GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

PROTEST OF:

TRI-CONTINENTAL INDUSTRIES, INC.)
) CAB No. P-297
Under Contract No. 9121-AA-NS-0-9-KC)

For the Protestor: Menkem Onyia, Chairman, Tri-Continental Industries, Inc.
For the Government: Nancy Hapeman, Assistant Corporation Counsel, D.C.

Opinion by Administrative Judge Benjamin B. Terner, with Administrative Judges Terry Hart Lee and Zoe Bush concurring.

ORDER AND OPINION

This is a timely protest filed by Tri-Continental Industries, Inc. (hereafter referred to as the "Protestor" or "Tri-Con") against the issuance of certain emergency solicitations[1/] for procurement of petroleum products by the District of Columbia (hereafter referred to as the "District" or "Government"). In its protest, Tri-Con objects to the issuance of the emergency solicitations on the grounds that: (1) the District improperly failed to exercise the second option with Tri-Con under Contract No. 9121-AA-NS-0-9-KC; (2) the District failed to advertise the emergency solicitations and otherwise improperly issued such solicitations; (3) the District should have awarded the emergency solicitations on a sole source basis; and (4) the District failed to notify either Tri-Con, the incumbent contractor, or all certified minority business enterprises (MBE's) of the emergency solicitations.

Findings of Fact (F.F.)

1. Award of Contract No. 9121: On October 5, 1989, the District's Department of Administrative Services (DAS) awarded Contract No. 9121-AA-NS-0-9-KC (hereafter, Contract No. 9121) to Tri-Con, for procurement of the following fuel oils: Unleaded Gas, Super Unleaded Gas, Regular Leaded Gas, Diesel DF-2, No. 1 Oil/Kerosene, No. 2 Burner Oil, No. 4 Burner Oil and No. 6 Burner Oil.

[1/] In the protest, Tri-Con specifically identifies by number four emergency solicitations as the subject of its protest, i.e. No. 2001-AA-NS-3-RD; No. 1328-AA-NS-3-RD; No. 1330-AA-NS-3-RD; and No. 1331-AA-NS-3-RD. However, in the text of its protest, Tri-Con refers to proposed solicitations for gasoline, fuel oil, diesel and kerosene. The four emergency solicitations identified specifically by Tri-Con do not provide for the procurement of diesel and kerosene, although a fifth solicitation, No. 1329-AA-NS-3-RD, does pertain to diesel and kerosene. For purposes of this protest, the Board will consider all five emergency solicitations.

2. Sheltered Market: Contract No. 9121 was a "sheltered market" contract.[2/]

3. Contract Term: The term of the base contract was for one year from October 15, 1989 through October 14, 1990, and included four additional one-year options.

4. Requirements Contract: The contract was a requirements contract for certain District agencies.

5. Performance: Tri-Con commenced performance under the contract, and on December 29, 1989, the District issued a partial termination for default to Tri-Con.[3/] Tri-Con continued to perform all of the remaining requirements of Contract No. 9121.

6. First Year Option: On October 12, 1990, the District exercised the first option year of the contract. Under this exercise of the option, the term of the contract was extended for the period of October 15, 1990 through October 14, 1991. The estimated amount of the first year option was $14,312,344.

7. Emergency Solicitations: On October 3, 1991, the District issued certain emergency solicitations,[4/] to meet the District's needs that had been previously covered by Contract No. 9121. Each of the emergency solicitations was sent to three prospective MBE offerors, which did not include the Protestor.

8. Exclusion of Tri-Con from the Emergency Solicitations: The District excluded Tri-Con from these emergency procurements because the contracting officer was aware of two on-going investigations of Tri-Con's performance under Contract No. 9121. One of these investigations was being conducted by the D.C. Metropolitan Police Department, and the other investigation was being conducted by the D.C. Office of the Inspector General. On the basis of such information, the contracting officer determined that it was not in the best interest of the District to continue to do business with Tri-Con, or to permit Tri-Con to participate in the emergency solicitations when the on-going investigations had raised serious, unresolved concerns regarding the illegality of certain actions by Tri-Con

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[2/]"Sheltered Market" is defined as a process whereby contracts or subcontracts are designated, before solicitation of bids, for limited competition from minority business enterprises on either a negotiated or competitive bid process. D.C. Code §1-1142(7) (1987). Each sheltered market procurement is required to be made in accordance with the Procurement Practices Act of 1985, D.C. Code §§ 1-1181.1 et seq. (1987); the Minority Contracting Act of 1976, D.C. Code §§ 1-1141 et seq. (1987); and the regulations issued pursuant thereto, 27 DCMR (1988).

