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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: International Technology Corporation

File: B-250377.5

Date: August 18, 1993

Dorn C. McGrath III, Esq., and Christopher L. Rissetto, Esq., Holland & Knight, for the protester.
William E. Hughes III, Esq., Whyte & Hirschboeck, for Laidlaw Environmental Services (GS), Inc., an interested party.
Paul M. Fisher, Esq., and Cynthia Guill, Esq., Department of the Navy, for the agency.
Christine F. Bednarz, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

An agency reasonably awarded a defaulted contract, including options, to the next-low, acceptable offeror from the original competition at its best and final price, since only 80 days passed between the original competition and the default, such that the prior competitive prices could reasonably be said to reflect what a recompetition of the requirement would achieve.

DECISION

International Technology Corporation (ITC) protests the Department of the Navy's award of the reprocurement of its contract No. N68378-93-D-8740 for waste management services to Laidlaw Environmental Services (GS), Inc., under request for proposals (RFP) No. N62474-91-R-0019. ITC contends that the Navy did not obtain proper competition for the reprocurement.

We deny the protest.

The Navy issued the RFP on December 26, 1991, for the procurement of hazardous waste management services for various Department of Defense activities within the San Francisco Bay area, including collection, transportation, packaging, and disposal services. The RFP contemplated the award of a fixed-price, indefinite quantity contract for a 1-year base period and two option periods, for a total contract period not to exceed 36 months.

Eight offerors responded with initial proposals by the amended February 7, 1992, proposal due date. After soliciting and evaluating revised proposals, the agency commenced discussions with seven offerors whose proposals were deemed to be within the competitive range; these offerors submitted best and final offers (BAFO) on January 15, 1993. On January 29, the Navy awarded the contract to Environmental Protection Services, Inc. (EPS), which had submitted the low-priced, technically acceptable proposal. Laidlaw submitted the next-low-priced, technically acceptable proposal, and ITC submitted the high-priced, technically acceptable proposal.[1]

EPS commenced performance on February 1. According to the agency, EPS quickly encountered performance problems, including delinquency on most of the delivery orders issued. Consequently, on April 1, the Navy terminated EPS's contract for default. To reprocure the services, the agency decided to negotiate an award for the remainder of the defaulted contract, including options, with the next-low, acceptable offeror from the original competition, Laidlaw. According to the Navy, this acquisition method was selected because the original competition had been so recently completed, because award to the next-low offeror mitigated the damages to the defaulted contractor, and because even a limited recompetition would further delay and disrupt these vital services. On April 6, the Navy awarded the undelivered portion of the defaulted contract, including options, to Laidlaw, based upon Laidlaw's agreement to honor its BAFO prices. This protest followed.

ITC claims that its exclusion as a potential source for the reprocurement contract violated Federal Acquisition Regulation (FAR) § 49.402-6(b), which requires that the contracting officer "obtain competition to the maximum extent practicable for the repurchase" of the undelivered work under a defaulted contract.[2] In ITC's view, this competition requirement precluded the Navy from negotiating an award with the next-low offeror on the original

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[1]Laidlaw held a predecessor contract for these services from April 1, 1989, to March 31, 1992. ITC held the interim contract for these services from April 1, 1992, until February 1, 1993, when the EPS contract commenced.

[2]In addition, FAR § 49.402-6 requires the contracting officer to obtain as reasonable a price as practicable for the repurchase. Although ITC alludes that the Navy failed to obtain a reasonable price by awarding the contract to Laidlaw on a sole-source basis, Laidlaw's BAFO price was approximately 6 percent lower than ITC's and basically equivalent to the government estimate.

