The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: A. J. Fowler Corporation

File: B-224156

Date: January 8, 1987

DIGEST

1. Following termination of mowing contract for default, contracting agency acted reasonably in obtaining those services by opening competition to the remaining bidders to the original solicitation so as to mitigate damages resulting from the default, thereby avoiding a sole-source award to the next low bidder on the original procurement.

2. Protester has not met burden of proving its case that the contracting officer failed to solicit from it an oral quotation for the repurchase services since the only evidence is conflicting statements by the protester and the agency.

DECISION

A. J. Fowler Corporation (Fowler) protests the award of a contract to Bentley Grassing Co., Inc. (Bentley), to complete the work which had been partially performed by Alabama Ground Maintenance (Alabama) under terminated contract No. DABT01-86-D-1014.

Under that contract, the contractor was to provide mowing services in the Cantonment and Family Housing Areas at Fort Rucker, Alabama. Fowler complains that the repurchase contract was awarded to a higher priced contractor absent a sufficient justification for doing so, in violation of the applicable procurement regulations. Fowler further contends that it was improperly excluded from competing in the reprocurement and asks that the contract with Bentley be terminated and the contract awarded to Fowler. We deny the protest.

The Army had initially awarded a contract under IFB No. DABT01-86-B-1003 to Lee Parker, the low bidder, on April 1, 1986. Parker's contract was terminated for default on April 11 and the agency commenced negotiations with the second low bidder who declined the award. The third low

bidder, Alabama Ground Maintenance, was awarded the first repurchase contract on April 18, but on September 2, the Army terminated that contract for default. Following the termination, the Army sought to reprocure the work against Alabama's account by soliciting oral quotations from the four remaining bidders to the original solicitation. A repurchase contract was awarded to Bentley on September 4 and Fowler filed its protest against the award with our Office on September 16.

Fowler first alleges that Bentley was not next in line for award when "the contract was abandoned" by Alabama Ground Maintenance; that Fowler was, in fact, the "next low bidder" and that the contracting officer improperly awarded the contract to the "next highest bidder." Fowler states that there are no valid reasons for the contracting officer's decision to "skip over" Fowler and make award to Bentley.

The contracting agency reports that the contract was awarded to Bentley as the lowest evaluated offeror that responded to an oral solicitation for these services. The agency reports that based upon the time remaining in the base year contract period as well as the "substantial quantity change" in contract services, the contracting officer decided to orally solicit offers from the four remaining bidders on the initial solicitation in order to obtain the most reasonable cost to the government and to maximize competition rather than make award to the "next low bidder" on the initial IFB.

As we indicated in our decision in TSCO Inc., 65 Comp. Gen. 347 (1986), 86-1 C.P.D. ¶ 198 at 5, where, as here, a repurchase is for the account of a defaulted contractor, the procurement statutes and regulations governing regular federal procurements are not strictly construed. Therefore, contracting officials may use any terms and acquisition method deemed appropriate for repurchase of the same requirement, provided the repurchase is at as reasonable a price as practicable and they obtain competition to the maximum extent practicable. Federal Acquisition Regulation (FAR), 48 C.F.R. § 49.402-6 (1985). We will review a repurchase action to determine whether the contracting agency proceeded reasonably under the circumstances. After examining the record before us, we conclude that the agency's decision to resolicit offers and not simply award the contract to Fowler as the next low bidder was reasonable.

It appears from the record that at the time of the second default termination, only 7 months remained in the base contract year and the quantity remaining for that period was

considerably less than at the time of the first default termination. The Army, concerned that too much time had elapsed between receipt of initial bids and the second repurchase, determined that the best way to mitigate costs to the defaulted contractor was to recompete the remaining services. Moreover, given the heavy rainfall and the condition of the grass at the time of the second default termination, the Army concluded that use of an oral solicitation would be the most expedient way to obtain the needed services.

