The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Joseph L. De Clerk and Associates, Inc.

File: B-233166

Date: January 18, 1989

DIGEST

1. Where agency properly determines due to urgent circumstances that it must use noncompetitive procedures provided for under the Competition in Contracting Act, agency properly may limit the number of sources to those firms it reasonably believes can promptly and properly perform the work. Agency reasonably determined protester was not a potential source for a 12-month, emergency contract where protester, who was terminated for default on the previous contract for the solicited services, had encountered problems in an aspect of performance critical to the emergency contract.

2. General Accounting Office will not consider the propriety of the procuring agency's decision to terminate a contract for default, since this is a matter for the procuring agency's board of contract appeals under the contract disputes clause.

DECISION

Joseph L. De Clerk and Associates, Inc., protests any award of a contract under request for proposals (RFP) No. F09603-88-R-58351, issued by the Department of the Air Force for on-call computer maintenance services in support of the Expanded Missile Data Analysis System (EMDAS). The EMDAS, located at nine continental United States sites, monitors the operational status and readiness posture of the Minuteman Missile System. The Air Force limited competition to two known qualified sources based on a determination that an unusual and compelling urgency for the services existed. The protester, who was terminated for default on the previous contract for the solicited services, principally argues that the agency improperly excluded it as an available source. We deny the protest.

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The Air Force awarded contract No. F09603-87-D-0965 to De Clerk for a base year and four option years. The base year was scheduled to expire on August 30, 1988. However, the Air Force terminated De Clerk's contract for default on July 11, for failure to timely perform. De Clerk has appealed this termination to the Armed Services Board of Contract Appeals.

On August 29, the Air Force issued the protested RFP to two known sources for the maintenance of the EMDAS. The initial closing date of September 19 was extended to September 26 at 4 p.m., at the request of one source. By letter dated September 23, and received by the Air Force on September 26 at 10:30 a.m., De Clerk protested to the agency that it was capable of competing for the solicitation but not given the opportunity. By message dated October 6, De Clerk protested to our Office that it was not given an opportunity to compete despite notifying the Air Force of its desire to participate.

De Clerk contends that the Air Force wrongfully terminated its contract for default, and held it to a different standard than the previous EMDAS contractor, to whom the Air Force issued the RFP. According to De Clerk, the Air Force implicitly recognized the defective nature of De Clerk's contract by rewording defective clauses and incorporating those changes into the protested RFP. De Clerk argues it should be given the opportunity to compete for the RFP since it has dedicated personnel located in close proximity to each EMDAS site, can provide faster response time than the restricted-source list bidders and is the only company with spare parts located within close proximity of each site.

The Air Force responds that the RFP is an emergency partial reprocurement of computer maintenance services provided for under De Clerk's terminated contract. The Air Force limited competition to known qualified sources due to the urgent nature of the services, and excluded De Clerk because it determined its previous performance for the same services was unsatisfactory.

The Air Force notes that a justification for using other than full and open competitive procedures due to an unusual and compelling urgency was approved by the Air Force's Director, Competition Advocacy. See 10 U.S.C. § 2304(c)(2) (Supp. IV 1986). The justification referred to the critical nature of the EDMAS, which collects maintenance data and allows for the forecast of component failures to determine cycle repair items, parts acquisitions, and end item replacement requirements for the Minuteman Missile Fleet. According to the Air Force, since De Clerk's contract has

been terminated, EDMAS is receiving only emergency repairs as components fail, and emergency purchase orders are issued each time a computer requires repair. Under this method of support, the Air Force reports, the system is not being maintained at the latest manufacturer's configuration, and using activities are not able to realize the required 95 percent System Effectiveness Level.

The Air Force explains that it issued the protested RFP to provide services for 1 year to avoid the administrative delay involved in issuing a purchase order each time a computer requires repair. The Air Force states that it plans to competitively solicit the maintenance requirements under Air Force Logistics Command Five Year Policy procedures, and notes that previous experience indicates the administrative lead time required to award such a contract is approximately 1 year.

Under the Competition in Contracting Act of 1984 (CICA), an agency may use noncompetitive procedures to procure goods or services where the agency's needs are of such an unusual and compelling urgency that the government would be seriously injured if the agency is not permitted to limit the number of sources from which it solicits bids or proposals. 10 U.S.C. § 2304(c)(2). This authority is limited by the CICA provisions at 10 U.S.C. § 2304(e), which require agencies to request offers from as many sources as practicable. An agency using the urgency exception may restrict competition to the firms it reasonably believes can perform the work promptly and properly, see Industrial Refrigeration Service Corp., B-220091, Jan. 22, 1986, 86-1 CPD ¶ 67, and we will object to the agency's determination only where the decision lacks a reasonable basis. See TMS Building Maintenance, B-220588, Jan. 22, 1986, 86-1 CPD ¶ 68.

We believe the Air Force's decision to use noncompetitive procedures was reasonable. The record indicates that an exigent situation existed, and a limited competition was called for, because EDMAS, a vital part of our national defense, and our first strike capability, lacked needed repair coverage. In light of the emergency situation, the Air Force limited the competition to firms which, in the Air Force's view, had satisfactory work experience and could promptly and properly furnish the needed repair coverage.

We see no basis to object to the Air Force's decision to exclude De Clerk from the competition. The record shows that the Air Force had issued a cure notice to De Clerk in April 1988, stating that De Clerk's failure to deliver software and manual updates had severely impacted EDMAS software development. De Clerk responded by letter dated

May 9, alleging vendor delay as one reason for its failure and stating that its vendor problem had been solved and delivery of the required items would be within 2 weeks. By letter dated May 13, the Air Force advised De Clerk that, acting in reliance upon De Clerk's assurances, it would forbear until May 25. De Clerk was advised that failure to deliver by that date would result in its contract being terminated for default. After De Clerk failed to deliver the items by May 25, the Air Force notified De Clerk by letter dated June 16 that it was considering terminating the contract for default, and that De Clerk should respond within 10 days. In a telephone conversation on June 28, the Air Force granted De Clerk a 5-day extension to reply. The Air Force reviewed De Clerk's response letter dated June 30, and notified De Clerk by letter dated July 7 that its contract was terminated for default because De Clerk had failed to show its failure to comply with the terms of the contract was without fault or negligence on its part. Notably, while De Clerk disputes the reasons for its performance problems, it does not deny that problems existed. Given these factors, we cannot conclude that the Air Force unreasonably determined that De Clerk was not an available source to perform the services solicited in the protested RFP.

De Clerk's contention that the termination of its contract was improper concerns a matter of contract administration within the jurisdiction of the contracting agency and the Armed Services Board of Contract Appeals under the disputes clause of De Clerk's contract and, therefore, is not for consideration by this Office under our Bid Protest Regulations. See 4 C.F.R. § 21.3(m)(1) (1988); VCA Corp.--Reconsideration, B-219305.3, Oct. 11, 1985, 85-2 CPD ¶ 403.

The protest is denied.

for James F. Hinchman
General Counsel