



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Brown, Boveri-York Kaelte-und Klimatechnik
GmbH

File: B-237202

Date: February 2, 1990

Marcia G. Madsen, Esq., Morgan, Lewis & Bockius, for the protester.
Robert J. Cirillo, Toledo-Werk GmbH, for the interested party.
Herbert F. Kelley, Jr., Office of the Judge Advocate General, Department of the Army, for the agency.
Peter Iannicelli, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. General Accounting Office will not consider the propriety of a contracting agency's decision to terminate a contract for default, since that is a matter for the contracting agency's board of contract appeals under the contract disputes clause.
2. Generally, statutes and regulations governing regular federal procurements are not strictly applicable to reprocurement after default; General Accounting Office will review reprocurement only to determine if the contracting agency's actions were reasonable in the circumstances.
3. Award of replacement contract for repair and maintenance of meat wrapping machines used in commissaries to the second-low offeror under the original procurement after the agency terminated the original contract with the protester for default was reasonable, where: (1) urgent need for repairs to prevent spoilage required that replacement contract be awarded immediately; (2) it was unlikely that there would be any new offerors participating even if a new procurement were conducted because only a short period of time had elapsed between first procurement and award of replacement contract; (3) replacement contract was made at

price that was approximately 9 percent lower than replacement contractor's original offer; and (4) agency reasonably concluded that protester was not a potential source for the procurement contract in view of its performance problems under the defaulted contract.

DECISION

Brown, Boveri-York Kaelte-und Klimatechnik GmbH (BBY) protests award of contract No. DAJA37-89-C-0214 by the Army to Toledo-Werk GmbH (Toledo) for repair and maintenance of meat wrapping equipment. Awarded to Toledo on August 28, 1989, the contract is a replacement for contract No. DAJA37-89-C-0146 which was awarded to BBY on July 11 and which was terminated by the Army for default on August 25. BBY contends that the contract was improperly awarded to Toledo on a sole-source basis.

We deny the protest.

Request for proposals (RFP) No. DAJA37-89-R-0090 was issued by the United States Army Contracting Center, Europe, as a competitive procurement to solicit offers for maintenance and repair of Toledo meat wrapping systems in Army commissaries throughout Europe. Proposals were received from BBY and Toledo only, and the contract was awarded to BBY on the basis of its lower-cost proposal. The contract was a time-and-materials, labor-hour contract for the term of August 1, 1989, through July 31, 1990, and contained options for 3 additional years. Toledo had performed these services for the Army under the previous contract.

According to BBY, shortly after the contract was awarded, BBY attempted to purchase spare parts from Toledo. Toledo at first refused to sell the firm any parts, causing BBY great difficulty in making the repairs required under its contract with the Army. However, after "much heated negotiation" between BBY and Toledo Scale Corporation, the American parent company of Toledo, BBY received a letter on August 22 stating that Toledo had been instructed to supply the parts needed for performing the contract.

According to the Army, BBY's performance was "extremely deficient" between the August 1st start of performance and the August 25th termination of BBY's contract. The Army reports numerous instances in which BBY either did not respond to calls from various commissaries requesting repairs or make requested repairs within the time limits

prescribed in the contract.^{1/} The Army also reports that BBY "cannibalized" existing government equipment to get parts needed to make repairs to meat wrapping equipment.

On August 14, the Army ordered BBY to show cause by August 24 why its contract should not be terminated for default. As BBY did not satisfy the Army regarding its performance and did not convince the Army that the contract should not be terminated for default during the show cause period, the Army terminated BBY's contract on August 25. Concurrently, the Army began negotiations with Toledo, the only other offeror under the solicitation, for a replacement contract. On August 28, the contracting officer verbally notified Toledo that the Army accepted Toledo's offer and that the firm was thereby awarded the replacement contract for a basic period of 1 year with options for 2 additional years.^{2/}

BBY protested to the Army on September 8, alleging that the award to Toledo was an improper sole-source award. The Army denied BBY's protest by letter of September 18. On September 29, BBY filed its protest in our Office.

As a preliminary matter, the propriety of the termination for default of BBY's contract is a matter of contract administration within the jurisdiction of the contracting agency and the Armed Services Board of Contract Appeals (ASBCA) under the disputes clause of BBY's contract and, therefore, is not for resolution under our Bid Protest Regulations. See 4 C.F.R. § 21.3(m)(1) (1989); Joseph L. De Clerk and Assocs., Inc., 68 Comp. Gen. 183 (1989), 89-1 CPD ¶ 47. We note in this regard that BBY filed a complaint with the ASBCA regarding the termination of its contract on November 13, 1989. Insofar as BBY alleges that any deficiencies in its performance were attributable solely to Toledo's refusal to sell BBY spare parts and that Toledo may have violated either restraint of trade or antitrust laws, such allegations concern matters outside our bid

^{1/} Under the contract terms, BBY generally was required to respond to requests within 24 hours and to make repairs within 48 hours after beginning repair work.

