BIG DIG CONTRACT GOES TO LOW BIDDER BY JUDGE'S ORDER

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By Thomas C. Palmer Jr.

A Superior Court judge yesterday ordered the Massachusetts Highway Department to award a Big Dig contract to the lowest bidder despite a technicality that made the company ineligible in state officials' eyes. Acting rapidly to avoid construction delays, and following a one-day trial last week, Judge Vieri Volterra stopped state officials from giving the contract for relocation of utilities downtown to Modern Continental Co. Modern, which came in fifth in the bidding, was the only company bidding that had registered with the state as being "prequalified" for the work.

Volterra ordered the department to award the contract to McCourt Construction Co., which had proposed to do the work for $12.4 million, or $1.2 million less than Modern Continental.

Neither McCourt nor the five other bidders that challenged the state's award to Modern Continental had filed the proper prequalification form with the state, establishing that they have the ability to do the work.

The judge ruled that all the contractors were in fact qualified to do the work, and he criticized the state for not sufficiently publicizing a change in procedures that required such prequalification. State officials say they were trying to streamline the bidding process, but the judge said they forgot to make that clear to the players.

To give the contract to Modern "would elevate form over substance" in state bidding procedures, Volterra wrote in an nine-page decision. Denying the contract to McCourt, the lowest bidder, would have been "against the public interest."

"The judge did something the highway department couldn't do, in essence set aside the prequalification" requirement, said Peter M. Zuk, director of the $8 billion Central Artery/Third Harbor Tunnel project. "The judge's decision will result in a $1.2 million saving for the taxpayer, and that is good news."

Although Volterra noted that only Modern Continental among the eight bidding companies was not "asleep at the switch" on the procedural change that the department had made, he ruled that was not sufficient reason to give Modern the contract. Volterra called it a "Kafkaesque situation" when department officials felt they were prevented by law from awarding the contract to a qualified low bidder.

"That this situation is created by a public agency of the commonwealth which is expending sorely needed and scarce state and federal funds would naturally cause great alarm to any responsible observer," he said.

"Clearly, it is inappropriate to squander another million and a quarter dollars by blindly insisting on meeting a statutory mandate that was unnecessary in the first place," he said.