

**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D. C. 20548

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*PL-I*

B-219305.2

**FILE:**

**DATE:** September 19, 1985

**MATTER OF:**

VCA Corporation

**DIGEST:**

1. Protest of defaulted contractor that its exclusion from the reprocurement was contrary to the government's duty to mitigate damages resulting from the default will not be considered by GAO since whether the government met its duty to mitigate damages is a matter for resolution under the Disputes clause of the defaulted contract.
2. Contracting agency acted reasonably in obtaining requirements from next low offeror on original procurement where there was a relatively short time between the original competition and the default of the contract awarded to the low offeror and the agency had an urgent requirement for the computer systems procured which would not permit a new competition.

VCA Corporation (VCA) protests the award of a contract to Presearch, Inc. (Presearch), under request for proposals (RFP) No. MDA-903-85-R-0065, issued by the United States Army, Defense Supply Service, Washington, D.C. (Army), to procure tempest compliant microcomputer systems for the Strategic Defense Initiative Organization. Essentially, VCA asserts that because the award was made for VCA's account under the reprocurement clause of its defaulted contract for the items, it should have been given a chance to mitigate its damages by submitting an offer on the reprocurement.

We dismiss the protest.

VCA initially protested award of a contract to Presearch under this solicitation in July 1985. A stop-work order was issued to Presearch by the Army. Thereafter, on July 29, 1985, VCA was awarded the contract. The Army then tried to work out a no-cost settlement with Presearch

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as encouraged by Federal Acquisition Regulation (FAR), 48 C.F.R. § 49.101(b) (1984), rather than terminating Presearch's contract for the convenience of the government.

Under the terms of VCA's contract, a minimum of 28 and a maximum of 90 systems were to be ordered. The first delivery order placed under the contract was for 38 systems for delivery by August 13. By August 5, VCA delivered 28 of the 38 required systems. However, VCA failed to make timely delivery of the remaining 10 systems ordered and, therefore, VCA's contract was terminated for default on August 22.

VCA argues that "since excess costs are charged to the defaulting contractor, there is an implied duty that the government allow VCA to bid for any reprocurement." We have considered protests of defaulted contractors in connection with their complaints that statutory and regulatory provisions applicable to a reprocurement were not followed. See, e.g., PRB Uniforms, Inc., 56 Comp. Gen. 976 (1977), 77-2 C.P.D. ¶ 213. We do not consider, however, complaints that the reprocurement action was inconsistent with the government's duty to mitigate damages resulting from the default. Whether that duty was met is for administrative or judicial determination under the Disputes clause of the defaulted contract rather than under the Bid Protest Regulations of GAO. See Shelf Stable Foods, B-218067, Jan. 29, 1985, 85-1 C.P.D. ¶ 120; Aero Products Research, Inc., B-205978, Mar. 26, 1982, 82-1 C.P.D. ¶ 288. Therefore, we will not consider this argument.

VCA contends that if the contract with Presearch is for a quantity greater than the undelivered quantity terminated for default, the contract must be treated as a new acquisition rather than a reprocurement. See FAR, 48 C.F.R. § 49.402-6(b), Federal Acquisition Circular No. 84-5, Apr. 1, 1985. VCA asserts that since it was requested to remove its 28 systems which were delivered, this evidences that the Presearch contract is for more than the undelivered portion under its first delivery order--10 systems. We do not agree with VCA that this is a new acquisition.

While only 10 systems remained to be delivered under the first delivery order at the time VCA's contract was terminated for default, under VCA's contract it could have been required to deliver up to a maximum of 90 systems. As VCA's protest states, VCA has been told to remove the 28 systems it delivered. While VCA may dispute whether the removal of the 28 systems was proper, this issue is a matter to be resolved under the Disputes clause of VCA's contract.

See Mark A. Carroll & Son, Inc., B-198295, Aug. 13, 1980, 80-2 C.P.D. ¶ 114. On this record, the Army's need was for the 38 systems under the original delivery order and was not a new acquisition under FAR, § 49.402-6(b), supra.

VCA asserts that since FAR, § 49.402-6(b), supra, requires that the contracting officer "obtain competition to the maximum extent practicable for the repurchase," even where it is not a new acquisition, it was a violation of procurement regulations for the Army to not have considered VCA as a source for the undelivered systems. However, the cited FAR section also provides that if, as here, the repurchase is for a quantity not over the undelivered quantity terminated for default, the contracting officer is authorized "to use any terms and acquisition method deemed appropriate for the repurchase."

In this regard, we have held that the ordering of the requirements for a reprocurement from the second low bidder on the original solicitation is an acceptable method of reprocurement, and where, as here, there is a relatively short time span between the original competition and the default, the bids received under the original invitation can reasonably be viewed as an acceptable measure of what competition would bring. Ikara Manufacturing Company, 58 Comp. Gen. 54 (1978), 78-2 C.P.D. ¶ 315; Hemet Valley Flying Service, Inc., 57 Comp. Gen. 703 (1978), 78-2 C.P.D. ¶ 117. Moreover, since VCA states that the Army notified it that the systems must be installed prior to the end of August, the date upon which a lease agreement for the equipment being replaced expired, the record shows that there was insufficient time after the default date, August 22, to conduct a new competition. Under these circumstances, the Army did not act improperly by ordering its requirements from the second low offeror under the original solicitation. Hemet Valley Flying Service, Inc., 57 Comp. Gen. 703, supra.

VCA also contends that the Army should have terminated Presearch's initial contract under this solicitation and that the Army's failure to do so evidences a predisposition against VCA. Since, however, as stated above, FAR, 48 C.F.R. § 49.101(b), encourages contracting officers to attempt to effect no-cost settlements where feasible, we do not believe it was improper for the Army to make such an attempt after issuing a stop-work order to Presearch, instead of terminating the contract, nor do we believe that this evidences a predisposition against VCA.

Finally, VCA alleges that despite the pendency of this protest, the Army failed to suspend performance under Presearch's contract as required by the Competition in Contracting Act of 1984, 31 U.S.C.A. § 3553 (West Supp. 1985). In view of our dismissal of VCA's protest, we need not consider this allegation.

The protest is dismissed.



Robert M. Strong  
Deputy Associate General Counsel