DECISION

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

614448

FILE: B-186341 DATE: September 7, 1976

MATTER OF: Saturn Systems, Inc.

U980798074

DIGEST:

1. RFP clause which provides contractor personnel are employees of contractor and contractor through its personnel shall perform the contract work is not intended to prohibit subcontracting. Rather, clear purpose of clause is to establish that there is no employment relationship between contractor's personnel and Government.

2. Where prime contractor retains responsibility for contract performance, subcontract of substantial portion of work to be performed is not assignment of contract.

3. Deletion from contract terms of RFP clause after award selection was not improper relaxation of specifications where RFP elsewhere contained substantially same requirement as that set forth in deleted clause. However, agency is advised to delete unnecessary RFP clause prior to submission of proposals and not after selection of successful offeror.

Saturn Systems, Inc. (Saturn) protests the award to Dacom, Inc. (Dacom) under RFP No. F09603-75-R-0988 issued on May 21, 1975, by the Department of the Air Force (Air Force), Warner Robins Air Logistics Center, Robins Air Force Base, Georgia.

Saturn's primary contention is that the Air Force gave Dacom a material competitive advantage over the other offerors by permitting it to subcontract most or all of the contract work to AIL Information Systems, Inc. (AIL). The thrust of Saturn's argument is that the solicitation precluded 100 percent subcontracting.

The RFP called for a requirements contract for various maintenance services on Intelligence Data Processing Systems within and without the United States. AIL was one of the offerors solicited, but it did not respond. Rather, Dacom submitted a proposal "in lieu of AIL" and stated that it had purchased AIL as of June 30, 1975. Dacom, in its letter dated July 21, 1975, transmitting the proposal, reported:

"There is still one more administrative/ legal detail to be completed before this organizational change is fully executed; however, we anticipate that this transaction will be finalized within the next few weeks. In the meantime, Dacom, Inc. is managing AIL Information Systems and operating as if the acquisition has in fact been executed. Accordingly, Dacom, Inc. is signing as the offeror under this proposal and, of course, will be responsible for the performance of the contract after the final award is received."

However, by letter dated September 18, 1975, AIL advised the contracting officer that "the acquisition by Dacom, Inc. of AIL Information Systems was not consummated" because of a court imposed qualification which was unacceptable to Cutler-Hammer, Inc., its parent corporation. In addition, Dacom submitted an executed agreement dated October 23, 1975, between it and AIL whereby AIL would perform all the work under any resulting contract in the role of subcontractor to Dacom. Dacom prevailed in the competition and was awarded a contract on March 25, 1976.

The solicitation provided in pertinent part as follows:

"J.10. BASIS FOR PERFORMANCE

Contractor personnel are employees of the Contractor under its administrative control and supervision. The contractor, through its personnel, shall perform the tasks prescribed herein and in orders issued hereunder. Contractor shall select, supervise and exercise control and direction over its employees under this contract. The Contractor or its employees shall not supervise, direct or control the activities of Air Force personnel, or the employees of any other Contractor. The Government shall not exercise any supervision or control over the Contractor's employees in their performance of contractual services under this contract. The Contractor is accountable to the Government for the action of his personnel." (Emphasis supplied)

Saturn argues that this language as well as other references in Section J of the RFP to the performance of "contractor maintenance personnel" required the use of the unique services of the successful offeror and prohibited substantial subcontracting.

It seems clear to us, however, that the purpose of the clause is to make it clear that there is no employment relationship between the Government and the contractor's personnel and between the contractor and the Government's personnel. The clause does not address the matter of subcontracting. In our opinion, none of the other references to contractor personnel in Section J suggests that subcontracting would be prohibited. For example, clause J-11(a) provides that the contractor shall be responsible for the number of personnel assigned to perform the required services, and clause J-13 provides that the contractor shall have the right to replace or transfer its personnel. These provisions do not deal with subcontracting and we see no reason why the contractor would be prohibited from subcontracting because of them. While under clause J-11(a) the contractor is responsible for deciding how many employees are needed to perform the required services and under clause J-13 it retains the right to transfer its personnel, these clauses do not require performance of the work using only the contractor's employees or otherwise prohibit subcontracting.

In fact, the RFP contains various provisions relating directly to subcontracting. For example, the RFP contains guidelines for subcontracting with small businesses and minority business enterprises and in labor surplus areas. There are qualifications for competition among subcontractors and advance notice requirements of intended subcontracting. Clearly, many separate provisions of the RFP contemplated that performance of the work might be subcontracted. Therefore, we cannot agree with the contention that subcontracting was prohibited.

Moreover, we do not agree with the protester's suggestion that the arrangement between Dacom and AIL constitutes an assignment of a contract in violation of 41 U.S.C. 15 (1970) and 31 U.S.C. 203 (1970). The contract expressly indicates that the relationship of Dacom and AIL is one of prime contractor and subcontractor with responsibility for performance of the contract remaining with Dacom.

Finally, Saturn argues that the deletion from the contract awarded of an RFP clause which defined "direct labor" was an improper relaxation of Government requirements without notice to the other offerors. The clause in question provided as follows:

> "J-32. DIRECT LABOR: For the purpose of this solicitation and any resulting contract, 'direct labor' shall include only that labor performed by production personnel actually engaged in the direct performance of work called for herein. Direct labor shall not include any labor performed by non-production type personnel, such as, but not limited to: timekeepers, payroll clerks, purchasing, materials handling, quality control, storing and issuing personnel, clerks, executives and similar classifications."

The Air Force and AIL argue that the deleted "direct labor" definition is merely a reiteration of the "Pricing of Adjustments" (Armed Services Procurement Regulation (ASPR) § 7-103.76 (1975 ed.)) clause which is incorporated into the contract by reference No. 25 of Section L of the RFP. AIL also points out that the RFP required a fixed price for the performance of these services, so that the competition was not affected by the deletion.

We agree with the Air Force/Saturn reading of the RFP provision. ASPR § 7-103.26 requires that the pricing of price adjustments be in accordance with the cost principles of ASPR Section 15, and those principles impose a definition of direct costs which essentially is the same as the definition contained in the deleted clause. See ASPR §§ 18-109(f) and 15-202 (1975 ed.). For this reason we do not find that the RFP requirements were improperly relaxed for the contractor. However, we are recommending to the Secretary of the Air Force that where an unnecessary RFP clause is to be deleted from the contract, the deletion should be made prior to the submission of proposals and not after the award selection.

Based on the foregoing, the protest is denied.

Acting Comptroller General
of the United States