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T. Crowley, PL-2

DECISION

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

FILE: B-191922 DATE: August 14, 1978

MATTER OF: Hemet Valley Flying Service, Inc.

DIGEST:

1. Question concerning propriety of sole-source award of reprocurement contract is within GAO bid protest jurisdiction, since GAO considers if award was made in accordance with applicable procedures, and does not consider either propriety of termination of original contract or whether contracting officer met duty to mitigate reprocurement costs, both of which are properly for consideration by boards of contract appeals.

2. Bidder on original procurement is interested party under GAO Bid Protest Procedures so as to be able to protest sole-source negotiated reprocurement of original contract.

3. Contracting officer acted reasonably in awarding reprocurement contract to next low bidder on original procurement having equipment available to perform needed services at price not in excess of that bidder's original bid since agency had urgent requirement for immediate reprocurement and under circumstances prior bids could be considered acceptable measure of what competition would bring.

4. Contention that required services for two air bases should have been reprocured separately instead of as one contract item is without merit in light of agency explanation that better pricing results from single procurement.

Hemet Valley Flying Service, Inc. (Hemet Valley) of Hemet, California, protests the award on April 10, 1978 of a negotiated contract, number 49-101-162, by the Forest Service, Department of Agriculture, to the

T&G Aviation-Globe Air, Inc. Joint Venture (T&G-Globe), of Mesa, Arizona, for air tanker services, which was a reprocurement of services defaulted under another contract. Hemet Valley contends that the reprocurement was improperly negotiated on a sole-source basis.

Under the contract originally awarded, Central Air Service (Central) of Rantoul, Kansas was to have aircraft available for use from April 1, 1978.

On April 7, 1978, the contract with Central was terminated for default. On that same day, the contracting officer determined that the services had to be immediately reprocured because the Forest Service, Region 3 (Southwest) was "in very high to extreme fire condition" and Region 8 (Southeast) was experiencing "heavy fire activity" requiring the use of air tankers. The contracting officer then decided to negotiate the reprocurement with T&G-Globe, the third low bidder (19% higher than Central) on the original procurement, as T&G-Globe had planes available. (The second low bidder, 11% higher than Central, had also been awarded a contract for all aircraft offered and apparently did not have equipment available for this requirement. Hemet Valley was fourth low bidder at 38% above the Central bid. The other two bids were 40% and 69% higher than the bid of Central).

The agency reports that the contracting officer, after considering the impact of inflation on wages and cost of aircraft parts, believed that if T&G-Globe would perform the contract at a price no greater than that bid on the original IFB, the price would be fair and reasonable. T&G-Globe agreed to perform the services required at the price originally bid.

The basic issue as framed by the protester is whether "the Forest Service abused its discretion by employing a non-competitive unreasonable method of reprocurement, a method which was inconsistent with the agency's duty to mitigate the excess costs of re-procurement."

Initially, we must decide whether this Office should exercise jurisdiction in this matter. The Forest Service and T&G-Globe both argue that we should not

because the propriety of the default termination has been appealed by Central to the Agriculture Board of Contract Appeals (Board) and any assessment of excess costs of reprocurement against Central may also be appealed to the Board. However, as the protester points out, the propriety of the default termination is not an issue in this case. What is at issue is the propriety of the sole-source approach to the reprocurement. We do agree that to the extent "the reasonableness of the reprocurement costs is inferentially raised by the central issue of this protest," it is a Board matter and not for consideration by this Office. See, e.g., Kaufman DeDell Printing, Inc., B-186158, April 6, 1976, 76-1 CPD 239; International Harvester Company, B-181455, January 30, 1975, 75-1 CPD 67. The basic issue itself, however--whether the reprocurement action was conducted in accordance with applicable procurement procedures--is one over which we properly can and do exercise jurisdiction without impinging on the jurisdiction of the contract appeal boards. See PRB Uniforms, Inc., 56 Comp. Gen. 976 (1977), 77-2 CPD 213; Charles Kent, B-180771, August 7, 1974, 74-2 CPD 84; Jets Service, Inc., B-186596, February 15, 1977, 77-1 CPD 108; Steelship Corporation, B-186937, March 10, 1977, 77-1 CPD 177.

