



GAO

Accountability * Integrity * Reliability

United States Government Accountability Office
Washington, DC 20548

Comptroller General
of the United States

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: Essan Metallix Corporation

File: B-310357

Date: December 7, 2007

Kevin M. Cox, Esq., and Nancy M. Camardo, Esq., Camardo Law Firm, P.C., for the protester.

Jason P. Matechak, Esq., Gregory S. Jacobs, Esq., and Steven D. Tibbets, Esq., Reed Smith LLP, for Maher, Ltd., an intervenor.

Major Walter R. Dukes, and Leslie A. Nepper, Esq., Department of the Army, for the agency.

Eric M. Ransom and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

An agency may properly exclude a defaulted contractor from the competition for the repurchase of the work remaining under the terminated contract.

DECISION

Essan Metallix Corporation protests the Department of the Army's failure to solicit it in the agency's repurchase of British stainless steel tubes under solicitation No. W52H09-07-T-5765.

We deny the protest.

The protester here was the awardee of the previous contract for the requirement, awarded on August 31, 2005. The subject repurchase began after the protester's contract was terminated for default¹ on January 16, 2007. Agency Report (AR),

¹ The protester's terminated contract was a contract for commercial items and thus included the "termination for cause" clause specified by Federal Acquisition Regulation (FAR) part 12 for commercial item acquisitions (FAR § 52.212-4), rather than the standard "termination for default" clause (FAR § 52.249-8). Although Essan was terminated "for cause" under FAR part 12, Essan's termination resulted from its failure to comply with the delivery schedule in its contract, and Essan's termination is described, variously, as "for cause" or "for default" in the record. For consistency, we will refer to Essan's termination as "for default" throughout this decision.

Tab 10m, Award Modification 6, at 1. This termination followed a nearly year-long delay in the procurement in which the protester failed in each of four attempts to manufacture tubes to meet its contract's first article test requirements. AR, at 1; Tab 10l, Award Modification 5, at 3.

After the termination of the protester's contract, the agency contacted all other producers of the tubes known to the agency at the time--Maher, Ltd., Essan's subcontractor under the terminated contract, and BAE Systems, a previous manufacturer.² The agency then began reprocurement via a two-stage process in which offerors were required to prove their capability to produce acceptable tubes under a five-tube production "prove-out" contract before being considered for the actual production contract. BAE did not submit a timely offer that met the government's needs for the prove-out contract.

Maher was issued a purchase order for the five-tube prove-out quantity on February 8, 2007, and its second delivery of tubes was found acceptable on July 31. The present solicitation was issued to Maher on August 7, and Maher was awarded the production contract on September 5. An award synopsis was posted on FedBizOpps the same day and Essan filed this protest on September 17. Essan asserts that it was improperly excluded from the competition for the reprocurement, that the reprocurement was for a different item than the terminated contract, and that Maher's proposed price in the reprocurement was unreasonable.

Generally, the statutes and regulations governing federal procurements are not strictly applicable to reprocurements of defaulted requirements. Bluff Springs Paper Co., Ltd./R.D. Thompson Paper Prod. Co., Joint Venture, B-286797.3, Aug. 13, 2001, 2001 CPD ¶ 160 at 2. Under the standard provisions applicable to fixed-price contracts, FAR §§ 49.402-6(b) and 52.249-8, an agency may use any terms and acquisition method deemed appropriate for repurchase of not more than the undelivered quantity for which the contract was terminated, but must obtain competition to the maximum extent practicable. In this case, because the terminated contract was for the acquisition of commercial items, FAR § 49.402-6 is only applicable as guidance, and only to the extent that it does not conflict with the specific procedures applicable to commercial item acquisitions. FAR § 12.403(a). As applicable here, for commercial item acquisitions, FAR § 12.403(c)(2) provides that the government's rights after a termination for default include all the remedies available to any buyer in the marketplace, and that the government's preferred remedy will be to acquire similar items from another contractor and to charge the defaulted contractor with any excess reprocurement costs. These FAR provisions allow the agency to purchase the needed supplies as expeditiously as possible while preserving the government's right to seek excess reprocurement costs from the defaulted contractor.

