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Robert Little
Proc. II

DECISION

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

FILE: B-187458 DATE: April 7, 1977

MATTER OF: John J. Kirlin, Inc.

DIGEST:

1. Bidder's failure to list subcontractor who will perform between .026 and .077 percent of contract may be waived as an inconsequential deviation to listing requirement.

2. Manufacturers who are not required to perform on-site work and whose commercially available products will require no significant or critical modifications, are not subcontractors for purposes of the invitation's Listing of Subcontractor requirements.

3. Where three sections of the specifications have overlapping coverage with respect to installation of fan-coil units, installation may be performed by any qualified firm listed in any one of the three sections.

4. GAO agrees with agency's position that specifications were ambiguous as to whether raised bases for fan-coil units were to be factory fabricated, and since rule of contra proferentem would preclude Government from requiring bases to be factory fabricated, low bidder's indication that it will shop fabricate raised bases affords no ground for rejecting bid or canceling the solicitation.

John J. Kirlin, Inc. (Kirlin) has protested the award of a contract to AFGO Engineering Corporation (AFGO), because, according to Kirlin, AFGO's bid is nonresponsive to the General Services Administration's (GSA) invitation for bids (IFB) No. GS-00B-02736 for improving the exhaust and air conditioning system of the United States Court House, Washington, D.C. Specifically, Kirlin contends that AFGO failed to list several subcontractors pursuant to the "Subcontractor Listing" requirements of the solicitation. For the reasons that follow, we believe that GSA may accept AFGO's bid.

The solicitation contained GSA's standard "Listing of Subcontractors" provision (Section 01100, "Special Conditions", paragraph 10) requiring bidders to identify those with whom they proposed to subcontract for performing specified categories of work. In the

event that the bidder intends to perform all or part of the specified categories of work itself, it is required to list itself and, where appropriate, identify those firms which will be performing the remainder and the portion they will perform. 41 C.F.R. § 58-2.202-70 (1976)requires the contracting officer to include in the Subcontractor List the categories comprising the mechanical, electrical, and elevator and/or escalator divisions of the project as well as other general construction categories of work comprising at least three and one-half percent of the cost of the contract.

The first ground of Kirlin's protest involves subcontractor listing for Heating Apparatus category (§ 15700) of Division 15 (Mechanical). In that section AFGO listed itself as performing 100 percent of the category. Paragraph 27 (Cleaning of Apparatus) provides that all water introduced into the heating system for filling, flushing, or makeup shall be treated chemically by a subcontractor specializing in water treatment for mechanical systems. Moreover, the subcontractor must provide the testing and application services and materials, and provide and operate any necessary equipment. AFGO does not specialize in water treatment for mechanical systems, and, therefore, has not listed all the firms or individuals who will perform the work under section 15700.

Kirlin's position is that even though the chemical treatment may be as high as .077% of AFGO's bid of $1,940,000.00 (i.e., $1500.00), even the smallest of prospective subcontractors are entitled to protection from bid shopping. GSA feels that $121,000.00 (the difference between AFGO's bid, and Kirlin's bid of $2,055,000.00) is too high a price to pay to protect the Government from the possibility of a prime's bid shopping for what GSA estimates to be only a $500.00 subcontract. In addition, AFGO argues that the water treatment subcontractor should not have been included in any listing requirement, because it would not be performing a "principal" subcontract.

GSA has recommended that this Office approve its applying a de minimus rule in cases such as this where the effect of the bidder's deviation from the solicitation requirements is inconsequential and other bidders will not be prejudiced. GSA does not argue that the listing requirement itself is not substantive (it is) but rather, GSA argues that this particular deviation is so inconsequential so as to permit waiver or cure under Federal Procurement Regulations (FPR) Section 1-2.405 (1964) (Minor informalities or irregularities in bids).

We believe that Kirlin's argument against application of a de minimus rule, i.e., that the smaller subcontractors have a right to protection from bid shopping, is at variance both with GSA's current regulations and with the purpose for subcontractor listing. GSA has already excluded from subcontractor listing coverage any firms performing less than 3-1/2 percent of certain categories of work. 41 C.F.R. 2.202.70(a); See, George E. Jensen, Contractor, Inc. et al., B-185792, July 9, 1976, 76-2 CPD 27; Wickham Contracting Company, B-179947, April 5, 1974, 74-1 CPD 173. In both of the cited cases, the subcontractors were small subcontractors quoting on relatively small portions of the work. Moreover, the subcontractor listing requirement is not intended to effect a national policy of protecting subcontractors from potential bid shopping. Rather, the primary purpose of the requirement is to effect GSA's policy to protect the Government from the poor quality of construction that may result from subcontractor bid shopping. 43 Comp. Gen. 206 (1963). Additionally, the efficacy of the subcontractor listing requirement has been questioned recently and was abandoned by the Department of Interior (40 Fed. Reg. 17848 (1975)) on the grounds that "* * * there is no substantial evidence that the requirement has been beneficial to the best interests of the Government." See Frank Coluccio Construction Company, Inc., B-185157, July 19, 1976, 76-2 CPD 51.

