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DECISION



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

FILE: B-190916

DATE: April 5, 1978

MATTER OF: Contra Costa Electric, Inc.

DIGEST:

1. Bid that does not reduce, limit or modify requirement that contractor shall perform 20 percent of work with own organization is responsive to IFB.
2. Protest that bidder cannot comply with article in General Provisions requiring contractor to perform 20 percent of work with own organization will not be considered, since determinations of affirmative responsibility are not ordinarily reviewed and article does not come within definitive responsibility criterion exception to rule.

Invitation for bids (IFB) No. N62474-76-B-7162, issued by the Naval Facilities Engineering Command, Department of the Navy (Navy), San Bruno, California, solicited bids for the construction of two new 12 KV distribution stations and modification to 11 stations including provision of a new 15 KV switchgear, supervisory equipment unit substations and miscellaneous wire and conduit.

The IFB stated in the General Provisions (Construction Contract):

"63. PERFORMANCE OF WORK BY CONTRACTOR

"The Contractor shall perform on the site, and with his own organization, work equivalent to at least 20 percent of the total amount of the work to be performed under the contract. If during the progress of the work the Contractor requests a reduction in such percentage and the Officer in Charge of Construction determines that it would be to the Government's advantage, the percentage of the work hereunder required to be performed by the contractor may be

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reduced, provided written approval of such reduction is obtained from the Officer in Charge of Construction. (ASPR 7-603.15)"

Bids were opened on November 22, 1977. Contra Costa Electric, Inc. (Contra Costa), on November 28, 1977, filed a protest with the Navy on the ground that the bids of the two lowest bidders (The Geggatt Company (Geggatt) and Arntz Construction Co., Beacon Construction Co., K.A. Construction Co., and Taaco Inc., a joint venture) were nonresponsive and that both bidders were not responsible and not small businesses. The latter issue was submitted to the regional office of the Small Business Administration which decided that the bidders were small businesses. As to the remaining issues, the Navy decided that the bids were responsive and that Geggatt was responsible. Subsequently, Contra Costa protested to this Office. On January 25, 1978, notwithstanding the instant protest, award was made to Geggatt pursuant to Armed Services Procurement Regulation § 2-407.8(b)(3) (1976 ed.).

A conference was held at our Office on February 22, 1978, during which the grounds for protest were clarified and set forth as follows:

1. Geggatt's bid is nonresponsive since it is unable to meet the "Performance of Work by Contractor" requirement (article 63), supra; and,

2. Article 63 is a definitive responsibility criterion that the contracting officer (a) determined Geggatt met without a reasonable basis, or, alternatively, (b) did not apply when evaluating whether or not Geggatt could satisfy the 20-percent requirement and, therefore, Geggatt is not responsible.

With respect to the first allegation, Contra Costa in support of its position cites 45 Comp. Gen. 177 (1965), which concerned a low bid that stated 90 percent of the work would be subcontracted, although the IFB required that 20 percent of the work be performed by the contractor, the same requirement as in article 63, supra. In that case, we held that the deviation in the bid was a material one which could not be waived and, therefore, the bid was nonresponsive.

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However, in the present case, there is no deviation in Geggatt's low bid. The bid, as submitted, did not reduce, limit or modify the requirement in article 63 that the contractor shall perform 20 percent of the work with its own organization. The bid was an offer to perform, without exception, the exact thing called for in the IFB, and upon acceptance bound Geggatt to perform in accordance with all the terms and conditions thereof. Accordingly, the bid is responsive. See 49 Comp. Gen. 553, 556 (1970); Prince Construction Company, Inc. (Reconsideration), B-187407, May 4, 1977, 77-1 CPD 303.

Concerning the second contention, it is our Office's policy not to review protests against affirmative determinations of responsibility unless either fraud is alleged on the part of procuring officials or the solicitation contains definitive responsibility criteria which allegedly have not been applied. See Central Metal Products, Incorporated, 54 Comp. Gen. 66 (1974), 74-2 CPD 64; Yardney Electronics Corporation, 54 Comp. Gen. 509 (1974), 74-2 CPD 376. This policy was adopted by our Office because normally responsibility determinations are based in large measure on the general business judgment of the procuring officials and, being subjective, are not readily susceptible to reasoned review. Central Metal Products, Incorporated, *supra*; and Keco Industries v. United States, 492 F.2d 1200, 1205 (1974). However, in situations where the question of responsibility revolves around a bidder's meeting or failing to meet certain specific and objective responsibility criteria expressed in the solicitation, we will review, to the extent possible, the determinations of the procuring officials to see if the specified responsibility criteria have been met. See Yardney Electric Corporation, *supra*.

It is Contra Costa's position, as stated above, that article 63 is a definitive responsibility criterion. In support of this position, Contra Costa cites several of our decisions. However, it is our view that article 63 is not a definitive responsibility criterion. Provisions like article 63 which state how the work is to be accomplished are performance requirements and are to be distinguished from requirements which are preconditions of performance. Descriptions of how the work is to be accomplished do not become definitive responsibility criteria just because they are stated in detail. Such descriptions are to be contrasted

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with provisions that set down preconditions of performance like the item will be "commercial, off-the-shelf" (Data Test Corporation, 54 Comp. Gen. 499 (1974), 74-2 CPD 365), the successful bidder will have a welding certificate and certain symbol stamps (M & M Welding and Fabricators, Inc., B-187573, January 17, 1977, 77-1 CPD 35), and the contractor will have a facility within 30 minutes of a naval hospital (Oceanside Mortuary, B-186204, July 23, 1976, 76-2 CPD 74). These are definitive responsibility criteria. See for a comparison Bernard Cap Company, Inc., B-188585, August 10, 1977, 77-2 CPD 108, where there was a requirement that berets be knitted on an 18-gauge machine. In Bernard Cap, we did not say that the provision was a definitive criterion of responsibility. We said, assuming it was, it was met.

By not taking exception to article 63, the bidder has promised to perform in accordance with its terms. Whether the bidder is capable of performance as it promised is a matter of responsibility. See 41 Comp. Gen. 106 (1961) and 41 id. 555 (1962). However, as indicated above, matters of affirmative responsibility are not ordinarily reviewed by our Office. Thus, the differences between Contra Costa and the Navy as to whether Geggatt is capable of performing in accordance with article 63 will not be considered.

Accordingly, Contra Costa's protest is denied in part and dismissed in part.

Deputy

R. Z. K. Miller
Comptroller General
of the United States