THANKS

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Master Security, Inc.

File: B-235711

Date: October 4, 1989

DIGEST

Agency's award of a sole source reprocurement for guard services, covered by a contract which was defaulted, for the remainder of the base contract period and 2 option years, to the second low bidder under the original solicitation was not reasonable since the agency did not justify any urgent and compelling need to noncompetitively procure the option requirements.

DECISION

Master Security, Inc. (MSI), protests the award of a contract by the United States Department of Agriculture (USDA) to replace a defaulted contractor under invitation for bids (IFB) No. 00-88-B-41, issued for security guard services at the USDA complex in Washington, D.C. MSI contends that the agency made an improper sole-source award of the repurchase contract to Areawide Services, Inc., instead of obtaining competition for the reprocurement of the services required.

We sustain the protest.

The IFB, issued on May 21, 1988, solicited bids for guard services for a period of 1 year with two 1-year options. Securiguard, Inc., submitted the lowest of the eight bids received at bid opening on June 21. Areawide and MSI were determined, at that time, to be the third and sixth low bidders, respectively. Award was made on August 31, 1988, to Securiguard, Inc., for services covering the period from November 1, 1988, through September 30, 1989. The agency states that when Securiguard did not resolve continued performance problems (which the agency identified soon after Securiguard commenced contract performance) within a 30-day cure period after the issuance of a cure notice, the agency notified the contractor by letter dated April 4, of the termination of the contract for default, effective April 30, 1989.

To reprocure these services, the agency decided to award a contract for the remainder of the first year and the two 1-year options to the next low bidder under the IFB. However, when it reviewed the bid abstract, it discovered that "the evaluation of options had not been completed correctly." As a result, the agency recalculated the initial bids, and Areawide became the second, instead of the third, low bidder, while the protester became the fifth, instead of the sixth, low bidder.1/

On April 3, the agency requested to meet with Areawide "to discuss the feasibility of providing security service at USDA." On April 4 (the same day the agency notified the defaulted contractor of the termination of its contract), the contracting officer met and discussed with Areawide the agency's need for guard service, the reinstatement of Areawide's June 21, 1988 bid, and a definite start date. Areawide and USDA agreed upon a start date of May 1, 1989, and the necessity of an adjustment in the hourly wage rates reflected in Areawide's original bid in view of the Department of Labor's issuance in September 1988 of a wage determination with an applicable rate increase of 65 cents per hour. On April 6, USDA and Areawide reached a negotiated agreement.

On May 1, 1989, the reprocurement was awarded to Areawide on the basis of its second low bid in the May-June 1988 competition for the initial contract, after that bid was "reinstated and adjusted." In reaching the decision to negotiate only with Areawide, USDA determined that it was "unforeseeable" (unlikely) that the ranking of the bidders in the May-June 1988 solicitation competition would change or that negotiations for the reprocurement would result in the "reduction" by any of those bidders of the hourly rates which they had bid in June 1988 below that which it negotiated with Areawide, since the minimum hourly wage rate had since been increased. The agency's position is that due to an urgent and compelling need to obtain guard services, its action in this regard was proper in view of its duty to reprocure the required services at a fair price and to minimize the defaulted contractor's damages.

1/ MSI alleged that Areawide was not the second low bidder on the original solicitation. However, the protester apparently abandoned this issue since it did not mention it in its comments on the agency report, in which the agency explained that it miscalculated the bids. See Universal Hydraulics, Inc., B-235006, June 21, 1989, 89-1 CPD ¶ 585.

MSI contends that the USDA's justification of its noncompetitive award to Areawide was not reasonable because there was sufficient time between the agency's notice to Securiguard of the termination of its contract (April 4) and the date on which the agency would need the services of another contractor (May 1) for the agency to seek some competition, at the least through simplified procedures such as oral quotations, for the required services. MSI also contends that it was not reasonable for the agency to assume Areawide was the only available contractor that could properly provide the necessary security services or that award to it would best accomplish the agency's duty to minimize costs to the defaulted contractor. Finally, MSI argues that in any case the options should not have been included in the reprocurement.

