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BROSNAN
P.L. II

DECISION

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

FILE: B-189423 DATE: January 24, 1978

MATTER OF: Mechanical Constructors, Inc.

DIGEST:

1. Regulations issued by Architect of the Capitol pertaining to mistakes in bids issued pursuant to delegation of authority from GAO and incorporated into IFB take precedence over local law.

2. Where amount of bid in words is less than amount of bid in figures upward correction to amount expressed in figures is permitted where agency determined from workpapers submitted by bidder that there was clear and convincing evidence of mistake and amount of intended bid.

3. Where formally advertised solicitation contained subcontractor listing requirement, low bid which listed proposed subcontractors for listed categories of work was responsive despite failure to list second-tier subcontractors who could conceivably perform work in several of the categories. Since subcontractor listing requirement contains no provision for listing second-tier subcontractors and is intended to preclude post award "bid shopping" by bidders, listing subcontractors with whom bidder would subcontract if awarded contract is all that is required for bid to be responsive.

4. While solicitation does not specifically require listed categories of work be done by subcontractors listed, and thus permits listed subcontractors to sub-subcontract work to be performed, where sufficient evidence is presented prior to award that listed subcontractor intends to sub-subcontract entire or substantial portion of work category and that prime contractor retains some control over the selection of the second-tier subcontractor who

will do work, award to such bidder would not be proper. However, evidence sufficient to support the existence of such control is not present in this case.

5. Generalized requirements applicable to all subcontractors are matters of responsibility and GAO will not review contracting agency's affirmative determination of subcontractor's general responsibility.

Mechanical Constructors, Inc. (MCI) protests the award of a contract to W. G. Cornell Co. of Washington, Inc. (Cornell) for mechanical, electrical and other construction work in connection with modifications to and enlargement of the Capital Power Plant under IFB No. 7721, issued on April 28, 1977 by the Architect of the Capitol (Architect).

Four bids were received and opened on the June 10, 1977 opening date. The apparent low bid of Cornell contained a discrepancy in that the amount of Cornell's bid was written as "Four Million Six Hundred Twelve" dollars while the amount set forth in numerals was "$4,612,000."

In accordance with the Regulations of the Architect of the Capitol for Mistakes in Bids (Architect's Regulations) Cornell was asked to verify its bid. Cornell indicated that a mistake had been made in that the word "thousand" had inadvertently been omitted from the written amount and submitted materials, including workpapers, to support its mistake claim.

MCI as the second low bidder at $4,619,000 protests against any correction of Cornell's bid and argues that Cornell's bid should not be accepted because of its failure to comply with the subcontractor listing requirement specified in the IFB.

Notwithstanding the pending protest the Architect authorized the correction of Cornell's bid to $4,612,000 and after notifying our Office awarded the contract to that firm because the Architect determined that the project could not be delayed.

Correction of Mistake in Bid

Cornell submitted to the Architect affidavits of its president and of the parties who prepared the bid, as well as copies of the original worksheets and estimates, as evidence of the alleged mistake and the amount of the intended bid. Upon reviewing these materials the Architect determined pursuant to Section 3.1.1 of the

Architect's Regulations that there was clear and convincing evidence that a mistake was made in writing out the amount of Cornell's bid and that clear and convincing evidence existed that the amount of the intended bid was the numerical entry of $4,612,000.

In regard to alleged mistakes in bid our Office has held that to permit correction prior to award, where a bidder will not be displaced as a result of that correction, a bidder must submit clear and convincing evidence that an error has been made, the manner in which the error occurred, and the intended price. 51 Comp. Gen. 503 (1972); Boatman and M gnani, Inc.; Standard Art, Marble & Tile Co., Inc., B-181345, June 13, 1974, 74-1 CPD 323. Similar requirements for correction are found in Sections 3.1.1 and 3.1.2 of the Architect's Regulations.

MCI argues that the Architect cannot rely upon its own regulations in correcting Cornell's bid because these regulations, which MCI insists were not issued pursuant to a statute, are not entitled to the "full force and effect of law" conferred upon both the Federal Procurement Regulations (FPR) and the Armed Services Procurement Regulation (ASPR). MCI reasons that since the Architect's regulations are not controlling the law of the District of Columbia (D.C.) should govern. MCI points out that Title 28, D.C. Code 3-118(c), which corresponds to Section 3-118(c) of the Uniform Commercial Code, provides that for the purpose of contract construction words control figures. MCI concludes that the application of local law prevents Cornell from using the figures set forth on its bid as a basis for correction. In this connection MCI cites Lametti & Sons, Inc., 55 Comp. Gen. 413 (1975), 75-2 CPD 265, which MCI contends supports its view that local law should govern.

Originally this Office possessed the exclusive authority to grant relief from mistakes in bid. 17 Comp. Gen. 817 (1938). That authority was delegated, in part, to several of the procuring agencies. 38 Comp. Gen. 177 (1958). The standards for correction were incorporated, with the consent of this Office, into FPR and ASPR. The regulations of the Architect regarding correction were likewise issued pursuant to a delegation by this Office. B-172905, June 2, 1971. These regulations which are incorporated by reference in the subject IFB and which are substantially the same as the corresponding provisions of ASPR and FPR govern the correction of bids because they represent a delegation by our Office of its authority in the area of mistake in bid. In any event since both MCI and Cornell signed their bids each of which contains a clause stating: "Mistakes in bids noted

by the Architect of the Capitol or alleged by bidders prior to award of contract, and mistakes in bids alleged by the Contractor subsequent to award, will be considered and acted upon in accordance with Regulations of the Architect issued for the resolution of mistake-in-bid cases and of claims of mistakes in bid * * *." each agreed to be bound by the regulations of the Architect in this area. Lametti and Sons, Inc., supra, cited by MCI does not help its argument since it concerned a procurement involving grant funds where in our view the grant specified that state and local law was to govern. In the instant case the IFB specifically states that the Architect's regulations are controlling.

