



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Pacific Dry Dock & Repair Company  
**File:** B-237611.2; B-237751  
**Date:** March 19, 1990

Jess B. Millikan, Esq., Derby, Cook, Quinby & Tweedt, for the protester.  
Justin P. Patterson, Esq., Department of the Interior, for the agency.  
Peter A. 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 to be resolved under the disputes clause of the contract.
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. Termination of protester's prior contract for default may properly be considered by contracting officer in determining protester nonresponsible for award of reprocurement contract.
4. Contracting officer had a reasonable basis for finding protester nonresponsible in reprocurement for repairs to ship, where: (1) agency had terminated original ship repair contract with protester for default after determining that protester's poor workmanship had damaged ship, thus necessitating reprocurement for additional repairs; (2) protester had been unable or unwilling to repair problem with ship's propeller shaft after more than 7 months of negotiations with agency under original contract; and (3) proposal submitted in reprocurement showed that protester did not plan to change its work methods or the personnel used, if awarded the reprocurement contract.

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**DECISION**

Pacific Dry Dock & Repair Company (PDD) protests the Department of the Interior's rejection of the offer PDD submitted in response to request for proposals (RFP) No. 1779, and award of a contract to Southwest Marine, Inc. (SWM), pursuant to RFP No. 1786.<sup>1/</sup> PDD contends that the contracting officer improperly determined PDD to be nonresponsible to perform the work under RFP No. 1779 and canceled the solicitation because no other timely offers were received by the agency. The protester also argues that, after having rejected its offer under RFP No. 1779, the agency improperly issued a second solicitation (RFP No. 1786) for the same requirement and, ultimately, made award to SWM on a sole-source basis pursuant to the second solicitation.

We deny the protest.

On November 21, 1988, the United States Geological Survey (USGS) awarded a contract to PDD to perform dry dock, inspection, and repair services on a research vessel, the Samuel P. Lee. PDD was supposed to complete repairs on the Lee by December 21, 1988, but, during the term of the contract, a problem developed in connection with the vessel's propeller shaft so that it would no longer turn freely, thus rendering the ship inoperable. The contracting agency asserted that the propeller shaft problem was caused by PDD's defective workmanship.

Specifically, USGS charged that PDD did not perform the required work on the stern tube, through which the propeller shaft passes, in accord with the welding procedures specified in PDD's contract. USGS communicated its concerns to PDD and ordered PDD to perform remedial actions in an effort to cure the propeller shaft problem. Extensive discussions were held between USGS and PDD during the period from January through July 1989, in an attempt to correct the problem. However, all attempted repairs failed, and the contracting agency ultimately terminated PDD's contract for default.

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<sup>1/</sup> RFP Nos. 1779 and 1786 are reprocurements for repairs to a research vessel, the Samuel P. Lee, originally begun by PDD under contract No. 14-08-0001-22200, which was terminated for default by the contracting agency on August 2, 1989.

The agency determined that the Lee urgently needed to be repaired as it was essential for ongoing marine projects which had been delayed while repairs were attempted. Without prompt repairs to the Lee, USGS found that a number of scientific programs would be jeopardized at a potential loss to the government of more than a million dollars. Therefore, USGS developed specifications designed to effect the repairs needed due to the allegedly defective work done by PDD. The protester inquired of USGS whether it would be allowed to participate in the reprocurement. In spite of PDD's prior poor performance, the contracting officer elected to accept a proposal from PDD.

On August 24, 1989, USGS issued RFP No. 1779, a reprocurement conducted pursuant to the default clause of PDD's contract, to acquire the dry dock and repair services deemed necessary to correct the damage done under the original contract. Because the Lee was no longer seaworthy, the reprocurement RFP was issued to SWM and PDD, the only two firms having adequate dry dock facilities and known to perform these type of services in the immediate geographic area. Only PDD submitted its initial proposal by 10 a.m., on September 5, the closing time specified in the RFP; SWM submitted a late proposal at 10:53 a.m. on the closing date.

The technical evaluation panel determined that PDD's proposal was technically unacceptable. In addition, the contracting officer found PDD to be nonresponsible to perform the work required in the reprocurement. The nonresponsibility determination, dated October 20, 1989, cited PDD's poor performance on the defaulted contract for repairs to the Lee and the firm's proposal of essentially the same management staff, work force and work methods for the replacement contract. Because no eligible offers had been received from responsible firms, USGS decided to cancel RFP No. 1779 and to obtain the services from SWM.<sup>2/</sup>

Consequently, on October 20, 1989, USGS issued another solicitation, RFP No. 1786, to SWM alone. SWM submitted a proposal which was evaluated as technically acceptable overall, and negotiations were conducted with the firm. SWM's initial proposed price was \$257,293. However, after negotiations, SWM agreed to do the work for \$230,000, a price which the contracting officer concluded was reasonable in the circumstances, and the contract was awarded to SWM on November 10.

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<sup>2/</sup> PDD filed its initial protest alleging that USGS improperly rejected its offer on October 30, 1989.

