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DECISION

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

[Protest Alleging Awardee Does Not Meet Experience and Warranty Requirements in IFB]

FILE: B-196370

DATE: July 18, 1980

MATTER OF: Peter Gordon Company, Inc.

DLG04949

DIGEST:

1. Protest alleging agency accepted non-responsive bid is timely although it was filed more than 10 days after bid opening since it was filed within 10 days after notification of award and protest need not be filed until protester learns that agency took action inconsistent with what protester believes to be correct.

2. Solicitation requirement that contractor have experience in installing specific type of roof and be able to provide 10-year warranty concerns bidder responsibility rather than bid responsiveness.

3. GAO does not review affirmative determination of responsibility in absence of showing of fraud or bad faith or allegations that definitive responsibility criteria in solicitation were misapplied. Solicitation provision which states prospective contractor must, before award, submit evidence that it can meet experience and warranty requirements constitutes definitive responsibility criterion.

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Peter Gordon Company, Inc. (Gordon) protests the award of a contract to M.C.&D. Capital Corporation (M.C.&D.), the low bidder on invitation for bids (IFB) No. 263-79-B-(93)-0155, issued by the Department of Health, Education, and Welfare, now Department of Health and Human Services (HHS), for replacement of roofs on five buildings at the National Institutes of Health in Bethesda, Maryland. Gordon contends M.C.&D. does not meet the experience and warranty requirements specified in the IFB. For the reasons discussed below, this protest is denied.

Subsequent to filing this protest, Gordon filed Civil Action 79-2686 in the United States District Court for the District of Columbia. This action sought a temporary restraining order (TRO) and a preliminary injunction prohibiting HHS and M.C.&D. from proceeding under the contract. The court denied Gordon's motion for a TRO, and subsequently approved a voluntary dismissal of the case by Gordon without prejudice. Although it is the policy of our Office not to decide matters where the issues involved are before a court of competent jurisdiction or have been decided on the merits by such a court, 4 C.F.R. § 20.10 (1980), we will consider the protest since this matter has been dismissed without prejudice. See Saddleback Mountain Radiologic Medical Group, B-195271, August 6, 1979, 79-2 CPD 85.

The specifications in the IFB provided that an Insulated Membrane Roofing System must be installed by a roofing contractor regularly engaged in installing roofs of this type and that prior to final payment the contractor must provide a warranty that the roof will remain watertight and the insulation will retain 80 percent of its thermal resistance for 10 years. The Dow Chemical Company (Dow) holds patents for the special type of roof system required by the IFB. The specifications also required that this roof system include rubberized asphalt sheet manufactured by the W.R. Grace Company (Grace) and that this material be installed by a "specialty contractor, regularly engaged in installing roofs meeting this spec." The "Notice to Bidders" in the IFB warned that prior to award, the prospective contractor would be required to provide acceptable evidence of its ability to obtain the necessary resources to satisfy the Government's need for

"experienced specialty contractors (subcontractors)" and evidence of a firm commitment from the manufacturer "to cover the agreement on meeting the warranty requirements * * *."

During the preaward survey, M.C.&D. provided evidence that it had experience in installing roofs and a contract with Grace appointing M.C.&D. as a contractor authorized to install the specified Grace material. M.C.&D. also disclosed a subcontract it had with Friedman Roof Co., Inc., (Friedman) which had installed several roofs using the Dow method and materials pursuant to a licensing agreement with that company. M.C.&D.'s information also indicated that under Friedman's agreement with Dow, Dow would warrant the roof system installed by Friedman for watertightness and thermal resistance for 10 years.

Gordon's primary position is that M.C.&D.'s bid was nonresponsive because, at the time it was submitted, M.C.&D. was not approved by either Dow or Grace to install the roof system. Consequently, Gordon maintains that it was improper for HHS to permit M.C.&.D to attempt to meet the experience and warranty requirements after bid opening. Nevertheless, Gordon indicates that M.C.&D.'s efforts to this end have been unsuccessful as neither Dow nor Grace will provide the necessary warranties because of M.C.&D.'s role in installing the asphalt sheet. Thus, Gordon argues that even if M.C.&D.'s bid is determined to be responsive, M.C.&D. is not responsible.

