P. William

Comptroller General
of the United States

Washington, D.C. 20548

140159

Decision

Matter of: Tecom Industries, Inc.

File: B-236371

Date: December 5, 1989

DIGEST

Contracting agency has a reasonable basis for limiting the competition in a reprocurement action to the only known source capable of producing the items to meet its operational requirements and in excluding the protester where the agency reasonably finds that the protester, whose contracts for these items were terminated for default, is not technically capable of meeting the requirements of the reprocurement solicitation.

DECISION

Tecom Industries, Inc. protests the proposed award of a sole-source contract to UB Corporation under request for proposals (RFP) No. N00163-89-R-0652 issued by the Naval Avionics Center for the reprocurement of 441 antennas used in the Walleye weapon to transmit and receive data link signals. Tecom, the defaulted contractor, alleges that the agency did not obtain competition for the reprocurement to the extent practicable.

We deny the protest.

From 1982 through 1987 Tecom was awarded four contracts to manufacture Walleye antennas in accordance with a Navy drawing which defines the requirements for an airborne antenna that can perform satisfactorily in operational environments such as exposure to salt spray and high humidity. According to the agency, as early as 1983, Tecom encountered technical problems related to gold plating the baseplate of the antennas. As a result, several modifications extending the delivery schedules for each of the four contracts were issued to afford Tecom an opportunity to resolve the technical problems associated with the gold plating. The difference between the initial delivery dates and the final delivery dates, as extended, was as much as several years. Nevertheless, Tecom was unable to produce

antennas that could meet the environmental specifications for salt fog and humidity. Because of this combination of factors--repeated extensions of the delivery schedules and unsatisfactory gold plating of the antennas--the four contracts were terminated for default.

The Navy determined that the undelivered quantity of antennas would be reprocured against Tecom's account on a sole source basis since the agency had an urgent need for the antennas. The agency limited the competition to UB, the only known qualified source, based on a determination that unusual and compelling urgency for these items existed. Accordingly, the reprocurement was not synopsized in the Commerce Business Daily and, while a Justification and Approval (J&A) for other than full and open competition was prepared, it was never executed because of the agency's view that the procedural formalities for a J&A under the Competition in Contracting Act (CICA) of 1984, 10 U.S.C. § 2304(f)(2) (1988), were not required for a reprocurement action. In any event, the Navy explains, Tecom was not solicited for the reprocurement because the agency did not believe that Tecom was technically capable of fulfilling the requirements by the required delivery date. Award of the contract to UB has been stayed pending our resolution of this protest. See 31 U.S.C. § 3553(c) (Supp. IV 1986); 4 C.F.R. § 21.4(a) (1989).

Tecom's principal contention is that the proposed sole source award to UB is improper because the contracting officer did not obtain competition to the maximum extent practicable. More specifically, it is Tecom's position that the agency knew that Tecom was a potential source for these items since the firm had communicated to the contracting officer that it is "ready, willing and able" to satisfy the requirements of the reprocurement solicitation and can do so "faster than any other source." Tecom maintains that had it been allowed to participate in the reprocurement, the firm would have shown that it had resolved its problems with gold plating; that its parent company will support Tecom's efforts to satisfactorily perform the resultant contract; and, that Tecom's management and technical resources are totally committed to resolution of any further gold plating problems.

We have consistently held that where a reprocurement is for the account of a defaulted contractor, the procurement statutes and regulations governing regular procurements are not strictly applicable and that to repurchase the same requirement on a defaulted contract the contracting officer may use any terms and acquisition methods deemed appropriate, provided that competition is obtained to the maximum

extent practicable and the reprocurement is at as reasonable a price as practicable. Federal Acquisition Regulation (FAR) § 49.402-6 (FAC 84-5); Aerosonic Corp., 68 Comp. Gen. 179 (1989), 89-1 CPD ¶ 45; DCX, Inc., B-232672, Jan. 23, 1989, 89-1 CPD ¶ 55.

We find the contracting agency's decision to limit the reprocurement to the only firm--UB--it believed was capable of promptly producing the antennas in accordance with specification requirements and to exclude the protester was reasonable. As noted above, the Navy has a current urgent demand for these antennas. The record confirms that at the time the decision was made to solicit only UB, Tecom had a long-standing problem with satisfactorily gold plating the antennas and, as conceded by Tecom, this gold plating is essential to the satisfactory performance of the antennas in operational environments. Tecom now asserts that it has resolved its problems in gold plating. The record indicates that after Tecom's protest was filed it sought and obtained from the agency an examination of plated antennas which it claimed could meet the specification requirements. This examination revealed, however, that the antennas did not meet the specifications and that Tecom still had not achieved a repeatable plating process capable of producing acceptable antennas. Even though in its post-conference comments Tecom asserts that it has identified and has a tentative business arrangement with UB's plating subcontractor, the fact remains that Tecom has not demonstrated it can satisfactorily produce this item. Thus, Tecom has not refuted the Navy's position that the firm was not a potential source that should have been solicited.

Tecom also alleges that this noncompetitive reprocurement was not preceded by an adequate J&A, in that the preliminary document prepared by the agency here does not recite the factual bases to support urgency; was not signed by an individual with the requisite authority; and improperly discounts the availability of an alleged third source other than Tecom.

As we indicated above, the contracting officer prepared a proposed J&A for this procurement but it was never fully processed because of subsequent advice that none was needed for a reprocurement action. Since the statutes and regulations governing regular federal procurements are not strictly applicable to a reprocurement for the account of a defaulted contractor, the Navy's position seems reasonable. In any event, there is no requirement that the award of a contract on the basis of urgency be preceded by a written justification; rather, the J&A may be executed within a reasonable period of time after the contract is awarded.

10 U.S.C. § 2304(f)(2); Allied Signal, Inc., Garrett AiResearch, B-228591, Feb. 25, 1988, 88-1 CPD ¶ 193. Consequently, there is no basis for us to object to the lack of a J&A or to the adequacy of the preliminary document that was prepared.

The protest is denied.

James F. Hinchman
General Counsel