^{2/} By letter of November 13, 1989, the contracting officer notified our Office that she does not intend to exercise the options in the replacement contract, but will seek offers for those years on the basis of full and open competition.

protest function. See Joseph L. De Clerk & Assocs., Inc.-- Request for Reconsideration, B-233166.3, Apr. 6, 1989, 89-1 CPD ¶ 357. Further, there is no indication that the Army was involved in any way in the actions by Toledo which BBY challenges.

The remaining issue--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. See DCX, Inc., B-232692, Jan. 23, 1989, 89-1 CPD ¶ 55.

Generally, in the case of a reprocurement after default, 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), 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. FAR § 49.402-6. We will review a reprocurement to determine whether the contracting agency proceeded reasonably under the circumstances. See TSCO, Inc., 65 Comp. Gen. 347, supra. Here, we find the Army's actions were reasonable.

In our opinion, the Army's decision to award a replacement contract to the second-low offeror on the original solicitation was proper, because of the urgent circumstances the Army faced. The Army reports that the majority of European commissaries rely on good performance of the meat wrapping machines to handle meat sales that average approximately 4 million pounds per month. If the machines fail to operate properly for even 3 days, spoilage will occur, resulting in thousands of dollars in losses, and serious disruption of service to commissary customers. The Army states that malfunctions that were not promptly repaired by BBY in accord with its contract left several installations in critical situations and that a replacement contract with a responsible contractor that "could perform the contract without further delay" had to be effected immediately. We have previously upheld as reasonable a contracting officer's decision to award a replacement contract to the second-low offeror under the original procurement where the requirement had become urgent at least in part due to delays related to the termination of the original contract. See DCX, Inc., B-232692, supra.

In addition to the urgency of the situation, the Army reports that it accepted the offer of the only other offeror

on the original procurement without conducting a new procurement, because only a short period of time--approximately 6 weeks--had elapsed between the first procurement and award of the replacement contract. Therefore, the contracting officer determined that it was unlikely that there would be any new offerors participating even if a new procurement were conducted. As the contracting officer believed that BBY had "failed to properly perform virtually every aspect of the contract," the contracting officer concluded that she could not consider awarding the replacement contract to BBY without having a preaward survey performed on the firm. After checking with cognizant Army officials, the contracting officer determined that a preaward survey, including a Defense Contract Audit Agency review, would take too long in view of the criticality of the situation. Given that the replacement contract was to be awarded just over 6 weeks after the original procurement had been completed, we find the contracting officer's decision to award to the next-low offeror in these circumstances to be reasonable. Id.

BBY argues that it was improperly excluded from the reprocurement because it was in a position to perform the services required as soon as it succeeded in negotiating a supply contract with Toledo; BBY states that it informed the Army of its agreement with Toledo before the reprocurement contract was awarded. BBY also contends that, at most, the Army should have awarded single purchase orders to Toledo to meet its short-term needs, pending completion of a competitive reprocurement.

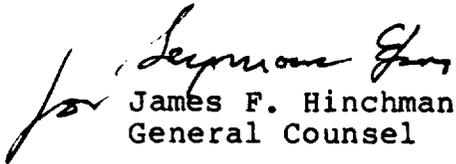
As a preliminary matter, the Army disputes BBY's contention that its performance problems necessarily were resolved as soon as it entered into a supply agreement with Toledo in late August; according to the Army, despite the fact that BBY already had secured an alternate supplier (other than Toledo) in early August, BBY's performance problems continued until the contract was terminated on August 25. In any event, contrary to BBY's position, we do not think that the Army was required to assume the risk that BBY's performance as demonstrated under the original contract would improve dramatically in the short term, particularly in view of the urgency of the Army's need for the required services.

Finally, although Toledo's replacement contract will cost the Army more than BBY's contract, we find that the Army made award to Toledo at as reasonable a price as was practicable. In an effort to reduce the excess reprocurement costs to be charged to BBY as the defaulted contractor under FAR § 49.402-6(c), the Army negotiated with Toledo and

got the firm to reduce its original offer by approximately 9 percent. The Army found this offer to be reasonable, even though higher than BBY's original offer, because: (1) the Army believes that Toledo's technicians are better trained to repair the machines used in the Army's commissaries; and (2) the Army asserts that BBY was understaffed at the beginning of the contract.

Since Toledo's renegotiated price was lower than its original offer, and because the need for these services was critical and Toledo as the former contractor was well-suited to begin work immediately, we find that the Army reasonably decided to accept Toledo's offer. Id. In addition, as noted above, the Army has decided not exercise the options under the procurement contract and instead will competitively resolicit those requirements, so that the sole-source award to Toledo will be limited to the remainder of the base year.

The protest is denied.

for
James F. Hinchman
General Counsel