17329

Withdrawn

DECISION

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

[Protest Alleging Awardee Does Not Meet Solicitation Experience Requirement]

FILE: B-200660 DATE: March 16, 1981

MATTER OF: Contra Costa Electric, Inc.

DIGEST:

1. Contract experience of proposed subcontractor may be used in determining whether bidder/prime contractor meets solicitation experience requirement since bidder was also prime contractor on previous similar contracts.

2. Protester has not carried burden of proving that awardee's bid was materially unbalanced in order to stay within cost limitation. Price pattern of awardee's bid leads to opposite conclusion.

Contra Costa Electric, Inc., protests the award of a contract to Jay and Sam Construction, Inc., for the repair and alteration of heating, ventilating and air-conditioning systems and for the installation of energy monitoring and control systems in various buildings at McClellan Air Force Base, California. The award was made under invitation for bids (IFB) No. F04699-80-B0042, issued by the Air Logistics Center, McClellan Air Force Base.

Contra Costa, the third low bidder, contends that Jay and Sam, the low bidder, and American Contracting Engineers, the second low bidder, do not meet the 2-year similar experience requirement contained in the IFB and have materially unbalanced their bids.

The protest is denied.

~~015965~~ 114592

Contractor Experience Requirement

Contra Costa alleges that Jay and Sam does not meet the following IFB provision, entitled "Quality Assurance, Contractor Qualification:"

> "The Contractor shall have a 2 year experience record in the design and installation of computerized building systems similar in performance to that specified herein."

The Department of the Air Force admits that Jay and Sam alone does not meet the requirement, but argues that in conjunction with its proposed subcontractor, Johnson Controls, Inc., Jay and Sam does meet the requirement. According to the Air Force, Jay and Sam has been the prime contractor with Johnson Controls as the subcontractor on prior contracts meeting the time and similarity requirements contained in the clause. The Air Force contends that it is permissible to meet the experience requirement in this manner because, even though the IFB uses the term "contractor" throughout the specifications, there is no prohibition on the use of subcontractors. Also, Defense Acquisition Regulation § 1-906(a) (Defense Acquisition Circular No. 76-22, February 22, 1980) provides that a subcontractor's responsibility may be considered in determining a prime contractor's responsibility. Finally, the Air Force argues that our decision in 39 Comp. Gen. 173 (1959) specifically permits a prime contractor to meet an experience requirement by having previously performed the necessary work "with its own organization or by using the subcontractors now proposed." Id. at 176.

Contra Costa points out that in 39 Comp. Gen. 173, supra, the solicitation in question specifically permitted subcontractors' experience to be considered in determining whether the bidder met the experience requirement, while here the entire solicitation and the experience clause mentioned only the contractor. Therefore, the protester argues, the subcontractor's experience cannot be considered in this case. Contra

Costa notes that at the bid protest conference held on this case, the Air Force's representative stated that the Air Force intended to send a letter to contracting personnel directing that future solicitations not be drafted in this manner. Contra Costa asserts that this constitutes an admission that the solicitation cannot be read as permitting subcontractors' experience to be considered.

Generally, GAO will not review affirmative determinations of bidders' responsibility, which involves such matters as experience and financial capacity. Central Metal Products, 54 Comp. Gen. 66 (1974), 74-2 CPD 64. An exception to that rule is when the solicitation contains a "definitive responsibility criterion" which allegedly has not been applied. Haughton Elevator Division, 55 Comp. Gen. 1051 (1976), 76-1 CPD 294. Definitive responsibility criteria involve specific and objective factors, such as specific experience requirements. The requirement in question here is clearly a definitive responsibility criterion, appropriate for our review. Neither party disputes this. Also, there appears to be no dispute that Jay and Sam do not meet the requirement alone, but do meet the requirement if the experience of Johnson Controls, the proposed subcontractor, is considered.

