

DECISION



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

FILE: B-212107; B-212107.2 **DATE:** March 16, 1984

MATTER OF: E.J. Murray Company, Inc.; W.M. Schlosser Company, Inc.

DIGEST:

1. Where a verified bid price on an alternate item is substantially below the prices for the same item submitted by the other bidders, but the price is not so low so as to indicate an obvious mistake, the agency may accept the bid.
2. A bid is responsive to a subcontractor listing requirement where the bidder lists the firms with which it proposes to subcontract and there is no evidence that the bidder retains control over the selection of second-tier subcontractors that actually will do the work.
3. Protest that an award to the low bidder would not be proper because one of its proposed subcontractors cannot comply with the solicitation's experience, Buy American Act, and Underwriters Laboratories listing requirements is dismissed since the protest is a challenge to the agency's determination that the low bidder is a responsible prospective contractor and the protester has not alleged either fraud or misapplication of definitive responsibility criteria.
4. Protest by third low bidder concerning responsiveness of second low bid is dismissed as academic since second low bidder is not currently in line for award.

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E.J. Murray Company, Inc. protests the proposed award by the General Services Administration of a construction contract to John C. Grimberg Company, Inc., the low bidder under invitation for bids (IFB) No. GS-11B-18700. Murray, the second low bidder, contends that the agency should reject Grimberg's bid because it contains an obvious mistake and because one of the subcontractors Grimberg listed cannot comply with solicitation requirements. Schlosser, the third low bidder, contends that Murray's bid is nonresponsive. We deny Murray's protest in part and dismiss it in part. We dismiss Schlosser's protest as academic.

MISTAKE

The solicitation for miscellaneous repairs and improvements at the Health and Human Services North Building in Washington, D.C. required each bidder to submit a lump sum base bid and prices for two alternate items. The agency decided to award all items and therefore determined the relative standing of the bidders by adding the alternate item prices to the base bids; the results were as follows:

<u>Bidder</u>	<u>Base Bid</u>	<u>Alternate 1</u>	<u>Alternate 2</u>	<u>Total</u>
Grimberg	\$1,891,000	\$225,000	\$36,000	\$2,152,000
Murray	1,845,000	350,000	44,300	2,239,300
Schlosser	1,880,000	338,000	38,000	2,256,000

Because six other bidders submitted prices for alternate item No. 1 ranging from \$330,000 to \$497,000, Murray contends that Grimberg's price for this item is an obvious mistake. Murray offers an analysis showing that the cost of performing alternate item No. 1 is \$334,300 just for labor and materials.

The regulations provide that after the opening of bids, the contracting officer should examine all bids for mistakes and, if he suspects that a bid is mistaken, contact the bidder for verification. Federal Procurement Regulations § 1-2.406-1. Generally, if the bidder verifies the bid, the contracting officer may consider the bid as originally submitted without the bidder having to prove that no mistake was made. G.T. Murphy, Inc., B-204351, February 23, 1982, 82-1 CPD 161. Here, the

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contracting officer did not request that Grimberg verify its bid, presumably because he did not suspect that Grimberg's bid contained a mistake. In any event, in response to Murray's protest, Grimberg informed the contracting officer through its attorneys that its bid was not mistaken.

Murray contends that, notwithstanding the verification, Grimberg's bid may not be accepted because it contains an obvious mistake. We do not agree. Grimberg's verification of its prices as submitted was unequivocal, and there is no objective evidence, other than price differential, that the bid may have been a mistake. See G.T. Murphy, Inc., supra. Although Grimberg's price for alternate item No. 1 is substantially lower than the prices of the other bidders, the difference is not so great as to compel the conclusion that the price was mistaken. In addition, even if we accept Murray's analysis indicating that Grimberg's bid on alternate item No. 1 was below cost, the submission of a below-cost bid does not constitute a legal basis for precluding a contract award. Microform, Inc.--Reconsideration, B-208117.2, September 27, 1983, 83-2 CPD 380.

SUBCONTRACTOR ISSUES

The solicitation required that each bidder indicate in its bid the names of the subcontractors who would perform each of several categories of work. Grimberg listed Tour & Andersson of Stamford, Connecticut, as its subcontractor under the category "section 15950-Temperature Control Systems." Murray contends that an award to Grimberg would be improper because Tour & Andersson cannot satisfy several requirements of the solicitation and because Tour & Andersson actually intends to use another firm to install the temperature control equipment.

Temperature control equipment

Paragraph 4.1.1 of section 15950 requires that the temperature control equipment be furnished and installed by a subcontractor who is regularly engaged in the manufacture and installation of temperature control equipment and systems. According to the protester, Tour & Andersson

manufactures, but does not install, temperature control equipment and, therefore, cannot satisfy this requirement. The protester says that Tour & Andersson intends to further subcontract the installation work to another firm and suggests that this renders the Grimberg bid nonresponsive. The agency admits that Tour & Andersson intends to subcontract the installation work, but notes that paragraph 4.1.1 permits the temperature control equipment to be installed by "mechanics regularly employed by or under contract to the temperature control subcontractor." The agency adds that the contracting officer has determined that Tour & Andersson can satisfy the requirements of paragraph 4.1.1 and that, to this extent, Grimberg is a responsible prospective contractor.

