DECISION

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

c1339

FILE: B-185405 DATE: August 13, 1976

MATTER OF: Lawrence W. Rosine Co. 98686

DIGEST:

1. Award may not be made under Navy total small business set-aside to firm found to be other than small business concern by SBA, even though firm's bid was only one received. Retrospective determination by Navy that there was not sufficient competition to justify set-aside and suggestion that IFB size classification may be erroneous do not allow direct award to sole bidder. Requirement must be resolicited so that all potential bidders, including other large business firms, may have opportunity to compete.

2. Fiscal year funds to be used for June 30, 1975, award under small business set-aside, conditioned on SBA determination that awardee is small business concern, can be used in subsequent fiscal year to fund replacement contract where award is withdrawn because of negative SBA size determination since conditional contract (1) was binding agreement obligating 1975 funds; (2) was sufficiently definite; (3) represented bona fide 1975 need; and (4) replacement contract to be awarded after resolicitation will cover same continuing need encompassed by conditional contract. 24 Comp. Gen. 555 (1945) overruled.

BACKGROUND

On June 10, 1975, invitation for bids (IFB) N62474-75-C-7024 was issued as a total small business set-aside by the Naval Facilities Engineering Command, Camp Pendleton, California, for floor repair in a family housing project. Only one bid, from the Lawrence W. Rosine Co. (Rosine), was received by the time set for bid opening on June 26, 1975. Rosine certified itself to be a small business.

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The National Flooring Company (National), which could not submit a timely bid due to unexpected traffic conditions, protested to the Navy that Rosine exceeds the IFB size standard of a maximum $1,000,000 in average annual receipts for the preceding 3 years. On June 27, 1975, pursuant to Armed Services Procurement Regulation (ASPR) § 1-703(b)(1)(a) (1974 ed.), the Navy referred the size protest to the Small Business Administration (SBA) for its determination. Since the SBA could not determine Rosine's size status before June 30, 1975, when the funds available for the contract would expire, an "award" was made to Rosine on June 30, 1975, containing the following condition:

> "The award is conditional upon a determination from the Small Business Administration on the small business size status of your firm. If their determination is that your firm is other than small business, this award will be null and void.* * *"

Rosine consented to the conditional award.

The SBA found Rosine not to be a small business concern on July 15, 1975. The SBA Size Appeals Board denied Rosine's appeal on September 29, 1975. On October 29, 1975, the Navy issued a modification to the contract stating:

> "Condition for award for subject project not having been met in accordance with Notice of Award letter of 30 June 1975, the conditional award of subject project is not effective."

The Navy has asked us (1) whether the award to Rosine can be reinstated since Rosine was the only bidder, or, in the alternative, (2) whether the floor repair requirement could be resolicited using the funds set aside for the Rosine contract.

(1) AWARD TO ROSINE

The Rosine contract cannot be reinstated since it was ineligible under the IFB. Although it asserts that no bidder would be prejudiced by such reinstatement, the Navy has not suggested that no other large business firms would have competed had the procurement not been restricted.

The Navy has asserted that the decision to set-aside the procurement for small business was, in retrospect, erroneous because a sufficient number of bids was not received. See ASPR § 1-706.5 (a)(1) (1974 ed.). The Navy has also suggested that the size classification standard of $1,000,000 was not appropriate for this procurement.

An award to Rosine would constitute a withdrawal of the small business set-aside under ASPR § 1-706.3 (1975 ed.) The proper procedure, where a total set-aside is withdrawn, is to resolicit so that all eligible bidders may have an opportunity to compete. 46 Comp. Gen. 102 (1966); B-164523, August 28, 1968; Society Brand, Inc., et al., 55 Comp. Gen. 475 (1975), 75-2 CPD 327; Interad, Limited, B-184808, November 19, 1975, 75-2 CPD 329.

Moreover, the Navy's contention that since National did not bid it is not an "interested party" entitled to protest Rosine's size is not relevant in the context of the present case, since the Navy referred the size question to the SBA which has specifically found that Rosine is other than a small business concern.

The Navy has also referred to a number of situations where invitation requirements were waived because only one bid was received. See, e.g., 34 Comp. Gen. 364 (1955), which states that delivery requirements may be waived if no bid received is responsive to them; 39 id. 796 (1960), which allowed defects in the bid bond of the only bid received to be waived; and 45 id. 59, 67 (1965), which allowed an amendment after bid opening to the IFB's change of utility rate provision, where only one bid was received, the contract could have been negotiated under the authority of 10 U.S.C. § 2304(a)(10) (1964), and the deviation from the advertised requirements was found to be not the type as would affect the legality of the award. However, in each of the referenced cases, which should be limited to their special circumstances, all qualified bidders were eligible to compete in free and open competition for the IFB requirements. There was no free competition open to large business bidders in the present case.

