

(C. Sklarew)



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Environmental Safety Consultants, Inc.

**File:** B-241714

**Date:** February 26, 1991

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Peter Nogu for the protester.

Lester Edelman, Esq., Department of the Army, for the agency.

Christina Sklarew, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

1. Cancellation of an invitation for bids after bid opening is proper where solicitation does not reflect changed requirements in work and award under the solicitation would no longer meet the government's actual needs.
2. Contract specialist's note to protester concerning protester's bid did not, by its language, contain indicia of binding agreement and, in any event, under Federal Acquisition Regulation § 4.101, only contracting officer possesses authority necessary to bind government to a contract.
3. While, in the absence of an express contract, government may, in appropriate circumstances, be liable for a contract implied-in-fact, where record does not show facts supporting such a contract, no such contract or liability exists.

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### DECISION

Environmental Safety Consultants, Inc. (ESC) protests the U.S. Army Corps of Engineers' rejection of its bid as nonresponsive under invitation for bids (IFB) No. DACA51-90-B-0073 and the subsequent cancellation of the IFB. We deny the protest.

The IFB, which was set aside for the exclusive participation of small disadvantaged business (SDB) concerns, was for the removal of hazardous and toxic waste materials in three locations in New York. Bidders were required to submit a bid bond with their bids and were cautioned that a failure to do so could result in the rejection of the bid. By amendment to the IFB, bidders were advised that no funding

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was currently available for this procurement, and that no contract would be awarded until funds were available.

The agency received two bids in response to the IFB by the scheduled bid opening on September 5. The lower of these, submitted by Integrated Waste Special Services, Inc., was rejected because the bidder had certified that it was not an SDB. The other, submitted by ESC, did not include a bid bond.

Because the Federal Acquisition Regulation (FAR) requires the contracting agency to waive the bid guarantee requirement where it has received only one bid under a solicitation unless the contracting officer determines that it would be detrimental to the interests of the United States to accept the bid, see FAR § 28.101-4(a) and FAR § 28.101-4(c), the contracting officer requested additional information from ESC in connection with the firm's financial condition. After reviewing the matter, the contracting officer determined that a waiver of ESC's failure to provide the bid bond would not be in the government's best interest, and rejected the bid as nonresponsive on October 1. Since both bids had been rejected as nonresponsive, the contracting officer canceled the solicitation.

Cancellation after bid opening is proper when an award under the solicitation would not serve the actual minimum needs of the government. Bangar Contractors Corp., B-240071, Oct. 16, 1990, 90-2 CPD ¶ 295. Here, the record shows that the agency's needs have changed since the IFB was first issued. The agency no longer requires removal of materials from one of the three original sites; in addition, new administrative and reporting requirements apply to the remaining work, and estimates of quantities of toxic waste to be removed have been changed. These changes require solicitation revisions and, in our view, are sufficiently material to warrant cancellation of the IFB. Id. Since cancellation was justified, we need not consider whether the Army could also justify the cancellation on the basis that none of the bids were responsive.

ESC also argues that it was awarded a contract on September 14, when it received a handwritten note from a contract specialist, written on personal stationery, requesting that ESC confirm its bid, acknowledge some corrections and acknowledge the amendments. The note also stated, "we are awarding only price schedule A, B & C." It was signed by the contracting specialist. The protester contends that this manifested an intent to contract. We disagree.

Here, the handwritten note lacked any indicia of a binding agreement between the parties since it specifically requested information preparatory to any award and provided information about the award terms. In any event, the government is not bound beyond the actual authority conferred upon its agents. FAR § 4.101 provides that only contracting officers shall sign contracts on behalf of the United States. The note was not executed by a contracting officer and thus could not bind the agency contractually in any case. See Patton Reading Servs., Inc., B-215792, Jan. 8, 1985, 85-1 CPD ¶ 24.

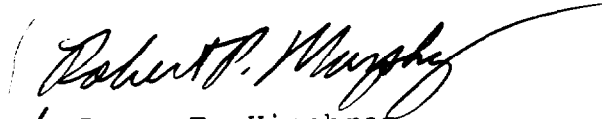
ESC argues that even if no formal contract existed, an implied contract was formed when the agency allegedly induced the protester to incur costs of performance and to release certain proprietary information to the government in reliance on its belief that a contract had been, or would soon be, awarded to ESC. The protester bases this argument on various inquiries that Army personnel made in connection with ESC's financial condition. The "performance" to which ESC refers consisted of such actions as providing financial information and preparing to secure payment and performance bonds. The Army states that it solicited information from the protester for the purpose of determining whether the bid bond requirement could be waived.

The United States may, in appropriate circumstances, be liable on implied-in-fact contracts. A contract implied-in-fact is one founded upon a meeting of minds, which, although not embodied in an express contract, is inferred as a fact from the conduct of the parties showing, in light of the surrounding circumstances, their tacit understanding that a "contract" indeed existed. See 55 Comp. Gen. 768, (1976).

Here, we are not persuaded that any meeting of the minds ever existed, nor do we find any conduct to support the protester's allegations. The actions the protester took consisted simply of steps taken in anticipation of entering a contract, and not the rendering of any work required under the solicitation. It is apparent from the record that the protester did not understand that its financial condition was being investigated in an attempt to ascertain

whether the bid bond requirement could be waived. This in fact was the purpose of the Army's requests for further information.

The protest is denied.

  
for James F. Hinchman  
General Counsel