

DECISION



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

FILE: B-205820

DATE: July 13, 1982

MATTER OF: Diversified Computer Consultants

DIGEST:

1. Agency determination to reprocur on a sole-source basis is justified because the agency knew of only one source of supply which could reasonably be expected to timely deliver the required equipment.
2. Agency's properly justified sole-source reprocurement does not constitute an improper or premature nonresponsibility determination on the unsolicited defaulted contractor.
3. GAO does not consider protests contending that an agency's sole-source reprocurement action was inconsistent with the Government's duty to mitigate damages resulting from a default.
4. GAO finds that the possible presence of a conflict of interest--the Government employee, who allegedly drafted the relevant specifications for a procurement, became an officer in a firm submitting a proposal--is academic when the protester was the successful offeror in the procurement.
5. GAO concludes that the possible presence of a conflict of interest--involving a former Government employee, now employed by the awardee of reprocurement--is academic where the record shows that, at the time of the reprocurement, the awardee was the only supplier capable of satisfying the agency's urgent legitimate minimum needs.

Diversified Computer Consultants (Diversified) protests the sole-source reprocurement resulting in the award of contract No. 53-3142-2-009 to IBIS Corporation by the Department of Agriculture for the supply and installation of a central processor with certain special features. Diversified contends that (1) the sole-source award was improper because Agriculture knew that Diversified was willing and able to perform at a much lower price and (2) the award to IBIS resulted from improper action by a former Agriculture employee, who is now an officer of IBIS. Agriculture explains that, at the time of the reprocurement award, IBIS was the only firm capable of meeting its urgent requirements and that there is no evidence of improper action by the former employee. We find that the protest is without merit in part and is dismissed in part.

Agriculture's determination to reprocure followed the termination for default of Diversified's contract with Agriculture for the identical items. Diversified had been the successful offeror in a competitive procurement (IBIS was the only other acceptable offeror) resulting in award to Diversified on September 30, 1981, in the amount of \$551,249. Diversified's contract provided that Diversified had to supply and install the required equipment within 60 days after award. The record shows that Diversified was able to obtain an option to purchase the required central processor but Diversified was not able to timely obtain one required and material special feature. When Agriculture learned that Diversified was not going to meet the delivery requirements of the contract, Agriculture sent Diversified a 10-day cure notice, considered available alternatives and decided to terminate Diversified's contract and reprocure from the only other known source, IBIS. On December 9, 1981, Agriculture sent Diversified written notice of the termination for default and the contracting officer called Diversified to provide oral notice. On December 11, 1981, Diversified's president returned the contracting officer's telephone call and then received oral notice of termination and notice that on December 10, 1981, Agriculture had reprocured by awarding a contract in the amount of \$650,000 to IBIS. On December 14, 1981, Diversified protested here.

Diversified contends that the sole-source reprocurement was unjustified because on December 11, 1981, Diversified advised Agriculture that Diversified was willing and able to perform at a much lower price. Diversified states that, from the date of its award (September 30, 1981), it had kept Agriculture informed on its progress in obtaining the special feature. Diversified had tried and failed to get the processor manufacturer to install a new special feature on Diversified's processor after the processor was to be installed at the Agriculture site. Diversified also had tried and failed to obtain the processor manufacturer's assistance in taking the special feature from another existing processor and installing it on Diversified's processor. Diversified further had tried to order the parts of the special feature from the processor manufacturer so that the protester's proposed subcontractor could build the special feature from the parts. The record shows that, at the earliest, it was December 11, 1981, before the processor manufacturer indicated that all requested parts could be supplied.

Diversified argues that, in view of Diversified's advice to Agriculture on December 11, 1981, it was willing and able to perform (1) Agriculture's automatic exclusion of Diversified from consideration on the reprocurement violated statutes and regulations requiring competitive procurement, (2) Agriculture's action was tantamount to an improper and premature nonresponsibility determination, and (3) Agriculture breached its duty to mitigate damages when assessing excess reprocurement costs.

Agriculture reports that, since it was not until December 11, 1981, the day after the reprocurement award, that Diversified told Agriculture that some of the required parts for the special feature could be obtained from the processor manufacturer, Agriculture could not have considered that information. Agriculture states that the required central processor with special feature was urgently needed to replace rapidly deteriorating equipment used in processing Agriculture's payroll and personnel information. The situation, Agriculture reports, required an immediate remedy in order to avoid disruption, which could seriously damage the operation of Agriculture. Agriculture notes that IBIS delivered the required equipment 10 days after award.