The requirement for bidders to list their proposed subcontractors is intended to prevent "bid shopping," the practice where a prime contractor uses one set of subcontractor quotes to prepare its bid and then, after award, looks for other subcontractors to perform at lower prices. Ordinarily, a bidder is responsive with respect to this requirement when it enters the names of the subcontractors that it proposes to engage for performance of the various categories of work. See Edgemont Construction Company, B-181250, August 29, 1974, 74-2 CPD 129. A listed subcontractor may further subcontract the work unless the solicitation provides otherwise. We have recognized, however, that the purpose of the subcontractor listing requirement may be frustrated where a bidder lists as one of its subcontractors an entity over which it has some control and that it knows intends to shop for second-tier subcontractors after award. See 47 Comp. Gen. 644 (1968); Mechanical Constructors, Inc., B-189423, January 24, 1978, 78-1 CPD 60. Such a practice may require rejection of the bid as nonresponsive. In our view, however, this is not such a case. The critical element is a finding that the bidder is acting in the guise of its own subcontractor, that is, that the bidder retains some control over the selection of the second-tier subcontractor who actually will do the work. Mechanical Constructors, Inc., supra. In this case, the protester has presented

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no evidence that Grimberg is in a position to control the selection of Tour & Andersson's subcontractor. Thus, there is no basis for us to conclude that the Grimberg bid is nonresponsive with respect to the subcontractor listing requirement.

The protester's argument that Tour & Andersson cannot satisfy the requirements of paragraph 4.1.1 is actually a challenge to the contracting officer's determination that Grimberg is a responsible prospective contractor. See Stauffer Construction Company, Inc., B-190707, June 19, 1978, 78-1 CPD 445. This Office does not review an agency's affirmative determination of responsibility unless the protester shows either that the determination possibly was made fraudulently or that definitive responsibility criteria in the solicitation were not met. 4 C.F.R. § 21.3(g)(4), as added by 48 Fed. Reg. 1931 (1983). The protester in this case does not allege fraud, and the requirement that equipment be installed by an experienced subcontractor merely describes how the work is to be performed and is not a definitive responsibility criterion. See generally Contra Costa Electric, Inc., B-190916, April 5, 1978, 78-1 CPD 268. Thus, we dismiss this aspect of the protest. Morse Typewriter Co., Inc., B-212636.2, September 27, 1983, 83-2 CPD 383.

Buy American Act

The solicitation requires that the contractor, and any subcontractors, materialmen, and suppliers, use only domestic construction material in the performance of the contract. This requirement was included pursuant to the Buy American Act, 41 U.S.C. § 10a-10d (1976). The protester contends that by listing Tour & Andersson, a Swedish company, as one of its subcontractors, Grimberg took specific exception to this requirement. According to the protester, Tour & Andersson does not manufacture its equipment in this country and will be using mostly Swedish-made equipment. These circumstances, says the protester, render Grimberg's bid nonresponsive.

Contrary to the protester's assertion, Grimberg's bid did not take exception to the domestic construction material requirement. The listing of a subcontractor

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that may be a foreign company is consistent with Buy American Act requirements since the Act is concerned only with the place of manufacture, not the nationality of the manufacturer. See Patterson Pump Company; Allis Chalmers Corporation; B-200165; B-200165.2, December 31, 1980, 80-2 CPD 453. Grimberg's bid obligates it to use or have used only domestic construction material; thus, the bid is responsive. Aesculap Instruments Corporation, B-208202, August 23, 1983, 83-2 CPD 228. Whether Grimberg has the ability, either alone or through its subcontractors, to comply with this requirement concerns Grimberg's responsibility. Ammark Corporation, B-192052, December 21, 1978, 78-2 CPD 428. As indicated, we will not review the contracting officer's affirmative determination of Grimberg's responsibility since the protester has not made a showing of possible fraud or of misapplication of definitive responsibility criteria. See Morse Typewriter Co., Inc., supra. Whether Grimberg actually does comply with this requirement is a matter of contract administration, which also is not subject to our review. 4 C.F.R. § 21.3(g)(1), as added by 48 Fed. Reg. 1931.

U.L. listing

The solicitation provides that the energy management control system must be listed by Underwriters Laboratories (U.L.) under U.L. Tests 864 and 1076 or the contractor must submit to the contracting officer a certificate from a nationally recognized testing organization stating that the system conforms to these U.L. standards. The protester complains that Tour & Andersson has not yet obtained the U.L. listing.

By signing the bid without exception, Grimberg promised to perform the contract in accordance with its terms. The contracting officer has determined that Grimberg is responsible, that is, that it is capable of satisfactory performance, including the U.L. listing requirement. As indicated, we review affirmative responsibility determinations only where either fraud or misapplication of definitive responsibility criteria is alleged. Since the solicitation provides that the contractor need not submit either the U.L. listing or the testing certificate until