32858

DECISION

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

FILE: B-219651 **DATE:** November 26, 1985

MATTER OF: BECO Corporation

DIGEST:

1. Federal procurement statutes and regulations do not apply per se to a construction management contractor operating by and for the Department of Energy; rather, such a prime contractor must conduct procurements according to the terms of its contract with the agency and its own agency-approved procedures. GAO review is to determine whether the procurement conforms to the federal norm, i.e., the policy objectives in the federal statutes and regulations.

2. When Department of Energy has approved a managing contractor's procurement procedures, and these specifically state that notice of award may be made by telephone, oral award is valid. In these circumstances, the parties intend to make a binding agreement at the time the oral notice is given, and written notice merely confirms the award.

3. Although applicable regulations require a contracting officer to examine all bids for error and to obtain verification where a mistake is suspected, there is no reason to do so when a bid is only 2 percent more than the next-low bid and 12 percent less than the government estimate.

4. Discrepancy between the stated total of a number of items and the correct mathematical total of those items does not constitute constructive notice of a mistake requiring the contracting officer to obtain verification of a bid. Unless there was a duty to verify, a post-award mistake claimed by other than an

awardee may not be corrected, since the sole responsibility for the preparation of a bid rests with the bidder, who must bear the consequences of its mistake unless the contracting officer has actual or constructive notice of an error before award.

5. Although in a small business set-aside the contracting officer generally is required to notify unsuccessful offerors, before award, of the name and location of the successful offeror, providing an opportunity to file a timely, i.e., pre-award, size status challenge, notice is not required when the contracting officer determines that award must be made without delay. In such a case, the size status determination will apply only prospectively.

6. Only the Small Business Administration (SBA) has authority to determine whether a firm is "small." Further, size status concerns the bidder's eligibility for SBA programs and for federal procurement purposes; it does not affect the bidder's responsibility or the responsiveness of its bid.

7. When protest is otherwise without legal merit, GAO does not reach the question of whether a subcontract awarded by a Department of Energy construction management contractor is subject to the Competition in Contracting Act of 1984, so that, as protester alleges, continued performance violates the stay provisions of the Act.

BECO Corporation protests the award of a subcontract to Bannock Paving Company under request for proposals (RFP) No. S5071, issued on July 10, 1985 by Morrison-Knudsen Company, Inc., a construction management contractor acting by and for the Department of Energy (DOE). The solicitation, which was set aside for small business concerns, called for road paving and repair at the Idaho National Engineering Laboratory near Idaho Falls. We deny the protest.

BACKGROUND

The RFP stated that proposals were due on July 31, 1985, "after which the public bid opening will promptly

commence."1/ It also stated that time was of the essence in the subcontract; that a written notice to proceed would be issued simultaneously with the award notice on/or before August 1, i.e., the following day; and that work must be completed by September 30.

At bid opening, Bannock was the apparent low bidder with a lump sum price of $1,203,039.30. BECO was second-low with a lump sum price of $1,221,875. The record indicates that at 8:05 a.m. on August 1, Morrison-Knudsen notified Bannock of the award by telephone and instructed the firm to proceed. Written notice of award, by letter of the same date, was delivered to Bannock on August 2.

At approximately noon on August 1, however, BECO informed the contracting officer that it had made a mathematical error in adding line items to arrive at a subtotal on one of three pages in its bid. According to BECO, its total lump sum price should have been $50,000 less, or $1,171,875. (BECO subsequently alleged that the corrected total should have been $1,171,935.) Later the same day and again on August 2, BECO challenged the size status of Bannock, informing the contracting officer that Bannock was a wholly-owned subsidiary of a large business. In each case, the contracting officer responded that the contract had already been awarded to Bannock.

BECO'S PROTEST

BECO's protest to our Office, filed August 5, has two primary grounds; implicit in each is a challenge to the validity of the oral award. First, BECO contends that the contracting officer should have noted and corrected its mistake, since BECO notified Morrison-Knudsen of it before formal, written notice of award had been delivered to Bannock. BECO asserts that it would have been the low bidder but for this mistake, which it contends is apparent on the face of its bid.

1/In view of this language and statement in Morrison-Knudsen's procurement procedures that award generally will be made to the responsible offeror submitting the lowest priced, responsive proposal, we will treat this as sealed bid procurement. See Anderson and Wood Construction Co., Inc., 62 Comp. Gen. 428 (1983), 83-1 CPD ¶ 595, in which we stated that, as a matter of sound policy, Morrison-Knudsen should not use the term "request for proposals" when an advertised (now sealed bid) procurement is intended.

Second, BECO asserts that Morrison-Knudsen should have terminated Bannock's contract for default immediately upon being advised by BECO that the firm was not a small business. The protester contends that Bannock's large size status, subsequently confirmed by the Small Business Administration (SBA), meant that the firm was not a responsible bidder and that its bid was nonresponsive.