T&G-Globe also questions the "standing" of Hemet Valley to the award. According to T&G-Globe:

> "* * * although Hemet originally bid * * * it does not have the standing of an unsuccessful bidder in response to that solicitation to challenge the subsequent negotiated procurement by the Forest Service. In the absence of any formal procurement proceeding in which it participated, it may well lack standing to pursue its present protest."

Our Bid Protest Procedures, 4 C.F.R. Part 20 (1977), provide that "[a]n interested party may protest to the General Accounting Office the award * * * of a* * * negotiated contract of procurement * * * by or for an agency of the Federal Government * * *." 4 C.F.R. 20.1 (1977). We have stated that "[i]n determining whether a protester satisfies the

interested party criterion, consideration is given to the nature of the issues raised and the direct or indirect benefit or relief sought by the protester. * * * This serves to insure a party's diligent participation in the protest process so as to sharpen the issues and provide a complete record on which the merits of a challenged procurement may be decided." Damper Design, B-190785, January 12, 1978, 78-1 CPD 31. Hemet Valley is clearly an interested party since its complaint is that it was improperly denied an opportunity to compete for the reprocurement award for which it was otherwise qualified; it need not have participated in the reprocurement to have that status. See, e.g., Kenneth R. Bland, Consultant, B-184852, October 17, 1975, 75-2 CPD 242; Enterprise Roofing Service, 55 Comp. Gen. 617 (1976), 76-1 CPD 5.

Although we agree with Hemet Valley as to the jurisdiction and interested party questions, we do not agree that the Forest Service's actions in this reprocurement were in contravention of the applicable procurement procedures. We have held that (as here) when a procurement is for the account of a defaulted contractor, the statutes and regulations governing procurement by the Government are not strictly applicable to the reprocurement. Aerospace America, Inc., 54 Comp. Gen. 161 (1974), 74-2 CPD 130; B-171659, November 15, 1971; 42 Comp. Gen. 493 (1963). While we did state in PRB Uniforms, Inc., supra, that when the contracting officer decides to conduct a new competition for the reprocurement he may not choose to ignore the regulatory provisions applicable to competitive procurement, the contracting officer has considerable latitude in determining the appropriate method of reprocurement, provided his actions are reasonable and consistent with the duty to mitigate damages. Charles Kent, supra; B-175482, May 10, 1972. The basic regulatory provision governing reprocurement upon termination for default is Federal Procurement Regulations (FPR) 1-8.602-6 (1964 ed.) which provides:

> "(a) Where the supplies or services are still required after termination and the contractor is liable for excess costs, repurchase of supplies or services which are the same as or similar to those called for in the contract shall be made

against the contractor's account as soon as practicable after termination. Such repurchase shall be at as reasonable a price as practicable considering the quality required by the Government and the time within which the supplies or services are required. * * *

"(b) If the repurchase is for a quantity not in excess of the undelivered quantity terminated for default, the legal requirements with respect to formal advertising are inapplicable. However, the contracting officer shall use formal advertising procedures except where there is good reason to negotiate. If the contracting officer decides to negotiate the repurchase contract, he shall note the reason in the contract file and shall identify the procurement as a repurchase in accordance with the provisions of the Default clause in the defaulted contract. * * *"

There is no argument here that formal advertising should have been used. Protester's objection concerns the negotiation of the reprocurement on a sole-source instead of a competitive basis. Thus, the question for resolution is whether the contracting officer's decision to contact only T&G-Globe was reasonable under the circumstances.

The defaulted contract covered items 12a and 12b (Coolidge and Coolidge/Rohnerville air bases, respectively) of the original solicitation. As the contracting officer perceived the situation on April 7, 1978, the aircraft required by items 12a and 12b were to be on 24-hour standby from April 1st. Both aircraft were scheduled to be at the designated base, Coolidge, on May 1, 1978, unless called up sooner. Region 3 (Southwest), where the Coolidge base is located, was experiencing very high to extreme fire conditions. There was also heavy fire activity in Region 8 (Southeast) where air tankers were being used and there was the possibility that air tankers from Region 3 might have to be dispatched to Region 8. The contracting officer knew that T&G-Globe was the next

low bidder on the original procurement which had aircraft available, and that its bid on the original contract was 19% higher than Central's. In the contracting officer's view, prices and costs had risen since the original bids had been received, so that a new contract price at not more than T&G-Globe's original bid would be a reasonable one and one arrived at through the recent bidding competition.

