

DOCUMENT RESUME

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[Bidder's Compliance with Requirement To Subcontract to Minority Businesses]. B-192670. November 28, 1978. 6 pp.

Decision re: Mayfair Construction Co.; by Robert P. Keller, Deputy Comptroller General.

Contact: Office of the General Counsel: Procurement Law I.

Organization Concerned: National Aeronautics and Space

Administration; Algonon-Blair Industrial Contractors, Inc.

Authority: 54 Comp. Gen. 66. 54 Comp. Gen. 509. 53 Comp. Gen.

932. B-190916 (1978). Keco Industries v. United States, 492

F.2d 1200, 1205 (1974).

A protester alleged that the awardee of a contract was given an unfair advantage because of waiver by the agency of the "minority contractor subcontracting requirements." The protest involved the agency's affirmative determination of responsibility which is not generally reviewed by GAO, but since compliance with the agency's intent to subcontract 20% of the value of subcontractors to minority businesses involved a definitive responsibility criterion, it was reviewable. The contracting officer's determination that the potential awardee should be found responsible in the minority subcontracting area was supported by objective evidence. (HTW)

DECISION

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

8428

FILE: D-192570

DATE: November 28, 1978

MATTER OF: Mayfair Construction Company

DIGEST:

1. It is GAO's policy not to review protests against affirmative determinations of responsibility unless fraud is alleged or solicitation contains definitive responsibility criteria which allegedly have not been applied.
2. Whether bidder satisfies agency intent to subcontract to minority business enterprise 20 percent of total value of subcontracts under procurement or complies with what agency views as best effort to obtain such percentage is definitive responsibility criterion reviewable by GAO.
3. Contracting officer's determination was supported by objective evidence received from Minority Business Enterprise Subcontracting Evaluation Committee which recommended that potential awardee be found responsible in area of Minority Business Enterprise Subcontracting Program. GAO has no objection to determination in view of facts of record and absence of evidence from protester demonstrating that determination lacked reasonable basis.

Mayfair Construction Company (Mayfair) protests the award of a contract pursuant to invitation for bids (IFB) No. 10-0054-8 issued by the National Aeronautics and Space Administration (NASA). The IFB called for mechanical and electrical installation on Mobile Launcher Platform No. 2 at the John F. Kennedy Space Center.

Mayfair alleges that Algernon-Blair Industrial Contractors, Inc. (Algernon), the low bidder and awardee, received the award under the instant procurement because NASA waived, subsequent to bid opening, the "minority contractor subcontracting requirements" ("requirements"). Mayfair believes that such waiver gave Algernon an unfair advantage. In addition, Mayfair suggests that Algernon's efforts to satisfy these "requirements" were insufficient. Also, Mayfair contends that had it not followed these "requirements," Mayfair would have been able to submit a lower bid than that which was submitted by Algernon. Further, it is Mayfair's apparent position that these "requirements" are mandatory, nonwaivable, and call for at least 20 percent of the total value of all subcontracts resulting from the instant procurement to be performed by minority business enterprises.

The IFB contains two clauses which concern what Mayfair refers to as "minority contractor subcontracting requirements." The first is Article 8 - MINORITY BUSINESS ENTERPRISE CONSTRUCTION SUBCONTRACTING (May 1976) - which provides, in pertinent part:

"(a) It is the policy of the Government that minority business enterprises shall have the maximum practicable opportunity to participate in the performance of Government contracts.

