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Comptroller General
of the United States
Washington, D.C. 20540

Decision

Matter of: Adaptive Concepts, Inc.
File: B-243304
Date: June 25, 1991

David R. Martin for the protester.
Jonathan H. Kosarin, Esq., and Brian Kau, Esq., Department of the Navy, for the agency.
Roger H. Ayer, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. The General Accounting Office will not consider the propriety of agency decision to terminate a contract for default, since this is a matter for the agency's board of contract appeals.
2. In reprocurng a contract on account of protester/defaulted contractor, agency properly made award to the second-low offeror on the terminated contract.

DECISION

Adaptive Concepts, Inc. (ACI), a defaulted contractor, protests the Department of the Navy's award of the reprocurement of its contract No. N60921-91-C-A118 for phase shifters to the next low offeror, Sage Laboratories, Inc. under request for proposals (RFP) No. N60921-90-R-A147. ACI contends that Sage was improperly admitted to the initial competition, that ACI's contract was improperly terminated, and that ACI was improperly excluded as an available source on the reprocurement.

We dismiss the protest in part and deny it in part.

The Navy received three offers on the RFP, of which only two (ACI and another firm) were timely. The Navy learned that it had inadvertently failed to solicit the incumbent contractor, Sage. An examination of the two timely offers disclosed that only ACI had offered a reasonable price. The Navy thus determined that adequate competition was not achieved because of the failure to solicit Sage. The Navy took corrective

action by issuing amendment No. 0001 to the RFP on September 4, 1990, reopening the solicitation and extending the closing date until September 13.

Four timely offers were received by the extended closing date. Since ACI's offer remained the lowest, the Navy awarded it the contract on September 29. When ACI failed to deliver the phase shifter within 120 days (i.e., by January 29, 1991), the Navy issued modification No. P00001 on February 4, terminating ACI's contract for default. On March 1, the Navy awarded the procurement contract to the next low offeror, and former incumbent contractor, Sage, because there was an urgent need for the phase shifters.

To the extent that ACI contends that the Navy improperly reopened the competition under the RFP to admit Sage, ACI's argument is untimely. Under our Bid Protest Regulations, 4 C.F.R. §§ 21.2(a)(1), (2) (1991), protests based on improprieties that are incorporated into a solicitation after the receipt of initial proposals must be filed not later than the next closing date for receipt of proposals; in other cases, protests must be filed no later than 10 days after the basis of protest is known or should have been known, whichever is earlier. ACI's protest states that ACI knew when the Navy issued the amendment that (1) the amendment was being made for the purpose of admitting Sage into the competition, and (2) ACI thought the amendment's purpose was improper. Thus, ACI's protest filed on March 14, 1991, more than 6 months after the amendment's September 13, 1990, closing date is untimely.^{1/} See Loral Def. Sys.--Arizona, B-240537, Nov. 16, 1990, 90-2 CPD ¶ 399.

ACI's contention that the Navy improperly terminated its contract concerns a matter of contract administration within the jurisdiction of the contracting agency and the Armed Services Board of Contract Appeals and, therefore, is not for consideration by our Office under our Bid Protest Regulations. See 4 C.F.R. § 21.3(m)(1); Joseph L. De Clerk and Assocs., Inc., 68 Comp. Gen. 183 (1989), 89-1 CPD ¶ 47.

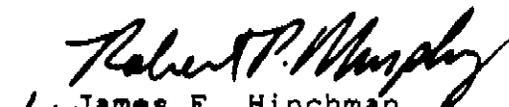
^{1/} In any event, we note that (1) the agency's corrective action--admitting the inadvertently excluded incumbent contractor to the competition--appears reasonable, see Federal Acquisition Regulation (FAR) § 14.205-4; Trans World Maintenance, Inc., 65 Comp. Gen. 401 (1986), 86-1 CPD ¶ 239, and (2) an agency may always take appropriate corrective action, regardless of when the matter is brought to its attention. See International Bus. Mach. Corp., B-197188, Oct. 21, 1980, 80-2 CPD ¶ 302.

With regard to the decision of the agency to reprocore the items from the next low offeror, since a reprocorement is for the account of a defaulted contractor, the statutes and regulations governing regular federal procurements are not strictly applicable. TSCO, Inc., 65 Comp. Gen. 347 (1986), 86-1 CPD ¶ 198. Under FAR § 49.402-6(b) (FAC 90-4), if the repurchase is for a quantity not over the undelivered quantity terminated for default, the agency may use any terms and acquisition method deemed appropriate for repurchase of the same requirement provided that the agency obtains (1) as reasonable a price as practicable; and (2) competition to the maximum extent practicable. We review such reprocorements to determine whether the agency acted reasonably under the circumstances. DCX, Inc., B-232692, Jan. 23, 1989, 89-1 CPD ¶ 55.

In our view, the Navy's decision to make award to the next low offeror was reasonable. The record shows that the acquisition of the phase shifters was a prerequisite to making an intelligence collection system operational and that the phase shifters must be installed by June 20 to allow for timely completion of the system. The Navy determined that another competitive solicitation would require 6 months (2 months to solicit for and award the contract, and 4 months to perform the work). With less than 5 months remaining between the February 4 default termination of ACI's contract and June 21; when the phase shifters had to be installed, the Navy concluded that insufficient time remained to reprocore on a competitive basis.

We see no reason why the agency should be forced, in effect, to gamble on ACI's ability to perform, where Sage was a proven alternative source and the outcome of the gamble would determine the availability of the intelligence collection system. In light of the urgent need to obtain delivery by June 21, as well as the relatively short time span between the original competition and the default termination, we think the Navy reasonably awarded the contract to Sage, the second low offeror, at its original unit price, since Sage had satisfactorily made and delivered the same items within the performance period under an earlier contract. DCX, Inc., B-232692, supra.

The protest is dismissed in part and denied in part.


for James F. Hinchman
General Counsel