

REPROCUREMENT CONTRACT MAY NOT EXCEED UNDELIVERED TERM OF DEFAULTED CONTRACT

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After a contract has been terminated for default, Federal Acquisition Regulation (“FAR”) 49.402-6 permits the agency to repurchase the same or similar services or supplies against the defaulted contractor’s account, as long as the supplies or services are still required. Even though the Government Accountability Office (“GAO”) recognizes that statutes and regulations governing regular procurements are not strictly applicable to reprocurements after default, the GAO will review a reprocurement to determine if an agency acted reasonably under the circumstances. Recently, the GAO sustained a protest because the Defense Information Systems Agency (“DISA”) awarded a reprocurement contract for a term that was 3½ months greater than the undelivered term left on the defaulted contract. *Steel Point Solutions, LLC*, B-418224, Jan. 31, 2020.

Akira Technologies, Inc. was awarded a task order by DISA for communications support services pursuant to a Federal Supply Services (“FSS”) schedule contract. The acquisition was therefore conducted pursuant to FAR Part 8.4 (Federal Supply Schedules), and the contract was issued as a commercial item contract, under FAR Part 12 (Commercial Items). Because of this, the original contract was terminated pursuant to FAR 8.406-(a)(1) and FAR 12.403, rather than FAR Part 49. Accordingly, FAR 49.402-6(b) is only applicable as guidance and only to the extent that it does not conflict with specific procedures in commercial item acquisitions. The DISA defaulted Akira after 3 ½ months of performance, and the protester here challenged the length of the reprocurement contract. GAO sustained the protest.

The GAO’s decision was based on its conclusion that under FAR 49.402-6, an agency cannot enter into a reprocurement contract for quantities or terms exceeding the undelivered quantity or term remaining, even for a commercial item. GAO concluded that the agency’s repurchase authority is restricted to any remedy available to a buyer in the marketplace. GAO noted that the preferred remedy is “cover,” which authorizes a buyer to purchase replacement goods for those due from the seller, and then repay the government the difference in price between the original and substituted price. GAO saw no authority permitting DISA to enter into a reprocurement contract for more than the undelivered quantity (i.e. the reprocurement contract was for 30 months of performance even though only 26 ½ months remained on the original contract) because it would exceed the legal remedy of “cover.”

Takeaway. The preferred remedy for a reprocurement after default is “cover,” whether in a FAR Part 49 procurement, a Part 12 procurement, or a Part 8 (Federal Supply Service) procurement.

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