

DECISION

number
2849c

**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548****FILE:** B-213667**DATE:** June 12, 1984**MATTER OF:** Parker-Kirlin, Joint Venture**DIGEST:**

1. Requirement in solicitation set aside for minority business participation that bidder submit with its bid certification from an agency of the District of Columbia Government that bidder is a minority business enterprise pertains to the bidder's eligibility to bid. Therefore, GAO finds that the fact that the bidder is certified at bid opening excuses the bidder's failure to provide evidence of the certification with its bid.
2. A joint venture is generally an association of legal entities to carry out a single business enterprise. Unless the terms of a joint venture agreement provide that one of the entities no longer exists, separate qualifications of each of the legal entities in the joint venture properly can be considered in evaluating the qualifications of the joint venture.
3. Procurement officials do not have the discretion to announce in the solicitation that one evaluation plan will be used and then follow another in the actual evaluation. Nevertheless, GAO finds no prejudice to the bidders resulting from awarding some points in the actual evaluation of bids under a solicitation's evaluation factor. Regardless of whether the bidders should have been given any points unless all of the evaluation factor's subcriteria were met, the information that had to be submitted on the evaluation factor remained the same.
4. GAO finds that solicitation requirement for listing of minority subcontractors related to the bidder's responsibility and need not have been completed prior to bid opening.

5. GAO finds no merit in protester's argument that it could have submitted more information under solicitation category of minority and apprenticeship hiring record if the protester had known that it was not limited to joint venture as opposed to separate firm business records. Solicitation did not limit the type of bid information that a joint venture bidder could submit. Nevertheless, GAO questions whether the protester should not have been permitted to submit further information after bid opening since such information would only reflect the protester's hiring record up to the time of opening. However, GAO sees no reason to disturb evaluation in view of the fact that failure to have any further hiring information considered was caused by the protester's erroneous interpretation of solicitation requirements.
6. GAO finds that it was improper for the District of Columbia to use noncost factors to determine award in a formally advertised procurement that was not set aside for minority business participation. Like federal procurements, District of Columbia awards are to be made to that responsible bidder whose bid conforming to the invitation for bids will be most advantageous, price and other factors considered. The other factors are objectively determinable elements of cost identified in the solicitation as factors to be evaluated in the selection of a contractor.

Parker-Kirlin, Joint Venture (Parker-Kirlin), protests the acceptance of the bids of BPI Mechanical, Inc. (BPI), and BPI Mechanical, Inc./E. J. Murray Company, Inc., Joint Venture (BPI/Murray), under invitations for bids (IFB) Nos. 0239-AA-02-N-3-CC and 0240-AA-02-N-3-CC, respectively. The IFB's were issued by the Government of the District of Columbia (D. C. Government) as part of the construction of the New Municipal Office Building. IFB No. 0239 was for plumbing work, and IFB No. 0240 was for heating, ventilation and air-conditioning work.

Subsequent to the filing of this protest, Parker-Kirlin filed suit against the D. C. Government in Superior Court of the District of Columbia, Civil Division, seeking injunctive

relief. Parker-Kirlin Joint Venture v. District of Columbia, John E. Touchstone, Civil Action No. 13209-83. By order dated December 13, 1983, the court set aside Parker-Kirlin's request for injunctive relief until a reasonable time after GAO decided Parker-Kirlin's protest.

By letter dated February 3, 1984, the D. C. Government notified our Office that awards were to be made during the pendency of protest because of the need to coordinate the work with other construction work, because of the long leadtime for procurement of equipment and because of anticipated budgetary overruns and delays in the scheduled completion time.

For the reasons set forth below, we deny the protest under IFB 0239, we deny the protest under IFB 0240 in part and sustain it in part. However, we do not recommend that the contract be terminated.

IFB 0239

The IFB was issued on July 14, 1983, and was restricted to properly certified minority business enterprises pursuant to the Minority Contracting Act, D.C. Code § 1-1141, et seq. (1981). An amendment created a bid evaluation process, where bid price was weighted 80 points and "other factors" were weighted 20 points. The other factors were: (1) existence as a "D.C. Business Firm" (5 points); (2) apprenticeship hiring record (10 points); (3) participation in the D. C. Department of Employment Services Hiring Plan (2 points); and (4) local minority hiring record (3 points). The amendment further specified a two-part bidding format. Bid information for the IFB's "other factors" was to be submitted on October 17, 1983. Bid prices were to be opened on October 27, 1983.