The agency first argues that the likelihood of MSI, as the fifth low bidder, obtaining the award on a competitive reprocurement, "would be so remote as not to be deemed [an] interested [party] because it would not be in line for award should its protest be sustained." To the extent the agency is arguing that under our Bid Protest Regulations, 4 C.F.R. § 21.0(a) (1989), MSI is not an interested party, we disagree since the agency itself has stated that there is no way of knowing how bidders would bid on a reprocurement. Since MSI competed in the initial solicitation by submitting a bid, its demonstrated interest as a potential competitor for the reprocurement after the default termination of the initial contract is sufficient for it to be considered an interested party to pursue this protest. See Consolidated Devices, Inc., B-232651, Dec. 20, 1988, 88-2 CPD ¶ 606.

With regard to the agency's reprocurement actions, it is well established that where, as here, a repurchase is for the account of a defaulted contractor, the procurement statutes and regulations which govern regular federal procurements are not strictly construed and, as the agency observes, we have stated that the contracting officer has considerable latitude in determining the appropriate method for repurchase. See Ikard Mfg. Co., 58 Comp. Gen. 54 (1978), 78-2 CPD ¶ 315. Federal Acquisition Regulation (FAR) § 49.402-6 authorizes contracting officers, in accordance with the Default clause (FAR § 52.249-8), to use any terms and acquisition method deemed appropriate for the repurchase, provided that the repurchase is made at as reasonable a price as practicable, and competition to the maximum extent practicable is obtained. Aerosonic Corp., 68 Comp. Gen. 179 (1989), 89-1 CPD ¶ 45; TSCO, Inc., 65 Comp. Gen. 347 (1986), 86-1 CPD ¶ 198; DCX, Inc., B-232692, Jan. 23, 1989, 89-1 CPD ¶ 55. Although contracting officers are given considerable discretion in

determining appropriate acquisition methods for the repurchase of goods or services not in excess of the undelivered requirement upon a contract termination for default, we will review a repurchase action to determine whether the contracting agency proceeded reasonably under the circumstances. TSCO, Inc., 65 Comp. Gen., supra.

We need not decide the propriety of the agency's reprocurement action with respect to the initial performance period since that portion of the contract has been completed. We find, however, that the agency did not act reasonably in including the two 1-year options as a part of this sole-source reprocurement. The agency justified its noncompetitive reprocurement on the basis of its urgent need to fulfill its responsibility to provide security at its facilities. Significantly, however, the agency's justification only referred specifically to guard services "for the five months remaining" under the basic requirement, and did not support the inclusion of the two 1-year options.

As indicated above, FAR § 49.402-6 authorizes contracting officers to use any terms and acquisition method deemed appropriate for the repurchase, provided that competition to maximum extent practicable is obtained. In this case, the agency made no attempt to obtain competition for the option periods, even though there was a 6-month period between the time the initial contract was terminated for default and the expiration of the base contract period--a more than adequate time to obtain competition for these periods. Moreover, the agency has offered no justification for having to include the option periods in the sole-source reprocurement. Where, as here, a noncompetitive award is based on urgent or compelling circumstances, it is improper to include options in the award, unless they are separately justified. See Colbar, Inc., B-230571, June 13, 1988, 88-1 CPD ¶ 562. Accordingly, we view the inclusion of the option periods in the reprocurement contract to be improper.

The protest is sustained. We recommend that the requirements represented by the options be competitively reprocured. If the price obtained under the competition is more advantageous than the current option price, the agency should not exercise the options or, if it already has done so, should terminate the Areawide contract and make award to the lowest priced offeror, if otherwise appropriate. We are so advising the Secretary of Agriculture. Since MSI's

protest is sustained, it is entitled to be reimbursed the costs of pursuing its protest, including attorneys' fees. 4 C.F.R. § 21.6(d)(1).

Milton J. Socolar

for Comptroller General
of the United States