DCCUMENT RESUME

03639 - [A2693861]

[Exclusion of Defaulted Contractor from New Competition for Reprocurement]. B-187723. September 22, 1977. 5 pp.

Decision re: PBE Uniforms, Inc.; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).
Contact: Office of the General Counsel: Procurement Law II.
Budget Function: General Government: Other General Government (806).
Organization Concerned: Defense Logistics Agency: Defense Personnel Support Center.
Authority: Assignment of Claims Act of 1940, as amended (31 U.S.C. 203; 41 U.S.C. 15). A.S.P.R. 2-407.8(b)(3). A.S.P.R. 8-602.6. F.P.R. 1-8.602-6. 54 Comp. Gen. 161. 42 Comp. Gen. 493. 54 Comp. Gen. 29. 54 Comp. Gen. 853. 27 Comp. Gen. 343. 54 Comp. Gen. 973. B-186158 (1976). B-184172 (1976). B-181558 (1974). B-171659 (1971). B-165884 (1969). B-187476 (1976). B-182318 (1975). B-183420 (1975). B-181455 (1975).

The protester, whose contract was terminated for default, objected to the agency's failure to solicit them for reprocurement. A defaulted contractor may not be automatically excluded from competition since such exclusion would constitute an improper premature determination of nonresponsibility. The right of the defaulted contractor to be solicited upon reprocurement was limited by the rule that the repurchase contract may not be awarded to such a contractor at a price greater than the terminated contract. (Author/SC)

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DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-187723 DATE: September 22, 1977

MATTER OF: PRB Uniforms, Inc.

DIGEST:

1. Although statutory requirement that contracts be let after competitive bidding is not applicable to reprocurements, when contracting officer conducts new competition for reprocurement, defaulted contractor may not automatically be excluded from competition since such exclusion would constitute an improper premature determination of nonresponsibility.

2. Right of defaulted contractor to be solicited upon reprocurement is limited by rule that repurchase contract may not be awarded to such contractor at price greater than terminated contract since award would be tantamount to modification of existing contract without consideration.

PRB Uniforms, Inc. (PRB), whose contract to supply durable press shirts to the Defense Logistics Agency's Defense Personnel Support Center (DPSC), Philadelphia, Pennsylvania, was terminated for default, has protested that agency's failure to solicit it for repurchase of the shirts and subsequent refusal to accept its late offer which, although lower than that of any other offeror, was higher than the terminated price.

PRB's contract was partially terminated on September 17, 1976, for failure to deliver; the balance was terminated on March 28, 1977. Request for proposals No. DSA100-76-R-1500 for 337,920 shirts, the initial quantity terminated, was issued by DPSC on September 21, 1976, and synopsized in the Commerce Business Daily on September 28, 1976; closing date was October 8, 1976. DPSC subsequently revised its delivery requirements and requested best and final offers by October 26, 1976.

Although it was on the qualified bidders list, PRB was not among the 55 firms solicited or 7 firms responding by that date. PRB subsequently learned of the solicitation and on October 28, 1976, it submitted an offer of $6.28 each FOB origin; its unit prices on the terminated contract had ranged from $4.45 to $4.94. PRB also protested the award of the repurchase contract to any other firm at a price higher than $6.28.

DPSC treated the offer as late and refused to consider it. After determining, pursuant to Armed Services Procurement Regulation (ASPR) § 2-407.8(b)(3) (1976 ed.), that award should be made despite the protest, DPSC awarded the repurchase contract to Lankford Manufacturing Company, Inc. (Lankford) on January 6, 1977, at unit prices of $7.22 and $7.25.

PRB argues that it should not have been excluded from competition and that the Government's duty to mitigate damages required acceptance of its offer since excess costs (based on a unit price of $4.46 for the terminated contract) would have been $321,024 less if the repurchase contract had been awarded to PRB at $6.28 instead of to Lankford at $7.23.

