



The Comptroller General  
of the United States

Washington, D.C. 20548

Shimamura

## Decision

**Matter of:** Bud Mahas Construction, Inc.

**File:** B-235261

**Date:** August 21, 1989

### DIGEST

1. Contracting officer's failure to check a box on the "solicitation, offer, and award" form, indicating whether contract is a negotiated agreement or is an award under sealed bidding procedures, does not affect the validity of contract award, because the form otherwise clearly indicates the existence of an enforceable contract.
2. Where invitation specifically states that payment and performance bonds may be furnished after contract award, awardee's failure to furnish such bonds prior to award does not nullify contract.
3. Where reprocurement is for the account of a defaulted contractor, the statutes and regulations governing regular federal procurements are not strictly applicable. Thus, where the original solicitation was restricted to small businesses, the contracting officer was not required to conduct a similarly restricted procurement when reprocuring because Federal Acquisition Regulation authorizes contracting officers to use any appropriate method or procedure.

### DECISION

Bud Mahas Construction, Inc., protests the proposed award of a contract to C.E. Wylie Construction Co., a large business, for completion of a defaulted contract that was awarded to Continental Construction Co., Inc., a small business, under invitation for bids (IFB) No. N62474-86-B-0638. The solicitation was originally issued as a small business set-aside by the Naval Facilities Engineering Command for construction of bachelor enlisted quarters at the Marine Corps Air Station, Tustin, California. Mahas contends that it should have been awarded the contract under the first solicitation after the two lowest bidders were rejected. Mahas also contends that the reprocurement should have been set aside for small businesses, and that the Navy is

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improperly proposing to award the contract to Wylie, a large business.

We deny the protest.

The IFB required prices for a base item and two additive items and advised that award would be based on price and price-related factors specified in the solicitation. The IFB required that a bid guarantee in the amount of 20 percent of the bid price be submitted with the bid and required submission of performance and payment bonds within 10 days of contract award.

Seven bidders responded by the January 17, 1989, bid opening date. Wylie's low bid of \$7,371,845 was rejected because the competition was restricted to small businesses. Continental's bid of \$7,529,000 was the second lowest, and Mahas' \$7,990,000 bid was third lowest. After a favorable responsibility determination, Continental was awarded the contract on February 6.

The notice of award informed Continental that its offer had been accepted and that performance and payment bonds had to be submitted to the Navy within 10 days of the February 6 contract award date. However, Continental did not furnish the required bonds within the prescribed time, and, after Continental failed to respond to the Navy's "cure" notice requesting compliance within 10 days, its contract was terminated for default on April 13.

The Navy offered the project to Wylie at its low bid price of \$7,371,845. After Wylie stated that it would not be able to perform the contract at that price, the Navy decided to reprocure on a negotiated basis. Offers then were solicited by phone from the original bidders.

Five companies submitted prices by the closing date. Wylie was lowest at \$7,450,000; Bodell Construction was second lowest at \$7,784,000; Baldi Bros. Construction was third lowest at \$7,832,367; Mahas was fourth lowest at \$7,890,000; and Kardan Construction submitted an \$8,069,040 price.

Mahas contends that it should have been awarded a contract under the first solicitation because it was next in line for award after the first two bidders, Wylie and Continental, were disqualified. Mahas contends that no contract was effectively awarded to Continental under the first solicitation, and, therefore, termination of the contract for default and reprocurement were not required. Specifically, the protester alleges that there was no contract because Continental failed to acknowledge receipt of the notice of

award and also because the Navy failed to complete the "solicitation, offer, and award" form, Standard Form (SF) 1442.

Under the Federal Acquisition Regulation (FAR), the contract award is the agency's acceptance of the bid; the bid and award together constitute the contract. FAR § 14.407-1(c)(5). The agency generally awards the contract by completing the "award" portion of the "solicitation, offer, and award" form, in this case block 29 of SF 1442. See FAR § 14.407-1(d)(1).