We think it is clear that the contracting officer was faced with a difficult decision. On the one hand, he had an extremely urgent need to obtain the necessary air tanker services; on the other hand, while taking steps to satisfy that need, he had the duty to act reasonably so as to keep excess reprocurement costs to a minimum. He resolved his dilemma by attempting to obtain what he believed would be the best price obtainable at that time, and planning to telegraphically solicit offers if he could not obtain that price from the firm most likely to agree to it. Although normally an agency must resort to competition to get the best available price rather than relying on prior bidding history as a firm indication of what prices could be expected from competing firms, see Olivetti Corporation of America, B-187369, February 28, 1977, 77-1 CPD 146, under the circumstances of this case we cannot conclude that the contracting officer was unreasonable in believing that he could best satisfy his responsibilities both to the Forest Service and to the defaulted contractor by negotiating for that price with the firm which had offered the price in a recent competitive environment.

In this regard, we point out that the awarding of a reprocurement contract to the second low bidder on the original solicitation is a recognized method of reprocurement, see Steelship Corporation, supra, particularly when the award is made at that bidder's original bid price. Cf. Fitzgerald Laboratories, Inc., ASBCA 15205, 15594, 71-2 BCA 9029. Here, in light of the relatively short time span between the original competition and the default, we think the contracting officer could reasonably view the bids received on the original invitation as an acceptable measure of what competition would bring, and, in view of the unavailability of equipment from the second low bidder, go directly to the third low bidder to ascertain if it would perform at its original bid price.

The protester asserts, however, that the contracting officer's decision is shown to be unreasonable because Hemet Valley has made an offer to perform the services for approximately 5% above the original contract price, which is less than T&G-Globe's price of 19% above the original price and substantially less than Hemet Valley's original bid. However, this offer from Hemet Valley is dated April 18, 1978, some eleven days after the reprocurement and 4 or 5 days after Hemet Valley knew of the reprocurement. Under these circumstances, we do not find Hemet Valley's offer to be persuasive as to the reasonableness of the contracting officer's actions.

The protester also contends that the contracting officer should not have reprocured the total services required in a non-competitive manner, but should have split the reprocurement into two parts. The Forest Service's position in this regard is as follows:

> "Several years ago, the Forest Service asked the Air Tanker Industry for their input for strengthening the air tanker bid. One of the most repeated items was to combine logical bases to lengthen the flying season for the successful bidders and in turn it would reduce the cost for the Forest Service, the rationale being, the longer the season, the more spread out the equipment amortizing rate would be, thus the daily rate could be reduced.
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> "The Coolidge base was one of the combinations that works in conjunction with Rohnerville base since their prime fire seasons are different. By combining two different size aircraft for Coolidge we gain additional price reduction because the successful bidder knows that he is assured he will have two aircraft working, one B-17 class and one C-119 class, one for the period April 1 - September 14, at Coolidge and one for April 1 - November 16, for Coolidge/ Rohnerville combination. Therefore, by design Items 12(a) and 12(b) are awarded to one bidder to obtain the best price for the Forest Service and in return the

> successful bidder has a good working season.
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> "Contrary to the theory put forth in the protest letter we would be stuck with higher not lower prices because the security of a longer season would be gone. Also, most important, we could not bill for excess reprocurement cost against the defaulted contractor because he would not be obtaining the same service for which he was defaulted."

In light of that explanation, we find no basis to disagree with the Forest Service's approach. See Paul R. Jackson Construction Company, Inc. and Swindell-Dressler Company * * *, 55 Comp. Gen. 366, 370 (1975), 75-2 CPD 220.

The protest is denied.

R.F. Keller

Deputy Comptroller General
of the United States