In not soliciting PRB, DPSC claims reliance on the many decisions of this Office in which it was said that when a procurement is for the account of a defaulted contractor, the statutes governing procurements by the Government are not applicable, see Allied Research Associates, Inc., B-183420, July 15, 1975, 75-2 CPD 38; International Harvester Company, B-181455, January 30, 1975, 75-1 CPD 67; Decatur-Wayne, Inc., B-181366, October 9, 1974, 74-2 CPD 200; Aerospace America, Inc., 54 comp. Gen. 161 (1974), 74-2 CPD 130; Charles Kent, B-180771, August 7, 1974, 74-2 CPD 84; B-178885, November 23, 1973; B-176070, December 7, 1972; B-171659, November 15, 1971; B-154650, August 12, 1964; 42 Comp. Gen. 493 (1963), and that the defaulted contractor may be disregarded as a source of supply. See B-175482, May 10, 1972; B-171636, January 17, 1972; B-165884, May 28, 1969; B-159575, August 31, 1966.

These decisions were based on the premise that the defaulted contractor would be liable for and would ultimately fund the reprocurement costs in excess of the defaulted contract price. We understand, however, that excess costs are recovered from defaulted contractors in a relatively small number of cases (primarily as a result of insolvency or bankruptcy) and that repurchase contracts, including the excess costs thereof, more often than not involve the expenditure of appropriated funds. In any event, those decisions were never meant to imply that contracting officials are free to proceed in whatever manner they see fit when awarding a reprocurement contract. In Charles Kent, supra, we pointed out while "considerable latitude is given the contracting officer * * * his actions must be reasonable in deciding what form the relet contract should take, and must be consistent with his duty to mitigate damages." See also B-175482, supra. Furthermore, it has been held that when formal advertising procedures are utilized in connection with a reprocurement, the Government "has the obligation to maintain the integrity of the bidding

system by applying the regulations relevant to that procedure." Royal - Pioneer Paper Box Manufacturing Co., Inc., ASBCA No. 13059, April 10, 1969, 69-1 BCA 7631. Applicable procurement regulations also provide that repurchases "shall be at as reasonable a price as practicable considering the quantity required by the Government and the time within which the supplies or services are required." ASPR § 8-602.6 (1976 ed.); Federal Procurement Regulations (FPR) § 1-8.602-6 (1964 ed).

What we glean from these decisions and provisions is that while the statutory requirement that contracts be let after competitive bidding is not applicable to reprocurements, see 42 Comp. Gen. 493, supra, once the contracting officer decides that it is appropriate to conduct a new competition for the reprocurement, he may not automatically exclude the defaulted contractor from that competition nor choose to ignore the regulatory provisions applicable to competitive procurements. Our prior cases stating that the defaulted contractor could be disregarded as a source of supply either arose out of a proper sole-source reprocurement, B-175482, supra, or essentially were predicated on the nonresponsibility of the defaulted contractor for the repurchase contract. See, e.g., B-171636, supra; B-165884, supra.

Responsibility determinations, however, may not be made in advance of the receipt of a bid or proposal. See, in this regard, Plattsburgh Laundry and Dry Cleaning Corp.; Nu Art Cleaners Laundry, 54 Comp. Gen. 29 (1974), 74-2 CPD 27, in which we pointed out that an agency's deliberate refusal to furnish a copy of a solicitation to a would-be bidder "was an improper and premature nonresponsibility determination." We have also noted that default is only one factor to be considered in determining responsibility. See B-165884, supra, and cases cited therein. Moreover, the boards of contract appeals do not regard a defaulted contractor as per se nonresponsible for the reprocurement contract, see Churchill Chemical Corporation, GSBCA Nos. 4321, 4322, 4346, 4353, January 24, 1977, 77-1 BCA 12,318; Woodrow P. Hudson d/b/a San Diego Concrete Disposal, ASBCA No. 21044, October 7, 1976, 76-2 BCA 12,182 and cases cited therein, and we have expressly upheld award to a defaulted contractor on the repurchase contract after the contractor was determined to be responsible. See R.H. Pines Corporation, 54 Comp. Gen. 853 (1975), 75-1 CPD 224.

