



Comptroller General  
of the United States

Washington, D.C. 20548

*Maeder*

## Decision

**Matter of:** Concord Analysis, Inc.

**File:** B-239730.3; B-241009

**Date:** December 4, 1990

James A. Dobkin, Esq., and Karen I. Meyer, Esq., Arnold & Porter, for the protester.  
William J. Holland and Millard F. Pippin, Department of the Air Force, for the agency.  
Jacqueline Maeder, Esq., Paul Lieberman, Esq., and John F. Mitchell, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. Bid which was accompanied by a bid guarantee including uncertified company checks was properly rejected as nonresponsive, even though the checks were erroneously cashed by the agency after bid opening.
2. Agency decision to cancel after bid opening an invitation for bids which had been set aside for small disadvantaged business concerns and to reprocure on an unrestricted basis was proper where no responsive bids had been received and the contracting officer determined that there was not a reasonable expectation that offers would be obtained from two responsible small disadvantaged businesses at prices not exceeding the fair market price by more than 10 percent.

### DECISION

Concord Analysis, Inc. protests the rejection of its bid and the subsequent cancellation of invitation for bids (IFB) No. FO4626-90-B0018, a small disadvantaged business set-aside issued by the Department of the Air Force for asbestos removal at Travis Air Force Base, California. Concord contends that the Air Force improperly rejected its bid for providing a defective bid bond and improperly canceled the solicitation after bid opening and resolicited the requirement on an unrestricted basis.

We deny the protest.

The solicitation, issued on February 12, 1990, required a bid guarantee in the amount \$280,000, which was 20 percent of

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\$1,400,000, the minimum quantity of work which would be required under the contract. Of the eight bids received by the April 10 bid opening, Concord was the second high bidder with a total bid price of \$5,307,144. The Concord bid was being considered for award because the other seven bids were all rejected as nonresponsive for not meeting the bid bond requirement.<sup>1/</sup> Upon review, however, the agency determined that Concord's bond was unacceptable because it was supported by uncertified company and personal checks.<sup>2/</sup> The Concord bid was rejected as nonresponsive on July 26, and Concord protested this decision the next day. Because there were no firms remaining in the competition, the agency canceled the IFB on July 27. On August 15, Travis Air Force Base resolicited bids for asbestos abatement under IFB No. F04626-90-B0115. The new IFB, which Concord also has protested, is similar to the canceled IFB except that it is not set aside for small disadvantaged businesses. Bid opening was originally scheduled for September 17, but has been postponed pending our decision in this protest.

The protester argues that its bid is responsive and that it should be awarded the contract. According to the protester, it was prepared to submit a cashier's check as its bid guarantee but, on April 9, it contacted an agency representative to determine if it could submit a company check with its bid, which Concord indicated was more convenient than obtaining a cashier's check.<sup>3/</sup> The protester states that the agency representative advised it to submit the company check with its bid, with the caution that if the check were rejected for insufficient funds, the agency would eliminate the bid from consideration. The protester argues that it reasonably relied to its detriment on the advice of the agency

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1/ The rejection of the low bid submitted by Design for Health, Inc. was the subject of a protest which was denied. Design for Health, Inc., B-239730, Sept. 14, 1990, 69 Comp. Gen. \_\_\_, 90-2 CPD ¶ 213.

2/ The bid guarantee provided by Concord consisted of a \$30,000 cashier's check, an \$80,000 check from Broadcast Capital Corporation, a \$50,000 check from Concord Analysis and a check for \$120,000 from the Franklin Money Fund drawn on Concord's account. These checks were cashed by the agency the day after bid opening and placed in a non-interest bearing account.

3/ The protester contacted the agency representative named in both the solicitation and the synopsis printed in the Commerce Business Daily. Although the protester believed that the representative was the contracting officer, this representative was, in fact, the contract specialist.

representative and acted in accordance with his instructions and that the Air Force's rejection of its bid violates elementary equitable principles.

Further, the protester argues that the plain language of Federal Acquisition Regulation (FAR) § 52.228-1, governing bid guarantees, does not unequivocally prohibit the acceptance of a company check as a bid guarantee. This FAR clause provides that the bidder must furnish a bid guarantee in the form of a firm commitment and that failure to furnish a bid guarantee in the proper form and amount, by the time set for opening of bids, may be cause for rejection of the bid.