[3/]The partial termination covered the supply and delivery of #4 fuel oil to St. Elizabeth Hospital and #6 fuel oil to D.C. Children's Center Heating Plant. The District reprocured #4 and #6 fuel oil from another contractor and this terminated portion of the contract is not part of the emergency solicitations that Tri-Con is protesting.

[4/]See footnote No. 1, supra.

in the performance of Contract No. 9121. Agency Report, p. 9, and Exhibit Nos. 19 and 21.

9. Award of the Emergency Solicitations: The emergency solicitations required the offerors to submit prices by October 7, 1991. The District received prices from two of the offerors for each emergency solicitation. Based on the lowest price proposed to the District, the following awards were made:

a. Contract No. 1221-AA-NS-3-RD for Unleaded Gasoline to Carter Fuel Oil in the estimated amount of $372,659.65 for the period of October 15, 1991, through February 11, 1992;

b. Contract No. 1330-AA-NS-3-RD for Super Unleaded Gasoline to Carter Fuel Oil in the estimated amount of $799,583.76 for the period of October 15, 1991, through January 1, 1992;

c. Contract No. 1329-AA-NS-3-RD for Diesel and Kerosene to Carter Fuel Oil in the estimated amount of $396,379.36 for the period of October 15, 1991, through February 11, 1992;

d. Contract No. 1328-AA-NS-3-RD for Fuel Oil #2 (Independent Agencies) to Green Fuel Oil in the estimated amount of $717,517.44 for the period of October 15, 1991, through February 11, 1992; and

e. Contract No. 2001-AA-NS-3-RD for Fuel Oil #2 (Executive Agencies) to Green Fuel Oil in the estimated amount of $838,946.74 for the period of October 15, 1991, through February 11, 1992.

10. Determination and Findings: On October 12, 1991, the same date that the contracting officer signed each of the emergency contracts, the contracting officer made a Determination and Findings ("D&F") justifying each of the emergency contracts. The emergency procurements were justified on the ground that the District would not be exercising the second option year on Contract No. 9121-AA-NS-3-KC, which was expiring on October 14, 1991, and that the District, therefore, was in dire need of the various fuel oils for the affected agencies.

11. Protest: On October 8, 1991, Tri-Con filed a protest with the Board on the grounds that the emergency solicitations and contracts were improper.

OPINION

1. The Protestor alleges that it was improper for the District not to exercise its option to renew and extend Contract No. 9121 for an additional year. The term of the base contract was for one year from October 15, 1989 through October 12, 1990, and

included four additional one-year options. (F.F.3.) On October 12, 1990, the District exercised the first option year of the contract, extending the term of the contract from October 15, 1990 through October 14, 1991. (F.F.6.) However, when this period of time expired, the District declined to exercise any further options to extend the contract.

The general rule is that there is discretion in the contracting officer, who represents the contracting agency, to decide whether or not an option is to be exercised. In this case, the contract describes the contract term and the option to renew as follows:

> D.17 CONTRACT TERM AND OPTION TO RENEW CLAUSE:
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> A. **Term of Contract**
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> The term of the contract shall be for a period of one (1) year from the date of award specified on Page 1 of the contract, subject to the District's option to extend the term of the contract in accordance with paragraphs B and C below. The Contractor shall be ready to commence the performance of work within fourteen (14) calendar days from the date of award.
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> B. **Option Period**
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> The government may extend the term of this contract for four (4) one-year (1) periods.
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> C. **Option to Extend the Term of the Contract**
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> (1) The government may extend the term of this contract for a period of four (4), one (1) year options, or a fraction thereof, by written notice to the contractor before the expiration of the contract; provided, that the government shall give the contractor a preliminary written notice of its intent to extend at least thirty (30) days before the contract expires. The preliminary notice does not commit the government to an extension. Prior to expiration of the contract, the contractor may waive the preliminary notice. The exercise of this option is subject to the availability of funds at the time of the exercise of this option. . . .
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> Agency Report, Ex. 1B, pp. 37-38.

