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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

[Protest Against Bid Rejection]

FILE: B-195902

DATE: August 15, 1980

MATTER OF: S & M Construction Co., Inc. *DL605092*

DIGEST:

Where improperly awarded contract for materials for and construction of water tank is terminated for convenience of Government and materials have been furnished under terminated contract, award for construction of tank may be made to bidder who should have received award on basis of bidder's lump-sum bid less amount paid by Government for furnished materials (\$10,388) since award would prejudice no one.

S & M Construction Co., Inc. (S&M), protested the rejection of its low bid by the Bureau of Indian Affairs *AGC 00006* (Bureau) and the award to another firm of contract No. 50C14201391 for materials for and the construction of a water tank. Subsequent to the protest, the Bureau terminated the partially performed contract for the convenience of the Government. S&M now requests that it be awarded the remainder of the terminated contract (the construction portion) at its bid price less the amount paid by the Government for the materials furnished under the terminated contract.

The S&M bid was rejected as nonresponsive because the "Affidavit of Individual Surety" submitted with the bid showed the individual surety of S&M to be an officer of the bidder, and the Bureau believed that was contrary to the affidavit instructions that:

"A corporation, partnership, or other business association or firm, as such, will not be accepted as a surety, nor will a partner be accepted as a surety for co-partners or for a firm of which he is a member.* * *"

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Subsequent to the award of the contract, however, the Bureau determined that the S&M bid had been improperly found to be nonresponsive, and the contract was terminated. Because all the materials required had been obtained under the terminated contract at a cost of \$10,388, the Bureau determined that an award to S&M under the original solicitation for only the required tank construction would not be proper since the specifications also called for supplying all materials. The Bureau, therefore, concluded that the construction of the tank should be advertised as a new procurement with the Bureau furnishing the materials needed for the construction to the successful bidder.

We agree with the Bureau's determination that the fact that the individual surety was an officer of the bidder was an insufficient reason for finding the S&M bid to be nonresponsive. In addition to the above-quoted language of the affidavit instructions relied on for rejection of the bid, the instructions include the following language:

"* * * Stockholders of a corporate principal may be accepted as sureties provided their qualifications as such are independent of their stockholdings therein. In arriving at the net worth figure in Item 7 on the face of this affidavit an individual surety will not include any financial interest he may have in the assets of the principal on the bond which this affidavit supports."

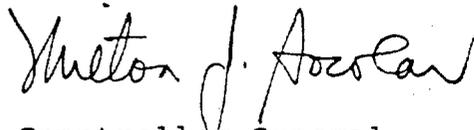
The "Affidavit of Individual Surety" submitted with the S&M bid was in conformance with the instructions. See, Jets Inc., B-194017, April 16, 1979, 79-1 CPD 269.

Accordingly, the protest is sustained.

However, we disagree with the Bureau's conclusion that it must readvertise the construction portion of the original solicitation. We recommend that an award be made to S&M on its original bid (assuming the bid to be otherwise responsive and the bidder to be responsible) and that simultaneously with the award a change order be issued to the contract decreasing the award price by the \$10,388 cost of the materials, deleting

the requirement that the contractor supply the materials, and requiring that S&M accept these materials as being in compliance with the specifications of the solicitation.

While we have noted in past decisions that under Federal Procurement Regulations § 1-3.101 (1964 ed.) procurements must as a general rule be conducted on a competitive basis to the maximum practical extent and that contract modifications may not be used to interfere with or defeat this requirement, we have also stated that this mandate is not to be considered absolute should a reasonable basis exist for not following it. Die Mesh Corporation, B-190421, July 14, 1978, 78-2 CPD 36; Kent Watkins & Associates, Inc., B-191078, May 17, 1978, 78-1 CPD 377. Such a case exists here. The Government will suffer no prejudice since it will have procured its entire requirement at the original, low bid price that it would have obtained had it properly made award to S&M. Other bidders on that solicitation, or prospective bidders on the Bureau's proposed resolicitation, will not be prejudiced since had the award been properly made to S&M the possibility of another party securing the construction work would never have arisen. While it may be argued that a bidder on a resolicitation might submit a price lower than the price at which S&M would now receive the contract award, we believe this likelihood to be highly theoretical in light of the fact that the original procurement was conducted approximately 1 year ago, and, in any event, even a slight likelihood that this might happen would be outweighed by the equities in this case which mandate our recommendation.



For The Comptroller General
of the United States