The dispute regarding whether PDD caused the propeller shaft problem and the propriety of the termination for default is a matter of contract administration within the jurisdiction of the contracting agency and is for resolution under the disputes clause of PDD's contract, not 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. Accordingly, the issue for resolution is whether USGS' reprourement of the required ship repairs was conducted properly after USGS terminated PDD's contract for default. See Brown, Boveri-York Kaelte-und Klimatechnik GmbH, B-237202, Feb. 2, 1990, 90-1 CPD ¶ 148. More specifically, the issue before us is whether the contracting officer was justified in determining that PDD was nonresponsible and awarding the contract to the remaining offeror, SWM, on a sole-source basis.

Generally, in the case of a reprourement 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 a reasonable price and obtain competition to the maximum extent practicable. FAR § 49.402-6. We will review a reprourement to determine whether the contracting agency proceeded reasonably under the circumstances. See TSCO, Inc., 65 Comp. Gen. 347, supra. Here, we conclude that the agency's determination that PDD was nonresponsible and decision to award to the sole remaining offeror were reasonable.

In examining PDD's proposal in the reprourement, the contracting officer concluded that the proposal did not reflect substantial changes to the oversight or workmanship previously used in unsuccessfully performing the original contract. Since it was USGS' opinion that PDD's poor workmanship had caused the propeller shaft problem in the first place, and because PDD proposed "more of the same" in the reprourement, the contracting officer found PDD to be nonresponsible based primarily on PDD's poor past

performance for the exact work that was now being reproced.<sup>3/</sup>

While PDD sought to establish in the protest that the propeller shaft problem was not caused by PDD's workmanship, in our view, the contracting officer's nonresponsibility determination was reasonable. The contracting officer relied on the fact that PDD had been terminated for default because USGS believed PDD had caused the problem in the first place and because PDD had not been successful in providing a cure in spite of negotiations that took place between USGS and PDD over a 7-month period. Contracting officers properly may rely on prior default terminations to support findings of nonresponsibility. See Automated Datatron Inc., 68 Comp. Gen. 89 (1988), 88-2 CPD ¶ 481; Herbert Bauer GmbH & Co., B-225500.3, Aug. 10, 1987, 87-2 CPD ¶ 142.

Furthermore, in spite of the fact that USGS had asserted that PDD's work under the original contract had caused damage to the Lee, PDD's reprourement proposal showed that PDD was essentially planning to do the propeller shaft repairs with the same personnel and in much the same manner that the original work had been performed. Under these circumstances, the contracting officer reasonably determined that PDD would not be able to remedy the problem and effect adequate repairs in the rapid manner required by the urgent

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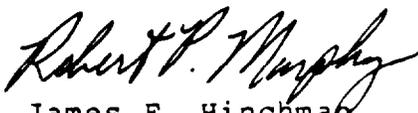
<sup>3/</sup> The contracting officer's statement in response to the protest discusses a preaward survey of PDD conducted by USGS. According to the agency, a USGS contract specialist telephoned representatives of both the Navy and the Coast Guard to inquire about PDD's performance on recent ship repair contracts with both agencies; based upon the conversations, the contract specialist concluded that PDD had not performed satisfactorily in either case. PDD has responded to this statement by providing letters from cognizant contracting officials at both agencies to the effect that PDD's performance under both contracts was satisfactory. While the legal memorandum submitted by the agency listed the preaward survey as grounds for the nonresponsibility determination, the USGS contracting personnel state that the information was not used in the determination. This is confirmed by the document itself, which refers only to the protester's history doing the work in question and its proposal. As a result, whether or not the agency's conclusions from the preaward survey were correct is not relevant to the issue here.

circumstances. See Automated Datatron Inc., 68 Comp. Gen. 89, supra.

Once the contracting officer had eliminated PDD from consideration for award, SWM alone remained as the only firm that does this type of ship repairs in the San Francisco Bay area and that has dry dock facilities large enough to accommodate the Samuel P. Lee. The reprocurment of the necessary repairs had to be confined to the San Francisco Bay area, because the ship was no longer seaworthy and could neither be towed nor powered to a distant dry dock without the possibility of additional damage. Moreover, the repairs were urgently needed in order to avoid disrupting various USGS projects and losing related funding amounting to more than a million dollars. In these circumstances, where repairs were required to be made as quickly as possible and only one responsible firm had adequate facilities within the necessary geographic area of performance, we find that the agency's decision to award the contract to SWM on a sole-source basis was reasonable. See DCX, Inc., B-232692, Jan. 23, 1989, 89-1 CPD ¶ 55.

Finally, the contracting agency found that SWM's contract price of \$230,000 was reasonable in view of the exigency of the situation. The record shows that SWM initially proposed to do the repairs for a total price of \$257,293, while USGS estimated that the price should be \$174,694. However, in order to expedite completion of the repairs so that the ship would be seaworthy in time to begin several of the scientific projects while the weather still permitted, USGS approved SWM's paying overtime rates to its workers to work more than a regular schedule, thus causing increased costs to be incurred by SWM. The record also reflects that SWM would not agree to do the work for less than \$230,000, in part because of SWM's concern that likely litigation between PDD and the agency might adversely impact upon SWM's contract. As PDD has neither alleged nor shown that SWM's total price was unreasonably high, and because of the fact that the repairs had to be completed as quickly as possible, we find that the agency's determination was rational in these circumstances.

The protest is denied.

  
for James F. Hinchman  
General Counsel