The contract language is clear that the term of the contract is one year, subject to the District's option to extend the term for four one-year periods. Section D.17B provides that the government may extend the term of the contract for four one-

year periods. The language is permissive. Section D.17(C)(1) provides that the exercise of the option is subject to the availability of funds at the time of the exercise of the option.

Here, the fact that the language of the option stated that its exercise was subject to the availability of funds does not compel the Government to exercise the option in the event that funds are available. In a recent case, the United States Court of Appeals for the Federal Circuit held that when language in a Government procurement contract which provided that the Government's obligations under the contract, and under any renewals thereof, were contingent upon the continued availability of funds, such language was only a limitation on the Government's liability, which did not obligate the Government to exercise renewal rights whenever sufficient funds were available. Government Systems Advisors v. United States, 847 F.2d 811 (Fed. Cir. 1988), aff'g., 13 Cl. Ct. 470 (1987). The court held that the Government had no liability for its decision not to exercise an option to renew a contract, because the inclusion of such an anti-deficiency clause in the contract did not limit the Government's freedom to choose not to exercise the option even if funds were available. Where there is an option clause in a Government contract, the Government may permit the contract to expire by its own terms. Law, Mathematics and Technology, Inc., ASBCA No. 29714, October 29, 1984, 85-1 BCA ¶17,765.

Furthermore, there is no special right to the option simply because the contract was awarded to a minority contractor under the District's "sheltered market program." Footnote 2, supra. The Minority Contracting Act of 1976 does not require the Government to exercise an option to renew a sheltered market contract. The same is true under the Federal Small Business Section 8(a) set aside program. See Optional Data Corporation, NASA BCA No. 381-2, November 28, 1984, 85-1 BCA ¶17,760.

Finally, the exercise by the government of the first option does not compel the government to exercise the second or any other option. The exercise of any option is discretionary. That is the plain meaning of the term.

2. The Protestor also contends that the proper procurement procedures, including public advertisement, were not followed. We find there is no merit to the Protestor's allegations in this regard.

It is apparent from a review of the Procurement Practices Act and the regulations issued pursuant thereto, that both the general requirements, as well as the advertising requirements, are different from the similar requirements that are applicable to procurement by competitive sealed bidding, to which the Protestor refers. See D.C. Code, § 1-1183.12 (1987) and 27 DCMR §§ 1710-1712 (1988).

3. The Protestor also claims that it should have been awarded the emergency procurement on the basis of a sole source award under Section 305(a) of the Procurement Practices Act, D.C. Code § 1-1183.5(a) (1987). The protest does not contain any

information to support this contention. We find there is no basis for a sole source award to Tri-Con. A sole source award can be made when there is only one available source for the required commodity or service. Here, there is clearly more than one source for the required fuel oil products, as evidenced by the fact that there were three vendors to whom the District issued emergency solicitations. These vendors were qualified to participate in the sheltered market. There was no justification for a sole source award to Tri-Con. The contentions of the Protestor in this regard are without merit.

4. The Protestor contends further that the District acted improperly when it failed to notify Tri-Con, the incumbent contractor, or all certified minority business enterprises (MBE's), of the emergency solicitations.

A. Notification of Minority Business Enterprises: First, we will consider whether the District was required to notify all certified minority business enterprises. Under the Procurement Regulations, emergency procurements must be made with as much competition as is maximally practicable under the circumstances. D.C. Code § 1-1183.12(a)(2) (1987) and 27 DCMR § 1712.3 (1988). Here, three minority business enterprises that were in the fuel oil business were notified; and under the existing facts and circumstances, that would appear to satisfy the requirement for as much competition as is maximally practicable.