HHS does not agree with Gordon that the primary issue in the protest concerns the responsiveness of M.C.&D.'s bid. It argues, however, that if, as Gordon insists, the primary issue is determined to be responsiveness, that issue is untimely since the protest was not filed until October 5, 1979, more than two months after the July 13 bid opening while our Bid Protest Procedures require protests to be filed not later than 10 working days after the basis for protest is known or should have been known. 4 C.F.R. § 20.2(b) (1980). For the reasons stated below, we agree with HHS that the primary issue raised in this protest concerns the responsibility of M.C.&D., but we do not agree that the protest would be untimely if the primary issue were responsiveness. We have held, in cases such as this, that timeliness is not measured from bid

opening because grounds for protest do not arise until the protester has learned of agency action or intended action which is inconsistent with what the protester believes to be correct. Werner-Herbison-Padgett, B-195956, January 23, 1980, 80-1 CPD 66. Here, the record indicates that Gordon protested to the agency within 10 working days from the time (September 18) it learned that HHS found M.C.&D's bid to be acceptable. See 4 C.F.R. § 20.2(a). Gordon then filed its protest with this Office within 10 working days of the time it learned HHS denied its protest.

Gordon's contention that M.C.&D.'s bid was nonresponsive because of that firm's inability at the time of bid submittal to satisfy the IFB requirements relating to experience and the warranty reflects a misunderstanding as to the distinction between matters related to responsiveness and those related to bidder responsibility. Responsiveness concerns whether a bidder has unequivocally offered to provide the product or service in total conformance with the material terms and specifications of the solicitation. J. Baranello and Sons, 58 Comp. Gen. 509 (1979), 79-1 CPD 322. The determination of responsiveness must be made from the bid documents as of the time of opening. Lift Power Inc., B-182604, January 10, 1975, 75-1 CPD 13.

On the other hand, responsibility, as employed in Federal procurements, refers to a bidder's ability or capacity to perform all of the contract requirements within the limitations prescribed in the solicitation. Werner-Herbison-Padgett, supra. It is well established that information bearing on a bidder's responsibility may be furnished after bid opening. B.F. Goodrich Company, B-192602, January 10, 1979, 79-1 CPD 11.

Although the questions raised by Gordon are categorized by that firm as concerning responsiveness, the solicitation provided for submission of information regarding specialty contractor and warranty before award (i.e., after bid opening), and specifically described it as "responsibility data", and the protester does not claim that M.C.&D.'s bid took exception to any terms and conditions of the solicitation. Here, the matters for

consideration relate not to responsiveness but to responsibility. See General Coatings, Inc., B-196589, November 19, 1979, 79-2 CPD 364.

This Office does not review affirmative determinations of responsibility except where the protester alleges fraud or bad faith on the part of the procuring officials (no such allegation has been made here) or where the solicitation contains definitive responsibility criteria which allegedly have not been applied. Contra Costa Electric, Inc., B-190916, April 5, 1978, 78-1 CPD 268; Central Metal Products, Inc., 54 Comp. Gen. 66 (1974), 74-2 CPD 64. The requirements in the "Notice to Bidders" that the prospective contractor must provide evidence that it has or can provide a subcontractor which has the required experience and can provide the required warranty clearly constitute definitive responsibility criteria. Preventive Health Programs, B-195846, February 20, 1980, 80-1 CPD 144.

The record indicates that M.C.&D. provided HHS with evidence which showed that its proposed subcontractor for the roof installation had experience in installing the specified roof system and was authorized by Dow to offer the required warranty. M.C.&D. also showed that it had experience in installing the required asphalt sheet and had an agreement with Grace to obtain the material. Although Gordon argues that neither Dow nor Grace will, in fact, provide the required warranty, we believe M.C.&D. submitted sufficient evidence from which the contracting officer could reasonably conclude that M.C.&D. met the criteria listed in the "Notice to Bidders." See Preventive Health Programs, supra. In this regard, it is significant that the specification only required that the contractor, not the manufacturer, supply the warranty and there was no separate requirement for a warranty covering the asphalt sheet.

The protest is denied.

Milton J. Socolar

For the Comptroller General
of the United States