BECO also protests Morrison-Knudsen's refusal to suspend performance during our consideration of the protest, contending that this violates the Competition in Contracting Act of 1984 (CICA), 31 U.S.C.A. § 3553(d)(2) (West Supp. 1985). In this regard, an undated determination to proceed with contract performance notwithstanding the protest was furnished to our Office upon request, but Morrison-Knudsen and DOE initially refused to provide the protester with a copy, a fact to which BECO also objects. These actions, BECO concludes, establish that Morrison-Knudsen and DOE acted arbitrarily, capriciously, and in bad faith.

BECO initially sought our recommendation that the bid be corrected and award be made to it. Since Bannock had substantially completed performance before the agency report was due, under CICA and our implementing Bid Protest Regulations, 4 C.F.R. § 21.3(c) (1985), the firm now seeks bid preparation costs, as well as the costs of filing and pursuing the protest.

ANALYSIS

1. Jurisdiction and Standard of Review

Our Office does not review subcontract awards by government prime contractors except where the award is by or for the government. 4 C.F.R. § 21.3(f)(10). Here, there is no question that Morrison-Knudsen is managing a government-owned facility and is thus acting "for" the government. See Rohde & Schwarz-Polarad, Inc.--Reconsideration, B-219108.2, July 8, 1985, 85-2 CPD ¶ 33; Rosemount, Inc., B-218121, May 16, 1985, 85-1 CPD ¶ 556. We therefore will review the procurement to determine whether it was consistent with and achieved the policy objectives of the "federal norm," i.e., the fundamental principles of federal procurement law as set forth in the statutes and regulations that apply to direct federal procurements. Piasecki Aircraft Corp., B-190178, July 6, 1978, 78-2 CPD ¶ 10. DOE correctly states that Morrison-Knudsen's procurements are not per se subject to these statutory and regulatory requirements. They must, however, be conducted

in accord with the terms of Morrison-Knudsen's contract with DOE and its DOE-approved procurement procedures. Id.

2. Oral Award

A threshold question is whether the oral award to Bannock was valid. BECO argues that a binding and enforceable contract cannot be created on the basis of an oral award where a reasonable bidder would not act in the absence of written confirmation and where, as here, a solicitation states that written notice of acceptance will be furnished to the successful bidder. The firm cites Sevcik-Thomas Builders and Engineers Corp., B-215678, July 30, 1984, 84-2 CPD ¶ 128, for this proposition.

In direct federal procurement, the government's acceptance of an offer must be clear and not conditioned on future actions by the parties. Northpoint Investors, B-209816, May 17, 1983, 83-1 CPD ¶ 523. Morrison-Knudsen's procedures, however, specifically state that notice of award can be made by telephone, with a subsequent letter confirming the award and transmitting subcontract or purchase order documents. We find that the parties in this case intended to make a binding agreement at the time of Morrison-Knudsen's 8 a.m. telephone call to Bannock on the day that the solicitation specifically stated award would be made. We therefore consider the oral award to Bannock valid, and we consider BECO's notice of mistake and size status challenge to have occurred after award.

3. BECO's Alleged Mistake

Morrison-Knudsen's solicitation asks bidders to "Please offer your best lump sum price, including all applicable taxes, bonds and insurance, for the satisfactory performance of all work included in proposed subcontract No. S5071 (copy attached.)" More than 50 different line items, some of which require unit and extended prices, are set forth on a 3-page bid schedule. Page 1 provides a place for bidders to subtotal the items on it, and page 3 provides a place for bidders to insert a total, lump sum price, as well as to write out that total in words. Page 2, however, has no place for bidders to subtotal the items on it, and this is what led to BECO's alleged mistake.

Initially, BECO advised Morrison-Knudsen and our Office that although all of the line item prices on page 2 of its bid schedule were correct, in subtotaling the items on that page, it had made a $50,000 error in addition. BECO states

that it carried over this incorrect subtotal, so that its lump sum price on page 3 was overstated by $50,000.

In DOE's report on the protest, the agency pointed out that the correct subtotal of the items on page 2 was not $50,000 less than the amount BECO had carried over, but only $49,940 less. BECO now explains that it made an additional $60 error in transcribing one line item from its worksheet to the bid schedule. Thus, according to BECO, its intended bid was $1,171,935, or $49,940 less than the total, lump sum price shown on page 3 of its bid schedule. This amount is still sufficient to displace Bannock as low bidder.

