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Ozarry - Brock

DECISION

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

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FILE: B-192843 DATE: February 15, 1979

MATTER OF: Skip Kirchdorfer, Inc.

DIGEST:

1. Contracting officer's negotiated award of a reprocurement contract under the public exigency provision after soliciting four firms, not including defaulted contractor was reasonable under circumstances where defaulted contractor was first asked if it would perform the work under its separate requirements contract and it declined to do so. Contracting officer has considerable latitude in determining appropriate method of reprocurement, and defaulted contractor does not have automatic right to be solicited.

2. Where requirements contractor declines to accept work order exceeding contract's maximum order limitation (MOL) even though under MOL provision contractor could have agreed to perform work, agency did not breach requirements contract by awarding contract for such work to another firm.

3. Award of reprocurement contract may not be made to defaulted contractor at price in excess of defaulted contract price since such an award would be tantamount to modification of existing contract without consideration.

4. Questions concerning whether contracting agency met duty to defaulted contractor to mitigate damages resulting from reprocurement are for resolution by agency board of contract appeals under disputes provision of contract rather than by General Accounting Office.

Skip Kirchdorfer, Inc. (Kirchdorfer) protests the award of contract DAKF23-78-C-0634, by the Department of the Army, to Van H. Revis (Revis) for roofing work on two buildings at Fort Campbell, Kentucky. The contract was a reprocurement of work defaulted under a prior contract held by Kirchdorfer.

Subsequent to the default termination, Kirchdorfer was awarded a requirements contract (DAKF23-78-D-0272) for roofing work on miscellaneous buildings at Fort Campbell for the period August 1, 1978, to July 31, 1979. This contract contained a maximum order limitation (MOL) of $10,000 per order.

The Army reports that on August 14, 1978, Kirchdorfer was requested to honor a delivery order under the requirements contract for reroofing the two buildings at a price of $12,000. The agency states that this oral request was refused by Kirchdorfer, on the basis that the order for $12,000 was over its $10,000 MOL.

Thereafter, the contracting officer orally solicited proposals from four firms which had previously performed roofing contracts at Fort Campbell. Kirchdorfer was not requested to submit an offer. Three responded and contract DAKF23-78-C-0634 was awarded on September 5, 1978, to Revis, the low offeror at $16,319.00.

Kirchdorfer argues that the award to Revis was a breach of its requirements contract. Further, Kirchdorfer contends that the award is improper because the agency refused to use formal advertising in the reprocurement, did not solicit current contractors at the Fort and failed to act in a timely manner on the reprocurement. Kirchdorfer states that it could have performed the reprocurement work either under its requirements contract or under a separate contract for a maximum of $12,000 and should have been given the opportunity to do so.

The estimated value of the work ($12,000) on the two roofs, as calculated using the prices in the requirements contract, exceeds the contract's MOL of $10,000 per order. However, the protester argues that each roof constitutes a separate "requirement" whose value is within the MOL and should have been ordered individually under the requirements contract.

The MOL provides at paragraph (c) that the contractor shall honor any order which exceeds the MOL unless that order is returned to the issuing office within 10 days with notice of intent not to perform. Upon receipt of this notice, the Government may secure supplies from another source. Under the terms of this paragraph, it appears the contractor has the "right of first refusal" for all roofing requirements which exceed the MOL. Here the record indicates that the contracting officer orally contacted Kirchdorfer and inquired as to whether it would be interested in accepting an order for the $12,000 requirement. Kirchdorfer asserts that it indicated it would accept the work only if it were placed on two orders. The agency states that it interpreted Kirchdorfer's response as a rejection. Although this oral request and refusal may not have been in conformance with the procedural requirements of paragraph (c), since Kirchdorfer could have accepted the work under one order pursuant to this paragraph we believe the contracting officer acted reasonably in viewing this oral refusal as a rejection notice. Moreover, there is some question as to whether it would have been proper to reprocure from Kirchdorfer under the requirements contract since the price for the work would have exceeded the original contract price. See PRB Uniforms, Inc., 56 Comp. Gen. 976 (1977), 77-2 CPD 213. Under the circumstances, we do not believe there was a breach of Kirchdorfer's requirements contract.

With respect to the reprocurement process, we have held that when a procurement is for the account of a defaulted contractor, the statutes and regulations

governing procurement by the Government are not strictly applicable, Aerospace America, Inc., 54 Comp. Gen. 161 (1974), 74-2 CPD 130, but if a contracting officer decides to conduct a new competition for a reprocurement, he may not ignore the regulations regarding competitive procurement. PRB Uniforms, Inc., supra. We did not, however, hold that a defaulted contractor has an automatic right to be solicited. A 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. Ikard Manufacturing Company, B-192316, November 1, 1978, 58 Comp. Gen. ___, 78-2 CPD 315; Hemet Valley Flying Service, Inc., B-191922, August 14, 1978, 78-2 CPD 117.

Defense Acquisition Regulation (DAR) 8-602.7(b) (1976 ed.) provides that if a reprocurement is for a quantity not in excess of the undelivered quantity terminated for default, the requirements for formal advertising are inapplicable, although formal advertising may be used. Here the agency negotiated the reprocurement under 10 U.S.C. 2304 (a)(2) (1976), which permits the use of negotiation when the public exigency so requires. The agency states it negotiated in order to mitigate damages and to insure the installation of new roofs before winter, explaining that it was not able to begin the reprocurement until late August, in part because Kirchdorfer's surety took nearly three months to determine that it would not complete the work under the defaulted contract. Although Kirchdorfer believes there was sufficient time to formally advertise the reprocurement, considering the latitude enjoyed by the agency under our decisions and DAR 8-602.7(b) in determining the method of reprocurement, we find no basis to object to the agency's determination to negotiate. We also find no support in the record for the protester's contention that the agency failed to solicit an adequate number of sources under the circumstances or that it should have again solicited Kirchdorfer.

The remaining issues--whether the agency failed to act in a timely manner and whether an award should have been made at a price higher than the price Kirchdorfer states it could have performed at--seem to bear on the question of whether the agency properly met its duty to mitigate damages. That is a question for resolution by the Armed Services Board of Contract Appeals under the disputes provision of the defaulted contract, rather than by this Office.

The protest is denied.

Deputy Comptroller General
of the United States