



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** James M. Smith, Inc.

**File:** B-233877

**Date:** April 19, 1989

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### DIGEST

1. Protest that contracting agency orally awarded a contract for shuttle bus service to the protester subject only to inspection and acceptance of its buses is without merit where agency did not transmit any written notice of award as prescribed in the invitation for bids; acceptance of a 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.
2. Protest alleging agency improperly made an aggregate award for midday and rush-hour shuttle bus services is denied where it is clear that the agency intended to make one award for the services.

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### DECISION

James M. Smith, Inc., protests any award under invitation for bids (IFB) No. 558-29-88, issued by the Veterans Administration (VA) (now the Department of Veterans Affairs) for shuttle bus services at the VA Medical Center, Durham, North Carolina. Smith alleges that the VA had orally awarded it a contract subject only to the inspection and acceptance of its buses and that the proposed aggregate award results in a higher overall cost than would a multiple award.

We deny the protest.

Apparently, shuttle bus services are needed to transport hospital employees between remote parking lots and the hospital during construction which has closed hospital employee parking lots. The IFB, issued on October 14, 1988, requested a bid for 12 months of morning and evening shuttle

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services for two routes (bid items 1 and 2) (hereinafter Bid Item I) and a separate bid for a "Bid Alternate" for "shuttle all day" service covering both routes during the hours between the morning and evening service.

The VA received the following five bids on November 15:

	Bid Item I	Bid Alternate
Metro Tours	\$ 74,400	\$ 24,000
Smith	78,000	48,000
Transcontinental Enterprises, Inc.	110,244	5,436
Southern Coach Company	102,400	138,192
Duke Power Company	104,400	67,824

The low bidder on Item I was determined to be nonresponsible. Consequently, on December 12, the protester's president, Mr. Smith, was advised by the contracting officer by telephone that as the low responsive bidder his firm was next in line for award for Item I, but that it was necessary to inspect his buses before making award. Since (1) the protester was located in Georgia; (2) at least one of the buses he would use in Durham would be diverted from a contract at Fort Hood, Texas; and (3) inspection was to occur in Durham, he was sensitive to how time consuming and expensive the relocation of his buses for inspection would be. The protester states that he sought to assure himself, therefore, that he had received the award, pending only the inspection and acceptance of the buses. After receiving what he considered to be such an oral assurance from the contracting officer, Mr. Smith then commenced pre-performance preparatory work and began his moving of a bus from Texas to Durham for an inspection scheduled for December 19. While enroute to Durham, on December 15, Mr. Smith contacted his office, and was informed that the contracting officer had left a message which stated that the agency had decided to award an aggregate contract to Transcontinental for both Bid Item I and the Bid Alternate, rather than Bid Item I alone, and that on this combination Smith's aggregate price was not the lowest. Therefore, the inspection was canceled.

Since he was enroute to Durham and away from his office, Mr. Smith filed a protest by telegram on December 16, alleging that an oral award had been made to him on December 12, and that he had relied on the oral award to his financial detriment. Once Mr. Smith returned to his office he submitted a more detailed account of the facts and circumstances surrounding the alleged oral award. In this letter, Mr. Smith also alleged that the agency awarded

the contract contrary to the IFB, in that the agency could have awarded a contract for either Bid Item I or the Bid Alternate, but could not award a combination of the two where this would result in a higher cost to the government than would multiple awards.

Mr. Smith first alleges that his company was orally awarded a contract for Bid Item I and that subsequent agency action illegally voided that contract. Mr. Smith alleges that he sought and received assurances from the contracting officer that his company would receive award if its buses passed inspection, and that the agency was aware that without these assurances he would not have moved his bus for inspection. Further, he notes that the agency's knowledge of his intentions arose not only from the communications regarding this IFB, but also as a result of a prior course of dealing regarding a prior procurement by the same medical center. Mr. Smith alleges, therefore, that the agency's retraction of the award constitutes a breach of contract.

We find no merit to this allegation. 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. Couse's Sanitation Services, B-223659, Sept. 15, 1986, 86-2 CPD ¶ 299. Here, of course, the award was contingent on inspection of the buses and that inspection never took place. Additionally, the Competition in Contracting Act (CICA) of 1984, 41 U.S.C. § 253 (Supp. IV 1986), Federal Acquisition Regulation (FAR) § 14.407-1(c), and the IFB all provide that the contracting officer shall award a contract by transmitting a written notice of award to the offeror. In light of these provisions, we do not think an offeror could reasonably assume that a contract award could be effected merely by oral advice. See, e.g., Couse's Sanitation Services, supra. Therefore, we do not conclude that Smith received an award of Item I. If the protester continues to believe that an award was made to it and that subsequent action by the VA was inconsistent with that award, it may raise the matter in a contract disputes forum. See Litton Systems, Inc. et al., B-229921 et al., May 10, 1988, 88-1 CPD ¶ 448.

The protester next contends that since the solicitation does not mandate award of a single contract, it is permissible to award either a single contract or multiple contracts, depending on which is more advantageous to the government. Smith alleges that if the agency were to make multiple awards, that is, award Bid Item I to Smith and the Bid

Alternate to Transcontinental, it would realize a cost savings of \$32,244 over the current plan to award a single contract for both the Bid Item I and the Bid Alternate.

We do not agree that the IFB provides for multiple awards. The agency is seeking shuttle bus services, and we think it should have been clear from the IFB itself that the VA intended to award a contract either for rush hour service only or for all day service that would include both rush hour and non-rush hour service. Indeed, the use of the term "Bid Alternate" suggests that the non-rush hour service represented by the "Bid Alternate" was not to be the subject of a separate contract, but was simply to be considered as a possible add-on to the basic contract for rush hour service.

While it is true that the IFB could have more clearly stated the exact basis for award, it does not appear that the protester was prejudiced thereby. Accordingly, since the VA decided it could make award for both rush hour and non-rush hour service, it appropriately determined that Transcontinental, the low overall bidder, was entitled to the award.

The protest is denied.



James F. Hinchman

General Counsel