As Kirlin points out, beginning with 43 Comp. Gen. 206 (1963) this Office has consistently held that failure to list a subcontractor for a category properly appearing on the Listing of Subcontractor form was a non-curable, non-waivable, material defect requiring rejection of the bid. James and Stritzke Company, 54 Comp. Gen. 159, 74-2 CPD 128; 50 Comp. Gen. 839, 842 (1971); B-166971, June 27, 1969. Moreover, it has been GSA's position that FPR § 2.405 was inapplicable to subcontractor listing cases, because to allow waiver or cure of the failure to list a subcontractor would permit bid shopping--the practice which the requirement for listing is intended to forestall.

GSA, having reconsidered its position on the materiality of failing to list an inconsequential subcontractor for work under the mechanical division of the contract, asks us to reconsider ours. In light of the "3-1/2 percent" exclusion which allows bid shopping in general construction categories, we must conclude that such an exclusion may be equally applicable to the mechanical, electrical, and elevator/escalator divisions of the specifications through the application of the rules regarding minor informalities or irregularities in bids. We can think of no reason why bid shopping among subcontractors in one category of work is any more or less invidious than bid shopping in any other category. Implicit in GSA's request is its representation that the Government can be protected from the evils of bid shopping without having to reject bids which fail to list a subcontractor for a concededly de minimus portion of the contract.

As with any informality, it is not sufficient that it be merely inconsequential as to price, quality, quantity, or delivery. Its correction or waiver must not be prejudicial to other bidders. We have serious doubts that Kirlin, had it been able to bid shop among the prospective subcontractors for the inconsequential portions of the specifications, could have reduced its price by $121,000. Consequently, we find no prejudice to Kirlin, the only bidder listing a water treatment subcontractor pursuant to category 15700. Therefore, we believe that GSA may waive AFGO's failure to list a subcontractor for that category.

The second ground of Kirlin's protest involves the 625 fan-coil heating and cooling units to be installed under the contract. This ground is divided into two subparts: the first being that AFGO failed to list its subcontractor for fabricating the fan-coil units; and second that AFGO failed to list the installer of the fan-coil units.

Kirlin notes that all fan-coil units are required by Paragraph 17 of Section 15800 of the specifications to have certain unusual characteristics and argues that fan-coil units with such characteristics are not available as, nor may they be assembled from, "off-the-shelf" items by any manufacturer. Hence, concludes Kirlin, the manufacturer of the fan-coil units may not be considered as a mere supplier. According to Kirlin, the fan-coil units must be "specially made to conform to particular IFB specifications," and the manufacturer of these custom items is a "subcontractor" for purposes of the Listing of Subcontractor requirements. AFGO did not list a fan-coil unit manufacturer as a subcontractor for fabricating the fan-coil units; therefore, argues Kirlin, AFGO's bid is nonresponsive.

GSA disagrees with Kirlin as to the extent that any manufacturer of the fan-coil units will be manufacturing items specially made to conform to the specifications. GSA contends that only 5 units will be "custom" made and those units will require only "custom" enclosures. The units requiring custom enclosures will be internally identical to the rest of the units to be supplied.

In our view the question to be resolved is when do the specifications, although calling for standard commercial items, i.e., fan-coil units, nevertheless require such extensive participation by the manufacturer in the contract's performance that the manufacturer is more properly classifiable as a subcontractor rather than a supplier. The term "subcontractor" for purposes of the subcontractor listing requirement is defined in the solicitation's Special Conditions as:

> "* * * the individual or firm with whom the bidder proposes to enter into a subcontract for manufacturing, fabricating, installing or otherwise performing work under this contract pursuant to the project specification applicable to any category included in the list."

In 49 Comp. Gen. 120 (1969) we interpreted language identical to that quoted above to mean that those manufacturers and fabricators whose products are specially made to conform with particular IFB specifications are subcontractors: firms who merely assemble off-the-shelf items are not. We also noted that there appeared to be adequate safeguards as to the quality of the item involved inasmuch as the contractor was required to supply, subject to the contracting officer's approval, details of mechanical and other equipment proposed to be incorporated in the work. In another case we held that even though 90 percent of the cost of the system called for in the specifications was accounted for by off-the-shelf components, the manufacturer was a subcontractor for purposes of the "Listing of Subcontractors" requirement. 52 Comp. Gen. 40 (1972). In that case GSA had reasoned that:

> "Even assuming that ninety percent of the cost of the components of the precipitator category are off-the-shelf items, it is our position that the degree of design and engineering required, the critical importance of the ten percent specifically fabricated components, and the on-site duties of the manufacturers require the manufacturers to be treated as subcontractors rather than mere suppliers". 52 Comp. Gen. at 43.

