

M. H. ...

**DECISION**



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

04744

FILE: B-190427

DATE: January 17, 1978

MATTER OF: Renovators West, Division of Western  
Empire Constructors, Inc.

**DIGEST:**

Where formally advertised solicitation contains subcontractor listing requirement, low bid which listed alternate subcontractors was nonresponsive as it afforded bidder opportunity to select which of two firms listed would be subcontractor contrary to requirement to preclude bid shopping.

Renovators West, Division of Western Empire Constructors, Inc. (Renovators), through counsel, protests the rejection of its bid under invitation for bids (IFB) No. R-CO-76-342 as nonresponsive to the subcontractor listing requirement. The IFB was issued by the General Services Administration (GSA) for initial space alterations at the Denver Federal Center, Denver, Colorado. Notwithstanding this protest, a contract has been awarded to Albrecht Construction, Inc., since GSA, in accordance with Federal Procurement Regulations § 1-2.407-8(b)(4) (iii) (1964 ed. amend. 68), determined that a prompt award would be advantageous to the Government.

The IFB required that the bidder submit as a part of the bid a "list of subcontractors" specifying the firms with whom the bidder would subcontract for each of the designated categories of work. The subcontractor listing requirements are contained in paragraph 15 of the Special Conditions of the IFB, which provides in pertinent part as follows:

"15. LISTING OF SUBCONTRACTORS

"15.1 For each category on the List of Subcontractors which is included as part of the bid form, the bidder shall submit either (i) the name and address of the individual or firm with whom he proposes to subcontract for performance of such category, or (ii) his own name, to indicate that the category will not be performed by subcontract.

"15.2 If the bidder intends to subcontract with more than one subcontractor for a category or to perform a portion of a category himself and subcontract with one or more subcontractors for the balance of the category, the bidder shall list all such individuals or firms (including himself) and state the portion (by percentage or narrative description) of the category to be performed by each.

\* \* \* \* \*

"15.4 Except as otherwise provided in this clause, the successful bidder shall not have any listed category or portion of category performed by any individual or firm other than those named in the bid for performance thereof. The contractor shall perform each category, or portion of category, for which he entered his own name, with personnel carried on his own payroll (other than operators of leased equipment).

"15.5 The term 'subcontractor' for the purpose of this requirement shall mean 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 specifications applicable to any category included on the list.

\* \* \* \* \*

"15.10 Notwithstanding any of the provisions of this clause, the Contracting Officer shall have authority to disapprove or reject the employment of any subcontractor he has determined non-responsible or who does not meet the requirements of an applicable Specialist or Competency of Bidder clause.

\* \* \* \* \*

"15.13 If the bidder fails to comply with the requirements of subparagraphs 15.1 or 15.2 of this clause, the bid will be rejected as nonresponsive to the invitation."

Renovator's bid, under the "Electrical" category, contained the names of two subcontractors listed in the alternative, i.e., "Amco or Howard Denver, Colorado," and under the heading "Portions of Category" stated "All." This was contrary to paragraph 15.1, supra, which required that a single firm be named for each category, except as provided in paragraph 15.2, supra. Further, the designation of two subcontractors without listing the portion of work each would be performing individually was contrary to paragraph 15.2, supra.

It is Renovators' position that the terms and conditions of the subcontractor listing requirement, pointing to paragraphs 15.2 and 15.4, supra, for support, do not prohibit the listing of subcontractors in the alternative. Renovators argues that the purpose of the [subcontractor] listing requirement is to insure that only competent contractors would work on the project involved," not to prevent bid shopping. Consequently, Renovators objects to the fact that GSA rejected Renovators' bid in an effort to prevent post-award bid shopping, adding that "[s]uch conduct has not in fact occurred in the instant matter." Renovators states that it is "not aware of any federal statute, rule or regulation which proscribes such conduct [bid shopping]." In addition, it is Renovators' contention that GSA's effort to prevent "bid shopping" based on the fact that it does not result in the Government receiving the lowest possible bids is incorrect, citing Oakland-Alameda County Builders' Exchange, et al. v. F.P. Lathrop Construction Company, 482 P.2d 226 (1971), for support.

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The California case cited by Renovators to support its contention that bid shopping will result in lower bids for the Government indicates a view different than its contention. Footnote number 4 on page 231 states:

"There is no contention that defendant engaged in the practice defined in the complaint as 'bid shopping'. Although also a form of price competition, bid shopping is less desirable than bid peddling because only the general contractor, and not the awarding authority or the public, benefits from this practice. Postaward bid shopping is prohibited in California on public works construction projects by Government Code section 4104, which requires general contractors, at the time they submit their prime bids, to list the names of the subcontractors whose bids were accepted in the computation of their prime bids. Thus, general contractors are not free to solicit lower subbids once they have been awarded the prime contract. (See Comment (1970) supra. 18 U.C.L.A.L. Rev. 389, 396, 402-404.)" (Emphasis supplied.)

"Bid shopping" is the seeking after award by a prime contractor of lower price subcontractors than those originally considered in the formulation of its bid. James and Stritzke Construction Company, 54 Comp. Gen. 159, 160 (1974), 74-2 CPD 128. This practice benefits the prime contractor every time it obtains a lower price, since it reduces the prime's costs, while having no effect on the prime's contract price with the Government. 43 Comp. Gen. 206 (1963).

The subcontractor listing requirement, 41 C.F.R. § 58-2.202-70 (1976), is intended to preclude "bid shopping" and its attendant undesirable effects and to require of bidders an agreement not to have any of the listed categories of work performed by firms other than those listed and is, therefore, a material requirement pertaining to bid responsiveness. James and Stritzke Construction Company, supra. 50 Comp. Gen. 839 (1971); 43 id., supra.

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We have held on numerous occasions that the test to be applied in determining the responsiveness of a bid is whether the bid as submitted is an offer to perform, without exception, the exact thing called for in the invitation, and upon acceptance will bind the contractor to perform in accordance with all the terms and conditions thereof. 49 Comp. Gen. 553, 556 (1970). When applying the test, the determining factor is not whether the bidder intends to be bound, but whether this intention is apparent from the bid as submitted. 42 Comp. Gen. 502 (1963). Accordingly, the affidavit submitted by Renovators after bid opening declaring that Renovators did not receive a bid from one of the alternate subcontractors (Howard) cannot be used in determining whether or not the Renovators bid is responsive.

We believe the Renovators bid is nonresponsive for failing to meet the subcontractor listing requirement. See James and Stritzke Construction Company, supra, where the bidder listed subcontractors in the alternative and the bid was found to be nonresponsive. In that situation, as here, the bidder, contrary to the terms of the IFB, could select after bid opening the firm with which it would subcontract and could engage in the practice of bid shopping.

Accordingly, the protest is denied.

  
Deputy Comptroller General  
of the United States