOUR YEARS THE TIME WHEN SUCH ANNUAL APPROPRIATIONS WOULD OTHERWISE LAPSE UNDER THE ACT OF JULY 6, 1949, 63 STAT. 407, 31 U.S.C. 712. FISCAL YEAR APPROPRIATIONS MAY PROPERLY BE "OBLIGATED" ONLY FOR BONA FIDE NEEDS ACTUALLY EXISTING WITHIN THE FISCAL YEAR SOUGHT TO BE CHARGED. 27 COMP. GEN. 764; ID. 25. THE NEED FOR CURRENT SERVICES, SUCH AS THOSE COVERED BY THE CONTRACT HERE UNDER CONSIDERATION, ARISES ONLY FROM DAY TO DAY, OR MONTH TO MONTH, AND THE GOVERNMENT CANNOT, IN THE ABSENCE OF SPECIFIC LEGISLATIVE AUTHORIZATION, BE

OBLIGATED FOR SUCH SERVICES BY ANY CONTRACT RUNNING BEYOND THE FISCAL YEAR.

IT IS NOTED THAT IN APPROPRIATING FOR THE COMMISSIONS' OPERATIONS FOR THE FISCAL YEAR 1954, THE CONGRESS HAS REAPPROPRIATED THE UNOBLIGATED BALANCE OF THE 1953 APPROPRIATION. UNDER ALL THE CIRCUMSTANCES, IF IT BE THE CONCLUSION OF THE COMMISSION THAT THE CONTRACT IN QUESTION SHOULD BE RENEWED, THIS OFFICE WILL NOT OBJECT TO THE RENEWAL CONTRACT BEING MADE RETROACTIVE TO JULY 1, 1953, WITH THE RATES ORIGINALLY STIPULATED REMAINING EFFECTIVE UNTIL THE AGREED EFFECTIVE DATE OF THE REDUCED RATES, BUT IN NO EVENT SHOULD A NEW OR RENEWAL CONTRACT BE MADE TO RUN BEYOND JUNE 30, 1954, EXCEPT BY OPTION TO RENEW AT THE ELECTION OF THE COMMISSION.