Fowler contends that the contracting agency need not have changed the way in which the repurchase contract was let. Specifically, the protester alleges that when the contract initially awarded to Parker was terminated for default, the contracting officer elected to negotiate with the next low abstracted bidder until an award was made. In its view, when the second contract with Alabama also was terminated, the repurchase should have been conducted in a similar manner, with the resultant contract being awarded to Fowler.

The protester also challenges the Army's justifications for its decision to recompete the procurement. Fowler first argues that while the contracting officer claims that she was precluded from making an award to Fowler because its small business size status had been protested by one of its competitors, the contracting officer was nevertheless aware that the size protest did not contain the degree of specificity required under FAR to require any action by the Small Business Administration (SBA) and was, therefore, in its view, frivolous. Fowler cites the language used by the contracting officer in her transmittal letter to the SBA wherein she states that the "protest does not contain detailed evidence of the protest as required by FAR § 19.302(c)(2)" as support for its position that the entire reprocurement was conducted improperly. In any event, Fowler asserts that the Army should not be permitted to rely on the fact that a size protest was filed with the SBA to justify its decision to resolicit because the Army could have obtained the required services through use of a work order on an as-needed basis, "according to the prices already bid."

The record shows that the Army's primary concerns in the repurchase were obtaining the required mowing services as quickly as possible at the lowest possible price in accordance with the repurchase regulations. Thus, the agency determined that it would be in the government's interest to open competition to the four remaining bidders on the

original solicitation by requesting an oral quote from each. Three firms responded and award was made to Bentley, the firm with the lowest quote.

We believe that the Army's decision to conduct a new competition among the four firms that expressed interest in the original procurement was reasonable and consistent with the FAR requirement that competition be maximized. Moreover, it allowed the agency to make an award at less than the defaulted contract price. We note that since it is the objective of our bid protest function to promote full and free competition for government contracts, we generally do not look favorably upon protests that a contracting agency should procure supplies or services from a particular firm on a sole-source basis. TSCO, Inc., 65 Comp. Gen. at 351, 86-1 C.P.D. ¶ 198 at 6; cf., VCA Corp., B-219305.2, Sept. 19, 1985, 85-2 C.P.D. ¶ 308, (where we upheld a repurchase contract award to the second low bidder given the short time span between the original competition and the default and our finding that there was insufficient time after the default to conduct a new competition).

Finally, Fowler maintains in its comments on the agency report that contrary to the agency's representations to our Office, the contracting officer did not solicit a quote from the firm for the defaulted services. The protester states that he did receive calls from the contracting officer on August 26 and 29. According to the protester, however, the basis for both calls was to determine if the firm "had an interest in providing the services and if I could be there by September 1, 1986." In addition, the protester states that the contracting officer "explained to me that they were only asking for this information for the purpose of checking availability of sources." Fowler denies having submitted a price "other than the one written and included with his original bid."

The record does not support this allegation. In memoranda prepared by the contracting officer in connection with the new competition, the contracting officer described the various contacts she had with the four remaining bidders to the original solicitation and included the oral price quotations received from all three firms based upon the new estimated quantities. Also included in the agency's report is a price negotiation memorandum which refers to a "synopsis of prices quoted for the repurchase of mowing services." The protester was identified, in all the memoranda referenced herein, as having provided the contracting officer with an oral quotation.

The protester bears the burden of submitting probative evidence to prove its case, and this burden is not met where the only evidence is the protester's self-serving statements which conflict with the agency's report. Inter Systems, Inc., B-220056.2, Jan. 23, 1986, 86-1 C.P.D. ¶ 77 at 3. Thus, the evidence of record indicates that Fowler, as well as the other remaining bidders to the original solicitation, were treated equally in that they were given an opportunity to submit quotations for the remaining work and that the procuring activity repurchased the mowing services on the basis of the lowest evaluated offer.

Accordingly, the protest is denied.

for Seymour Efros
Harry R. Van Cleve
General Counsel