In view of the foregoing, the Navy's first question is answered in the negative, and the requirement must be resolicited rather than awarded directly to Rosine.

(2) USE OF 1975 FISCAL YEAR FUNDS FOR REPLACEMENT CONTRACT

The funds to be used for the Rosine contract were made available through the Family Housing Management Account by the Military Construction and Reserve Forces Facilities Authorization Act, 1975, Public Law 93-552, 88 Stat. 1759 (1974), and the Military Construction Appropriation Act of 1975, Public Law 93-636, 88 Stat. 2181 (1975). The Navy has informed our Office that the money to be used from the account had been appropriated for operation and maintenance of family housing. The amounts available for operation and maintenance could not be obligated after the 1975 fiscal year. See 31 U.S.C. § 718 (1970).

Fiscal year funds may be validly obligated only if supported by proper documentary evidence such as a binding agreement. 31 U.S.C. § 200(a) (1970).

Where contract performance has extended beyond the period of availability for obligation of a fiscal year appropriation and the contract has to be terminated because of the contractor's default, we have consistently found that the funds obligated under the original contract are available for the purpose of engaging a replacement contract or to complete the unfinished work, provided that a bona fide need for the work, supplies or services existed at the time of the original contract's execution, and the need continues to exist up to the time of the execution of the replacement contract. See 2 Comp. Gen. 130 (1922); B-105555, September 26, 1951; 34 Comp. Gen. 239 (1954); 40 Comp. Gen. 590 (1961); B-160834, April 7, 1967. In addition, where contracts have been terminated for reasons other than contractor default, e.g., where contract awards were erroneously made, we have allowed the use of fiscal year funds after the expiration of the fiscal year to fund replacement contracts, if the foregoing conditions have been satisfied. See 17 Comp. Gen. 1098 (1938); 34 id. supra; B-152033, May 27, 1964; B-158261, March 9, 1966; B-157179, September 30, 1970; B-173244(2), August 10, 1972.

The contracting officer here was faced with a dilemma. The procurement, for the repair of family housing, had been set aside for small business. The only bid received was from a firm which had certified itself as small. The contracting officer has no authority to ignore such a certification. ASPR § 1-703(b) (1974 ed.). He may accept it, if it is not protested by someone else, or he or another party may refer it to the SBA for a size determination. A decision on a referral could not be made by SBA

before the obligation period for the funds expired. Therefore, the contracting officer had either to make award to Rosine notwithstanding the protest (which he had a right to do under ASPR § 1-703(b)(5) (1974 ed.) if he determined that the situation was urgent) or lose the funds. In the latter case, it would mean that the work--to make living quarters habitable--could be performed only when and if fiscal year 1976 funds were made available for the project. Also, military families would be dislocated until the work was completed.

Because of his concern for getting the work completed and the size protest, the contracting officer decided to make an immediate award with the condition that the contract would be terminated at no cost if the SBA found Rosine other than small. This allowed the contracting officer to apply the post-award SBA determination to the instant contract without subjecting the Government to possible termination for convenience costs in the event Rosine was found to be other than small. Given the circumstances, the contracting officer's actions appear reasonable.

Even if a large business awardee's certification that it was a small business is in bad faith--and we do not decide that issue here--the Government has the option to cancel or terminate for the convenience of the Government or retain that firm's contract, whichever is appropriate under the circumstances. See 41 Comp. Gen. 47 (1961); 53 id. 434 (1970); Bancroft Cap Co., Inc., et al., 55 id. 469 (1975), 75-2 CPD 321. This rule is applicable here even though the condition indicated the contract would be null and void if Rosine was found by SBA to be other than a small business, since the condition was for the benefit of the Government rather than Rosine. See Stewart v. Griffith, 217 U.S. 323 (1910); Rogers v. Dorrance, 117 A. 564 (Ct. App. Md. 1922); Murray v. Edes Mfg. Co., 35 N.E.2d 203 (Sup. Jud. Ct. Mass. 1941); Gorman v. Gorman, 128 N.Y.S.2d 658 (App. Div. 1954); 5 Williston on Contracts § 746 (1961).

Therefore, we conclude that the award to Rosine, even with the condition, was sufficient evidence of a binding agreement sufficient to support the obligation of funds under 31 U.S.C. § 200(a) (1970). The record also demonstrates that (1) the initial agreement with Rosine was sufficiently definite to obligate 1975 funds; (2) the Rosine

contract represented a bona fide 1975 fiscal year need even though it was executed at the end of the fiscal year; and (3) any replacement contract awarded after resolicitation of the requirement will cover the same continuing need for floor repair, and will not represent a different requirement.

Consequently, the obligated 1975 funds may be used to fund a resolicited replacement contract encompassing the previously advertised flooring requirement. See B-152033, supra; B-173244(2), supra. 24 Comp. Gen. 555 (1945) overruled.

The Navy's second question is answered in the affirmative.

Deputy Comptroller General
of the United States