



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Southern Dredging Co., Inc.,

File: B-225402

Date: March 4, 1987

DIGEST

Because the Federal Acquisition Regulation requires that bids received from firms suspended at the time of bid opening from contracting with the government be rejected, such firms may not be considered for award even though they may no longer be suspended at the time of award. Prior inconsistent decision is overruled.

DECISION

Southern Dredging Co., Inc., protests any award by the United States Army Corps of Engineers of a contract to either the Great Lakes Dredge & Dock Company or Bean Dredging Corporation under invitation for bids (IFB) No. DACW65-87-B-0001 because both those firms were suspended from government contracting at the time of bid opening. The agency's position is that because the suspensions of these firms subsequently expired, they are now eligible for award. We sustain the protest.

The IFB is for dredging the Craney Island rehandling basin, Norfolk Harbor, Virginia. When the agency opened bids on October 15, 1986, Great Lakes was the lowest bidder at \$2,120,458; Bean Dredging was second lowest at \$2,269,300; and Southern Dredging was third lowest at \$2,478,116. The agency received five other bids at higher prices. The government's estimate for the work was \$2,536,335. The protester contends that no award may be made under the IFB to either Great Lakes or Bean Dredging, citing the Federal Acquisition Regulation (FAR), 48 C.F.R. § 14.404-2(g) (1986), which provides: "Bids received from any person or concern that is suspended, debarred, or ineligible (see Subpart 9.4) shall be rejected if the period of suspension, debarment, or ineligibility has not expired as of the bid opening date."

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The protester contends that the drafters of section 14.402-2(g) added the words "as of the bid opening date" to clarify when the period of suspension must expire in order for a suspended firm to be eligible for award.^{1/} The protester has submitted a copy of a "spreadsheet" reportedly used by those who drafted this provision indicating that the reason for specifying the date of bid opening rather than award as the critical date was that otherwise an agency might tend to delay an award until after a period of ineligibility had expired. The protester contends that the pre-FAR decisions of this Office indicating that a firm suspended at the time of bid opening nevertheless may receive an award when the suspension is removed prior to award, see, e.g., Kings Point Mfg. Co., Inc., et al., B-210389.4, et al., Dec. 14, 1983, 83-2 CPD ¶ 683, are no longer controlling on this issue.

The agency contends that decisions of this Office involving solicitations issued subsequent to the effective date of the FAR support its position that a firm's status at the time of award rather than at the time of opening determines the firm's eligibility for award. The agency cites SRS Technologies, B-222548.2, Aug. 21, 1986, 86-2 CPD ¶ 208; Tracor Applied Sciences, Inc., B-221230.2, et al., Feb. 24, 1986, 86-1 CPD ¶ 189; and Skip Kirchdorfer, Inc., B-215784, Dec. 3, 1984, 84-2 CPD ¶ 606. The agency argues that the purpose of suspension is not to punish a firm, but to protect the government's interest in ensuring that it contracts only with responsible firms. To deny a contract to a firm that is otherwise currently responsible solely on the basis that the firm had been suspended as of the date of bid opening, argues the agency, surely would be punitive. The agency also notes the cost savings the government would realize here by contracting with either of the two previously suspended bidders. The agency recognizes, however, that there is a substantial basis for the protester's position.

We agree with the protester. FAR, 48 C.F.R. § 14.404-2(g), mandates the rejection of a bid received from a bidder suspended at the time of bid opening. The regulation does not vest the contracting agency with the discretion to do

^{1/} Prior to the FAR, neither the Defense Acquisition Regulation, 32 C.F.R. § 2-404.2(f) (1983), nor the Federal Procurement Regulations, 41 C.F.R. § 1-2.404-2(d) (1983), contained this specific language.

otherwise.^{2/} Applying that regulation to the facts of this case, we conclude that the bids from Great Lakes and Bean Dredging should not be considered, since both bidders were suspended from contracting with the government as of the October 15 bid opening.

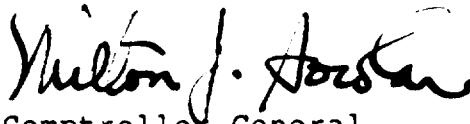
We also agree with the protester that the pre-FAR decisions of this Office are no longer controlling on the issue of when a suspension must be lifted in order for a suspended bidder to become eligible for award. Prior to the FAR, the regulations did not in all instances require the rejection of bids received from bidders suspended at the time of bid opening. For this reason, and since a firm's suspension related to the issue of responsibility, we said that a suspended firm's eligibility for receiving an award should be determined at the time of award and not at the time of bid opening. See, e.g., Bauer Compressors, Inc., 63 Comp. Gen. 303 (1984), 84-1 CPD ¶ 458. Now, however, the FAR clearly establishes the time of bid opening as the point at which a suspended bidder's eligibility for award is determined. We will, of course, apply the rule in this and all future decisions involving this issue.

With respect to the three post-FAR cases cited by the agency, two, SRS Technologies, B-222548.2, supra, and Tracor Applied Sciences, Inc., B-221230.2, supra, involved solicitations of competitive proposals. Such procurements are subject to the requirements of FAR Part 15, which does not contain a provision concerning offers from suspended contractors similar to FAR, 48 C.F.R. § 14.404-2(g). Our holdings in those cases are therefore not in conflict with our views here. Our decision Skip Kirhdorfer, Inc., B-215784, supra, however,

^{2/} The Department of Defense Federal Acquisition Regulation Supplement, 48 C.F.R. § 209.405(a)(1) (1985), provides for rejection of bids received from suspended bidders unless a written determination is made that there is a compelling reason to make an exception. This regulation purportedly implements FAR, 48 C.F.R. § 9.405(a) (1986), which provides that an agency should not award a contract to a suspended bidder unless there is a compelling reason to do so. The agency has not argued that there is a compelling reason in this case for considering either Great Lakes or Bean Dredging for award.

did involve a formally advertised (now sealed bidding) procurement, the requirements for which are contained in FAR Part 14. Since that case is inconsistent with our holding here, it is overruled and will no longer be followed.

We sustain the protest. The agency should award the contract to the protester if it finds the firm otherwise eligible for award.

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