Agriculture argues that a defaulted contractor, like Diversified, does not have an absolute right to participate in a reprocurement and that, at the time the reprocurement was necessary, Agriculture reasonably believed that a competitive procurement was not possible because IBIS was the only known source capable of meeting Agriculture's urgent needs. Agriculture also argues, citing our decision in Hemet Valley Flying Service, Inc., 57 Comp. Gen. 703 (1978), 78-2 CPD 117, that in a reprocurement situation, award of a contract to the second low bidder under the original procurement is a legitimate method of procurement where vital services could be disrupted.

In our view, the record clearly and convincingly shows that between the time that Agriculture sent the termination notice to Diversified on December 9, 1981, and the award to IBIS on December 10, 1981, Agriculture did not have any basis to conclude that Diversified could deliver the required special feature. We have held that a sole-source procurement is justified where the Government's minimum needs can be satisfied only by one firm which could reasonably be expected to make timely delivery. See, e.g., Bird Electronics Corporation, B-205155, June 2, 1982, 82-1 CPD ____; McDonnell Douglas Corporation, B-202904, August 18, 1981, 81-2 CPD 154. Titan Atlantic Construction Corp., B-200986, July 7, 1981, 81-2 CPD 12. Here, Agriculture urgently needed the equipment to avoid disruption of vital services. Agriculture had waited the contractual term for its competitively selected contractor, Diversified, to deliver as required. In the circumstances, Agriculture's determination that it could wait no longer than absolutely necessary seems reasonable and justified. We are persuaded, therefore, in view of the recent competition for this work and Agriculture's contacts with Diversified during the period of Diversified's contract, that Agriculture had a reasonable basis to turn to IBIS (the runner-up in the original competition) as the only known source of timely supply.

Regarding Diversified's contention--that Agriculture's action is tantamount to an improper or premature non-responsibility determination--we disagree. Since we find that Agriculture's determination to reprocure on

a sole-source basis was justified, we do not find that Diversified was improperly excluded on a nonresponsibility basis.

Regarding Diversified's contention--that by excluding Diversified from consideration in the reprocurement, Agriculture failed to mitigate damages (including Agriculture's alleged failure to obtain cost and pricing data from IBIS)--we do not consider protests contending that the procurement action was inconsistent with the Government's duty to mitigate damages resulting from a default. We conclude that the mitigation of damages question should be addressed by an administrative or judicial determination under the Disputes clause of the defaulted contract rather than our Bid Protest Procedures. See, e.g., Aero Products Research, Inc., B-205978, March 26, 1982, 82-1 CPD 288. Thus, we will not consider the merits of this aspect of Diversified's protest.

Diversified also contends that the award to IBIS resulted from improper action by a former Agriculture employee. Diversified believes that, prior to leaving Government employment, this former employee was directly responsible for drafting the specifications used in the initial procurement and reprocurement. Diversified states that the former employee then (about the time the initial procurement was publicized) purchased equipment to meet the specifications, stored the equipment, and submitted an offer at an exceptionally high price in anticipation of being the sole-acceptable offeror. Diversified further states that after award to Diversified, IBIS conducted a pressure campaign to discredit Diversified.

In response, Agriculture reports that the employee resigned in 1975 and the procurement request was first initiated in June 1981. Agriculture provided an audit report by the Agriculture Inspector General stating that there is no evidence that the former employee participated in any activity related to the contract.

In our view, there is no convincing evidence in the record of a conflict of interest on the part of the former employee. The record contains no indication that the specifications used in the initial procurement do not represent the agency's legitimate minimum needs. In any event, the fact that Diversified was successful on

the initial procurement renders academic any question of conflict of interest regarding the initial procurement. Regarding the reprocurement, in view of the urgency and Agriculture's knowledge of only one potential timely supplier at the time the reprocurement was conducted, the question of conflict of interest regarding the former employee also appears to be academic.

Accordingly, the protest is denied in part and dismissed in part.

Milton J. Fowler
for Comptroller General
of the United States