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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: King Nutronics Corp.

File: B-259846

Date: May 3, 1995

Neil Papiano, Esq., and Dennis A. Page, Esq., Iverson, Yoakum, Papiano & Hatch, for the protester.
B. Kevin Bennett, Esq., Department of the Air Force, for the agency.
Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency properly excluded defaulted contractor from reprocurement where record shows that it reasonably did not expect to receive a conforming product in a timely manner from the company.

DECISION

King Nutronics Corp. protests the Department of the Air Force's failure to solicit it under request for proposals (RFP) No. F33660-95-R-7004 for deployable torque calibration systems.[1] The solicitation was issued as a partial reprocurement against the account of the protester, which had defaulted under an earlier contract for the items.

We deny the protest.

The original contract, F33659-94-C-7000, which called for delivery of 75 deployable torque calibrator systems, was awarded to King Nutronics on November 3, 1993, at a price per unit of $11,858. The contract required the awardee to submit a first article for agency testing. King Nutronics submitted a first article for testing in March 1994; the first article failed 22 of 71 criteria and was rejected. The contracting officer subsequently determined that it would be in the government's best interest to permit King Nutronics a second opportunity to submit an acceptable first

[1]A deployable torque calibrator is a high precision instrument designed for on-site calibration of torque wrenches, torque watches, "T" handle wrenches, and torque screwdrivers used by the Air Force on aircraft guidance systems.

article. The agency tested the second first article during early July 1994 and determined that major deficiencies still existed. By letter dated July 7, the contracting officer formally notified King Nutronics that its second first article had been rejected and that a decision to terminate its contract for default was pending. The contracting officer subsequently decided to terminate the contract since, in his judgment, major changes would be required to correct the deficiencies and King Nutronics appeared unwilling to make these changes. King Nutronics received notice of the termination on November 4.[2]

On November 10, the agency issued RFP No. F33660-95-R-7004, requesting updated price proposals, to the two offerors other than the protester that had submitted technically acceptable proposals under the earlier RFP. Both offerors responded by the November 23 closing date. The agency then solicited best and final offers which were received on December 21. On December 27, the agency awarded a contract in the amount of $846,208 (or $15,597 per unit) to Consolidated Devices, Inc.

King Nutronics complains that despite its timely request,[3] the agency failed to furnish it with a copy of the RFP until after the initial closing date, thereby depriving it of the opportunity to submit an offer. The protester insists that it was improper for the agency to exclude it from the competition simply because its previous contract had been terminated for default.

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[2]The protester has appealed the termination for default to the Armed Services Board of Contract Appeals (ASBCA).

[3]According to the protester, its president requested a copy of the reprocurement documents during a telephone conversation with the contracting officer on November 7. The contracting officer refused to furnish the documents and suggested that the protester make a Freedom of Information Act (FOIA) request for them, which the protester did the same day. On November 12, the agency notified King Nutronics by telephone that its FOIA request would not be processed until King furnished a written statement that it would pay for costs associated with the processing of the request. On November 17, the protester amended its FOIA request to include such a statement, and on November 29, the agency released a copy of the solicitation to it. The copy released failed to indicate either the date the solicitation had been issued or the closing date for receipt of offers, however, and on December 12, King again contacted the agency for this information which was furnished to it.

The agency explains in response that it did not exclude the protester from the reprocurement simply because King Nutronics's previous contract had been terminated for default; it excluded the protester because, based on its experience with the company under the earlier contract, pursuant to which King had failed to furnish an acceptable first article, it did not reasonably expect to receive a conforming product in a timely manner from the protester.

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 Federal Acquisition Regulation (FAR) § 49.402-6, the agency may use any terms and acquisition method deemed appropriate for repurchase of the requirement, provided it obtains as reasonable a price as practicable and competition to the maximum extent practicable. Our review of the procurement is limited to determining whether the agency proceeded reasonably under the circumstances. Barrett and Blandford Assocs., Inc., B-250926, Feb. 2, 1993, 93-1 CPD ¶ 95. Here, we see no basis to object to the agency's actions.

Although an agency may not automatically exclude a defaulted contractor from a reprocurement simply because it has defaulted, Ikard Mfg. Co., 58 Comp. Gen. 54 (1978), 78-2 CPD ¶ 315, it may consider the circumstances which led to the termination for default in determining whether or not to resolicit the company, Douglas County Aviation, Inc., B-208311, June 8, 1983, 83-1 CPD ¶ 623, and it is not required to solicit a source that it does not reasonably believe will be capable of fulfilling its requirements. Barrett and Blandford Assocs., Inc., supra; Introl Corp., B-210321, June 1, 1983, 83-1 CPD ¶ 591. Here, as noted above, the protester failed in two attempts to submit an acceptable first article under the prior contract, both times deviating materially from the specifications, in the contracting officer's judgment.[4] The contracting officer determined that the protester appeared unwilling to make the changes necessary to correct the deficiencies in the first article. Under these circumstances, we think that the contracting officer reasonably believed that the protester would not be capable of fulfilling the agency's requirements, and thus properly did not include the protester in the firms solicited for the reprocurement.

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[4]We recognize that the protester disputes the agency's determination regarding the acceptability of its second first article, but this is a matter for decision by the ASBCA, to which the termination for default has been appealed, and not our Office. See 4 C.F.R. § 21.3(m)(1) (1995); Barrett and Blandford Assocs., Inc., supra.

To the extent that the protester appears to be under the impression that had it been able to obtain a copy of the RFP prior to the closing date and submit an offer, the agency would have been required to consider it for award, it is mistaken. Where an agency has reasonably decided not to solicit an offeror under a reprocurement, it is not required to consider an unsolicited offer from that source. See Douglas County Aviation, Inc., supra; Las Energy Corp., B-242733, May 21, 1991, 91-1 CPD ¶ 497 (protester not prejudiced by agency's failure to furnish it with copy of solicitation where agency had reasonably determined not to solicit it).

The protester also argues that the agency failed to seek the maximum competition practicable on the repurchase, as required by the FAR, by failing to publish a synopsis of the solicitation in the Commerce Business Daily (CBD); by allowing only 13 days for the submission of offers; and by failing to send copies of the solicitation to all small business concerns on the agency's mailing list.

Given our conclusion that the agency properly did not solicit an offer from the protester, the protester is not an interested party to raise this issue since even if the protest were sustained on this ground, the protester would not be eligible to compete in the reprocurement. See Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3556 (1988); 4 C.F.R. § 21.0(a). In any event, the argument is without merit. The contracting officer decided to resolicit the two sources that had provided technically acceptable proposals under the earlier RFP rather than undertaking a completely new acquisition effort, since, in his judgment, the latter approach was unlikely to increase competition significantly and would add at least 180 days to the administrative lead time for completing the reprocurement. We do not think that such a decision was unreasonable. Once the agency had reasonably determined to restrict the reprocurement to the two known sources, it had no reason to attempt to generate additional interest in the requirement through publication of a synopsis in the CBD or mailing of a copy of the RFP to all sources on its mailing list.

The protest is denied.

\s\ Michael R. Golden
for Robert P. Murphy
General Counsel