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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20546

FILE: B-189327

DATE: November 8, 1977

MATTER OF: Gramercy Contractors, Inc.

DIGEST:

1. Where protester's allegation questions affirmative determination of subcontractor responsibility, GAO will not review matter, except where fraud or misapplication of definitive responsibility criteria has been alleged.
2. Where formally advertised solicitation contains duplicate subcontractor listing and bid submission requirements, and low bid listed two different subcontractors on separate listings under same work category, low bid need not be rejected as nonresponsive since record discloses no practical opportunity to bid shop, bidder was not given chance to clarify bid, and there is no legal reason to preclude contracting officer from making binding determination as to what was intended by bidder based on knowledge of listed subcontractors.

Gramercy Contractors, Inc. (Gramercy), protests the award of a contract to PJR Construction Corporation (PJR) pursuant to invitation for bids (IFB) INY75015 - RNY 74180, issued by the General Services Administration (GSA), on March 29, 1977, involving repairs and alterations to the United States Customs Court and Federal Office Building in New York City. The award was made in early August, and the contract is scheduled for completion 390 calendar days from the date of receipt of notice to proceed, which was issued August 31, 1977.

The IFB required that the bidder submit in duplicate the bid form and a "list of subcontractors" supplement to the bid form specifying the firms with whom the bidder would subcontract for each of the designated categories of work. The subcontractor listing requirements are contained in paragraph 10 of the Special Conditions of the IFB, which provides in pertinent part as follows:

"10. LISTING OF SUBCONTRACTORS

"10.1 For each category on the List of Subcontractors which is included as part of the bid form, the bidder shall submit the name and address of the individual or firm with whom he proposes to contract for performance of such category, Provided, that the bidder may enter his own name for any category which he will perform with personnel carried on his own payroll (other than operators of leased equipment) to indicate that the category will not be performed by subcontract.

"10.2 If the bidder intends to subcontract with more than one subcontractor for a category or to perform a portion of a category with his own personnel and subcontract with one or more subcontractors for the balance of the category, the bidder shall list all such individuals or firms (including himself) and state the portion (by percentage or narrative description) of the category to be furnished by each.

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"10.5 Except as otherwise provided herein, the successful bidder agrees that he will not have any of the listed categories involved in the performance of this contract performed by any individual or firm other than those named for the performance of such categories.

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"10.11 Notwithstanding any of the provisions of this clause, the Contracting Officer shall have authority to disapprove or reject the employment of any subcontractor he has determined nonresponsible or who does not meet the requirements of an applicable Specialist or Competency of Bidder clause.

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"10.14 If the bidder fails to comply with the requirements of subparagraphs 10.1, 10.2 or 10.3 of this clause, the bid will be rejected as nonresponsive to the invitation."

The list of subcontractors contained eight categories, two of which were "Sprinklers & Plumbing" and "Heating, Ventilating, Air Conditioning" (HVAC). The former category was divided, by FJR, into two separate categories with All Counties Sprinklers, Inc. (All Counties), listed for only the sprinkler work and Matthews Plumbing & Heating Co. (Matthews) for only the plumbing work. With respect to the latter category, one list of subcontractors had All Counties listed, while the other had Beck & Scalafani, Inc. (Beck).

Citing paragraph 9 of the Special Conditions of the IFB Gramercy challenges the competency of All Counties to perform the HVAC work and contends that All Counties did not meet the requirements of the IFB for a sprinkler contractor. Because of our conclusion below, the competency of All Counties to perform HVAC work is academic and will not be considered. In pertinent part, paragraph 9 of the Special Conditions provides:

"9.1 The bidder or the subcontractor whom the bidder will use for performance of special equipment, such as Pistol Range Equipment, shall have had at least three years' successful experience installing and servicing such equipment."

These matters essentially concern responsibility of a subcontractor which in turn might very well affect the responsibility of the bidder. See Federal Procurement Regulations f 1-1.1206 (1964 ed. amend. 95). We do not review protests against affirmative determinations of responsibility, unless either fraud is alleged on the part of procuring officials or where the solicitation contains definitive responsibility criteria which allegedly have not been applied. Central Metal Products, Inc., 54 Comp. Gen. 66 (1974), 74-2 CPD 64; Data Test Corporation, 54 Comp. Gen. 499 (1974), 74-2 CPD 365, affirmed 54 Comp. Gen. 715 (1975), 75-1 CPD 138. Affirmative determinations are based in large measure on subjective judgment which are largely within the discretion of procuring officials who must suffer any difficulties experienced by reason of a contractor's inability to perform.