Both Parker-Kirlin and BPI submitted information relating to the IFB's "other factors." At bid opening, the "other factors" points were announced. BPI received 16.6 points and Parker-Kirlin received 15 points. Parker-Kirlin submitted a price of \$378,000 and BPI submitted a price of \$379,500. Parker-Kirlin received the full 80 cost points for having the low bid price and BPI received 79.7 cost points for having the close second low bid. BPI's total evaluation score was 96.3 points while Parker-Kirlin's total score was 95 points.

Parker-Kirlin contends that BPI submitted a nonresponsive bid because BPI failed to submit a minority business enterprise (MBE) certification, as required by the IFB. Parker-Kirlin emphasizes the IFB cautioned that only those business enterprises that have been issued a certificate of MBE registration were authorized to submit bids. Parker-Kirlin contends that a valid MBE certification was a material requirement of a bidder's eligibility to bid and, as such, involved bidder responsiveness.

The D. C. Government states that while BPI's bid did not include a copy of BPI's MBE certification, the company was certified by the Minority Business Opportunity Commission on July 12, 1983, in the areas of mechanical and general contracting, plumbing, heating, and air conditioning. Thus, the D. C. Government contends that BPI was a certified MBE at the time it submitted its bid. The D. C. Government further states that the IFB request that MBE certification be submitted with the bidder's bid price was for convenience so that procurement officials would not have to conduct independent research on a bidder's certification. The D. C. Government argues that the evidence of certification at bid opening does not determine bid responsiveness, but rather the actual fact of certification. The D. C. Government further argues that not attaching evidence of MBE certification has no effect on price, quantity, quality, or delivery and, as a consequence, can be waived as a minor informality where the bidder, as here, is certified at the time of bid opening.

BPI alleges that not only was BPI properly certified as an MBE prior to bid opening, but BPI's certification was received by the D. C. Government's procurement officials prior to bid opening, along with information pertaining to the "other factors" portion of BPI's bid. Therefore, BPI contends that the failure to resubmit the certification with its bid price was a minor informality and waivable.

GAO Analysis

Because the record does not establish whether BPI's allegation is true, we have decided the matter without responding to that allegation.

We have held that the submission of MBE certification with a bid pertains to the bidder's eligibility to bid and is similar to the small business certification requirements for small business set-asides that the bidder be small at

bid opening. Northern Virginia Chapter, Associated Builders and Contractors, Inc., et al., B-202510, April 24, 1981, 81-1 CPD 318, affirmed on Reconsideration, B-202510.2 August 3, 1981, 81-2 CPD 85. Consequently, we agree with the D. C. Government that the crucial question is whether the bidder is certified as an MBE at the time of bid opening and not whether the bidder has provided evidence of certification with its bid. As stated above, the IFB request for MBE certification was merely for the convenience of the D. C. Government.

IFB 0240

A. Background

The IFB was issued on July 14, 1983, on an unrestricted basis, and used the identical evaluation and two-step bidding process as IFB 0239. Information for this IFB's "other factors" was to be submitted on October 21, 1983. Bid prices were to be opened on November 3, 1983.

Evaluation of the bidders' information on the "other factors" portion of IFB 0240 was completed on November 1, 1983. Parker-Kirlin received 15 points and BPI/Murray received 18 points. On November 3, 1983, bids were opened. Parker-Kirlin's bid was \$3,443,000 and BPI/Murray's bid was \$3,487,000. Parker-Kirlin's low bid received 80 points, and BPI received 78.6 points for its second low bid. Parker-Kirlin's total score was 95 points and BPI's was 96.6 points.