We agreed with that position on the ground that,

> "* * * bidders were required to list subcontractors who would specially fabricate significant portions of the precipitator and who would perform substantial on-the-site work relating to the precipitator and the control system." Id.

Thus, the question here is whether the fan-coil manufacturers are required to specially manufacture significant or critical portions of the fan-coil units and perform substantial on-site work. There is no evidence that the fan-coil unit manufacturer will perform any on-site work.

In order to show that the fan-coil unit manufacturers should be treated as subcontractors, Kirlin states first that the front panels of built-in fan-coil units over 4 feet long shall be hinged at the top under Paragraph 17.3.4 of section 15800 and that the top-hinged panels must be specially fabricated by the manufacturer. AFGO notes however, that its supplier's most recent price list shows the hinged panel as an optional accessory. It is our understanding that such hinged panels are customarily hinged at the top for structural as well as accessibility considerations. Hence, we

see no merit in Kirlin's contention that hinged panels have to be specially manufactured.

Second, Kirlin points out that the oiling tubes for the fan-motors are required to have spring-loaded covers. AFGO concedes that these are not standard items but argues that the covers are at best a trivial requirement so that their addition to the standard fan-coil unit should not require the supplier to be classified as a subcontractor. We concur.

Third, Kirlin argues that, because a Number 14 groundwire required by Section 15800, paragraph 17.7.2.2, to be connected between the speed switch box and the motor frame does not appear in various fan-coil manufacturer's literature, such item is not readily available from the manufacturer. AFGO has pointed out that such groundwire is, in fact, part of the standard wiring harness of its intended supplier.

Fourth, Kirlin argues that providing thermal insulation material in all air flow paths is a requirement of Paragraph 17.7.4, thus requiring special manufacture of the enclosures. We note however, that Paragraph 17.7.4 requires only that the insulation material in the air flow path shall be same as the material specified for acoustic duct linings, except for thickness. It does not require insulation material in "all air flow paths."

Fifth, Paragraph 17.8.1 requires piping hookups to have interconnecting piping and a valving arrangement consisting of (1) shut-off valves in each coil connection, (2) a balancing valve (between each return coil connection and shut-off valve), and (3) a motorized electric control valve. The valving and intervalve piping arrangement, according to Kirlin, requires specialized construction, because, although the standard practice in the trade is to have the intervalve piping fabricated from soft copper tubing, these specifications require that the copper be "hard drawn." Kirlin then notes that AFGO's standard intervalve piping is "soft drawn" as is generally used in the industry. AFGO states, however, that the section relied on by Kirlin and the specifications referred to therein do not purport to specify the use of either hard or soft copper tubing and merely define wall thickness and service. Regarding the hot water piping, neither steel nor copper is specified for the fan-coil units, and the Standard Heating Specification, Public Buildings Service, GSA, paragraph 72, which Kirlin alleges would have required hard drawn copper, was deleted from the specifications. Hence, even if Kirlin's interpretation is correct, soft copper tubing would not have been precluded between the respective "hot water" valves. Again assuming

Kirlin is correct, the difference between soldering bent soft cooper tubing and soldering hard drawn copper tubing (consisting of two or three straight pieces and one or two "90° elbows") between the various "cold water" valves is not significant.

Sixth, Kirlin notes that the required auxilliary drip pans must be insulated and argues that no manufacturer provides these as a standard or catalog item. Whether or not Kirlin is correct, we cannot see how insulating a drip pan is so significant or critical an operation as to require the unit's manufacturer to be classified a subcontractor.

Finally, Kirlin notes that the requirement for a mock-up is further evidence that the fan-coil units are to be other than off-the-shelf items. We do not see any indication, however, that the mock-ups cannot include an article to be supplied under the contract, i.e., a manufacturer's standard unit.

Kirlin has also argued that, even if the items listed as specially manufactured are insignificant in themselves, when taken together, they are significant. We have seen no evidence that the specifications call for anything other than an off-the-shelf fan-coil unit, albeit with several unusual features. Therefore, we believe AFGO did not have to list a fan-coil unit manufacturer as a subcontractor.