The narrow issue presented to us is whether the solicitation permits the use of subcontractors and, if so, whether the experience clause permits the use of subcontractors' experience in determining the bidder's responsibility. There is no general prohibition on the use of subcontractors to perform portions of Government contracts. Presentations South, Inc., B-196099, March 18, 1980, 80-1 CPD 209. In this case, we do not think that the use of the word "contractor" throughout the specifications can reasonably be construed as prohibiting the use of subcontractors, and there is no specific clause doing so. Also, there are numerous clauses referring to subcontractors in the Instructions to Bidders and General Provisions sections of the solicitation. Additionally, we do not think that a letter (if one has in fact been sent) requesting contracting activities to specifically mention subcontractors in future

solicitations is necessarily an admission that the solicitation here did not permit subcontracting or the consideration of subcontractor experience. Rather, it may well be a good-faith attempt to respond to the protest by making the requirement more clear.

Our decision in 39 Comp. Gen. 173, supra, sanctions the use of proposed subcontractors' experience in determining a bidder/prime contractor's compliance with an experience clause, where the bidder was also the prime contractor on the contracts which are being relied on to meet the experience requirement. While, as Contra Costa points out, the clause in that case specifically provided that subcontractors' experience could be considered, the decision was not based on that factor.

In interpreting the clause in question, we discussed the experience clause formerly used by the agency, which:

> "* * * referred only to the bidder himself, and no mention was made of the use, qualifications, or experience of subcontractors. * * * Presumably this was because full responsibility for satisfactory performance would be placed upon the prime contractor, and because satisfactory performance of prior contracts, whether accomplished solely by use of the prime contractor's organization or with the aid of subcontractors, would be indicative of the prime contractor's competency and responsibility." Id. at 176. (Emphasis added.)

We then stated that the clause in question could not be interpreted as a relaxation of the requirements of the former clause. In sum, the rule is that the contract experience of a proposed subcontractor may be used in determining whether the bidder meets an experience requirement if the bidder was the prime

contractor on those previous similar contracts, whether or not the experience requirement specifically mentions subcontractor experience.

Here, Jay and Sam was the prime contractor and Johnson Controls the subcontractor on the contracts relied upon to meet the experience requirement. Therefore, Jay and Sam appears to have satisfied the requirement.

Unbalanced Bid

The IFB required separate lump-sum bids for items 0001AA and 0001AB. The solicitation also contained a notice that the bid price for item 0001AB was statutorily limited to $100,000, and that a bid which was materially unbalanced for the purpose of bringing the affected item within the limitation "may be rejected." Jay and Sam bid $99,611 for item 0001AB and $133,603 for item 0001AA. Contra Costa bid $98,607 for item 0001AB and $224,835 for 0001AA.

Contra Costa alleges that Jay and Sam must have unbalanced its bid by shifting approximately $45,000 in installation costs on item 0001AB to item 0001AA, in contravention of the cost limitation clause. In support of this allegation, the protester asserts that the equipment to be provided by Jay and Sam under item 0001AB costs approximately $85,000 and that installation and mechanical costs are approximately $60,000. Therefore, Contra Costa argues, Jay and Sam must have shifted those excess costs to item 0001AA. Contra Costa has provided an affidavit showing its own cost breakdown and stating that it could meet the cost limitation only by using another manufacturer's equipment.

Contra Costa has not carried its burden of proving that Jay and Sam shifted costs from item 0001AB to 0001AA. There are possible reasons other than shifting costs to explain Jay and Sam's ability to stay within the cost limitation, including a willingness to take a loss on that item without making it up on the other item. Certainly, Jay and

Sam's low price for item 0001AA, in comparison to Contra Costa's high price, supports the conclusion that costs were not shifted.

Since we have concluded that Jay and Sam, the low bidder, met the experience requirement and did not submit a materially unbalanced bid, award to it was proper. Therefore, we need not consider the allegations with regard to American Contracting Engineers, the second low bidder.

Milton J. Socolar

Acting Comptroller General
of the United States