Here, the contracting officer accepted Continental's low, responsive offer by signing and dating the SF 1442. The contracting officer, in so doing, failed to check the box in either block 28 or 29, as instructed by the SF 1442. Block 28 is captioned "Negotiated Agreement" and requires the contractor to sign the document and return copies of it to the agency. Block 29 is captioned "Award" and requires nothing further from the contractor. This failure to check a block did not affect the validity of the award because the SF 1442 otherwise contained the essential elements of a contract. Specifically, the SF 1442 included Continental's offer to perform the required work at the specified bid prices and was signed by the firm's president, while the contracting officer's signature on the SF 1442 evidenced the government's acceptance of the offer. Thus, an enforceable contract was effected at that point. Moreover, there is no basis for Mahas' contention that award of the contract was contingent upon Continental's acknowledgment of receipt of the notice of award. Although the Navy requested acknowledgment of the notice, once the contracting officer accepted Continental's offer by signing the SF 1442, no further acknowledgment from Continental was necessary.

Mahas also alleges that Continental's failure to provide a performance bond in a timely manner nullified the award of the contract because providing the bond was a condition precedent to contract award. We disagree. The February 6 notice of contract award required that performance and payment bonds be provided before commencement of work under the contract. However, the notice did not state, as Mahas has alleged, that the bonds were a condition precedent to contract award. In fact, the IFB specifically stated that bonds were to be provided within 10 days after contract award, and the notice merely reflected that requirement.

Further, when Continental failed to furnish the required bonds after contract award, and its contract was terminated for default, the Navy was not required to make award to Mahas at a higher price merely because that firm was next in

line for award under the original solicitation. See Arrow, Inc., B-231001, July 13, 1988, 88-2 CPD ¶ 44. On the contrary, under FAR § 49.402-6(b), the contracting officer is required to obtain competition to the maximum extent practicable when reprocurring against a defaulting contractor's account, and the contracting officer's decision to conduct a new negotiated procurement was consistent with that requirement. United Technologies, Elliot Support Services Division, B-224887, Oct. 10, 1986, 86-2 CPD ¶ 425.

Mahas also alleges that the Navy violated procurement regulations by conducting the reprourement on an unrestricted basis because the original solicitation was set aside for small businesses, and thus that it would be improper to award the contract to Wylie, a large business.

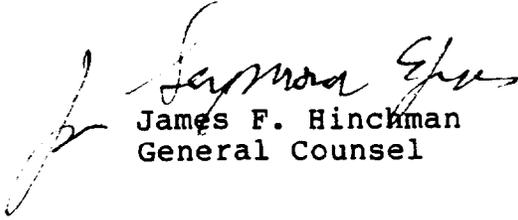
Generally, the applicable regulations require that a procurement be set aside for small business where the item or service being procured has been previously acquired successfully by the contracting office on the basis of a small business set-aside. FAR § 19.501(g) and Department of Defense FAR Supplement § 219.501(g). However, where, as in this case, a reprourement is for the account of a defaulted contractor, the statutes and regulations governing regular federal procurements are not strictly applicable. DCX, Inc., B-232692, Jan. 23, 1989, 89-1 CPD ¶ 55. Accordingly, the FAR provision regarding repetitive small business set-asides does not apply here. Instead, in arranging for completion of work under a defaulted contract, the contracting officer is authorized to use sealed bidding or any other appropriate method or procedure, but must use the same plans and specifications and exercise reasonable diligence to obtain the lowest price available. FAR § 49.405. We will review a reprourement to determine whether the contracting agency's actions were reasonable under the circumstances, DCX, Inc., B-232692, supra, and consistent with its duty to mitigate damages. See Hemet Valley Flying Service, Inc., 57 Comp. Gen. 703 (1978), 78-2 CPD ¶ 117.

Here, in view of the FAR requirement to maximize competition and to obtain the lowest available price in order to mitigate damages, the contracting officer acted reasonably in not restricting the reprourement to small businesses. In this regard, we agree with the Navy that including Wylie, which had submitted the lowest bid in the original procurement, was in the best interests of the government, the defaulted contractor and the sureties to reprocur the project for "zero damages."

Moreover, the record shows that the Navy conducted the reprourement in a reasonable manner. The agency ensured

adequate competition by soliciting prices from the seven original bidders and actually obtained prices from five firms. The Navy also obtained a quoted price of \$7,450,000 from Wylie which is lower than Continental's \$7,529,000 price under the defaulted contract, and \$440,000 lower than Mahas' bid under the original solicitation, thus meeting the FAR requirement to obtain the lowest price available.

The protest is denied.



James F. Hinchman  
General Counsel