We agree with GSA's position that since paragraph 9 of the Special Conditions was not intended to include normal construction work, but only to cover special equipment, the clause is not applicable to the present situation. Thus, since the record fails to indicate fraud on the part of procuring officials and there are no definitive responsibility criteria applicable to All Counties, we will not consider this issue. Compare George Hyman Construction Company of Georgia; Westinghouse Elevator Company, B-186279, November 11, 1976, 76-2 CPD 401.

Gramercy contends that PJR's bid is nonresponsive due to the listing of different subcontractors for HVAC work, which allows PJR to bid shop between the two listed companies since there is a "possibility that All Count[ies] could take on the HVAC at this time" or "that All Count[ies] might have submitted a bid to PJR for the HVAC work with the intent to subcontract out such work to another firm." Gramercy objects to GSA's determination (in response to Gramercy's protest to GSA) that PJR intended to use Beck which is viewed as, "in effect, selecting for the low bidder one of the two listed HVAC subcontractors submitted, when the bidder has not done so himself." Further, Gramercy contends that since the HVAC work is a substantial part of the contract, the conflict in PJR's bid should not be characterized as a minor informality and waivable under the de minimus rule or any other rule.

GSA's position is that PJR's bid is responsive since "All Counties has not performed and does not perform HVAC work," which means that there would be no opportunity for PJR to bid shop between All Counties and Beck. GSA appears to base its conclusion upon the fact that All Counties' name implies that the firm only performs sprinkler work. It is GSA's contention that the implication is especially strong since PJR divided the "Sprinklers & Plumbing" category into two separate categories. We note that an independent inquiry was conducted by the regional office of GSA confirming that All Counties only performs sprinkler work, while no inquiry was necessary concerning Beck as its work is known to the regional office. In this connection, GSA responds to Gramercy's objection, that by awarding the contract GSA is selecting an HVAC subcontractor for the low bidder, by pointing to the work All Counties and Beck perform and concluding that since only one performs HVAC, "[T]here could not be any 'selection' by GSA."


In addition, GSA views Gramercy's allegations concerning bid shopping as pure speculation, which would not constitute sufficient grounds to support the rejection of PJR's bid as nonresponsive. Further, GSA characterizes PJR's entry of All Counties' name under the HVAC category as an "inadvertent clerical error," which GSA contends does not affect PJR's binding commitment to use Beck for HVAC.

We do not view the terms of the IFB as requiring the rejection of PJR's bid as nonresponsive and find GSA's view of the matter persuasive. In our opinion what occurred here is similar in principle to the situation in B-161336, June 23, 1967, which involved an original of a submitted bid that offered no prompt payment discount, while the copies submitted indicated a 5-percent discount for payments within 20 days. In that case, we

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concluded that, despite the discrepancy, there was no question as to the bidder's intention to offer the 5 percent discount and that an award to that bidder was not subject to legal objection. The record indicates that All Counties has not and does not perform HVAC work, which eliminated any practical opportunity for PJR to bid shop. While theoretically PJR might have intended award to All Counties with the actual work to be performed by a lower-tier subcontractor, as a practical matter such possibility is so remote as not to merit serious consideration since it is unlikely All Counties could be found responsible for the HVAC work. Further, the contracting officer made the final determination as to which subcontractor PJR intended to use, without giving PJR any chance to clarify its bid. This is not a case where the bidder attempted to retain the discretion to select between two possible subcontractors. As in B-161336, supra, it merely involves the issue of which copy of the list of subcontractors was correct. Where one copy lists for HVAC work a firm which clearly performs such work and the other copy lists for the work a firm which just as clearly does not perform such work, we agree with GSA that the former copy should be accepted as the one intended. There appears to be no basis for reasonable doubt that Beck was the intended HVAC subcontractor and that the placing of All Counties under HVAC was simply a clerical error.

Accordingly, the protest is denied.


Deputy Comptroller General
of the United States