The agency contends that uncertified personal and company checks are not acceptable as a bid guarantee, relying on the Department of Defense Federal Acquisition Regulation Supplement (DFARS) § 252.228-7007. DFARS § 252.228-7007, which applies to solicitations and contracts for construction, provides, in relevant part, that:

"(a) The Offeror (Bidder) shall furnish a separate bid bond, or United States bonds, Treasury notes or other public debt obligations of the United States, in the proper form and amount, by the time set for opening of bids. Failure to do so may be cause for rejection of the bid."

The agency also points to Forbes Mfg., Inc., B-237806, Mar. 12, 1990, 90-1 CPD ¶ 267, in which our Office upheld the rejection of a bid as nonresponsive because it included a required bid deposit in the form of an uncertified company check. In Forbes, the protester bid on a contract for the sale of surplus scrap metal and proffered an uncertified company check from a standard bank account as its bid guarantee. The solicitation required that a proper bid deposit be in the possession of the contracting officer at the time of bid opening, or else the bid would be rendered nonresponsive, and that all bid deposits and payments "must be in U.S. currency either in cash or by cashier's check, bank draft, or money order." Although agency officials assisted Forbes in preparing its bid and the agency cashed the Forbes check, the agency subsequently determined that the Forbes bid was nonresponsive because it was accompanied by a bid deposit in the form of an uncertified company check. Forbes protested this determination to our Office and we agreed with the agency, reasoning that uncertified company checks "are not only contingent upon sufficient funds in the account, but the instrument itself is susceptible to a stop payment order and does not provide the type of firm commitment necessary to form a binding contract."

The protester attempts to distinguish the situation here from Forbes, on the basis that the language governing bid guarantees in the Forbes case is unequivocally restrictive and the list of acceptable forms of bid deposits is exhaustive and that neither the agency nor the bidder has discretion to deviate from this list. As noted above, the protester asserts that the language in FAR § 52.228-1 is permissive, and the protester argues that DFARS § 252.228-7007 does not apply because the solicitation describes the contract to be issued as "an indefinite-quantity contract for the supplies or services specified" and is therefore not a solicitation for construction.

We agree with the agency that DFARS § 252.228-7007 applies to this solicitation and that Forbes is controlling. The solicitation is clearly a solicitation for construction. The work in question consists primarily of building renovation, and the solicitation Bidding Schedule calls for submission of bid prices in accordance with FAR § 52.214-18, which is applicable to the preparation of bids for construction work. Additionally, the solicitation incorporates by reference numerous FAR clauses relating to construction, including, for example, § 52.222-13, Compliance with Davis-Bacon and Related Act Regulations; § 52.232-5, Payments Under Fixed-Price Construction; and, § 52.246-21, Warranty of Construction. The solicitation also includes FAR § 52.236-15 - Schedules for Construction Contracts.

As the protester points out, the solicitation does state that "[t]his is an indefinite-quantity contract for the supplies and services specified . . . ." This clause, however, is not inconsistent with a construction contract since construction is a form of service. See FAR § 2.101. Therefore, contrary to the protester's assertions, DFARS § 252.228-7007 and the logic of the Forbes rationale do apply. Accordingly, as in Forbes, the agency here properly rejected Concord's bid as nonresponsive for failing to submit a bid guarantee in the proper required form.

The protester also asserts that the cashing of its check estops the government from rejecting its bid. As we stated in Forbes, however, the fact that the checks submitted by Concord were successfully negotiated does not make the bid responsive. Bid responsiveness must be determined from documents that have been submitted at the time of bid opening and a bid cannot be made responsive by actions of either the government or the bidder taken after bid opening. Hintz and Hintz Logging, B-225124, Nov. 18, 1986, 86-2 CPD ¶ 583. Thus, notwithstanding the Air Force's error in cashing Concord's check, its bid, unaccompanied by an acceptable bid bond, was required to be rejected as nonresponsive. Id.

Forbes is also dispositive of the protester's argument that its bid should not be rejected as nonresponsive because the protester relied on advice of an agency representative when it submitted an uncertified check as a bid bond. The agency representative has submitted an affidavit in which he states that he did not advise Concord to submit a company check, rather, when questioned as to whether personal or company checks were acceptable as a bid guarantee, he researched the FAR and "could find nothing disallowing or allowing of [p]ersonal or [c]ompany checks," and so informed Concord. However, regardless of what advice was provided, a bidder may not rely upon oral advice regarding the bid bond which is in direct conflict with the terms and conditions of the solicitation. Douglas M. Andrews, B-218687, May 17, 1985, 85-1 CPD ¶ 571. Similarly, such erroneous advice, even if given, does not estop the government from rejecting a nonresponsive bid. Id.

