DECISION

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

FILE: B-221306 **DATE:** February 26, 1986

MATTER OF: TSCO, Inc.

DIGEST:

1. Protest filed with GAO within 10 working days after adverse agency action on protest at that level (contracting agency proceeded to accept best and final offers) is timely and, thus, will be considered.

2. Where the contracting agency did not transmit any written notice of award to offeror, and informed the offeror that a contract would not be signed until a date when the contracting officer would be available, it should have been clear to the offeror that award had not been made; meetings between the offeror and agency and ancillary unsigned contract documents prepared by the agency indicated only that the agency planned to make an award to the offeror, and were not substitutes for a proper award by the contracting officer.

3. A reprocurement for the account of a defaulted contractor is not subject to the strict terms of the regulations that govern regular federal procurement and will not be disturbed where agency's actions are reasonable; reopening negotiations to permit an additional offeror to submit a proposal, thereby avoiding a sole-source award, is not unreasonable, since it promotes competition and helps assure that the goverment will receive the most reasonable price.

4. Protest that the contracting agency disclosed the protester's offered price to another offeror, resulting in that offeror submitting the lowest cost proposal, is denied where the allegation is unsupported in the record, and where the record discloses other reasons for the competitor's low offer.

5. Protester's procurement costs, including reasonable attorneys' fees for pursuit of protest, will not be awarded where the contracting agency did not act improperly and the protest is denied.

TSCO, Inc. (TSCO), protests the award of a contract to Bill McCann, Inc., under a reprocurement to replace the defaulted contractor under invitation for bids (IFB) No. DACA27-85-B-0050, issued by the United States Army Corps of Engineers. We deny the protest.

The IFB, originally issued June 14, 1985, called for construction to install air conditioning at dependent schools at Fort Knox, Kentucky. Two bids--those of TSCO and Webb Mechanical Enterprises, Inc.--were received by the bid opening date. One bid, McCann's, was received 4 minutes after the time specified for bid opening and thus was rejected and returned to McCann unopened. Award was made to Webb on September 26 based on its low bid price of $6,925,538. Webb experienced difficulties obtaining required payment and performance bonds, however, and, on November 4, the Corps terminated Webb's contract for default.

Following the termination, the Corps undertook to reprocure the work against Webb's account by initiating negotiations with TSCO, the only other timely bidder. At a November 18 meeting, the Corps advised TSCO that its goal was to minimize Webb's liability. In response, TSCO proposed a lump-sum price of $6,988,956 which, although lower than its original bid price, still was higher than the defaulted contract price. By letter dated November 19, TSCO furnished the Corps a breakdown of its prices for each of seven schools. The next day, the Corps gave TSCO a contract number the firm had requested for securing bonds. The Corps advised TSCO that the dates on the bonds should be left blank, and would be completed when the Corps signed the contract. The signing would not take place until November 22, the Corps further advised, since the contracting officer would be unavailable before then. On November 20-21, TSCO met with Corps construction representatives and Fort Knox school officials to discuss, and ultimately agree to, a construction schedule.

By letter to the Corps dated November 19, McCann insisted on being afforded an opportunity to compete for the reprocurement, and stated that it would offer a price below the defaulted contract price. The Corps determined it would be in the government's interest to include McCann in a competition and, by telegrams received November 26, requested that TSCO and McCann submit best and final offers by noon on November 27. Both firms submitted timely offers. TSCO submitted its offer at 10 a.m., along with a

separate letter complaining that opening the procurement to McCann was improper since TSCO already had an oral contract with the Corps; the Corps should not have disclosed the scheduling plan TSCO developed with the Corps; and McCann unfairly had access to TSCO's original bid price. The Corps awarded McCann the contract on December 2, based on its low price of $6,620,000.

TSCO contends that the award to McCann was improper since it already had been awarded a contract; the Corps violated procurement regulations in conducting the procurement; and the Corps engaged in auction techniques.

Timeliness

Preliminarily, the Corps argues that TSCO's protest is untimely and thus should not be considered because TSCO did not file it with our Office within 10 days after becoming aware that the Corps intended to reopen the competition. We find that TSCO's protest is timely.