B. D. C. Business Firm

Parker-Kirlin asserts that BPI/Murray should have received no (rather than 3.8 of 5) evaluation points for the "other factors" subcategory of existence as a D. C. business firm. Parker-Kirlin points out that, under the IFB, the bidder had to have its principal office located in the District of Columbia for a period of at least 2 years, paid D. C. taxes, and had a workforce comprised of at least 51 percent D. C. employees. Parker-Kirlin asserts that because the BPI/Murray joint venture was formed solely to bid on the IFB, the joint venture did not meet this requirement. Accordingly, the joint venture was evaluated by the D. C. Government improperly as separate entities.

In addition, Parker-Kirlin argues that even if BPI/Murray was properly evaluated, the joint venture still did not qualify as a D. C. firm because neither separate

entity met all the solicitation criteria. Specifically, Parker-Kirlin alleges that E. J. Murray Company, Inc., has a principal place of business in Maryland. Although BPI Mechanical, Inc., has a principal place of business in the District of Columbia, the company has not been located there for 2 successive years, nor has it paid D. C. taxes for calendar years 1981 and 1982. According to Parker-Kirlin, BPI Mechanical, Inc., has been in existence as a corporate entity only since May 1982.

The D. C. Government takes the position that the separate records of the companies comprising the joint venture can be taken into account in determining the qualifications of the joint venture. The D. C. Government emphasizes that a joint venture is a special combination or association of legal entities designed to carry out a single business enterprise for profit and, consequently, an evaluation of a joint venture reasonably entails the separate entities which comprise it.

As to Parker-Kirlin's argument that neither BPI Mechanical, Inc., nor E. J. Murray Company, Inc., qualified as a D. C. business firm, the D. C. Government argues that if the Parker-Kirlin argument were adopted, none of the 2.5 of 5 points should have been awarded to Parker-Kirlin under this subcategory. The D. C. Government states that less than 51 percent of Parker-Kirlin's employees are District of Columbia residents and that less than 51 percent of Parker-Kirlin's wages are paid to District of Columbia residents.

GAO Analysis

The joint venture agreement between BPI and E. J. Murray Company cannot be ignored in evaluating the combined bid of the two companies under the "other factors" portion of the IFB. See Harper Enterprises, B-179026, January 25, 1974, 74-1 CPD 31. However, we cannot accept Parker-Kirlin's argument that only the prior business history of the joint venture must be considered. Parker-Kirlin's argument is based on the theory that, like a partnership or corporation, a joint venture is a business with a legal identity separate from its "owners or subsidiaries." In our view, the D. C. Government correctly states that a joint venture is essentially an association of legal entities to carry out a single business enterprise. Unless the terms of a joint venture agreement provide that one of the entities no longer exists, we fail to see how the separate qualifications of each of the legal entities compromising the joint

venture can be ignored in evaluating the qualifications of the joint venture. See Harper Enterprises, supra.

With respect to Parker-Kirlin's argument that the two companies separately do not meet this requirement, the IFB provided:

" . . . A maximum of five (5) points is assigned under the category for each bidder which qualifies as a D. C. business firm. For purposes of this category a 'D. C. business firm' means a business for whose principal office has been physically located in the District of Columbia for a period of at least two (2) successive years prior to the date for submission of bids for other price factors. During such period the business firm must have been subject to the tax levied under D. C. Code 1981, § 47-1810.1 et seq. and had a workforce of which at least 51% of the employees were residents of the District or of which at least 51% of the wages were paid to D.C. residents"

The IFB further provided that each bidder meeting the D. C. business firm requirement would receive the maximum number of assigned points while bidders not meeting the requirement would receive no points.

The record shows that the D. C. Government gave no points only if the bidder was not physically located in the District of Columbia. If the bidder was so physically located, the D. C. Government awarded points up to five or subtracted points from five depending on the number of the D. C. business firms criteria met. Since Parker-Kirlin and BPI/Murray were physically located in the District of Columbia, the two bidders were awarded some points.

We find that this method of evaluation was inconsistent with the stated evaluation criteria since the IFB specifically provided that a bidder would receive no points if it did not meet all the requirements. We have held that a procuring agency does not have the discretion to announce in the solicitation that one evaluation plan will be used and then follow another in the actual evaluation. See Umpqua Research Company, B-199014, April 3, 1981, 81-1 CPD 254.

