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The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: DCX, Inc.

File No.: B-232692

Date: January 23, 1989

DIGEST

Protest by defaulted contractor that reprocurement of requirement through sole-source award to next low offeror under original solicitation was improper because of change in original delivery schedule is denied where award was made at the second low offeror's original price, there was a relatively short time span between the original competition and the default, and there was insufficient time after the default to conduct a new competition.

DECISION

DCX, Inc., protests the award of a contract to Bruce Industries, Inc., under request for proposals (RFP) No. DLA400-87-R-5894, issued by the Defense Logistics Agency (DLA) for light sets for military medical tents. DCX argues that the reprocurement of the requirement on which DCX had defaulted by award to Bruce, the next low offeror on the original solicitation, should have been treated as a new acquisition since DLA materially changed the delivery schedule in the reprocurement.

We deny the protest.

The RFP, issued on July 21, 1987, solicited offers on 12,001 light sets to be delivered at the rate of 4,000 per month between August 19, 1988, and November 4, 1988. A first article test report was required no later than June 30. DLA received 5 proposals by the March 1 closing date for receipt of offers. On April 1, DLA awarded a contract to DCX, the low offeror, at a unit price of $364.55, and a charge of $24,233 for the first article test report. Bruce was the second low offeror with unit prices ranging from $389 to $405, and a charge of $18,283 for the first article test report.

DCX failed to deliver a first article test report by the June 30 deadline. On July 1, the contracting officer notified DCX that she would forbear terminating the contract until July 12 in order to allow DCX to complete first article testing. In that letter, the contracting officer emphasized DCX's obligation to deliver in strict accordance with the specifications and the item description in the contract, and stressed the importance of the contract delivery dates in light of the fact that the light sets are a major component of tents to be assembled for use in the Army's mobile hospitals. DCX failed to deliver a first article by the July 12 deadline and DLA terminated the contract for default on July 13. DCX filed a notice of appeal of its termination to the Armed Services Board of Contract Appeals (ASBCA) on October 4.

Because of delays associated with the termination for default and the urgency of the requirement to support the medical tent project, the Army asserts, the contracting officer decided to negotiate for the repurchase with Bruce, the next low offeror on the original solicitation, rather than resolicit. Before award DLA changed the delivery schedule on the reprocurement to require delivery of 1,200 light sets per month over a 9-month period (December 31, 1988 through September 30, 1989) rather than 4,000 per month over 2-1/2 months (August 19 through November 4, 1988). According to DLA, the delivery schedule was modified due to a change in the type of tent to be used and the delivery schedule for those tents. On August 31, DLA awarded a contract to Bruce at its original unit price as a repurchase against DCX's terminated contract and agreed to waive the first article test report requirement for Bruce.

DCX contends that the new delivery requirements for the reprocurement constitute a material change to the contract such that the reprocurement should have been treated as a new acquisition and DCX should have been included in the recompetition.

Where, as here, a reprocurement is for the account of a defaulted contractor, the statutes and regulations governing regular federal procurements are not strictly applicable. TSCO, Inc., 65 Comp. Gen. 347 (1986), 86-1 CPD ¶ 198. Under the Federal Acquisition Regulation (FAR) § 49.402-6(b), if the repurchase is for a quantity not over the undelivered quantity terminated for default, the contracting officer may use any terms and acquisition method deemed appropriate for repurchase of the same requirement, but must repurchase at as reasonable a price as practicable and obtain competition

to the maximum extent practicable. We will review a reprocurement to determine whether the contracting agency acted reasonably under the circumstances. TSCO, Inc., 65 Comp. Gen., supra.

What is at issue here is the propriety of the sole-source award for the reprocurement. To the extent that DCX challenges the changes in the delivery schedule as they relate to the propriety of the default termination, the issue is within the jurisdiction of the contracting agency and the ASBCA under the Disputes clause of DCX's contract and, therefore, is not for consideration by our Office. See Bid Protest Regulations, 4 C.F.R. § 21.3(m)(1) (1988); VCA Corp., B-219305.2, Sept. 19, 1985, 85-2 CPD ¶ 308, aff'd on reconsideration, B-219305.3, Oct. 11, 1985, 85-2 CPD ¶ 403. The basic issue itself, however--whether the reprocurement action was conducted in accordance with applicable procurement procedures--is one over which we properly can and do exercise jurisdiction without impinging on the jurisdiction of the contract appeals boards. Id.

In our view, the agency's decision to award a reprocurement contract to the second low offeror on the original solicitation was proper since award was made at the second low offeror's original price; there was a relatively short time span between the original competition and the 6 week delay from default (4-1/2 months); and there was insufficient time after the default to conduct a new competition. See Hemet Valley Flying Service, Inc., 57 Comp. Gen. 703 (1978), 78-2 CPD ¶ 117; VCA Corp., B-219305.2, supra. Contrary to DCX's argument, we see no basis to conclude that the agency was required to conduct a new competition, in view of its pressing need for the light sets. Although the original delivery schedule was extended due to a delay in receiving the tents in which the light sets were to be used, the record shows that the agency nevertheless required delivery of the light sets to begin before delivery of the tents in January 1989, only 5-1/2 months after DCX was terminated for default. Given that the original procurement took 8 months, plus 3 months for first article delivery, it was reasonable for the agency to make award to the second lowest offeror who qualified for first article waiver in order to ensure that its delivery requirements for the light sets would be met.

The protest is denied.

James F. Hinchman
General Counsel