Regarding the installation of the fan-coil units required by Section 15800, Kirlin concedes that AFGO, through its union contracts, can connect the units to the hot and cold water piping under Sections 15700 and 15900 of the specifications. Kirlin questions whether the listed subcontractor can set the units in place and perform the testing that Kirlin argues is required by Section 15800 paragraph 18.

GSA states that Sections 15700 and 15900, dealing with the installation of the heating and air conditioning systems respectively, overlap in coverage with the fan-coil installation requirements of Section 15800. Thus, argues GSA, the units may be set in place by any qualified firm listed in those three categories. In this regard we note that the installer of the fan-coil units is not required to be a "specialist" or meet any specific "competency" requirements. See generally, George Hyman Construction Company of Georgia, et al, B-186279, November 11, 1976, 76-2 CPD 401. Thus, we agree with GSA's position.

Regarding the testing, as AFGO correctly notes, the listing required by paragraph 18 relates totally to the air duct system, not the fan-coil units. These units specifically are to be tested

by the subcontractor listed under Section 15960, Air and Water System Adjustments and Tests. Therefore, we do not believe that Kirlin's protest has merit in this regard.

Kirlin also has raised an issue as to AFGO's intention to comply with the specifications. More precisely, Kirlin notes that AFGO has stated that it will use its sheet-metal subcontractor to fabricate fan-coil unit sub-bases required by Section 15800 paragraph 17.3. Kirlin argues that this specification requires the sub-base to be "factory fabricated" by the fan-coil unit's manufacturer. Because AFGO has stated during the course of this protest that (1) the sub-base is not required to be "factory fabricated" and (2) that AFGO does not plan to have the sub-base factory fabricated, Kirlin argues that AFGO has "constructively" taken exception to the specifications.

The specifications cited by Kirlin require that the successful bidder will furnish fan-coil units, each unit having:

> "* * * a rigid factory fabricated enclosure of steel not lighter than No. 18 M.S. gage with raised base as shown on drawings, except unit No. 9 which shall have a custom enclosure with extended end and back for piping connection and passage. Unit 9 enclosure shall be constructed typical to specified factory fabricated enclosure."

Kirlin argues that the term "enclosure" includes "raised base" and that, therefore, the raised base must be factory fabricated with the rest of the enclosure.

AFGO argues that the term "enclosure" does not include "raised base", because the base is nothing but a sheet metal box which merely houses pipe runouts and makes the unit taller. Moreover, argues AFGO, the drawings only require the contractor to furnish the base with the fan-coil unit and does not indicate that the manufacturer must furnish the contractor with a factory fabricated enclosure which includes a base. Thus, according to AFGO, it can meet the specifications with a factory fabricated enclosure (excluding base) and a shop fabricated "base".

GSA argues that there can be only one reasonable interpretation of the specifications regarding the No. 9 enclosures: that they need not be factory fabricated. GSA bases this conclusion on the provision that the No. 9 units shall have "custom" enclosures constructed "typical to" factory fabricated enclosures. With regard to the sub-bases, GSA believes the specifications are subject to two reasonable interpretations, and is therefore ambiguous:

"One possible interpretation is that the words 'factory fabricated' not only modify 'enclosure' but also modify 'raised base', thereby requiring both the unit enclosures and the sub-bases to be factory fabricated. Detail 6 requires that a new 6 inch base be furnished with each fan-coil unit; however, it does not mention factory fabrication nor can such a requirement reasonably be implied.

"A second possible interpretation is that the words 'factory fabricated' modify 'enclosure' only and that the sub-base is not required to be factory fabricated.

"Because paragraph 17.3 is subject to more than one reasonable interpretation, we are of the opinion that the rule of contra proferentem would preclude the Government from enforcing the proposed contract so as to require that the sub-base be factory fabricated, should the successful bidder take a contrary position.

"We are not aware of any reason why it would be necessary or desirable to have the sub-bases factory fabricated rather than shop fabricated, especially in view of the fact that paragraph 17.10 of Section 15800 requires the construction of a mock-up. This requirement will insure that all architectural, mechanical and electrical requirements are properly coordinated, thereby eliminating any of the 'aesthetic and functional problems' alluded to by Kirlin * * *.

"Again, since the contra proferentem rule would preclude the Government from reading paragraph 17.3 as Kirlin now reads it if the successful bidder/contractor read it otherwise, the Government likewise cannot validly reject the low bid for non-compliance with an interpretation which could not be enforced after award."

We agree with GSA's position on this issue. Moreover, it seems clear to us that the difference in cost between factory fabricated enclosures and shop fabricated enclosures could not have been significant. We see no reason to recommend a resolicitation of bids because of specification ambiguity relating to the sub-bases.

Accordingly, Kirlin's protest is denied.

Acting Comptroller General
of the United States