



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: ATA Defense Industries, Inc.

File: B-275303

Date: February 6, 1997

Claude P. Goddard, Jr., Esq., Kilcullen, Wilson and Kilcullen, Chartered, for the protester.

Col. Nicholas P. Retson, and Maj. Scott D. Schuler, Department of the Army, for the agency.

Andrew T. Pogany, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Reprocurement, following termination for default, through issuance of a delivery order under a Federal Supply Schedule (FSS) contract is proper where agency has an immediate need for the equipment and there are no known sources of supply other than the FSS contractor and the defaulted contractor.

DECISION

ATA Defense Industries, Inc. protests the issuance of a delivery order by the U.S. Property and Fiscal Officer, National Guard Bureau, Departments of the Army and the Air Force, Jackson, Mississippi, to Caswell International Corporation for moving tank targets under the General Services Administration's Federal Supply Schedule (FSS) contract No. GS-02F-0434D. The delivery order is a reprocurement of the same items that had been awarded to ATA. ATA's contract was terminated for default.

We deny the protest.

ATA was the low bidder under two-step sealed bidding solicitation No. DAHA22-95-B-0003 at a price of \$444,000 for a quantity of 10 moving tank targets ("Armored Moving Target Systems") in August 1995; award to ATA was delayed until February 16, 1996, as a result of a protest filed by Caswell, the only other offeror. In August 1996, ATA requested a 60-day extension for delay caused by the Caswell protest. The protester and the contracting officer executed a bilateral contract modification, effective August 28, 1996, which recognized that ATA had experienced "excusable delay" as a result of the Caswell protest, and the "[c]ontract delivery date

[was] changed from 21 August 1996 to 20 October 1996."¹ On October 18, ATA requested another 60-day extension, due to continued internal "competition for engineering and manufacturing resources," and promised delivery of all 10 targets no later than December 20, 1996. ATA, along with its request, provided photographs of the tank targets undergoing engineering testing. Without any further discussion, the contracting officer, on October 22, terminated ATA's contract for default. According to the protester, the "contracting officer later acknowledged to ATA's President [that] he was under 'tremendous pressure' to take the default action because the [agency] technical personnel wanted to obtain Caswell tank targets." On October 23, 1 day after he terminated the ATA contract for default, the contracting officer issued a delivery order to Caswell for the tank targets under its FSS contract with a delivery date of March 23, 1997, at a price of \$476,560. This protest followed.

ATA argues that the contracting officer abused his discretion in ordering from the FSS when he reprocured the tank targets because he "actually knew" that he could obtain the targets sooner and at a lower price from ATA. The protester also argues that the contracting officer decided to exclude ATA from the reprocurement before he defaulted ATA's contract, citing the contracting officer's statement that "had [he] intended to reprocure from the defaulted contractor, [he] would not have terminated [its] contract." Further, since there was allegedly no reason to question ATA's ability to perform by December 20, 1996, ATA argues that the contracting officer improperly excluded the firm from the reprocurement and improperly determined ATA to be nonresponsible. Finally, ATA questions whether the specified tank targets were actually listed in the FSS as available from Caswell.

Most of ATA's assertions are not for our consideration as they involve issues related to the propriety of the default action and to the government's duty, when reprocurring, to mitigate damages for which the defaulted contractor will be liable--these are matters for resolution by the cognizant board of contract appeals or Court of Federal Claims under the disputes clause of the contract. See, e.g., PRB Uniforms, Inc., 56 Comp. Gen. 976 (1977), 77-2 CPD ¶ 213; Skip Kirchdorfer, Inc., B-192843, Feb. 15, 1979, 79-1 CPD ¶ 111. The question for our review is whether the agency acted reasonably and consistent with regulation in conducting the reprocurement as it did.

The Federal Acquisition Regulation (FAR) provides that the contracting officer "shall obtain competition to the maximum extent practicable" for a repurchase, but also recognizes that under the default clause of the contract the contracting officer

¹According to ATA, Caswell's protest caused a slippage which created engineering and manufacturing conflicts with other urgent and substantial Army contracts in process.

may use any appropriate acquisition method. FAR § 49.402-6. Thus, if the contracting officer decides to conduct a new competition, the defaulted contractor may not be automatically excluded from that competition; however, a defaulted contractor does not have an automatic right to be solicited for every reprourement, since the contracting officer may reasonably rely on a reprourement approach that does not involve a new competition where that approach, under the circumstances, satisfies the FAR requirement for maximum practicable competition. International Technology Corp., B-250377.5, Aug. 18, 1993, 93-2 CPD ¶ 102; Skip Kirchdorfer, Inc., supra.

Here, the contracting officer did not conduct a new competition. He simply placed a delivery order under an existing FSS contract. The agency reports that this approach was taken because the government had an immediate need for the equipment and there were only a limited number of sources, and only one FSS contractor, Caswell, that could meet the requirements.

We see nothing improper with the agency's approach. Given the government's continuing and immediate need for the equipment and the lack of sources of supply, the contracting officer's decision not to conduct a competition but instead to look to the FSS and place an order with the only FSS contractor able to meet the agency's needs was an eminently reasonable decision. While the protester insists that it could have provided the equipment sooner than the FSS contractor and at a lower price, we see no reason on this record why the contracting officer should have considered the protester, which had just failed to meet delivery requirements, as a reliable source for the reprourement. Accordingly, and given the FAR's general preference for use of FSS contracts, see FAR § 8.001, we think the contracting officer's use of the FSS was appropriate and that the reprourement actions here were reasonable and consistent with FAR § 49.402-6.

The protest is denied.

Comptroller General
of the United States