B. Lack of Notification and Exclusion of Tri-Con: Tri-Con, the incumbent contractor, was not notified of the emergency procurements and was, in fact, excluded from participating in the competition for such emergency solicitations. The reason for this exclusion given by the District was that there were two on-going investigations of Tri-Con's performance under Contract No. 9121: one being conducted by the Metropolitan Police Department, and the other by the Office of the Inspector General. The contracting officer determined that, due to these on-going investigations, it was not in the best interests of the District to exercise the second option of the contract; and as a result, emergency solicitations were necessary in order to provide a continuous supply of fuel oil, gasoline, and diesel oil to District government departments and agencies. (F.F.8.) The contracting officer explained his reasons for excluding Tri-Con from the emergency solicitations by stating:

> I did not issue the emergency solicitation to Tri-Con because of the ongoing Metropolitan Police Department Investigation of Tri-Con's performance under contract no. 9121-AA-NS-0-9-KC and the information provided me by the District's Inspector General. The information available to me from the Inspector General and the Metropolitan Police Department raised serious concerns regarding the illegality of certain actions by Tri-Con in the performance of contract no. 9121-AA-NS-0-9-KC. For this reason, I did not issue the emergency solicitations to Tri-Con. (Agency Report, Exhibit 21.)

Under the facts of the instant protest, Tri-Con, the incumbent contractor, was intentionally excluded from the emergency solicitation because on-going investigations raised serious concerns about certain actions by Tri-Con in the performance of its contract. Since the investigations were not completed, we do not know the results, that is, we do not know whether the actions of Tri-Con were legal or illegal, proper or improper.

We find the District's failure to notify Tri-Con, and its intentional exclusion from the emergency solicitations, was improper.[5/] The District failed to follow its own procedures for debarment or suspension. Its action constitutes a de facto debarment.[6/]

If the District had permitted Tri-Con to participate in the competition for the emergency solicitations, Tri-Con would have had to satisfy the requirements for responsibility, and it is not clear from the record whether or not Tri-Con could have cleared that hurdle. However, unless Tri-Con was formally debarred or suspended, or was unable to meet the responsibility requirements, it had a right to compete for award of the emergency procurements for petroleum.

The Procurement Practices Act provides for debarment and suspension,[7/] and the procurement regulations provide detailed debarment and suspension procedures.[8/]

Debarment will exclude a contractor from District contracting and District approved subcontracting for a reasonable, specified period; and suspension will disqualify a contractor temporarily from District contracting and District approved subcontracting. 27 DCMR § 2299.1 (1988).

After reasonable notice to the business involved, and reasonable opportunity for that business to be heard, the District may debar a business for cause from consideration for award of contracts or subcontracts. As an option or preliminary step to debarment, the District may merely suspend a business from consideration for award of contracts, if there is probable cause for debarment. D.C. Code § 1-1188.4 (1987). The procedures for debarment and suspension provide due process safeguards for the subject of such proceedings. The procedures require notice to the contractor, and in most instances, an opportunity to be heard. For example, the debarment proceedings require that the Director shall initiate such proceedings by notifying the contractor of the following: (a) the reasons for the proposed debarment, in sufficient detail to put the

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[5/] Freedom Elevator Corporation, Comp. Gen. Dec. B-199773, December 18, 1980, 80-2 CPD ¶438.

[6/] See Art-Metal-USA, Inc. v. Solomon, 473 F.Supp.1 (D.D.C. 1978).

[7/] D.C. Code § 1-1188.4 (1987).

[8/] 27 DCMR §§ 2210 to 2217 (July 1988).

contractor on notice of the conduct or transactions upon which the proposed debarment is based; (b) the cause relied upon for the proposed debarment; (c) that the contractor may submit in person, in writing, or through a representative, information and argument in opposition to the proposed debarment; (d) the District's procedures governing debarment; (e) the potential effect of the proposed debarment; and (f) that, if no suspension is in effect, the District will not solicit offers from, award contracts to, renew, or otherwise extend contracts with, or consent to subcontracts with the contractor, pending a debarment decision. 27 DCMR § 2214.1 (1988).

The requirements of the District procurement regulations provide an opportunity for a contractor being investigated for an alleged wrong to defend himself. By not following its own procedures for debarment or suspension before it excluded the incumbent contractor form the emergency solicitations, the District denied the contractor's right to notice and his right to attempt to rebut the charges and defend himself, if he chose to do so.

