

DOCUMENT RESUME

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[Nonresponsive Bids Due to Subcontractor Listing Requirement, and Subsequent Waiver]. B-188603. June 15, 1977. 6 pp.

Decision re: George Hyman Construction Co., GA; Blaka Construction Co., Inc.; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services:
Definition of Performance Requirements in Relation to Need of the Procuring Agency (1902).

Contact: Office of the General Counsel: Procurement Law II.
Budget Function: General Government: Other General Government (806).

Organization Concerned: General Services Administration.

Authority: B-157279 (1965); B-104810 (1975); 41 C.F.R. 5B-2.202-70. F.P.R. 1-2.301; 39 Comp. Gen. 570; 38 Comp. Gen. 98. 53 Comp. Gen. 586; 38 Comp. Gen. 532; 47 Comp. Gen. 644. F.P.R. 1-2.405. B-169974 (1970). B-153613 (1964). B-187617 (1977). 55 Comp. Gen. 955. 49 Comp. Gen. 120. 46 Comp. Gen. 156. 45 Comp. Gen. 849. 54 Comp. Gen. 967.

Bidder listed its own name for work category requiring subcontract to meet special fabrication specifications, thus violating subcontractor listing requirement. Where all bids were nonresponsive to that requirement, GAO will not object to its waiver, since it is not prejudicial and will yield contract meeting Government's needs. The fact that a protest on another procurement was withdrawn after agency's representation that all bids would be rejected on the subject solicitation did not preclude waiver here. Waiver of requirement was not objected to, and the low bid could be accepted. (Author/DJM)

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DECISION



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

FILE: B-188603

DATE: June 15, 1977

**MATTER OF: George Hyman Construction Company
Blake Construction Company, Inc.**

DIGEST:

1. Subcontractor listing requirement is not satisfied by bidder which lists only its own name for work category and indicates that it plans to perform all such work itself, where bidder in fact must subcontract substantial portion of the work because it requires special fabrication to meet Government specifications.
2. GAO will not object to waiver of subcontractor listing requirement for all bidders since all bids were nonresponsive to that requirement and waiver, while not prejudicial to any bidder, would result in contract award which would satisfy Government's needs. Fact that protest was withdrawn on another procurement in reliance on agency's representation that all bids would be rejected on this procurement does not preclude waiver under circumstances of case.

George Hyman Construction Company (Hyman) has protested the rejection of its low bid by the General Services Administration (GSA), Public Buildings Service, under Project No. 190066 for the construction of the Lister Hill National Biomedical Communications Center in Bethesda, Maryland. GSA contends that Hyman's bid and the 16 other bids received are nonresponsive for failure to comply with various aspects of the subcontractor listing requirement specified in the invitation for bids (IFB), but states it would be willing to make award to Hyman. Blake Construction Company, Inc. (Blake), the ninth low bidder, protests, in turn, any award to Hyman under the instant solicitation.

The IFB required each bidder to furnish with its bid the name and address of the subcontractor which would perform each of specified categories of work. If the bidder intended to perform any category of work itself, it was to list its own name for that category. Where a category was to be performed in part by the bidder and in part by another firm, the bidder was to describe the portion of work to be performed by each. "Subcontractor" was defined in the solicitation as any " * * * firm with whom the bidder proposes to enter into a subcontract for manufacturing, fabricating, installing or otherwise performing work under this contract * * *." The

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solicitation stated that if a bidder failed to comply with the subcontractor listing requirement its "bid will be rejected as non-responsive to the invitation."

On the subcontractor listing form, Hyman entered only its own name for the concrete category and indicated that it planned to perform all such work itself. However, the fabrication of reinforcing steel (rebar), which is part of this category of work is work which Hyman cannot perform with its own personnel and will be required to subcontract. Therefore, GSA found Hyman's bid nonresponsive to the requirement to list both itself and the subcontractor which would perform the rebar fabrication.

We agree that Hyman's bid is nonresponsive. In B-169974, August 27, 1970, a similar case, all three bidders (one of which was Hyman) listed only themselves for the concrete category and did not list the firm with which they proposed to subcontract for the rebar work. Because the reinforcing steel had to be specially fabricated for the contract in accordance with approved shop drawings (i. e., the rebar was not a standard off-the-shelf item), we held that the reinforcing steel fabricator was a "subcontractor" and, therefore, required to be listed on the bid form. Consequently, all three bids (including Hyman's) were found non-responsive to the subcontractor listing requirements of the IFB. See Frank Coluccio Construction Company, Inc., 55 Comp. Gen. 955 (1976), 76-1 CPD 215; 49 Comp. Gen. 120 (1969); 46 Comp. Gen. 156 (1966).

