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DECISION



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

FILE: B-208547

DATE: December 20, 1982

MATTER OF: Dawson Construction Company, Inc.

DIGEST:

1. The general Services Administration's (GSA) subcontractor listing requirements are intended to preclude the seeking after award by a prime contractor of lower priced subcontractors than those originally considered by the prime contractor. These requirements apply also to situations where a prime and a subcontractor each will perform a portion of a contract work category. Therefore, subcontractor listing requirements are materials ones pertaining to bid responsiveness.
2. GSA should not have rejected the protester's bid as nonresponsive where the solicitation's subcontractor listing form mistakenly provided that fabricators of construction materials were to be listed and where it is clear from reading the protester's listings for two related work categories that the protester would perform all the onsite installation of wooden materials and the listed subcontractor would be the fabricator of such materials.

Dawson Construction Company, Inc. (Dawson), protests the rejection of its low bid under invitation for bids (IFB) GS-01B-02306 issued by the General Services Administration (GSA). The IFB was for the conversion and modernization of the United States Courthouse in New Haven, Connecticut. An award during the pendency of the protest was made to the third low bidder as the lowest responsive bidder because GSA determined that delivery of usable office space in the courthouse would be unduly delayed by failure to make a prompt award.

Immediately after GSA's award, Dawson brought suit against GSA in the United States District Court for the

District of Massachusetts (Civil Action No. 82-2954-G). The court has issued a temporary injunction against GSA prohibiting any performance on the contract until this Office has issued its decision.

For the reasons set forth below, we sustain the protest.

Dawson's bid and the bid of the second low bidder were rejected as nonresponsive for failure to comply with the subcontractor listing requirements set forth in the IFB. The subcontractor listing requirements, 41 C.F.R. § 5-2.202-51 (1982), are intended to preclude "bid shopping" and its attendant undesirable effects. John Grace & Co., Inc., B-190439, February 15, 1978, 78-1 CPD 131. "Bid shopping" in general is the seeking after award by a prime contractor of lower price subcontractors than those originally considered in the prime contractor's bid. See John Grace & Co., Inc., supra. This applies equally to situations where, as here, a prime and a subcontractor will perform a portion of a work category. See Thomason Industries Corporation, B-187631, January 24, 1977, 77-1 CPD 49. Therefore, subcontractor listing requirements are material ones pertaining to bid responsiveness. See Renovators West, Division of Western Empire Constructors, Inc., B-190427, January 17, 1978, 78-2 CPD 39.

Dawson asserts that it complied with all the IFB requirements for subcontractor listing. Dawson listed itself and another firm, Pridgen Cabinet Company (Pridgen), under Division 6, Carpentry, of the IFB's subcontractor listing form without stating the portion of work to be performed by each company. In Dawson's opinion, paragraph 15 of the Special Conditions of the IFB did not require Pridgen to be listed on the subcontractor listing form. Specifically, Dawson argues that paragraph 15 required that a bidder list only those subcontractors which would be performing work at the construction site. Dawson alleges that Pridgen was to be used merely as the fabricator of certain wooden materials at Pridgen's plant and that these materials were to be installed by Dawson at the construction site. Thus, Dawson takes the position that although it wrote Pridgen on the subcontractor listing form, it never

intended to subcontract with Pridgen as a "subcontractor" as defined by paragraph 15 and, actually, intended to perform all the onsite carpentry work itself.

Subparagraph 15.7.1 of the Special Conditions of the IFB defined the term "subcontractor" as follows:

"The term 'subcontractor' shall mean an individual or firm with whom the bidder proposes to enter into a subcontract for the performance of work on the site, including construction, fabrication, or installation of materials and/or equipment pursuant to the project specifications applicable to any category on the list of subcontractors. It excludes any manufacturer, fabricator, or supplier whose onsite work would be limited to incidental activities such as testing or adjusting equipment or material installed by others."

Dawson contends, moreover, that its listing of Pridgen arose not from its failure to comply with paragraph 15 listing requirements, but rather from GSA's erroneous inclusion of an offsite fabricator listing requirement in the subcontractor listing form. Dawson alleges that the sole reason it listed Pridgen was because the subcontractor listing form provided that such fabricators had to be listed. In this regard the subcontractor listing form provided:

"LISTED BELOW ARE THE NAME AND BUSINESS ADDRESSES AS REQUIRED BY THE 'LISTING OF SUBCONTRACTORS' PARAGRAPH OF THE SPECIAL CONDITIONS.

"YOUR ATTENTION IS DIRECTED TO THE FACT THAT ANY CATEGORIES, SUCH AS STRUCTURAL STEEL AND ARCHITECTURAL CAST STONE, WHERE A FABRICATOR IS TO BE USED, THE FABRICATOR MUST BE LISTED, IN ADDITION TO THE ERECTOR."

Dawson asserts that the form's fabricator listing provision made no distinction between onsite and offsite fabricators and that in an attempt to comply with the form's language, Dawson listed Pridgen. Dawson further asserts that the fabricator listing language did not state that any percentages or portions of work had to be shown where fabricators were involved and, consequently, the company did not provide such information on the subcontractor listing form.