"(b) The Contractor agrees to use his best efforts to carry out this policy in the award of his subcontracts to the fullest extent consistent with the efficient performance of this contract. * * *

"(c) In keeping with national policy, it is NASA's objective that a vigorous procurement program of actively seeking out and soliciting minority firms be accomplished at the prime Contractor and subcontractor levels to ensure their equitable participation in this construction effort. It is NASA's intent that at least twenty percent (20%) of the total value of all subcontracts resulting from this prime contract shall be awarded to minority business enterprises as defined above. * * *"

The second is found in the Additional Instructions and Conditions Section, paragraph 30, entitled PRE-AWARD SURVEY. This paragraph, besides setting forth what is expected of the apparent low bidder during the preaward survey, provides, with respect to minority subcontracting, the following:

"A separate Minority Business Enterprise Subcontracting Program Plan shall [at the time of the preaward survey,] be submitted in writing consisting of but not limited to:

"(a) A summary of the corporate program for the employment of minority business enterprises. This summary shall include how this program will be carried out on this contract if award is made.

"(b) A report and verification of the company's efforts to achieve the 20 percent minority subcontracting goal. This shall include but not be limited to solicitation procedures, the number of minority firms solicited and their response.

"(c) The total work to be subcontracted, including a list of all proposed subcontractors both minority and non-minority subcontractors, and their plant addresses. This list shall include:

- (i) The value of each subcontract.
- (ii) A summary description of work to be performed.
- (iii) A written certification of the bona fide status of each proposed minority subcontractor.
- (iv) Schedule of awards."

Essentially, Mayfair's protest is directed at NASA's affirmative determination of Algernon's responsibility. 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. 86 (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.

In the present case, it is our view that the 20-percent minority subcontracting requirement in the first quoted provision specified a goal and not a quota and that the subcontracting program plan, report and verification requirement and other requirements of the second quoted provision set down preconditions of performance and, thus, definitive responsibility criterion. Cf. Contra Costa Electric, Inc., B-190916, April 5, 1978, 78-1 CPD 268. Therefore, since Mayfair's allegations call into question whether NASA adequately considered Algernon's ability to perform in accordance with this requirement, the question of Algernon's responsibility is properly for review by our Office.

The record discloses that the Minority Business Enterprise Subcontracting Evaluation Committee (Committee) conducted a preaward survey of Algernon which, among other things, concerned the 20-percent minority subcontracting goal and the amount of effort expended by Algernon to achieve such goal. The Committee advised that Algernon's Minority Plan (Plan) indicated that it had solicited 37 minority firms and that seven of those submitted a bid. Also, the Plan indicated that all but one of the responding minority firms were not competitive. Consequently, the Committee requested Algernon to recontact minority firms whose type of work was in either the steel, steel erection or electrical area. Algernon acceded to this request and advised NASA in a letter dated July 27, 1978, of the following:

"We have talked to Keystone, Fandion & Sons and New World Construction concerning the fabrication and/or erection on this project. Keystone has advised us that due to the nature of the job we did not prepare a subcontract proposal for erection services * * *. We have attempted to work with Fandion & Sons to see if they could find their error in their previous estimate to us. This has been to no avail. * * *. We have also attempted to work with New World Construction and have been somewhat successful in working the contract out with him due to the price variation * * *"

"We have also attempted to work out the electrical with Fischbach & Moore and their minority contract. The price differential at the present time is somewhat in excess of \$30,000, so we have not been successful in this attempt."

Based on the foregoing, the Committee recommended to the contracting officer that Algernon be found responsible in the area of the Minority Business Enterprise Subcontracting Program. It is apparent from the record that the contracting officer concurred with the Committee and considered this information, together with that obtained during the remainder of the preaward survey, adequate to support an affirmative determination of responsibility.

Our Office will not object to a contracting officer's determination unless it is shown to be without a reasonable basis. See Leasco Information Products, Inc., et al., 53 Comp. Gen. 932 (1974), 74-1 CPD 314. In this instance, there was objective evidence before the contracting officer relevant to the definitive responsibility criterion. This in itself is sufficient to satisfy our Office's review standard. The relative quality of the evidence is a matter for judgment by the contracting officer, not our Office. See Yardney Electronics Corporation, supra,

Accordingly, Mayfair's protest is denied.

R. F. K. 114.
Deputy Comptroller General
of the United States