The protester next argues that the cancellation of the IFB was improper since its bid was responsive and the agency therefore does not have the "compelling reason" required by FAR § 14.404-1 to cancel an IFB after bid opening. FAR § 14.404-1 provides that a solicitation may be canceled before award but after bid opening if there is a compelling reason to do so. The regulations specifically state that a compelling reason to cancel exists where no responsive bids have been received. FAR § 14.404-1(c)(6). Since Concord's bid was properly found nonresponsive and the record shows that none of the other seven bids received was responsive, the agency acted properly in canceling the solicitation and resoliciting. See TLC Sys., B-226531.2, July 30, 1987, 87-2 CPD ¶ 116.

Finally, Concord argues that the resolicitation is improper because it is not restricted to small disadvantaged businesses. DFARS § 219.502-72(a) requires, in relevant part, that a contracting agency set aside an IFB for small disadvantaged business participation if there is a reasonable expectation that:

"(1) offers will be obtained from at least two responsible SDB concerns . . . and

(2) award will be made at a price not exceeding the fair market price . . . by more than 10 percent . . . ."

The DFARS also provides that the contracting officer should presume that the requirements for an SDB set-aside are met if the acquisition history shows that: (1) within the past 12-month period a responsive offer from at least one responsible SDB concern was within 10 percent of the award price on a previous procurement of similar supplies or services, and

(2) the contracting officer has reason to know (from the activity's relevant solicitation mailing list, response to resolicitation notices, or other sufficient factual information) that there is at least one other responsible SDB source of similar supplies or services. DFARS § 219.502-72(c).

Concord argues that it was disqualified for submitting an insufficient bid, not for being technically unqualified to perform the work under the IFB, and notes that none of the other bidders was disqualified because it could not perform the work. Therefore, the protester argues that, based on the offers received, the Air Force must reasonably anticipate that at least two responsible SDB concerns will respond to the solicitation. Additionally, Concord argues that because the bids received fell below the government estimate, it appears likely that award would be made at a price not exceeding the fair market price by more than 10 percent.

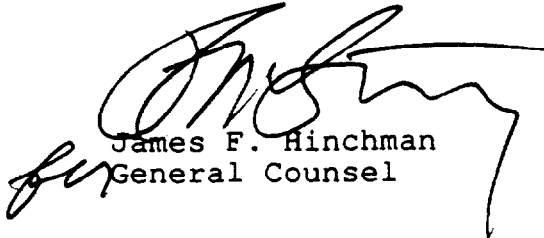
The decision to conduct a particular procurement as an SDB set-aside is a business judgment within the discretion of the contracting officer. See Superior Eng'g and Elecs. Co., Inc., B-231772, Aug. 31, 1988, 88-2 CPD ¶ 197. This Office will not disturb a contracting officer's set-aside determination unless there has been a clear showing of an abuse of that discretion. See Techplan Corp.; American Maintenance Co., 67 Comp. Gen. 357 (1988), 88-1 CPD ¶ 312. Here, in our view the contracting officer reasonably determined, based upon the recent acquisition history for asbestos removal, that there was not a reasonable expectation that bids would be received from two responsible SDB concerns whose bid price would be within 10 percent of the fair market price.

Of the eight actual SDB bidders in the prior procurement, not one firm submitted a responsive bid. Thus, in accordance with DFARS § 219.502-72(c), the contracting officer did not have to presume that there would be two responsible SDB concerns that would bid on the present procurement. Further, no responsibility determinations were made with regard to any of the SDB bidders on the prior procurement and there is nothing in the record to show that the contracting officer should have known from other factual information that any of the known SDBs were responsible sources. On the contrary, the fact that none of the competing SDBs was able to submit an adequate bid guarantee suggested that they lacked the financial capacity to perform, that is, that they are not responsible. See Commercial Energies, Inc., B-234789, July 12, 1989, 89-2 CPD ¶ 40.

Concord also requests costs, including legal fees, incurred in the preparation of the protest.

Our Bid Protest Regulations provide for the recovery of costs only where a protest is found to have merit. 4 C.F.R. § 21.6(d) (1990). Since we find the determination of Concord's bid as nonresponsive and the cancellation and resolicitation on an unrestricted basis to be proper, there is no legal basis for recovery of protest costs. TLC Sys., B-226531.2, supra.

The protest and the claim are denied.

  
James F. Hinchman  
General Counsel