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

FILE: B-218661.2 **DATE:** May 6, 1985

MATTER OF: O. V. Campbell & Sons Industries, Inc.--Reconsideration

DIGEST:

Prior decision denying protest is affirmed on reconsideration where protester fails to establish in its reconsideration request that prior decision contained either errors of fact or of law.

O. V. Campbell & Sons Industries, Inc. (Campbell), requests reconsideration of our decision in O. V. Campbell & Sons Industries, Inc., B-216585, Apr. 3, 1985, 85-1 C.P.D. ¶ ____, in which we denied in part and dismissed in part Campbell's protest against the Air Force's intent to award a contract to K&L Construction, Inc. (K&L). The contract was for installation of replacement ethylene propylene diene monomer (EPDM) roofing on existing carports and storage sheds of Whiteman Air Force Base, Missouri. Campbell contended that K&L's bid was nonresponsive because it furnished an IFB required certificate of manufacturer's approval bearing the name of another firm, Gentges Roofing & Sheet Metal Company (Gentges), instead of K&L's name.

In order to prevail in its request for reconsideration, Campbell must convincingly show either errors of fact or of law in our earlier decision. See Corbetta Construction Company of Illinois, Inc., 55 Comp. Gen. 972, 975 (1976), 76-1 C.P.D. ¶ 240 at 5; Bid Protest Regulations, 4 C.F.R. § 21.12(a) (1985). Campbell has failed to meet this burden.

Campbell's objections focus on the following segment of our decision:

"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 contends that the above segment artificially creates contractual relationships, both with regard to performance of work and warranties, where there is no evidence of privity of contract between any of the parties (K&L, the manufacturer, Gentges). Specifically, Campbell contends that we erred in concluding that Gentges was K&L's subcontractor for purposes of performing the roofing installation. In Campbell's view, the presence of Gentges name on the certificate of manufacturer's approval does not establish that Gentges would in fact perform the roofing installation as K&L's subcontractor. Further, Campbell argues that nothing on the face of the bids establishes that K&L and Gentges are in a subcontracting relationship.

We disagree. The IFB's quality assurance provision provided that:

> "Roofing system must be installed by a roofing contractor approved by the roofing system manufacturer . . .."

Bidders were further required to include with their bids a manufacturer's certificate stating that the named entity "is accredited as an authorized and approved applicator of our [the manufacturer's] roofing system." Since the named entity on K&L's bid was Gentges and the roofing system had to be installed by an entity approved by the manufacturer, we think it reasonable to conclude that where a bidder submits the name of a manufacturer approved entity, other than itself, to perform work that can only be performed by a manufacturer-approved entity, that bidder is evidencing an intent to subcontract that work to the named entity.

Regarding Campbell's contention that there is no privity of contract between the manufacturer of the roofing material and K&L which could provide a basis for the benefit of the manufacturer warranties to flow through to the Air

Force, we noted in our previous decision that the Federal Acquisition Regulation, 48 C.F.R. § 52.246-21, required K&L (but only if the contracting officer directed it) to obtain written warranties from subcontractors and manufacturers for the benefit of the government. K&L made this promise to the Air Force when it signed its bid. In effect, K&L promised that, in its contractual dealings with subcontractors and manufacturers, it would make the government a third party beneficiary, and it, if so required, would not only be able to furnish written evidence of the government's third party beneficiary status, but would also enforce the required warranties for the benefit of the government.

Finally, Campbell notes that one cannot establish from the face of the bid what percentage of the work would be subcontracted and what percentage performed by the bidder. Campbell further notes that it was impossible to tell from the face of a bid exactly what any bidder intended to do vis-a-vis subcontracting. We agree. However, we cannot agree that this lack of information regarding subcontracting necessitates the legal conclusion proposed by Campbell that the bidder and the entity certified by the roofing material manufacturer must be one and the same in order for the bid to be responsive.

Accordingly, Campbell has failed to provide a basis upon which to modify our prior decision and it is therefore affirmed.

Harry R. Van Cleve
General Counsel