GSA states that it found Dawson's bid nonresponsive because the company failed to comply with subparagraph 15.2 of the Special Conditions of the IFB, which provided that if a bidder intended to perform a category of contract work with its own forces and subcontract with one or more subcontractors for the balance of the work category, the bidder was to list all such firms, including itself, and state either by percentage or narrative description the portion of the work category to be performed by each firm. GSA further states that the list of subcontractors submitted by Dawson named Dawson and Pridgen under Division 6, Carpentry, but failed to state the portion of work to be performed by Dawson and the portion to be performed by Pridgen as required by subparagraph 15.2. In this regard, GSA points out that subparagraph 15.14 specifically provided, among other things, that if the bidder failed to comply with subparagraph 15.2, its bid would be rejected as nonresponsive to the IFB.

As to the language in the subcontractor listing form regarding the listing of fabricators, GSA states that under prior agency regulations, bidders on construction projects were required to list all first-tier subcontractors regardless of whether their work was to be performed onsite or offsite. GSA points out that pursuant to the prior subcontractor listing requirements, bids were rejected for failure to name the fabricator and the language in the subcontractor listing form was intended to remind bidders to list all subcontractors, including fabricators. GSA also states that its present subcontractor listing regulations require only the listing of onsite subcontractors, as specified in paragraph 15 of the IFB's Special Conditions.

According to GSA, a subcontractor listing form providing for the listing of fabricator subcontractors was inadvertently included in the IFB.

Finally, GSA asserts that subcontractor listing is a material bidding requirement and, as a consequence, Dawson's failure to properly complete the subcontractor listing form cannot be waived by the agency as a minor informality or irregularity. In this regard, GSA also takes the position that any statements by Dawson after bid opening regarding the company's intent at the time of bid opening should not be considered because this would give Dawson an unfair opportunity to decide after the other bidder's prices have been exposed whether it would be advantageous to the company to qualify for the award.

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. See 49 Comp. Gen. 553, 556 (1970). Also, when applying this test, the determining factor is not whether the bidder intends to be bound, but whether this intention is apparent from the bid as submitted. Renovators West, Division of Western Empire Constructors, Inc., supra. Accordingly, the statements of intention given by Dawson after bid opening cannot be considered in determining whether Dawson's bid was responsive to the IFB.

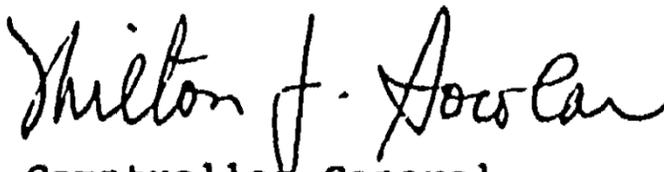
However, we do not agree with GSA that Dawson's completion of the subcontractor listing form required rejection of the company's bid as nonresponsive. We note that through inadvertence the subcontractor listing form required the listing of fabricators, without any distinction as to whether the work was onsite or offsite. In completing the form, Dawson listed itself in the subcontractor column under Division 6 and Pridgen in between the subcontractor column and the portion of work column. Also, it appears that Pridgen's name was written over a line that Dawson had drawn through the portion of work column. Further, under Division 8, Wood Windows, on the form, Dawson listed Pridgen in the subcontractor column and itself in between the subcontractor column and the portion of work column.

This time, Dawson's name was apparently partially written over a line that Dawson had drawn through the portion of work column.

In our opinion, the lines drawn by Dawson were equivalent to using the word "none" so that Dawson was, in effect, indicating under Division 6 that all onsite work was to be done by it and no onsite construction work was to be performed by Pridgen. Division 6, Carpentry, is covered by sections 0601, 06200, and 06400 of the IFB's technical provisions. These sections cover both the manufacturing standards for all woodwork materials and specific standards for the installation of such materials. Division 8, wood windows, is covered by section 08610 of the IFB's technical provisions. This section primarily covers the requirements for manufacture of the windows and states that installation is to be in accordance with the "approved installation instructions." Since the subcontractor listing form provided that fabricators were to be listed, we find that reading Dawson's listing for Division 6, together with its listing for Division 8, it is reasonable to conclude that Dawson intended only itself as the installer of all wooden materials delivered to the construction site with Pridgen being the fabricator of such materials. Therefore, we find that Dawson's intention is clear and its bid responsive.

The protest is sustained.

Since performance has not begun, it would be appropriate for GSA to terminate for the convenience of the Government the contract awarded and if Dawson is otherwise responsible make an award to Dawson. However, in light of the ongoing judicial proceedings, we are not making a recommendation for corrective action, as that ultimately is for the court to decide. Robert E. Derecktor of Rhode Island, Inc.; Marine Power & Equipment, Co., Inc.,
B-199445.4; B-199445.5, November 17, 1980, 80-2 CPD 361.

for 
Comptroller General
of the United States