In Art Metal-USA, Inc. v. Solomon, supra, the United States District Court for the District of Columbia found that there was a de facto debarment where the General Services Administration (GSA) executed a termination for convenience of a contract for steel file cabinets, and held up the awards on four other contracts, while an investigation was in progress, in order to determine if there were contract abuses by the contractor. In this case, the court held:

> With respect to Art Metal's likelihood of success on the merits, it is clear at the outset that due process of law requires that before a contractor may be blacklisted (whether by debarment or suspension) he must be afforded specific procedural safeguards, including, inter alia, a notice of the charges against it, an opportunity to rebut those charges and, under most circumstances, a hearing.[9/]

As Nash and Cibinic, noted authorities on Government Contract Law, have stated:

> Actions or communications indicating a refusal to deal with a contractor in the future have been held to be de facto debarment or suspension. In Airco, Inc. v. Cecil D. Andrus, 26 CCF ¶ 83,636 (D.C.C. 1979) the contractor was threatened with placement on an "informal blacklist" by the Department of the Interior. Specifically, the agency threatened to notify its customers and contractors that Airco was in violation of an agency regulation that would prevent such customers from doing business with Airco. The court found

[9/]Citing Gonzalez v. Freeman, 118 U.S.App. D.C. 180, 334 F.2d 570 (1964); and other cases.

> that while Interior had not cancelled or terminated any contract with Airco and had not put Airco on an "ineligible" list, the effect on Airco was the same as a formal debarment but without the protective procedures to which Airco would have been entitled by a formal debarment action.[10/]

In the instant protest, an incumbent contractor was intentionally excluded from participating in a solicitation that would continue the services he was presently providing. Without being able to compete for the solicitation, he would have no possibility of winning an award to provide such services. He has been blacklisted, and the effect on Tri-Con is the same as formal debarment without the protective procedures to which Tri-Con would have been entitled by a formal debarment action.

The Procurement Practices Act prescribes the remedies available in a protest of a solicitation or award of a government contract. The statute refers to the remedy of termination for convenience of a contract, as well as the award of bid or proposal preparation costs, although "other relief" may be available depending on the particular facts and circumstances. D.C. Code, § 1-1189.8(e) (1987).

We are precluded from providing the remedy of a termination for convenience of the emergency solicitations. First, all of the emergency solicitations expired by February 11, 1992, or earlier. (F.F.9.) We are also precluded from granting bid preparation costs, because Tri-Con was not permitted to bid on the emergency solicitations; and when the emergency solicitations expired, the District participated in a Metropolitan Washington Council of Governments procurement with certain Maryland and Virginia county governments. This was done in order for the District to obtain petroleum products on the most economic basis that was available. It would be contrary to good public policy to preclude the District from participating in such mutually beneficial efforts by local governments to save public funds in the purchase of petroleum. Furthermore, the Protestor failed to submit a bid when the Council of Governments sponsored procurement for petroleum was advertised.[11/]

Due to these considerations, there is a limited remedy for the Protestor.

We conclude that the Protestor is entitled to have the protection afforded by debarment or suspension proceedings, and that the District is obligated to initiate such proceedings by written notification within a reasonable time, provided such proceedings

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[10/]J. Cibinic and R. Nash, Formation of Government Contracts, pp. 284-285, 2nd ed., (1986).

[11/]See Protest of Tri-Continental Industries, Inc., CAB No. P-303, February 24, 1992, Agency Report, Exhibit No. 8, Affidavit of Ronald Davis, January 10, 1992; and Exhibit No. 9, Affidavit of John Lee, January 13, 1992. Tri-Con did not submit a bid for the solicitation of petroleum sponsored by the Metropolitan Washington Council of Governments, although a copy of the solicitation was sent to Tri-Con.

are warranted by the results of the investigations. In the meantime, the Protestor has a right to compete for District procurements under the same conditions as any other prospective contractor.

It is, by the Board, hereby

ORDERED, that the Protestor shall not be barred from participating in future solicitations for the award of District government procurements for which it is qualified; and

FURTHER ORDERED, that this protest is remanded to the Director, Department of Administrative Services, with instructions to take appropriate action within a reasonable time in regard to initiation of debarment or suspension proceedings, as warranted by the facts and evidence resulting from investigation of this matter by the Metropolitan Police Department, the Inspector General, and the District or Federal government.

DATE: March 6, 1992

Benjamin B. Terner

BENJAMIN B. TERNER
Administrative Judge

CONCUR:

Terry Hart Lee

TERRY HART LEE
Administrative Judge

Zoe Bush

ZOE BUSH
Chief Administrative Judge