Nevertheless, we find no prejudice to the bidders resulting from the evaluation scheme used. Regardless of the evaluation points that were ultimately given, the

information that had to be submitted by the bidders under the IFB's D. C. business firm category remained the same. In any event, even if the IFB's scoring procedure had been used by the D. C. Government both Parker-Kirlin and BPI/Murray would have received no evaluation points for being a D. C. business firm and BPI/Murray would still have had the highest overall evaluation score.

C. Listing Minority Subcontractors

Parker-Kirlin alleges that BPI/Murray did not submit the IFB-required list of minority subcontractors with its bid. Parker-Kirlin further alleges that BPI/Murray must subcontract all the sheet metal work required by the IFB because neither company in the joint venture has a sheet metal shop. Parker-Kirlin emphasizes that the IFB required that 30 percent of any subcontracted work be certified MBE's and that these MBE's were to be listed in the bid. Parker-Kirlin therefore argues that BPI/Murray's bid should have been rejected because it failed to list its minority subcontractors or even make a statement that the requirement of 30-percent minority subcontract work would be met.

The D. C. Government states that the IFB contains no requirement that a specific percentage of anticipated subcontract work be given to certified MBE's. The D. C. Government also states that no listing of minority subcontractors was required to evaluate bids under the "other factors" category.

GAO Analysis

We find that the listing of minority subcontractors provision was merely for information and need not have been completed by a bidder prior to bid opening. We have held that similar requirements are contract performance requirements which set forth how the work is to be accomplished. See 41 Comp. Gen. 106 (1961); 41 Comp. Gen. 555 (1962). Such provisions relate to bidder responsibility, not responsiveness. See Delta Elevator Service Corporation, B-208252, March 23, 1983, 83-1 CPD 299; Contra Costa Electric, Inc., B-190916, April 5, 1978, 78-1 CPD 268. Therefore, even assuming that BPI/Murray will have to subcontract some heating, ventilation, and air-conditioning work, we cannot conclude that BPI/Murray's bid should have been rejected because the joint venture failed to provide a list of minority subcontractors.

D. Apprenticeship and Minority Hiring

Parker-Kirlin contends that there was no rational basis for the D. C. Government to award BPI/Murray any points for a record of apprenticeship and minority hiring because no such record existed for the joint venture. In the alternative, Parker-Kirlin argues that the IFB clearly stated that the apprenticeship and local minority hiring record were to be judged on the number of apprentices or local minorities hired by the "bidder" for the last 5 years. In this regard, Parker-Kirlin emphasizes that it submitted information pertaining only to its joint venture rather than information pertaining to the individual companies which make up its joint venture. Parker-Kirlin alleges that, had its individual companies submitted separate records, Parker-Kirlin could have shown the D. C. Government that approximately 300 District of Columbia minority residents had been hired over the last 5 years. Therefore, Parker-Kirlin takes the position that the D. C. Government failed to properly state this unequivocally in the IFB to permit all bidders to compete equally.

Parker-Kirlin also asserts that the D. C. Government violated the policy of the Minority Contracting Act, D.C. Code § 1-1141, et seq. (1981), and Minority Business Opportunity Commission regulations, by awarding evaluation points to the BPI/Murray joint venture based upon its individual record of a nonminority company, E. J. Murray Company, for hiring local D. C. resident employees. Parker-Kirlin charges that a large nonminority firm like E. J. Murray unfairly received more evaluation points under the terms of IFB because the evaluation was based upon the total number of local minorities rather than the percentage of local minorities hired in the bidder's total workforce. Parker-Kirlin points out that it has hired only a small number of minority District of Columbia residents over the past 5 years, but this number constituted a significant portion of the joint venture's small workforce. Parker-Kirlin alleges that for the last 5 years, E. J. Murray Company has hired, on the other hand, perhaps 10 D. C. residents out of a total workforce of 1,000 employees. According to Parker-Kirlin, a registered local MBE joint venture will necessarily receive less points based on its limited business experience than a large nonminority firm with expanded business experience which joins with a minority firm as a first-time joint venturer.

