

DECISION

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

30919

FILE:

B-216585

DATE: April 3, 1985**MATTER OF:**

O. V. Campbell & Sons Industries, Inc.

DIGEST:

1. Protest alleging that low bid is nonresponsive, because low bidder submitted the name of its roofing subcontractor instead of its own name on an IFB required manufacturer's certification (designed to evidence manufacturer's approval for warranty purposes of roofing installer), is denied where IFB permitted subcontracting and under the contract contractor can be required to obtain and pass through required warranties from both subcontractors and manufacturers.
2. Small Business Administration has exclusive authority to determine matters of small business size status for federal procurement and sales purposes.
3. Subcontracting with a large business in connection with a construction contract set aside for small business is not legally objectionable.

O. V. Campbell & Sons Industries, Inc. (Campbell), protests the Air Force's intent to award a contract to K&L Construction, Inc. (K&L), under invitation for bids (IFB) No. F23606-84-B-0049, a 100 percent small business set-aside, for installation of replacement ethylene propylene diene monomer (EPDM) roofing (a rubberized sheeting) on existing carports and storage sheds at Whiteman Air Force Base, Missouri. Bidders were required to submit a certificate from their proposed EPDM manufacturer evidencing the manufacturer's approval of the "roofing contractor" who would be installing the roofs. Campbell contends that K&L's bid is nonresponsive because the manufacturer's certification accompanying K&L's bid carried the name of Gentges Roofing & Sheet Metal Company (Gentges) and not K&L's name. Campbell also contends that Gentges is not a small business and therefore ineligible as a potential subcontractor.

We deny the protest in part and dismiss in part.

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The IFB clearly permitted subcontracting as it only required the bidder to perform 15 percent of the work called for under the contract, which included roofing, painting, and minor tree trimming. Although the IFB did not contain a subcontract listing requirement, it did require bidders to provide manufacturer's approval of the roofing contractor. Since K&L was not required to do the roofing work we fail to see how identifying Gentges as the roofing contractor renders K&L's bid nonresponsive. Rather, we think the approval statement indicates simply that K&L intended to subcontract the roofing work to Gentges.

Campbell notes that the IFB requires the bidder to furnish a 10-year manufacturer's warranty of the installed roofing system. Campbell argues that there can only be a 10-year warranty if the bidder is the same party as the approved roofing contractor. We disagree. Although we have found bids to be materially nonresponsive where the IFB sought a manufacturer's direct warranty to the purchaser and the bid submitted failed to provide the required warranty, Engineering Equipment Company, Inc., B-189310, Oct. 13, 1977, 77-2 C.P.D. ¶ 293, we do not find the situation here to be similar.

The IFB requires that the benefits of several warranties be made available to the Air Force. There is the 10-year manufacturer's warranty against leaks, under which the manufacturer agrees to repair any leaks in the roofing system for a period of 10 years after the roofing contractor's completion of installation and manufacturer's inspection and acceptance of the installation. There is a parallel 5-year Performance Agreement, under which the roofing contractor agrees for a period of 5 years after final acceptance to provide emergency roof repairs within 24 hours of receiving notice that a roof is defective or leaking. There is also a 20-year manufacturer's warranty against premature deterioration of the EPDM as a result of weathering. We think that the IFB's Warranty of Construction (APR 1984), Federal Acquisition Regulation, § 52.246-21, 48 C.F.R. § 52.246-21, insures that the Air Force will receive the benefits of these warranties when it provides:

"(g) With respect to all warranties, express or implied, from subcontractors, manufacturers, or suppliers for work performed and materials furnished under this contract, the Contractor shall--

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"(2) Require all warranties to be executed, in writing, for the benefit of the Government, if directed by the Contracting Officer, and

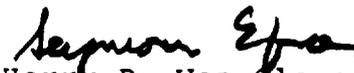
"(3) Enforce all warranties for the benefit of the Government, if directed by the Contracting Officer.

"(h) In the event the Contractor's warranty under paragraph (b) of this clause has expired, the Government may bring suit at its expense to enforce a subcontractor's, manufacturer's, or supplier's warranty."

We are therefore of the view that under the contract K&L can be required to obtain the named warranties, in writing, from both the roofing contractor (i.e., subcontractor Gentges) and the EPDM manufacturer in such form that the government may benefit therefrom either through K&L or on its own behalf. Consequently, we find no basis for Campbell's contention that the Air Force can only enjoy the benefits of the 10-year manufacturer's warranty if K&L and the approved roofing contractor are one and the same.

Under 15 U.S.C. § 637(b) (1982), the Small Business Administration has exclusive authority to determine matters of small business size status for federal procurement and sales purposes. Burlington Constructors Inc., B-216824, Oct. 31, 1984, 84-2 C.P.D. ¶ 492. Therefore, we will not consider Campbell's contentions that Gentges is not a small business. In any event, subcontracting with a large business in connection with a construction contract set aside for small business is not legally objectionable. Burlington Constructors Inc., B-216824, supra.

The protest is denied in part and dismissed in part.

for 
Harry R. Van Cleve
General Counsel