The fact that the defaulted contractor has a right to be solicited, however, does not necessarily entitle him to have his low bid or offer considered for award. The right is limited by the long established rule that a repurchase contract may not be awarded to the defaulted contractor at a price greater than the terminated contract price, because this would be tantamount to modification of the existing contract

without consideration. See Volcanite Portland Cement Co. v. United States, 74 Ct. Cl. 692 (1932); F & H Manufacturing Corporation, B-184172, May 4, 1976, 76-1 CPD 297; Allied Research Associates, Inc., supra; R. H. Pines Corporation, supra; Western Filament, Inc., B-181558, December 10, 1974, 74-2 CPD 320; Decatur-Wayne, Inc., supra; Aerospace America, Inc., supra; B-171659, supra; B-165884, supra; 27 Comp. Gen. 343 (1927); H & S Oil Company, Inc., ASBCA No. 16321, June 9, 1972, 72-2 BCA 9520; P. L. Andrews Corp., ASBCA No. 5722, August 31, 1960, 60-2 BCA 2787.

Turning to the facts of this case, we find that while PRB was entitled to compete for this procurement, it was not entitled to have its late offer considered. In the first place, although the contracting officer failed to solicit PRB, the procurement was duly synopsized in the Commerce Business Daily and we believe therefore that PRB was on notice of the pending repurchase despite the contracting officer's failure to solicit a proposal from it. See Southeastern Carbonics, Inc., B-187476, November 12, 1976, 76-2 CPD 406; Del Norte Technology, Inc., B-182318, January 27, 1975, 75-1 CPD 53; see also Scott Graphics, Incorporated, 54 Comp. Gen. 973 (1975), 75-1 CPD 302. Secondly, PRB's offer was at a price in excess of the defaulted contract price, thereby precluding its acceptance in any event.

In so concluding, we have considered PRB's contention that "the government had a duty to consider [its] offer in mitigation of damages" notwithstanding the higher offered price. PRB states that it will "vigorously contest" both the validity of the termination for default and the excess cost assessment before the Armed Services Board of Contract Appeals, and urges that this Office "take into consideration" various Board decisions regarding the Government's duty to mitigate damages. PRB particularly refers to Wear Ever Shower Curtain Corporation, GSBCA No. 4360, December 16, 1975, 76-1 BCA 11,636, which PRB states stands for the proposition "that the mere fact that a defaulted contractor bid on the repurchase at a price higher than that of the defaulted contract was not a basis for rejection of that bid in meeting the Government's duty to mitigate damages," and which contains dicta to the effect that "a quasi-reformation of the original contract" resulting from the acceptance of the defaulted contractor's higher price "could have been avoided by assertion of the Government's right to excess reprocurement costs under the defaulted contract." In this regard, PRB asserts that the Government could withhold or set off against amounts due under the reprocurement contract the difference between the reprocurement price and the original price "so that the net amount actually paid to the defaulted contractor would be no higher than the original terminated contract price."

The question of whether the Government met its duty to mitigate damages in this case is a matter for resolution by the Board pursuant to the Disputes clause of the defaulted contract. Kaufman De Dell Printing, Inc., B-186158, April 8, 1976, 76-1 CPD 239; International Harvester Company, supra. We cannot agree, however, that it would have been proper for the Government to accept PRB's offer at a price higher than those contained in the defaulted contract. While it may be possible to contractually provide that acceptance of a defaulted contractor's higher priced offer will not operate as a modification of the defaulted contract (a matter on which we express no opinion at this time), no such provision was contained in the original PRB contract, in the repurchase solicitation, or in PRB's offer in response thereto. Thus, under well-established Government contract principles, acceptance of PRB's offer would have legally constituted a modification of the original contract, notwithstanding any accompanying assertion by the Government of its right to excess reprocurement costs. Moreover, the Government's set-off rights are limited by the Assignment of Claims Act of 1940, as amended, 31 U.S.C. 203, 41 U.S.C. 15 (1970), which would preclude the Government's setting off excess costs in the event of a valid assignment of the repurchase contract to a financing institution. Although PRB argues that the "no set off" provisions of the Act would not apply to the repurchase contract, because "the rules regarding the repurchase solicitation are different than would normally apply," we are aware of no authority supporting the proposition that the Act does not apply to repurchase contracts.

In light of the above, the protest is denied. To the extent that our prior decisions are inconsistent with this decision, they are modified in accordance with the views expressed herein.

Deputy Comptroller General
of the United States