



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

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B-178072

June 6, 1973

The Empire Construction Company
31 South Calvert Street
Baltimore, Maryland 21202

Attention: Mr. G. W. Bailey
Executive Vice President

Gentlemen:

This is in reply to your telegram of February 22, 1973, and subsequent correspondence, protesting against the cancellation of invitation for bids 13007-3001-0 and 13007-3001-1 and the subsequent award of a negotiated contract to Martin G. Imbach, Incorporated (Imbach) by the United States Coast Guard, Curtis Bay, Baltimore, Maryland.

The solicitations were for the construction of a new bulkhead at the Curtis Bay Coast Guard Yard, the cost for which was estimated to be \$352,200. IFB 13007-3001-0 was issued as a small business set-aside on October 4, 1972. On October 27, the 3 bids received were rejected, one bid (in the amount of \$382,850) because it did not come from a small business concern and two bids (yours and Imbach's) because they were more than twice as high as the Government estimate and therefore regarded as unreasonable. The Coast Guard then issued a second solicitation, without the small business set-aside provision, on November 1, 1972. Your bid in the amount of \$503,285, the only bid received in response to that IFB, was rejected as being unreasonably high.

By letter of November 29, 1972, the contracting officer advised you that your bid had been rejected but that the Coast Guard wanted to attempt "to negotiate a contract for this service with your firm." By letter of December 14, 1972, however, the contracting officer informed you that he intended "to seek competition by soliciting proposals from several firms and would appreciate receiving a proposal from Empire Construction Company." We understand that the contracting officer then held discussions with several firms, including yours, which resulted in a change to the specifications. Although price proposals were received in the course of these negotiations, a formal solicitation was not issued and a contract was not awarded.

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On April 4, 1973, RFP CG-80-1757, incorporating the changed specifications, was issued. The low proposal (\$333,300) in response thereto was received from Imbach while you proposed a price of \$446,955 and another offeror proposed a price of \$489,900. Award was made to Imbach pursuant to the Coast Guard's determination that award should be made notwithstanding the pendency of your protest.

You assert that the Coast Guard was required to make award to you, either under IFB 13007-3001-1 or through sole-source negotiations, because you were the low responsive, responsible bidder on the formal advertisements. You also question whether the award was made on the basis of the same specifications upon which you submitted a proposal.

We believe that the Coast Guard's actions in rejecting all bids received in response to the invitations and awarding a contract to the lowest offeror under the subsequently issued RFP were in accordance with the applicable law and regulations. FPR 1-2.404-1(b)(5) provides that invitations for bids may be cancelled and all bids rejected when the contracting officer determines that all otherwise acceptable bids are at unreasonable prices. FPR 1-3.214 authorizes negotiation of contracts when it has been determined by the head of an agency that "bid prices after advertising therefor are not reasonable," provided that each responsible bidder on the formally advertised solicitation is afforded a reasonable opportunity to negotiate and that the negotiated contract price is the lowest price of those proposed by the offerors. The procurement file contains the required Determination and Findings, signed by the Commandant of the Coast Guard, that the bid prices were unreasonable and, as noted above, award was made to the low proposer. With regard to your assertion that negotiations should have been conducted only with you, we do not believe that sole-source negotiation is either required or contemplated by the regulations. See 46 Comp. Gen. 360, 363 (1966).

In your letter of May 14, 1973, you state that you made your final offer "strictly in accordance with the original plans and specifications as shown on the attached request for proposals dated 4 April 1973," and you ask that we "satisfy" you that the contract awarded to Imbach is based on those same specifications. As indicated above, the original specifications for constructing the bulkhead were revised before issuance of the RFP. However, we have no information that the specifications contained in the RFP were again revised or were not adhered to in the awarding of the contract, nor have you provided any information or documentation which suggests such a situation.

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With regard to the Coast Guard's awarding the contract while your protest was pending, FFR 1-2,407-8(b)(1) provides that a contract may be awarded prior to resolution of a protest if the contracting officer determines that the items to be procured are urgently required or that a prompt award will otherwise be advantageous to the Government. The Coast Guard procurement file contains a Determination and Findings dated April 13, 1973, which states that the existing bulkhead "is in urgent need of repair, with collapse considered imminent," that such a collapse would put one-fifth of the Curtis Bay Yard's industrial waterfront out of commission and would severely restrict the response capability of the Coast Guard's search and rescue station at Baltimore, and that an award was therefore authorized in view of such urgency. The Coast Guard also notified us of its intent to make the award while the protest was pending in accordance with FFR 1-2,407-8(b)(3). Our Office cannot object to the award under these circumstances. 49 Comp. Gen. 369 (1969); B-175203, April 18, 1973.

For the foregoing reasons, your protest is denied.

Sincerely yours,

PAUL G. DEMBLING

For the Comptroller General
of the United States