The Corps' position fails to take into account the fact that TSCO filed a protest with the Corps shortly before the deadline for submitting final offers. Under our Bid Protest Regulations, a protest based on alleged solicitation improprieties must be filed with the contracting agency or our Office before the next closing date for receipt of proposals after the impropriety arises. 4 C.F.R. § 21.2(a)(1) (1985). The record shows that TSCO became aware on November 22 or November 26 that the Corps intended to reopen the solicitation to another firm, and filed a protest with the Corps challenging this action at 10 a.m., on November 27, 2 hours prior to the deadline for submission of best and final offers. This protest was timely.

Where a timely protest has been filed initially with the contracting agency, any subsequent protest to our Office will be considered if filed within 10 working days after the protester receives notice of adverse agency action. 4 C.F.R. § 21.2(a)(3). The Corps' continued receipt of best and final offers on November 27 constituted initial adverse agency action, i.e., notice that the Corps planned to proceed with the reopening of the solicitation. December 12 was the tenth working day after November 27 (accounting for the November 28 Thanksgiving holiday), so TSCO's protest filed in our Office on December 11 was timely and, thus, will be considered on the merits.

Oral Award

TSCO takes the position that it was awarded a contract orally on November 20 when the Corps gave TSCO a contract number. As additional evidence of the award, TSCO points to the Corps' request for funds for the contract, preconstruction meetings between TSCO and the Corps, and the Corps' preparation of documents including an unsigned notice to proceed.

The Competition in Contracting Act of 1984, 10 U.S.C.A. § 2305(b) (West Supp. 1985), and Federal Acquisition Regulation (FAR), 48 C.F.R. § 15.1002 (1984), provide that the contracting officer shall award a contract by transmitting written notice of award to the offeror. There was no such written notice here. See Kunert Electric, B-204439, June 8, 1982, 82-1 C.P.D. ¶ 551. In any case, acceptance of a prospective contractor's offer by the government must be clear and unconditional, and a contract does not come into existence when the purported acceptance is conditioned on future actions by the offeror or the procuring agency. Sevcik-Thomas Builders and Engineers Corp., B-215678, July 30, 1984, 84-2 C.P.D. ¶ 128. As discussed, although TSCO was given a contract number to use in securing its bonds, the Corps specifically advised TSCO that the contracting officer--the government official with authority to bind the Corps contractually--would not sign and date the contract until November 22. While TSCO apparently views the signing as a formality, we think the Corps' advice in this regard clearly indicated that the Corps did not intend to award a contract earlier than November 22.

The Corps' issuance of a contract number for bonding purposes; conducting construction planning meetings; and preparation of contract documents, indicated only that the Corps anticipated an award to TSCO, not that an award had been made. We have specifically held that informing an offeror of the contract number assigned to the solicitation falls short of indicating the contracting agency's clear, unconditional acceptance of the offer. Mil-Base Industries, B-218015, Apr. 12, 1985, 85-1 C.P.D. ¶ 421.

We note, finally, that the government can be estopped from denying a contract only to the extent that the offeror was injured by its reliance on the government's actions. Family Service of Burlington County, B-215956, Sept. 4, 1984, 84-2 C.P.D. ¶ 250. TSCO has not asserted, and the

record contains no evidence, that it has suffered any specific financial or other harm as a result of reliance on the Corps'actions. In any case, remedies with respect to an estoppel argument, such as a claim for expenses incurred in anticipation of contract performance, must be pursued under the Contract Disputes Act of 1978, 41 U.S.C. § 601 et seq. See Lunn Industries, Inc., B-210747, Oct. 25, 1983, 83-2 C.P.D. ¶ 491.

Violation of Regulations

TSCO alleges that the Corps violated several procurement regulations in conducting this procurement, and that the award to McCann thus should be overturned. TSCO principally argues that the Corps' reopening of discussions and requesting a best and final offer from McCann, when McCann had not submitted an initial proposal, violated FAR, 48 C.F.R. § 15.611, which sets forth general principles governing negotiated procurements.