The D. C. Government again takes the position that a reasonable evaluation of the effectiveness of a joint venture is the separate records of the companies. In addition, the D. C. Government notes that IFB 0240 did not limit the information to be submitted by a joint venture under the "other factors" portion to only the business records of the joint venture itself.

GAO Analysis

In evaluating a bidder's hiring record based on the number of apprentices and minorities hired rather than on the percentage hired, the IFB specifically provided that bidders would be scored on the basis of the "number" of apprentices and minorities hired within the last 5 years. Because the IFB clearly stated that the number of apprentices and minorities was the basis for evaluation, we find that the D.C. Government's evaluation of bids was proper.

However, in our view, the basic issue here is whether the hiring record of a joint venture bidder was limited to consideration of only the prior business history of the joint venture itself. For the reasons stated above, we are unable to conclude that the evaluation of a joint venture's hiring record must be so limited. Harper Enterprises, supra. As to Parker-Kirlin's allegation that it was misled into failing to submit records of the individual entities in its joint venture, we fail to see how the IFB caused this. While Parker-Kirlin is a local minority joint venture that is certified by the Minority Business Opportunity Commission of the District of Columbia, the IFB clearly was not restricted to MBE participation, joint venture or otherwise. Further, as noted by the D. C. Government, the IFB did not limit the type of information that a joint venture bidder could submit under the "other factors" portion of the solicitation.

Nevertheless, we question whether the D. C. Government could not have given Parker-Kirlin the opportunity to submit further information after the October 21, 1983, submission date set forth in the IFB. We have held, for example, that information bearing on a bidder's responsibility may be furnished after bid opening up to the time performance is due. Lapteff Associates, Martel Laboratories, Inc., Kappe Associates, Inc., B-196914, B-196914.2, B-197414, August 20, 1980, 80-2 CPD 135. Although the bidder's apprenticeship and minority hiring record does not directly relate to its ability to perform, we do think that it is similar to the

MBE certification requirement in IFB 0239, that is, evaluation is to be made based on the apprenticeship and minority hiring record of the bidder up to the time of bid opening and not on whether the bidder has provided evidence of that record with its bid. In our view, the IFB request for this information here was also for the convenience of the D. C. Government so that procurement officials would not have to conduct independent research on a bidder's apprenticeship and minority hiring record.

In any event, we find that the D. C. Government evaluated in good faith the information that Parker-Kirlin did submit. Moreover, we further find that the D. C. Government's failure to evaluate whatever information Parker-Kirlin had concerning its individual companies was caused by Parker-Kirlin's erroneous interpretation of the IFB's requirements regarding the submission of minority and apprenticeship hiring information. Therefore, under the circumstances, we see no reason to disturb the D. C. Government's evaluation of Parker-Kirlin's bid information in this area.

E. Authority to Implement "Other Factors" Evaluation

In the alternative, Parker-Kirlin contends that if it is found that the bids were properly evaluated under the "other factors" portion of the IFB, the D. C. Government had no authority to provide for a process where preference is given to local companies with certain apprenticeship or hiring records. According to Parker-Kirlin, the IFB preference evaluation scheme actually violates the D. C. Government's procurement regulations because it is unnecessarily restrictive and unduly limits the number of bidders. Parker-Kirlin further points out that the IFB was not a minority business set-aside.

The D. C. Government states that Mayor's Order 82-204 (December 8, 1982) is the authority for including evaluation criteria in IFB 0240 for minority and apprenticeship hiring. The D. C. Government notes that the order specifically provides that the construction of the municipal center shall give increased employment opportunities for local apprentices and enhance the opportunities available to the minority and small business community. In addition, the D. C. Government argues that the two-step evaluation procedure does not unduly restrict competition. In the D. C. Government's view, the two-step procedure protects the integrity of the bidding process by requiring an evaluation of other bid factors prior to the submission of bid prices.

The D. C. Government asserts that bidders are fairly evaluated without any suggestion that the evaluation was slanted in favor of the apparent low bidder.