Here, Hyman admits that it plans to subcontract the rebar work if it is awarded the contract. However, it maintains that the cost of the rebar fabrication subcontract will constitute only 1.81 percent of the total Government estimate for the project and urges that we apply the rule that the failure to list a subcontractor for a category of work constituting less than 3-1/2 percent of the estimated cost of the contract will not affect the responsiveness of the bid. See B-157279, August 17, 1965; 47 Comp. Gen. 644 (1968) and 41 C.F.R. 5B-2.202-70 (1976). We cannot agree. The rebar fabrication is not a separate "category" of work, but is only one part of the concrete category which itself is approximately 20 percent of the estimated contract price. We also do not believe it appropriate to treat Hyman's failure to list its subcontractor as waivable as a minor informality under the so-called "de minimis rule" of section 1-2.405 of the Federal Procurement Regulations (FPR) (1964 ed.) in view of Hyman's estimate that the rebar work will cost \$251,500, which is some 12.6 percent of the concrete work.

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Our conclusion that Hyman's bid is nonresponsive to the subcontractor listing requirement does not resolve the matter. As indicated above, GSA regards all bids as nonresponsive to the subcontractor listing requirement. It therefore suggests the possibility of waiving the requirement. As stated in GSA's administrative report:

"* * * GSA would have no objection if [GAO] should conclude that an award might be made under this solicitation and without resoliciting. GSA would be amenable to foregoing the constraints upon bid shopping that would have been created by fully responsive bids, and thus waiving the defects in all of the 17 bids, particularly since GSA presently is considering the elimination of the subcontractor listing requirement altogether.

"Waiver of the listing requirement and of the bidder's failure to be responsive thereto under the instant solicitation would avoid the necessity for a readvertising and the substantial increase in cost that could be expected. Construction costs in the Washington, DC area are currently rising at the rate of 3/4 of one percent per month. There would be at least a 7 or 8 months' lapse (and possibly longer) between the time the instant bids were opened and the time when new bids could be opened after receipt of a Comptroller General decision on this protest, issuance of a new solicitation, and preparation of new bids. The level of construction costs on a project of this magnitude would have increased on the order of three quarters of a million dollars and this substantial increase in costs would be reflected in the bids. This would seem to be an excessive premium to pay in order to enforce the subcontractor listing requirement under the instant solicitation by rejecting all of the 17 nonresponsive bids, when that very requirement might be eliminated in the resolicitation.

"Nor do we see that waiving the requirement and the bidders nonresponsiveness thereto would be prejudicial to any of them. Although all seventeen bidders were equally nonresponsive with respect to * * * [two aspects of the subcontractor listing require-

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ment] they were not equally nonresponsive as to the concrete category (i. e., the fifth, seventh, eighth, ninth, eleventh, twelfth and fourteenth apparent low bidders listed their proposed rebar subcontractor). Nevertheless, we do not believe that an award to the apparent low bidder (Hyman) would be prejudicial to the aforementioned seven bidders, for the following reasons. The estimated cost of the rebar work is \$251,500. The difference between Hyman's evaluated bid price (\$13,885,376) and the fifth low bidder's evaluated bid price (\$14,721,805) is \$836,429.

Therefore, any advantage that might arguably be gained by Hyman in not listing its proposed rebar subcontractor (thereby affording Hyman the opportunity to bid shop the rebar work) clearly would have no effect on the competitive standing of the bidders. Under the circumstances, all bidders would experience equivalency as a result of waiver."

Blake objects to the suggested waiver. Blake states the general rule that award may not be made to a nonresponsive bidder, asserts that acceptance of Hyman's bid would be prejudicial to other bidders, and further asserts that such action would be inconsistent with action taken by GSA on another procurement and with assurances given to Blake by GSA that it would reject all bids and readvertise on both the other procurement and this one. Blake states that it relied on those assurances when it, as the low bidder on the other procurement, withdrew its protest against rejection of its bid.