BECO argues that its error can be discovered merely by adding the line items on page 2 of its bid schedule, and that the contracting officer had a duty not only to check the bid before making award, but also to permit correction once the mistake was called to his attention. In this regard, BECO also contends that Morrison-Knudsen and DOE failed to treat bidders equally in that they corrected a $.50 error in Bannock's bid, revising that firm's bid upward from $1,203,039.30 to $1,203,039.80, but improperly refused to correct what BECO characterizes as a "clerical error" in its own bid.

Morrison-Knudsen's procedures permitting post-award correction of mistakes apply only to mistakes claimed by the awardee. DOE's regulations for management and operating contractors contain the same restriction. See 48 C.F.R. § 970.4405 (1984). Under federal law, the general rule applicable to a mistake in bid alleged after award by other than the awardee is that the sole responsibility for the preparation of a bid rests with the bidder, and where a bidder makes a mistake in bid it must bear the consequences of its mistake unless the contracting officer was on actual or constructive notice of an error before award. Prince Construction Co., B-196726, Jan. 9, 1980, 80-1 CPD ¶ 29.

The Federal Acquisition Regulation (FAR), 48 C.F.R. § 14.406-1 (1984), does impose a duty on the contracting officer, before award, to examine all bids for error and to obtain verification where a mistake is suspected. However, that duty does not extend to checking the addition of a column of line items to determine whether the bidder might have made an error in its total or subtotal. Therefore, the discrepancy between the stated total of the line items of BECO's bid and the correct mathematical total of those items did not constitute constructive notice to the contracting

officer of a mistake requiring verification. See East Bay Auto Supply, Inc., B-210392, June 10, 1983, 83-1 CPD ¶ 642; R.A. Jone Co., B-180293, Apr. 26, 1974, 74-1 CPD ¶ 218. As these cases indicate, responsibility for the preparation of its bid rested with BECO, and it must bear the consequences of its mistake. Here, there was no reason for the contracting officer otherwise to suspect a mistake in BECO's bid, since a substantial disparity between the bid and other bids or the government estimate was not evident. BECO's bid was only 2 percent more than Bannock's and 12 percent lower than Morrison-Knudsen's estimate. Compare PNM Construction, Inc., B-215973, Nov. 30, 1984, 84-2 CPD ¶ 590 (protester's bid was 18.49 percent less than awardee's and 14.39 percent less than the government estimate). Therefore, as the contracting officer had neither actual nor constructive notice of BECO's computation error before award, verification was not required and BECO's alleged mistake is not correctable.

As for the $.50 error in Bannock's bid, we believe this is clearly correctable as a clerical error and is in any event de minimus.

4. Bannock's Size Status

BECO also alleges that Bannock is not a small business and that Morrison-Knudsen should have terminated its contract for this reason. The DOE responds that it had no reason to challenge Bannock's small business status because the firm certified in its bid that it was small.

A bidder's representation regarding its size status must be accepted by the contracting officer unless another party challenges the representation or the contracting officer has reason to question it. FAR, 48 C.F.R. § 19.301(b); Dohrman Machine Production, Inc., B-217138, Feb. 12, 1985, 85-1 CPD ¶ 189. In a direct federal procurement that is set aside for small business, the contracting officer generally is required to inform unsuccessful offerors, before award, of the name and location of the apparent successful offeror, providing the other offerors with an opportunity to file a timely, i.e., pre-award, size status challenge. Notice is not required, however, when the contracting officer determines that the urgency of the requirement necessitates award without delay. FAR, 48 C.F.R. § 15.1001(b)(2). The contracting officer, we believe, effectively made such a determination in this case when he awarded the contract and simultaneously gave the notice to proceed to Bannock. Moreover, a post-award protest concerning the small business representation of another bidder may only be considered prospectively. In

such a case, the contracting officer need only forward the protest to the SBA for its consideration in future actions. FAR, 48 C.F.R. § 19.302(j).

BECO's argument that Morrison-Knudsen should have terminated Bannock's contract for default upon being advised by BECO that the firm was a subsidiary of a large business is without legal merit. Only the SBA has the authority to determine whether a firm is "small," 13 C.F.R. § 121.1(a) (1985), and size status concerns the bidder's eligibility for SBA programs and for federal procurement purposes. Id. § 121.1(b). Size status does not affect the bidder's responsibility or the responsiveness of its bid.

5. Determination to Proceed

As noted above, BECO also protests Morrison-Knudsen's and DOE's determination to proceed with performance of the subcontractor notwithstanding the protest, alleging that this violates the stay provision of CICA. In view of our conclusion that BECO's protest is otherwise without legal merit, we need not reach the alleged violation of CICA.

We cannot conclude that Morrison-Knudsen or DOE acted arbitrarily, capriciously, or in bad faith in connection with this procurement. The protest is denied, as is the claim for bid preparation costs and costs of filing and pursuing the protest.

for Seymour Efros
Harry R. Van Cleve
General Counsel