GAO Analysis

Parker-Kirlin's protest against the inclusion of certain bid evaluation criteria in the IFB is untimely. Under our Bid Protest Procedures, protests based upon alleged improprieties in the solicitation which are apparent prior to bid opening shall be filed prior to bid opening. 4 C.F.R. § 21.2(b)(1) (1983). While Parker-Kirlin did file its protest against award to any other bidder on the bid opening date, the issue that there was no authority for the inclusion of apprenticeship and minority hiring in IFB 0240 was not raised by Parker-Kirlin until a supplemental protest 6 weeks after opening.

In any event, because the court has expressed interest in a decision by our Office, we will, in accordance with our policy when a court expresses interest, consider the issue on the merits. See New York University, B-195792, August 18, 1980, 80-2 CPD 126.

In our opinion, the D. C. Government was attempting to evaluate in a formally advertised procurement context matters that do not pertain to price. Under D.C. Code § 1-1110 (1981) all contracts for the purchase of supplies or services are to be let by formal advertisement. Contracts for construction are encompassed within this requirement. See Northern Virginia Chapter, Associated Builders and Contractors, Inc., et al., supra.

We find that it is improper to use information not pertaining to price for the purpose of making award in a procurement required by the D. C. Code to be advertised. In procurements by federal agencies, Federal Procurement Regulations § 1-2.407-1(a) (1964 ed.) and 41 U.S.C. § 253(b) require that award under a formally advertised procurement be made to that responsible bidder whose bid conforming to the invitation for bids, will be most advantageous to the government, price and other factors considered. We have consistently interpreted this requirement to mean that award will be made on the basis of the most favorable cost to the government, assuming the low bid is responsive and the bidder responsible. 37 Comp. Gen. 550 (1958); Central Washington University, B-200316, August 18, 1981, 81-2 CPD 152. In the context of a formally advertised procurement,

"other factors" are objectively determinable elements of cost identified in the solicitation as factors to be evaluated in the selection of a contractor. Emerson Electric Company, Environmental Products Division, B-209272, November 4, 1982, 82-2 CPD 409.

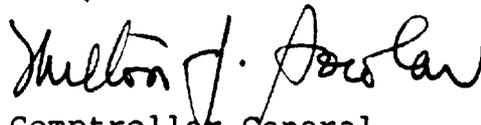
The procurement regulations of the D. C. Government set forth the same standard for advertised procurements as the Federal Procurement Regulations. Materiel Management Manual, Government of the District of Columbia § 2420.4B(3) (1974). Further, we note that Parker-Kirlin's bid price was \$44,000 lower than BPI/Murray's. Since BPI/Murray's higher point score was the obvious result of a slightly higher rating than Parker-Kirlin under the other factors portion of the IFB, it is clear that the award to BPI/Murray was made at other than the most favorable cost to the D. C. Government.

The D.C. Code § 1142 (1981) does provide an exception to the advertising requirement where the Mayor may authorize negotiations pursuant to the Minority Contracting Act in order to foster local minority opportunities. Here, however, the IFB was not set aside under the Minority Contracting Act for MBE participation. With respect to the D. C. Government's argument that Mayor's Order 82-204 authorized the bid evaluation process for the IFB, it appears to us that this order was intended only to allow maximum participation of the minority business community through the use of the Minority Contracting Act and its implementing regulations. In fact, D.C. Code § 1-1146 specifically provides for the allocation of construction contracts to local minority enterprises in order to attain the stated goal of 35 percent minority business participation in construction contracts. Therefore, we do not think that the order was intended to authorize the award on a basis other than price of contracts not set aside for MBE participation.

We sustain Parker-Kirlin's protest on this issue.

Normally, it would be appropriate for the D. C. Government to consider the feasibility of terminating the awarded contract and issuing a revised solicitation reflecting award on the basis of the lowest evaluated price. However, in view of Parker-Kirlin's failure to object to the IFB's evaluation criteria prior to bid opening, we do not recommend that BPI/Murray's contract be terminated. Instead of filing a timely protest against the solicitation's evaluation criteria, Parker-Kirlin participated in the procurement by submitting pertinent information under the "other

factors" portion of the IFB and by submitting a bid. Parker-Kirlin chose to complain about the other factors portion of the IFB only after it lost the award. Airco, Inc. v. Energy Research and Development Administration, 528 F.2d 1294, 1300 (7th Cir. 1975).

for 
Comptroller General
of the United States