



Comptroller General
of the United States

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Washington, D.C. 20548

Decision

Matter of: Performance Textiles, Inc.

File: B-256895

Date: August 8, 1994

Paul G. Dembling, Esq., and Paula K. Goldman, Esq., Schnader, Harrison, Segal & Lewis, for the protester. Jonathan Cramer, Esq., Department of Justice, Federal Bureau of Prisons, for the agency. Paula A. Williams, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Contracting agency reasonably awarded a repurchase contract to the third-low bidder from the original competition at its original bid prices since only a relatively short period of time had passed between the original competition and the default, and the second-low bidder on the original competition had submitted revised bid prices which were higher than the awardee's original prices.

DECISION

Performance Textiles, Inc. protests the award of a procurement contract to H. Landau & Company by Federal Prison Industries, Inc., doing business under the trade name UNICOR, to replace a defaulted contractor under invitation for bids (IFB) No. 1PI-B-0778-94. Performance contends that UNICOR did not obtain competition to the maximum extent possible and, as a result, questions the reasonableness of the repurchase contract price.

We deny the protest.

The IFB, issued on November 15, 1993, solicited bids to furnish nylon duck fabric for a period of 1 year with two 1-year options. The Osterneck Company submitted the lowest of eight bids received at bid opening on December 30, for line item Nos. 0001 through 0004. Performance and Landau were determined, at that time, to be the second- and third-low bidders, respectively. A contract for line item

Nos. 0001 through 0004 was awarded on February 8, 1984, to Osterneck which UNICOR terminated for default on March 23, because Osterneck had repudiated the contract.

On March 4, prior to the actual default termination, the contract specialist contacted Performance, the second-low bidder on the original solicitation, and asked whether it would revive its bid. In response, the protester indicated that in the approximately 90 days since bid opening, the prevailing market prices for these line items had risen and submitted revised bid prices to the contract specialist by facsimile on March 7. The protester's revised bid reflects an increase of \$.045 per unit for each line item. The contract specialist decided to make a sole-source award to the protester based on its revised bid and submitted the contract documents to the firm for signature.

During pre-award review of the proposed award to Performance, UNICOR's Office of Procurement Executive declined to approve the proposed sole-source award on the grounds that Performance's revised bid prices were higher than that of the third-low bidder on the original competition (Landau) and that until the agency ascertained whether Landau's prices had also changed, award at a price higher than that offered by Landau would be inconsistent with the government's duty to mitigate damages resulting from the default. The contract specialist then contacted Landau, which offered the same prices it had submitted in its original bid. On March 25, UNICOR awarded the repurchase contract to that firm since its prices were lower than the protester's revised prices. This protest followed.

Notwithstanding that its revised prices were higher than Landau's, the protester contends that UNICOR did not obtain the lowest prices practicable since it failed to request a best and final offer (BAFO) from Performance, Landau, and some or all of the other original offerors. Further, the protester asserts that when it learned that the repurchase contract was going to be awarded to Landau at a price lower than its revised prices, it submitted another "price proposal" to UNICOR on March 24, offering the same prices as it had on the original solicitation, an offer which UNICOR ignored. UNICOR maintains, however, that to further solicit revised "bids" would impermissibly give rise to the appearance of an "auction."

Generally, in the case of a repurchase after default, the statutes and regulations governing regular federal procurements are not strictly applicable. TSCO, Inc., 65 Comp. Gen. 347 (1986), 86-1 CPD ¶ 198. Under the Federal Acquisition Regulation (FAR), the contracting agency may use any terms and acquisition methods deemed appropriate to repurchase the same requirement on a defaulted contract so

long as competition is obtained to the maximum extent practicable and the repurchase is at as reasonable a price as practicable. FAR § 49.402-6; Aerosonic Corp., 68 Comp. Gen. 179 (1989), 89-1 CPD ¶ 45. Within this context, our Office has held that it is reasonable to award a repurchase contract to the next low responsive, responsible bidder on the original solicitation at its original bid price provided that there is a relatively short time span between the original competition and the default and there is a continuing need for the items. See International Technology Corp., B-250377.5, Aug. 18, 1993, 93-2 CPD ¶ 102.

Here, UNICOR's decision to try to award the repurchase contract to the next low bidder on the original solicitation was reasonable since the items were urgently needed and repurchase was within a few months of bid opening. When Performance, the next low bidder, declined to revive its bid but instead offered a higher price, it was appropriate for UNICOR to query Landau, the original third-low bidder, and when Landau offered its original pricing, in effect reviving its bid, to consider that bid for award. Although Performance then offered its original unit prices after an inadvertent disclosure to the firm that Landau's prices did not change, we see no reason why UNICOR should have been required to permit what would have been tantamount to an impermissible auction, in which a bidder, knowing the prices bid by others, would have an opportunity to bid again for the identical items. See generally Carnes Constr., Inc., B-241778, Feb. 26, 1991, 91-1 CPD ¶ 215. Moreover, in the context of this reprourement process, where the agency simply seeks to make award to the bidder next in line for award, there is no requirement for requesting BAFOs.

The protest is denied.

/s/ Ronald Berger
for Robert P. Murphy
Acting General Counsel

¹Performance's other objections are without merit. For example, the protester asserts that UNICOR's approach to the reprourement evidences an unreasonable lack of planning. Since, as the protester itself acknowledges, the statutes and regulations governing regular procurements are not strictly applicable to a reprourement after default, UNICOR was not required to follow any "formal" advance planning procedures.