

DOCUMENT RESUME

01604 - [A1051654]

[Protest by Defaulted Contractor Contending That New Procurement Is Dissimilar and Requires New Solicitation]. B-186937. March 10, 1977. 3 pp.

Decision re: Steelship Corp.; by Robert F. Keller, Acting Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).

Contact: Office of the General Counsel: Procurement Law 2.

Budget Function: National Defense: Department of Defense - Procurement & Contracts (050).

Organization Concerned: Department of the Army: Corps of Engineers.

Authority: A.S.P.R. 8-602.6. B-181366 (1974). B-186235 (1976). 10 U.S.C. 2304(a).

Award of a Corps of Engineers contract for a diesel tugboat was protested by the Company with whom the previous contract was terminated because of bankruptcy. The protest by the defaulted contractor contending that the new procurement is so dissimilar as to require a new solicitation will be considered, but review will be limited to questions of similarity between procurements. (RR?)

01604

DECISION



L. Kogutowski
Pres. I.
**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-186937

DATE: March 10, 1977

MATTER OF: Steelship Corporation

DIGEST:

GAO will consider protest by defaulted contractor contending that new procurement for contractors account is so dissimilar as to require new solicitation; however, review is limited to whether contracting officer had reasonable basis upon which to conclude similarity between two procurements, and where replacement craft was acceptable under step one of original two-step procurement for "stock model" towboat, contracting officer had reasonable basis to conclude that there was similarity.

The Corps of Engineers, Department of the Army, issued request for technical proposal (RFTP) No. DACW03-75-R-0006, on June 23, 1975, for the procurement of a twin-screw diesel towboat under two-step procurement procedures.

Under step one, technical proposals were received from seven firms on July 23, 1975. These technical proposals were derived from qualified sources of a "stock model" twin-screw diesel towboat that would conform to various minimum general requirements in the RFTP. Of the seven, three technical proposals were found to be acceptable. Step two of the solicitation No. DACW03-76-B-0018 was issued to the three firms on December 10, 1975. On January 29, 1976, three bids were received and opened as follows:

Steelship Corporation (Steelship)	\$ 794,860.00
Superior Boat Works, Inc. (Superior)	987,450.00
Brent Towing Company, Inc. (Brent)	1,204,997.50

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By letter dated January 26, 1976, Brent protested to the Corps on the basis that the other bidders had not offered a "stock model" towboat as required by the solicitation. Both Steelship and Superior presented evidence to support the requirement of a "stock model." The protest by Brent was held to be without merit and denied by the Corps on April 5, 1976. On April 12, 1976, contract No. DACW03-76-C-0072 was awarded to Steelship.

On June 1, 1976, the contract with Steelship was terminated for default due to its failure to furnish payment and performance bonds as required by the contract. Steelship filed a voluntary petition for bankruptcy on June 8, 1976. Award was made to Superior for Steelship's account on June 10, 1976, for the towboat Superior proposed under step one at the same price bid on January 29, 1976. The default termination is pending before the Armed Services Board of Contract Appeals (ASBCA).

Steelship protests to our Office the award of the contract to Superior without readvertisement alleging that the towboat procured from Superior was dissimilar. In support of formal advertising for dissimilar craft, 10 U.S.C. § 2304(a) (1970) and Armed Services Procurement Regulation (ASPR) § 8-602.6 (1975 ed.) are cited.

In Decatur-Wayne, Inc., B-181366, October 9, 1974, 74-2 CPD 200, our Office indicated that the issue of "similarity" is one for ASBCA determination under the default clause of the original contract and that in view of the finality which attaches to the ultimate ASBCA determination a decision by our Office would be premature and unwarranted. We continue of that view, but for the exception indicated below.

The default clause in Government contracts provides that in the event of termination for default the Government may procure items the "same as or similar" to that called for under the defaulted contract and the contractor shall be liable for any excess costs for such "similar" supplies. Where the items reprocured are "similar," the difference between the cost of reprocurement and the original contract price is the proper measure of the defaulted contractor's liability. See Eastern Tool and Manufacturing Co., ASBCA No. 4815, 58-2 BCA 1947. The determination of similarity by the Board affords an appropriate means for measuring excess costs to the defaulted contractor.


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While our Office cannot review complaints with regard to disputes under defaulted contracts, we have always been concerned with whether procurement laws and regulations have been followed. Accordingly, consistent with that position, we will consider protests by a defaulted contractor contending that a new procurement is so dissimilar as to require a new solicitation. However, we will limit our review of the situation to whether the contracting officer had a reasonable basis upon which he could conclude that there was a similarity between the two procurements. With respect to the reasonable basis test, see top of page 3 of SCM Corporation, B-186235, August 10, 1976, 76-2 CPD 147.

We wish to emphasize that our review is not intended to usurp or replace the authority of the ASBCA. We believe that our purpose and standard are sufficiently different from that of the ASBCA so as not to amount to an encroachment upon its jurisdiction.

Turning to the immediate situation, we find that the Superior proposal was one of the three found acceptable under step one of the two-step procurement for a "stock model" towboat. Therefore, we decide that the contracting officer had a reasonable basis upon which to conclude that there was a similarity between the two craft. Accordingly, the protest is denied.

In the circumstances, it is not necessary to consider the agency's question of whether the company which subsequently acquired the assets of Steelship is an interested party and if so whether its protest was timely filed.


Acting Comptroller General
of the United States