² Essan was the only firm to submit a quotation for the terminated contract.

In Montage, Inc., B-277923, B-277923.2, Dec. 29, 1997, 97-2 CPD ¶ 176, our Office reexamined our previous view that a defaulted contractor may not be automatically excluded from a competition for the defaulted requirement because such an exclusion would constitute an improper premature determination of nonresponsibility. In recognition of the broad authority to reprocure accorded the contracting officer by FAR § 49.402-6, we adopted the position that we would decline to review an agency's decision not to solicit a defaulted contractor in the reprocurement of work remaining under the defaulted contract. While the FAR provisions regarding the termination of contracts for commercial items use different concepts than those used in the standard default clauses, they clearly invest equal or greater latitude in the contracting officer to determine how to conduct a reprocurement after the termination of a contractor for default.³ As a result, in accordance with our holding in Montage, Inc., we will not review the agency's decision to exclude Essan from the reprocurement here.

Essan also asserts that the subject solicitation was for a different item than that to be supplied under the terminated contract and thus falls outside the agency's FAR § 12.402(c)(2) authority to acquire "similar items" from another contractor after a default. The agency argues that the specifications were essentially unchanged between the two procurements. We agree.

The record here reflects that the subject solicitation requires Maher's tubes to conform to revision B of drawing 922423. AR, Tab 4, Solicitation, at 20-21. This version of the drawing differs from revision A, used in the Essan contract, only in that revision B allows the option of producing tubes to an "S" or "S1" condition, where revision A allowed only an "S1" condition.⁴ Agency Supplement, at 4-5; Attach. 4, Revision B. However, the record also reflects that revision B of the drawing was created in July 2006, on Essan's request, and that the agency allowed Essan the option of producing tubes to the "S" condition under the terminated contract. Id. Thus, in our view, there is no support in the record for the protester's

³ For example, while, as noted above, FAR § 49.402-6(b) requires the agency to obtain competition to the maximum extent practicable, there is no parallel requirement in the FAR provisions relating to commercial item acquisitions.

⁴ The "S" and "S1" designations refer to hardness conditions required to allow the tubes to be bent into their final form. The "S" designation refers to the hardness condition required of a "flow formed" tube, while the "S1" designation refers to the hardness condition required of an "extruded" tube. Essan attempted to produce tubes by both methods, while Maher [DELETED]. In its supplemental comments, Essan asserts that it was limited to only one production method under its contract while Maher's contract allows for three production methods. Supplemental Comments, Tab 1, Affidavit of Joseph Jankowski, at 5. We find no evidence in the record to support that assertion.

contention that the reprourement is not for the same item as the terminated contract.⁵

Essan's final argument is that Maher's price for the required tubes was unreasonable. Given our conclusion that the agency properly excluded Essan from the reprourement, Essan is not an interested party to raise this issue, since, even if its protest were sustained on this issue, Essan would not be eligible to compete for the award. See 4 C.F.R. § 21.0(a)(1) (2007); Four Winds Servs., Inc., B-280714, Aug. 28, 1998, 98-2 CPD ¶ 57.

The protest is denied.

Gary L. Kepplinger
General Counsel

⁵ Essan also argued that the reprourement is for a different item due to slight differences in the allowable wall thickness variance and chemical composition requirements between the contracts. Essan did not raise these allegations in particular except in an affidavit attached to its supplementary comments. Further, Essan has not directed our attention to where the allegations are supported in the record, and has not explained how slight (and more restrictive) changes to the allowable tolerances render the tubes required under Maher's contract different items. Based on our review of the record, we see no evidence to suggest that the reprourement is not for the same or "similar items" under FAR § 12.403(c)(2).