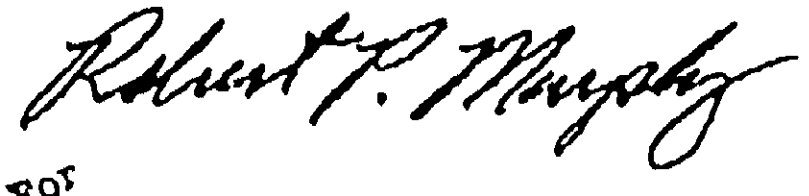
solicitation, where there were other offerors, such as itself, allegedly capable of satisfying the Navy's requirements within the time constraints of the reprocurement. In essence, the protester believes that, in order to justify this "noncompetitive" award, the agency was required to demonstrate that only Laidlaw could commence performance within the pressing time constraints of the reprocurement, which ITC, the predecessor contractor, claims cannot be done.

Although FAR § 49.402-6(b) requires the maximum competition practicable for a repurchase, it also provides that if, as here, the repurchase is for a quantity not over the undelivered quantity terminated for default, the contracting officer may "use any terms and acquisition methods deemed appropriate for the repurchase." Our Office will review the reasonableness of the agency's selected acquisition method against this competition requirement, while recognizing, as a general rule, that the statutes and regulations governing regular procurements are not strictly applicable to reprocurements after default. TSCO, Inc., 65 Comp. Gen. 347 (1986), 86-1 CPD ¶ 198; Tecom Indus., Inc., B-236371, Dec. 5, 1989, 89-2 CPD ¶ 516. Within this context, our Office has held that it is reasonable to award a reprocurement contract to the next-low, qualified offeror on the original solicitation at its original price, provided that there is a relatively short time span between the original competition and the default, and there is a continuing need for the services. Hemet Valley Flying Serv., Inc., 57 Comp. Gen. 703 (1978), 78-2 CPD ¶ 117; DCX, Inc., B-232672, Jan. 23, 1989, 89-1 CPD ¶ 55; VCA Corp., B-219305.2, Sept. 19, 1985, 85-2 CPD ¶ 308, aff'd, B-219305.3, Oct. 11, 1985, 85-2 CPD ¶ 403. Under such circumstances, an agency can reasonably view the offers received under the original solicitation as an acceptable measure of what the competition would bring, sufficient to satisfy the FAR § 49.402-6(b) competition requirement for the reprocurement. VCA Corp., supra; Hemet Valley Flying Serv., Inc., supra; compare Master Sec., Inc., B-235711, Oct. 4, 1989, 89-2 CPD ¶ 303 (agency should not make award to the next low offeror in the original competition if the delay between the original competition and the default is too long to assure the original prices reflect the current

competitive environment);[3] see also Adaptive Concepts, Inc., B-243304, June 25, 1991, 91-1 CPD ¶ 605 (where there was a 6 month period between receipt of proposals and the award of the defaulted contract to the next low offeror at its proposal price, and the agency reasonably justified the award based on urgency).

Here, there was a continuing need for the waste disposal services when the default occurred. At that time, approximately 60 days had passed since the contract was awarded and approximately 80 days had passed since the submission of BAFOs. The Source Selection Authority (SSA) for this procurement stated in an affidavit that there was no reason to believe that the prices for these services had changed significantly during this time period given the low rate of inflation--a fact which ITC does not dispute and which seems reasonable in light of the recency of the original competition. Thus, the record evidences that the original competition remained an accurate index of the competitive environment; therefore, the Navy was justified in awarding the reprocurement contract to the next-low, acceptable offeror on the original solicitation at its original price. See DCX, Inc., supra; VCA Corp., supra; Hemet Valley Flying Serv., Inc., supra.

The protest is denied.



For James F. Hinchman
General Counsel

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[3]In Master Security, we found that the agency improperly included the contract options in a sole-source reprocurement to the next-low bidder, since the award of the options was not justified by an urgent and compelling need. The default in Master Security occurred more than 10 months after bids had been submitted under the original competition, which undercut any assurance that the prior bids still reflected the prices that could be obtained in a recompetition and rendered unreasonable a noncompetitive award to the next-low bidder absent some independent justification.