Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: E. Huttenbauer & Son, Inc.

File: B-239142.2; B-239143.2; B-239144.2; B-239145.2; B-239146.2; B-239314

Date: August 17, 1990

Francis L. Zarrilli, Esq., Fronefield and De Furia, for the protester.
Michael Trovarelli, Esq., Defense Logistics Agency, for the agency.
Robert A. Spiegel, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Defaulted contractor reasonably was not solicited on reprocurement of remaining quantities of defaulted contracts, where it expressly declined to perform defaulted contracts under existing conditions.

DECISION

E. Huttenbauer & Son, Inc. protests the determination of the Defense Personnel Support Center (DPSC), Defense Logistics Agency (DLA), not to solicit Huttenbauer for the reprocurement of the remaining quantities on six Huttenbauer contracts1/ for various food tray packs, which DPSC had terminated for default.

1/ Reprocurement of contract Nos. DLA13H-88-C-0794 and DLA13H-89-C-0828 was under solicitation No. DLA13H-90-R-6906; reprocurement of contract No. DLA13H-89-C-0576 was under solicitation No. DLA13H-90-R-6946; reprocurement of contract No. DLA13H-89-C-0813 was under solicitation No. DLA13H-90-R-6908; reprocurement of contract No.DLA13H-89-C-0985 was under solicitation No. DLA13H-90-R-6905; and reprocurement of contract No. DLA13H-89-C-0994 was under solicitation No. DLA13H-90-R-6907.

We deny the protests.

DLA terminated for default five of the six tray pack contracts on March 30, 1990, and the sixth contract on April 12. The agency states that the default terminations were caused by Huttenbauer's unwillingness or inability to meet established delivery schedules, even after requested extensions were granted. In addition, on March 30, DLA informed Huttenbauer that it would no longer be classified as an industrial preparedness planned producer of the tray packs.

The reprocurement solicitations were issued from April 19 to April 23 and proposals were received on April 27. The protester was not solicited. The protester claims that eligibility to make an offer on the tray pack reprocurements was conditioned upon the firm's classification as a planned producer and, therefore, its removal from this status constituted a de facto debarment.

Generally, in the case of a reprocurement after default, the statutes and regulations governing regular federal procurements are not strictly applicable. Pacific Dry Dock & Repair Co., B-237611.2; B-237751, Mar. 19, 1990, 90-1 CPD ¶ 302. The contracting officer may use any terms and acquisition method deemed appropriate for repurchase of the defaulted requirement. Federal Acquisition Regulation § 49.402-6(b) (FAC 84-5). However, the repurchase must be at a reasonable price and competition obtained to the maximum extent practicable. Id. We will review a reprocurement to determine whether the contracting officer proceeded reasonably under the circumstances. TSCO, Inc., 65 Comp. Gen. 347 (1986), 86-1 CPD ¶ 198.

While it is true that Huttenbauer was not specifically solicited, DPSC states, and the record confirms, that planned producer status was not a prerequisite to being solicited on these reprocurements. Therefore, there is no basis for Huttenbauer's argument that its loss of planned producer status was a de facto debarment.

DLA decided not to solicit Huttenbauer because the agency found that it was not in the government's best interests to continue contracting with a contractor whose recent performance record was so poor. DLA's determination was

supported by two recent pre-award surveys by the Defense Contract Administrative Services Management Area, Dayton, Ohio; financial data furnished by Huttenbauer itself; and the agency's own experience. Among other performance deficiencies, DLA identified the following: (1) the protester has "long-standing problem[s] with making timely deliveries" under prior Government contracts; (2) it has made "repeated threats of bankruptcy"; (3) it has "a negative net worth of over half a million dollars"; and (4) the United States Department of Agriculture (USDA) would no longer certify Huttenbauer's products because Huttenbauer had not paid for the inspection services. DLA concluded from the cumulative evidence that Huttenbauer lacked the capability to perform the work required by its defaulted contracts. Huttenbauer has not disputed that it has severe financial problems, although it attributes these problems, in part, to economic duress by DLA.

We think that DLA acted reasonably in not soliciting Huttenbauer. The record shows that shortly before these reprocurement solicitations were issued, Huttenbauer had advised the agency that it would not perform its contracts "because the markets are too high." Huttenbauer confirmed this position shortly after the terminations. In addition, at the time of the reprocurements, USDA had removed its inspectors from Huttenbauer's facilities, so that Huttenbauer's products could not be certified by USDA. Under the circumstances, the contracting officer could logically conclude that Huttenbauer neither could nor would perform under the existing conditions. In this regard, we point out that a defaulted contractor may not be awarded the procurement contract at a price higher than the defaulted contract price. Air Inc., B-233501, Nov. 2, 1988, 88-2 CPD ¶ 505; Preston-Brady Co., Inc., B-211749, Oct. 24, 1983, 83-2 CPD ¶ 479. Thus, Huttenbauer could not be awarded a higher contract price on the reprocurements, and since it had declined to perform the existing contracts for financial reasons, we think that the contracting officer had a reasonable basis for not soliciting Huttenbauer for the reprocurements.

Accordingly, the protests are denied.

for Ronald Berger
James F. Hinchman
General Counsel