The acceptance of a bid which is nonresponsive to a material solicitation requirement is not permitted. 41 CFR § 1-2.301; 39 Comp. Gen. 570 (1960); 38 id. 98 (1958). The basis for the strict rules governing bid responsiveness is grounded in the need to protect the integrity of the competitive bidding system by assuring that all bidders compete on an equal footing. See 17 Comp. Gen. 554 (1938); P. Shnitzer, *Government Contract Bidding* 237 (1976). In most cases, of course, the integrity of the system can be preserved only by strict application of the responsiveness rules. However, in cases where it appeared that acceptance of a deviating bid would result in a contract would would satisfy the Government's actual needs and would not prejudice any other bidder, we permitted acceptance of the bid notwithstanding that the bid was technically nonresponsive, *GAF Corporation et al.*, 53 Comp. Gen. 526 (1974), 74-1 CPD 68; *Thomas Construction Company, Inc.*, B-184810, October 21, 1975, 75-2 CPD 248; 38 Comp. Gen. 532 (1957); see also *Keco Industries, Inc.*, 54 Comp. Gen. 967 (1975), 75-1 CPD 301, since the integrity of the competitive system was not adversely affected thereby. See *Union Carbide Corporation*, B-187617, April 7, 1977, 56 Comp. Gen. ___, 77-1 CPD 243.

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Here, in view of GSA's statement that it is "considering the elimination of the subcontractor listing requirement altogether" and would be amenable to waiving the requirement in this instance, it appears that acceptance of Hyman's bid will result in a contract which will satisfy GSA's requirements. Moreover, it is clear that no other bidder will be prejudiced thereby. The 16 other bids submitted were determined to be nonresponsive to the subcontractor listing requirement. Given this and the disparity between bid prices as indicated in the statement quoted above, we fail to see that the other bidders would be prejudiced since the estimated cost of the rebar work is \$251,500. See B-169974, supra, where, following this rationale and under very similar circumstances, we stated:

"In view of the serious financial consequences to the Government flowing from a rejection of all bids and a readvertisement, our Office will not object to administrative waiver of the requirement for listing subcontractors with respect to the concrete category. While recognizing that this represents a departure from the general rule of bid responsiveness, we are taking this position since we observe that both the original determination to include in the invitation a subcontractor listing requirement and the choice as to those categories of work that should be subject to the listing requirement are matters of procurement policy and judgment. Furthermore, our conclusion is buttressed by the fact that no bidder would be prejudiced by an award under the invitation. * * *"

See also B-153613, May 6, 1964, where our Office permitted acceptance of a nonresponsive low bid which exceeded an administrative cost limitation set forth in the IFB when all other bidders exceeded either the administrative or applicable statutory limitation, and 45 Comp. Gen. 849, (1936), where we did not object to the acceptance of a low nonresponsive bid since all bidders were equally deficient in not having furnished authorization to use Government furnished property.

With regard to Blake's withdrawal of its protest on another GSA procurement based on assurances that no award would be made under the instant IFB, it appears that GSA's statement was in good faith and in fact was initially implemented by the rejection of all bids. However, GSA's decision to reject all bids and cancel the instant solicitation was subject, of course, to possible protest by Hyman and the other bidders on the project.

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We do not believe that Blake could reasonably regard what it was told by GSA as precluding a decision on such a protest, and implementation thereof, which would be favorable to Hyman. We therefore believe that Blake and GSA could only regard what GSA said as a statement of then current intentions. As indicated above, GSA did act in accordance with those intentions.

Once the Hyman protest was filed, however, we think it was reasonable for GSA, without being unfair to Blake, to state that it would be willing to waive the subcontractor listing requirement under the circumstances of this case. GSA first defended its initial decision to reject all bids. It then pointed out the existence of certain circumstances which made it "amenable" to waiver, a course of action previously approved by this Office under similar circumstances. See B-169974, *supra*. In so doing, it was careful to further point out that Blake in fact had withdrawn its protest on the other procurement on the basis of a GSA representation that both solicitations would be canceled. We think this administrative response, setting forth both GSA's position and the situation involving Blake and the prior procurement was an appropriate one made to enable this Office to consider all the facts and circumstances of this case.

Furthermore, GSA's willingness to waive the subcontractor listing requirement in this procurement, even though it indicated no such willingness in the procurement on which Blake was the low bidder, appears to have a reasonable basis. We note that while the bid price disparities in this procurement suggest that no bidder will be prejudiced by the waiver, the differences in prices in the other procurement were substantially less; in addition, the value of the work for which subcontractor bid shopping was possible appeared to be significantly higher than the value of the rebar work in the instant procurement. Thus, we think it is doubtful that waiver in the other case would have been appropriate.

For the above reasons, we would not object to waiver of the subcontractor listing requirement and, if otherwise proper, to acceptance of Hyman's bid.


Deputy Comptroller General
of the United States