Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Montage, Inc.

File: B-277923.2

Date: December 29, 1997

David M. Nadler, Esq., and Tina M. Ducharme, Esq., Dickstein, Shapiro, Morin & Oshinsky, for the protester.
Kimberly L. Frye, Esq., Vicki O'Keefe, Esq., and George Brezna, Esq., Naval Facilities Engineering Command, for the agency.
Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

An agency may properly exclude a defaulted contractor from a reprocurement for the remaining work in the defaulted contract; to the extent that PRB Uniforms, Inc., 56 Comp. Gen. 976, 978 (1977), 77-2 CPD ¶ 213, and cases following that decision, state that a contracting officer may not automatically exclude a defaulted contractor from the competition for a reprocurement, those cases will not be followed.

DECISION

Montage, Inc. protests the Department of the Navy's failure to solicit it in the agency's reprocurement of the replacement of the heating, air conditioning, and ventilation (HVAC) system in the PFC Curtis B. Schooley U.S. Army Reserve Center, Galax, Virginia.

We deny the protest.

On March 13, 1996, the Navy awarded to Montage contract No. N68925-96-C-A100, an indefinite delivery, indefinite quantity, multi-trade construction contract. On November 14, Montage received delivery order No. 0009 under this contract to replace the HVAC system at the Schooley Center within 180 days of the order. On June 12, 1997, the Navy terminated delivery order No. 0009 for default "due to [Montage's] failure to make progress in the work and for default in performance."

On June 17, the Navy offered this requirement as a sole source to Capitol Contractors, Inc. through the Small Business Administration's section 8(a) program. After Montage protested this intended noncompetitive award to our Office, the Navy cancelled its request for a section 8(a) award and decided to obtain competition to the maximum extent practicable by soliciting three sources, but not Montage.

Montage challenges its exclusion from the Navy's competition of the reprocurement and argues that limiting the competition to three sources does not satisfy the requirement that competition be obtained to the maximum extent practicable.

Generally, the statutes and regulations governing federal procurements are not strictly applicable to reprocurements of defaulted requirements. E. Huttenbauer & Son, Inc., B-239142.2 et al., Aug. 17, 1990, 90-2 CPD ¶ 140 at 2. Rather, the contracting officer may use any terms and acquisition method deemed appropriate for the repurchase; however, the contacting officer must repurchase at as reasonable a price as practicable and must obtain competition to the maximum extent practicable. Federal Acquisition Regulation (FAR) § 49.402-6(a), (b). The FAR provision allows the agency to purchase needed supplies and services as expeditiously as possible while preserving the government's right to seek excess reprocurement costs from the defaulted contractor.

There have been no cases where our Office has sustained a protest against a contracting officer's failure to solicit the defaulted contractor. However, we have stated that a defaulted contractor may not automatically be excluded from a competition for the defaulted requirement because such an exclusion prior to the submission of bids or proposals would constitute an improper premature determination of nonresponsibility. See PRB Uniforms, Inc., 56 Comp. Gen. 976, 978 (1977), 77-2 CPD ¶ 213 at 3. More recently, however, we have concluded that whether a defaulted contractor should be solicited depends on the circumstances of each case and that the contracting officer has a wide degree of discretion in this regard. For example, we have upheld a contracting officer's determination not to solicit the defaulted contractor where the defaulted contractor declined to perform the contract requirements, such that the contracting officer reasonably concluded that the defaulted contractor could not and would not perform the contract. E. Huttenbauer & Son, Inc., supra, at 3. Also, we have found that a contracting officer need not solicit a defaulted contractor where a competitive reprocurement was reasonably not conducted. See ATA Defense Indus., Inc., B-275303, Feb. 6, 1997, 97-1 CPD ¶ 61 at 3 (sole source order under the Federal Supply Schedule).

Our earlier statement that the automatic exclusion of a defaulted contractor from a reprocurement constitutes an improper premature determination of nonresponsibility reflected the regulations then in effect, which generally provided for reprocurement competitions within the context of general procurement statutes and regulations. Specifically, Armed Services Procurement Regulation (ASPR) § 8-602.6(b) (1976) provided that:

> the PCO may use formal advertising procedures [although not required to do so]. If the PCO decides to negotiate the repurchase contract, he may either (1) use any authority listed in [ASPR] 3-201 through 3-217 (10 U.S.C. 2304(a)(1)-(17)), as appropriate, or (2) if none of those authorities to negotiate is used, the contract shall identify the

> procurement as a repurchase in accordance with the provisions of the Default clause in the defaulted contract.

