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DECISION

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

FILE: B-200986 DATE: July 7, 1981

MATTER OF: Titan Atlantic Construction Corp.

DIGEST:

1. Whether prime contractor was required to provide protective system for underground oil distribution pipes and whether contracting agency interfered with prime contractor's relationship with subcontractor in violation of prime contract provisions are matters of contract administration which should be resolved under disputes clause of contract. Therefore, these protest issues are dismissed.

2. To extent protest involves disagreement between prime contractor and subcontractor, such matter is dispute between private parties and will not be considered by GAO.

3. Dispute arose between agency and contractor over whether contractor was required to make repairs and provide protective system for underground pipes, but agency never terminated contract for default. Instead, agency chose to effect repairs under separate contract. Agency may not automatically exclude contractor from competition for repair contract since such exclusion is tantamount to improper premature determination of nonresponsibility.

4. Agency decisions to procure on sole-source basis must be adequately justified. Here, agency decision to make sole-source award is not supported by record. Fact that awardee on repair contract installed original system and, therefore, was familiar with system is not legally adequate justification. Urgency basis is also legally inadequate justification where agency made no effort to determine existence of other sources which could perform repairs within prescribed timeframe. Protest, therefore, is sustained.

[Protest of Contract Award on Sole-Source Basis]

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Titan Atlantic Construction Corp. (Titan) has protested the sole-source award of a contract (No. DACA31-80-C-0175) issued by the United States Army Corps of Engineers to Krick Plumbing & Heating Company, Inc. (Krick). The contract is for furnishing cathodic protection for fuel oil pipes, repairing pipes, and installing aboveground fuel tanks for 211 family housing units at the Walter Reed Army Medical Center in Washington, D.C. Titan was the prime contractor for the design and construction of the family housing at this Walter Reed facility. Krick was originally a subcontractor under Titan's prime construction contract, and, as subcontractor, Krick installed the original underground fuel distribution system for supplying heat to the family housing units.

Beginning in October 1979, the Corps of Engineers discovered that the pipes carrying fuel throughout the heating system were leaking in several places. The Corps of Engineers notified Titan that leaks had been discovered and that, in view of the frequency and location of the leaks, the integrity of the entire oil distribution system was in question. The Corps of Engineers considered the leaks to be latent defects for which Titan was responsible under its design and construction contract. The Corps of Engineers pointed out to Titan that, under the provisions of that contract, Titan was responsible to provide cathodic protection of fuel pipes if soil resistivity measurements showed that such protection was necessary. On June 12, 1980, the Corps requested that Titan submit a plan to determine the cause of the leaks and recommend corrective action by June 20 since a sound, leak-free system had to be assured prior to the start of the next heating season. When Titan did not submit such a plan, the contracting officer for the original construction contract wrote Titan on July 9, indicating that the pipe system was deteriorating and would eventually result in a shutdown of the entire system for repairs and demanded that Titan submit its proposed plan for corrective action by July 18. On July 24, representatives of the Corps of Engineers and Titan met to discuss the problem. The contracting officer provided Titan with a copy of the Corps of Engineers' report on the matter, stated that he believed that Titan was obligated to repair the system, and gave Titan an

August 7 deadline for submission of its proposed repair plan. On that date, Titan indicated that it was investigating the pipe failure problem and would submit its findings upon completion of its investigation. Titan also indicated that "there is presently compelling evidence that the condition encountered is not the responsibility of Titan Atlantic Construction Corp." and that it would make a claim for all costs related to the repairs.

On August 14, the contracting officer informed Titan that its repeated failure to submit a report as requested showed that it did not intend to take expeditious action to repair the leaks. Accordingly, the contracting officer informed Titan that he intended to have the system repaired by separate contract and to deduct the cost from money owed to Titan under its construction contract. On August 27, Titan submitted its findings to the Corps. Titan indicated that it could effect the repairs over a 4-week period given 10 days' notice for $85,985. Furthermore, Titan disclaimed liability and stated that there was no way that it could have known that a cathodic protection system was necessary at the time of installation. Titan also suggested that the Corps of Engineers issue a new contract to cover the repairs.

On September 24, the contracting officer requested authority to negotiate a sole-source repair contract with Krick because: (1) Krick had installed the original system and was, therefore, familiar with the entire system; (2) Krick had willingly performed all repairs for the Corps; (3) Krick could begin performance immediately; and (4) the repairs had to be accomplished very quickly due to the impending cold weather and because the Maryland Environmental Protection Agency had cited the Walter Reed complex for oil pollution and demanded that repairs be made before the heating system could be used again. The request was approved by higher-level authority within the Corps on September 26 and a letter contract was executed with Krick on September 29. Telephonic negotiations resulted in agreement on a price of $43,021 on October 10. On October 15, the Corps of Engineers notified Titan that the contract for pipe

repairs and installation of a cathodic protection system had been awarded to another firm and that the cost of the repairs would be deducted from any monies owed to Titan.

On October 23, Titan protested to our Office on the bases that:

> (1) Titan was not given an opportunity to do the repairs on the basis of a constructive change or otherwise;
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> (2) The Corps interfered with Titan's subcontract relations with Krick since Krick would have been directed to perform the disputed work if the Corps had allowed Titan to effect the repairs; and
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> (3) The Corps should not have awarded the contract to Krick on a sole-source basis since no emergency existed, and, furthermore, the contract awarded went beyond the scope of the work recommended by the Corps' own Construction Engineering Research Laboratory.