The FAR provisions cited by TSCO are not controlling here. We long have held that where, as here, a reprocurement is for the account of a defaulted contractor, the statutes and regulations governing regular federal procurements are not strictly applicable. Douglas County Aviation, Inc., B-208311, June 8, 1983, 83-1 C.P.D. ¶ 623. Under FAR, 48 C.F.R. § 49.402-6, entitled "Repurchase against contractor's account," the contracting officer may use any terms and acquisition method he deems appropriate for repurchase of the same requirement (as the standard default clause similarly provides), but must repurchase at as reasonable a price as practicable and obtain competition to the maximum extent practicable.1/ We will review a reprocurement to determine whether the contracting agency proceeded reasonably under the circumstances. Id. We find the Corps' actions were reasonable.

1/ TSCO asserts that FAR, 48 C.F.R. § 49.402-6, requires the contracting officer to comply with generally applicable procurement regulations in conducting reprocurements. The cited provision, in fact, contains no such requirement and TSCO's position is untenable in light of our prior decisions.

The record shows that the Corps' primary concern in the reprocurement was obtaining the lowest price possible, in accordance with the repurchase regulations. Although the Corps initially planned to contract with TSCO without competition, the agency decided that a competition, in fact, would be preferable once McCann informed the Corps that it was interested in competing and that it would offer a price below the defaulted contract price. We believe it was reasonable for the Corps, at this juncture, to request a final offer from TSCO and McCann by a common deadline: such action allowed for competition among the two firms that expressed interest in the original procurement, and presented the Corps with the opportunity to make award at less than the defaulted contract price. Permitting McCann to compete also was consistent with the FAR requirement that competition be maximized.

We also point out that, as it is the objective of our bid protest function to promote full and free competition for government contracts, we generally do not look favorably upon protests that a contracting agency should procure supplies or services from a particular firm on a sole-source basis. Ingersoll-Rand, B-206066, Feb. 3, 1982, 82-1 C.P.D. ¶ 83.

Auction

TSCO maintains that, in the course of including McCann in the reprocurement, the Corps engaged in prohibited auction techniques. Specifically, TSCO argues that the Corps must have disclosed TSCO's offered price when advising McCann that it would be permitted to compete. TSCO urges that we sustain its argument based on the Corps' failure to deny in its report that it revealed TSCO's price.

The record contains no evidence that TSCO's price was revealed to McCann, and a protester's unsubstantiated statements are not sufficient to establish otherwise. Andrews Tool Co., B-214344, July 24, 1984, 84-2 C.P.D. ¶ 101. It is relevant that the record shows McCann's late bid on the original procurement was lower than either TSCO's or Webb's bid. We thus do not consider it surprising that McCann's offered price on the reprocurement, although somewhat above its original bid (due, McCann explains, to a mistake in its original calculations), remained below Webb's defaulted contract price. That is, we find no reason to assume, as TSCO argues, that McCann's low price must have resulted from a disclosure of TSCO's price.

We believe the apparent absence of an express denial by the Corps can be traced to the manner in which TSCO raised this allegation. TSCO's original protest letter asserts that the Corps "engag[ed] in auction techniques," without specifying the actions to which the allegation referred. The Corps did specifically reply to the allegation in its report, under the heading "Allegation of 'Auction Technique,'" but apparently read the allegation as an objection to the fact that TSCO's bid on the original procurement had been disclosed to McCann at the public bid opening, a complaint TSCO raised in its agency-level protest. The Corps' response, therefore, was along the lines that such a disclosure does not constitute auctioning just because a reprocurement is conducted. The Corps' response was a reasonable attempt to answer TSCO's allegation and will not be deemed an admission by the Corps that it acted improperly.

TSCO also claims it was improper for the Corps to disclose to McCann the construction schedule TSCO developed during meetings with Corps personnel and Fort Knox school officials; the Corps advised McCann of the schedule when informing McCann that it would be permitted to submit an offer. Disclosure of the schedule is unobjectionable. TSCO has no apparent proprietary rights in the construction schedule, and the Corps properly determined that both TSCO's and McCann's offers should be based on the same schedule to assure that competition would be on an equal basis.

TSCO has requested reimbursement of its procurement and protest costs, including reasonable attorneys' fees. There is no basis for awarding such costs where, as here, the contracting agency did not act improperly, and we deny the protest. Polaris, Inc., B-218008, Apr. 8, 1985, 85-1 C.P.D. ¶ 401.

The protest and request for costs are denied.

for Seymour Efros
Harry R. Van Cleve
General Counsel