Unlike the ASPR, the current regulation does not require the use of any particular procurement process but "authorizes the contracting officer to use any terms and acquisition method deemed appropriate for the repurchase." FAR § 49.402-6(b). Although agencies are required to "obtain competition to the maximum extent practicable for the repurchase," there is no requirement for full and open competition. Id.

Thus, contracting officers are invested with wide latitude to determine how needed supplies or services are to be reprocured after the default of a contract. In the absence of a countervailing law or regulation, such a broad grant of discretion necessarily includes determining, in view of the circumstances of the default, whether or not to solicit or allow the defaulted contractor to compete in the reprocurement. The agency, with its particularized knowledge of the contractor's past performance (or failure to perform) on the requirement being reprocured, is clearly in the best position to make that determination. Although "competition to the maximum extent practicable" must be obtained in the reprocurement, that standard does not, in our view, mean that an agency must consider an offer from a defaulted contractor for the reprocurement of the very work for which it was defaulted. Accordingly, and in light of the broad authority accorded contracting officers by FAR § 49.402-6, we will not review an agency's decision not to solicit a defaulted contractor.

Our current view is consistent with that expressed in various board of contract appeals decisions reviewing agency's default terminations, which have long held that the contracting officer's broad discretion in conducting reprocurements includes the exclusion of the defaulted contractor from the repurchase.[1] See, e.g., Zan Machine Co., Inc., ASBCA No. 39462, June 4, 1991, 91-3 BCA ¶ 24,085 at 120,542; Morton Mfg., Inc., ASBCA No. 30716, Oct. 31, 1988, 89-1 BCA ¶ 21,326 at 107,553; see also Edwards v. U.S., 22 Cl. Ct 411, 417 note 6 (1991).[2]

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[1]Although a contracting officer may need to consider soliciting a defaulted contractor, under certain circumstances, to preserve the agency's right to seek excess reprocurement costs under the Contract Disputes Act, whether excess reprocurement costs were properly mitigated is not a matter for consideration by our Office. See VCA Corp., B-219305.2, Sept. 19, 1985, 85-2 CPD ¶ 308 at 2.

[2]The protester cites Tom W. Kaufman Co., GSBCA No. 4623, June 6, 1978, 78-2 BCA ¶ 13,288, for the proposition that "an agency must solicit the defaulted contractor where, as here, that contractor is the most suitable and readily available source for reprocurement." (Emphasis in original.) That decision specifically recognized,

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> [T]he "general rule is that the Government is not required to invite bids on repurchase solicitations from a defaulted contractor." [Citations omitted.] The reasoning underlying this rubric would seem to be obvious: If the defaulted contractor had originally complied with its contractual obligations, the need to reprocure would never have arisen.

Morton Mfg., Inc., supra, at 107,553.

In sum, the agency did not abuse its discretion in excluding Montage from the competition of the delivery order for which it had been defaulted. To the extent that PRB Uniforms, Inc., supra, and other decisions citing that case state that a defaulted contractor may not be automatically excluded from the competition for the reprocurement of the requirement as to which it defaulted, those cases will not be followed.

Montage also complains that the Navy has failed to obtain competition to the maximum extent practicable as required by FAR § 49.402-6. Given our conclusion that the Navy properly excluded Montage from the reprocurement, Montage is not an interested party to raise this issue because, even if Montage's protest were sustained on this ground, the protester would not be eligible to compete for award. Bid Protest Regulations, 4 C.F.R. § 21.0(a) (1997); King Nutronics Corp., B-259846, May 3, 1995, 95-2 CPD ¶ 112 at 4. In any event, soliciting three sources, as was done here, would appear to satisfy the requirement for competition to the maximum extent practicable. See FAR § 13.106-2(a)(4).

The protest is denied.

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[2](...continued)
however, that generally the "Government is not required to invite bids on repurchase solicitations from a defaulted contractor." Id. at 60,020. Rather, and as recognized by other boards of contract appeals, although an agency desiring to preserve its right to seek excess reprocurement costs against a defaulted contractor may have to solicit a defaulted contractor where the contractor will be able to deliver conforming supplies or services without delay, there is no absolute requirement that the defaulted contractor be solicited or awarded the reprocurement. Id.; see also Spectrum Leasing Corp., ASBCA Nos. 25724, 26049, Dec. 18, 1984, 85-1 BCA ¶ 17,822 at 89,200; Proven Profit Sys., Inc., GSBCA No. 5752-TD, July 31, 1981, 81-2 BCA ¶ 15,258 at 75,525-75,526.