Titan's first two grounds for protest are matters of contract administration which would necessarily involve determinations of the rights and obligations of the Corps and Titan under the Titan design and construction contract in order to decide whether each party had complied with provisions of that contract. See Harris Corporation, B-192632, April 5, 1979, 79-1 CPD 235. Whether Titan complied with the contract requirements and whether the Corps had the right to contract with Krick to make the repairs essentially involve a dispute between the parties which should be resolved under the disputes clause of the contract. See also, New England Telephone and Telegraph Company, 59 Comp. Gen. ____ (B-197297, September 25, 1980), 80-2 CPD 225. Moreover, Krick has argued that its contract with the Corps for repair of the oil distribution system in no way affected any rights Titan may have had under its subcontract with Krick for installation of the original distribution system. To the extent that

Krick and Titan disagree about their subcontract relationship, such matter is a dispute between private parties which we will not consider. See Ted R. Brown & Associates, Inc., B-201724, February 23, 1981, 81-1 CPD 127; System Development Corporation, B-191195, August 31, 1978, 78-2 CPD 159. Accordingly, since neither of these issues is appropriate for consideration under our Bid Protest Procedures (4 C.F.R. part 20 (1980)), they are dismissed.

Regarding Titan's charge that a sole-source award to Krick was not justified, the Corps of Engineers argues that a noncompetitive procurement was fully justified because: (1) the situation presented was analogous to a reprocurement after termination for default and, therefore, the statutes governing procurement by the Government were not applicable and (2) even if this case is not considered similar to a reprocurement action, the proper procedures were followed and appropriate authority to sole-source granted on the basis that "an exigency situation existed."

Defense Acquisition Regulation § 1-300.1 (1976 ed.) requires procurements to be conducted on a competitive basis to the maximum practical extent. Procurement on a noncompetitive basis is only authorized when the legitimate needs of the Government so require, e.g., when the minimum needs of the procuring agency can be met only by items or services which are unique; when time is of the essence and only one known source can meet the agency's need within the required timeframe; when it is necessary to insure compatibility between the procured and the existing equipment; or when an award to other than the proposed sole-source contractor would result in unacceptable technical risks. However, because of the requirement for maximum practical competition, the agency's decision to procure on a sole-source basis is subject to close scrutiny and, therefore, must be supported by adequate legal justification. A decision to procure on a sole-source basis will not be disturbed by this Office when the agency's written findings and determinations of the need to negotiate on a noncompetitive basis is supported by the record. See Electronic Systems U.S.A., Inc., B-200947, April 22, 1981, 81-1 CPD 309, and cases cited therein.

We believe that the Corps of Engineers' reliance upon our decisions in reprocurement actions (holding that, when a procurement is for the account of a defaulted contractor, the statutes governing Government procurements are not applicable) is misplaced. In those cases, the reprocurements were conducted only after the original contract had been terminated for default. Here, Titan has not been terminated. Rather, a dispute as to Titan's obligations under the original contract has arisen, and, as previously stated, we think the proper remedy for such dispute is found in the disputes clause of the contract. In this regard, we note that even Krick argues that Titan was not bound under the terms of its design and construction contract to provide cathodic protection for the underground pipes. Moreover, even where a contractor has been defaulted, once the contracting officer chooses to conduct a new competition for the reprocurement, he may not automatically exclude the defaulted contractor from consideration or ignore regulations applicable to competitive procurements unless the exclusion is based upon a proper sole-source determination or upon a proper determination that the defaulted contractor is not responsible. PRB Uniforms, Inc., 56 Comp. Gen. 976 (1977), 77-2 CPD 213. Neither exception is applicable here.

In the instant case, the record does not support the conclusion that competitive procurement was precluded.

One basis given by the Corps for awarding to Krick on a sole-source basis was Krick's familiarity with the system because Krick had installed the pipes originally and made subsequent repairs. However, this does not constitute adequate justification for conducting a noncompetitive procurement. A company's prior experience with the procuring agency which may facilitate the company's performance of the required services and enable it to better anticipate problems in the system is not a legally adequate justification to support a sole-source procurement. Furthermore, the fact that a particular contractor may be able to perform the services with greater ease than any other contractor does not justify a noncompetitive procurement to the exclusion of others. Electronic Systems U.S.A., Inc., supra.

The second basis advanced by the Corps was the need to make repairs before the start of the heating season. This argument is also an unacceptable justification absent evidence that only Krick could perform the work within the prescribed timeframe. Titan alleged all along that it could make the proper repairs in a timely manner. Further, there is no indication that the Corps made any effort to determine the existence of other commercial sources or the feasibility of a competitive procurement. We note that Titan found a firm which was supposedly willing and able to begin repairs with only 10 days' notice and complete repairs within 4 weeks.

Moreover, the Corps admits that the contracting officer chose not to let Titan do the repairs because of "his loss of faith in the ability of Titan to perform." Responsibility determinations, however, may not be made in advance of the receipt of a proposal and an agency's refusal to furnish a copy of a solicitation to a would-be offeror amounts to an improper and premature nonresponsibility determination. Even if Titan had been terminated for default on its design and construction contract, it could not properly have been found nonresponsible based solely on its previous performance prior to submitting a proposal. See W. M. Grace, Inc., B-197192, January 10, 1980, 80-1 CPD 33, and PRB Uniforms, Inc., 56 Comp. Gen. 976 (1977), 77-2 CPD 213. Accordingly, the contracting officer's decision to exclude Titan from the competition was tantamount to an improper premature determination of nonresponsibility.

Accordingly, we find that the Corps of Engineers did not properly justify its sole-source award to Krick and the protest is sustained. However, because the repairs were to be completed before the beginning of winter 1980, we cannot recommend corrective action. Therefore, we are notifying the Secretary of the Army of the deficiencies we have found in this procurement with the intent of preventing similar problems in future procurements.

Milton J. Socolar

Acting Comptroller General
of the United States