



Comptroller General
of the United States

3371210

Washington, D.C. 20548

Decision

Matter of: Government Associates

File: B-240682.5

Date: October 12, 1993

Ruth E. Ganister, Esq., Rosenthal and Ganister, for the protester.

Thomas F. Abernathy, Esq., and George Papiouanou, Smith, Currie and Hancock, for Case, Inc., an interested party.

Leslie A. Cook, Esq., and James M. Carr, Esq., Defense Logistics Agency, for the agency.

John L. Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Defense Logistics Agency reasonably determined that noncompetitive sale of surplus government property--contractor inventory obtained from a defaulted contractor because of progress payments made--should be canceled because it was conducted in a manner inconsistent with competition requirements of 40 U.S.C. § 484 (1988 & Supp. IV 1992).

2. Claim that valid sales contract of contractor inventory existed that should be honored or that the government should be liable for damages if it is not honored, involve matters of contract administration not subject to review by the General Accounting Office, but are for consideration by a contract appeals board or a court of competent jurisdiction.

DECISION

Government Associates protests the Defense Logistics Agency's (DLA) cancellation of a sale of surplus Nomex greige material to Government Associates.¹ Government

¹We consider this protest under 4 C.F.R. § 21.11 (1993), since the Defense Logistics Agency, by letter dated January 13, 1987, has agreed to our considering bid protests involving its surplus property sales. See Consolidated Aeronautics, B-225337, Mar. 27, 1987, 87-1 CPD ¶ 353.

Associates argues that it has a binding contract for the material, and that DLA must honor the contract.

We deny the protest.

On October 31, 1986, DLA awarded contract No. DLA100-87-C-0333 to Case, Inc. for 582,480 fire retardant coverall flight suits. Case's contract was terminated for default by DLA on July 20, 1989. Pursuant to the progress payments and default clauses of that contract, DLA subsequently obtained title to all property acquired or produced by Case that was allocable or properly chargeable to Case's contract. The property included the Nomex greige material acquired by Case for use under that contract. The material was located in various quantities in Kentucky, Pennsylvania, and North Carolina. The material located in North Carolina is the subject of this protest.

On June 21, 1991, Case made an unsolicited offer to purchase the material from the agency for \$150,000. Case reduced its offer to \$125,000 by letter dated September 13, 1991. On September 9, 1992, a representative of Government Associates contacted the agency and stated that Government Associates was interested in purchasing the material. On October 2, DLA received an offer from Government Associates to purchase the material for \$1.35 per linear yard. On November 18, 1992, Case again offered to purchase the materials for \$125,000. By letter dated March 1, 1993, a DLA Plant Clearance Officer accepted Government Associates's offer to purchase the material for \$1.35 per linear yard, and requested that Government Associates forward to DLA a certified check, cashier's check, or money order for the total amount offered, which, based on DLA's inventory, was \$157,650.30. DLA received this check on April 7. Case protested the sale on April 6. After investigating the matter, DLA, by letter dated May 20, returned Government Associates's check, and informed that firm that it was canceling the sale because it had determined that the Plant Clearance Officer lacked the authority to sell the material. This protest followed.

In the exercise of our bid protest function, our Office generally will not review a contracting agency's decision to terminate a contract, or any claim arising from such a termination, because under the Contract Disputes Act of 1978, 41 U.S.C. § 602(a)(4) (1988), these are matters of contract administration for consideration by a contract appeals board or a court of competent jurisdiction. Medical Gas & Respiratory Servs., Inc., B-216632, Feb. 27, 1985, 85-1 CPD ¶ 246; see Amarillo Aircraft Sales & Servs., Inc., B-214225, Sept. 10, 1984, 84-2 CPD ¶ 269. However, where the contracting agency's action is based upon the determination that the contract was improperly awarded, our

Office will review the validity of the procedures leading to the award to the terminated contractor, Mansfield Assocs., Inc., B-242270, March 13, 1991, 91-1 CPD ¶ 284; Central Texas College, B-211167.3, Mar. 2, 1984, 84-1 CPD ¶ 259.

Government Associates argues that because it completed the requisite forms for sale and delivered a cashier's check to DLA as requested, it has a binding contract for the material and the agency "must honor said contract." DLA responds that the sale was improperly conducted without competition contrary to applicable law and regulation, and that the Plant Clearance Officer therefore had neither implied nor actual authority to conduct the sale.

The statute governing the disposition of surplus government property requires, except in limited circumstances not applicable here, that all disposals or contracts for disposal of surplus property be made by the sealed bidding method or, in certain circumstances, by negotiated sales at fixed prices, with both such sales being publicized in a manner consistent with the value and nature of the property involved. 40 U.S.C. § 484(e) (1988 & Supp. IV 1992); see William D. Garrett, B-192592, Nov. 16, 1978, 78-2 CPD ¶ 350.

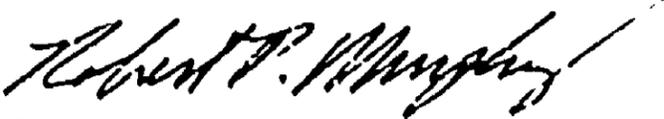
The sale of the Nomex greige material to Government Associates was not conducted in a manner consistent with the procedures envisioned by 40 U.S.C. § 484(e). The sale was never advertised, nor was any kind of solicitation for the sale ever issued by the agency, nor was there any effort to obtain competition. Rather, it appears that the sale was based on the selection of one of two unsolicited offers to purchase the material with no evidence that the agency determined that the sale was in the government's best interests. No justification was prepared as to why this sale could or should be noncompetitive; nor is one apparent. The protester has not explained how this sale could possibly fall under the stated exceptions to the requirement for competition required by the statute or how this sale otherwise complied with that statute. Under the circumstances, DLA could reasonably conclude that the noncompetitive sale to Government Associates was improper.²

²The agency asserts that this sale of contractor inventory was supposed to be conducted in accordance with the Defense Acquisition Regulation Supplement (DFARS) § 245.610 and subpart 245.73, but was not. The protester asserts that this sale does not fall under that regulation because it is "work in process" inventory from a defaulted contract, to which the government had acquired title in order to liquidate progress payments that have been made under the defaulted contract, and the DFARS excludes such sales from

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The real focus of the protester's argument is that DLA consummated a binding contract that the agency must honor. Whether a binding contract exists and whether Government Associates might be entitled to damages from the cancellation of the sale are matters of contract administration not subject to bid protest review by our Office.

The protest is denied.


for James F. Hinchman
General Counsel

²(...continued)

its coverage. See Federal Acquisition Regulation § 45.600. The protester essentially claims that there are no applicable agency regulations, other than the plant clearance officer's reasonable exercise of responsibility under the default clause, that govern this sale, and thus the sale did not violate any regulation. We need not decide the meaning of the FAR § 45.600 exemption as it applies to this sale, since 40 U.S.C. § 484(e) governs all surplus government property disposals and the protester has not explained how this sale is exempt from, or consistent with, that statute.