Our Office has considered similar cases involving discrepancies in a bid between the amount in a bid set forth in numerals and the amount written and we have specifically rejected MCI's argument that the general rule on construction of contracts that the amount set forth in words is to govern, B-153977, June 24, 1964, and held that correction shall be permitted upon the bidder's submission of clear and convincing evidence establishing the amount of the intended bid whether the intended bid be that set forth in words or in numerals. B-171763, March 9, 1971; B-148648, April 19, 1962.

MCI also contends citing Asphalt Construction, Inc., 55 Comp. Gen. 742, 76-1 CPD 82, that to permit correction where the bid as corrected is within $7,000 (or only .15 percent higher) of the next low bid would undermine the integrity of the competitive bidding system and should not be allowed.

In Asphalt Construction, Inc., supra, we upheld the contracting officer's denial of bid correction where the corrected bid was within $5,000 of the second low bid in a $670,000 procurement. However, in that case we stated:

> "It is clear that the contracting officer was not entirely convinced that Asphalt would have been the low bidder if a mistake had not been made in computing its bid. * * *"

We have ruled that the closeness of the corrected bid and the next low bid is a factor for consideration in bid correction. George C. Martin, Inc., B-187638, January 19, 1977, 77-1 CPD 39. In the final analysis, however, the decision whether or not to permit correction must be made by the contracting agency on a case-by-case basis after consideration of all relevant facts and circumstances. This decision will not be disturbed by our Office unless there is no reasonable basis for the decision. 53 Comp. Gen. 232 at 235 (1973).

Here, the agency studied the materials submitted by Cornell and concluded that it was sufficient to establish in a clear and convincing manner the nature of the error and the amount of the intended bid. We have reviewed the record and it is our conclusion that the record reasonably supports the Architect's determination to permit Cornell's bid to be corrected.

Subcontractor Listing

The subject IFB contains a subcontractor listing requirement which provides in pertinent part as follows:

"7.1 Each bidder shall submit with his bid a list of subcontractors with whom he proposes to subcontract for the listed items of work * * *.

"7.2 For the purpose of this Section, the term 'subcontractor' shall mean the individual or firm with whom the successful bidder undertakes to enter into a contract for manufacture, fabrication, or installation of work to specification requirements, or for any other work required to be performed under this contract at the site.

* * * * *

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

"7.5 * * *. Failure to submit the list in compliance with the requirements of Subsections 7.1, 7.2, 7.3 and 7.4, and by the time set for bid opening, shall cause the bid to be considered non-responsive, * * *.

"7.6 Except as otherwise provided in this Section, the successful bidder undertakes that he will not contract for the performance of any of the listed items of work with any individual or firm other than those named for the performance of such items of work, and that he will

not perform the work of any of the listed items of work with personnel on his own payroll unless he has so indicated on the list.

* * * * *

"7.10 The bidder shall list only such individuals or firms as prospective subcontractors who are experienced in and capable of performing their work in a competent and satisfactory mannner, * * *.

"7.11 Notwithstanding any of the provisions of this Section, the Architect of the Capitol shall have authority to disapprove or reject the employment of any subcontractor who, in his opinion, does not meet the requirements of the standard of competence needed for the proper performance of the work under this contract, and such disapproval or rejection shall not be grounds for any increase in the contract price and/or the time for performance of this contract."

It is MCI's position that Cornell's bid is not responsive because it listed Grunley-Walsh Construction Company (GW), a general contractor, as its subcontractor for eight items of work and GW is not qualified to perform and will not itself perform the majority of the work in five of these eight categories.

MCI argues that permitting Cornell to list a general contractor violates the primary purpose of the subcontractor listing requirements which is to prevent "bid shopping" since GW will not perform the work itself but preserve to itself the option to "shop" for the subcontractor who will actually do the work.

Further MCI insists that the listing of GW as the subcontractor in the above mentioned categories is inconsistent with section 2.17.1 of the IFB which provides:

"The term 'subcontractor' as used herein shall mean an individual or firm of established reputation, * * *. Such individual or firm shall be regularly engaged in either manufacturing or fabricating items required by the contract, installing items required by the contract, or otherwise performing work required by the contract, and shall maintain to the extent customary in the trade and required for the work a regular force of skilled workmen and qualified supervisory personnel. * * *."

In this regard MCI questions whether GW satisfies the criteria to qualify as a subcontractor as defined by Section 2.17.1 for five of the subject work categories.

It is the Architect's position that the listing provisions do not specifically require that the party listed "actually perform the work under any category with its own forces, and no requirement was intended." Further, although the Architect recognizes that "bid shopping" may occur at the subcontractor level it is its position "that the evils inherent in bid shopping are most pernicious and prevalent at the level of the prime contractor, and that it is neither practical nor desirable to attempt to impose a bid shopping prohibition below the prime contractor level." Finally, the Architect indicates that Section 2.17.1 of the IFB defines the term "subcontractor" for the purpose of determining responsibility and the fact that a listed subcontractor may not fit within the scope of Section 2.17.1 would not affect the responsiveness of the bid.

The subcontractor listing requirement is intended to preclude post award "bid shopping": the seeking after award by a prime contractor of lower priced subcontractors than those originally considered in the formulation of the bid price, and, is therefore, a material requirement pertaining to bid responsiveness. Edgemont Construction Company, B-181250, August 29, 1974, 74-2 CPD 129, and cases cited therein. Since the purpose of the listing requirement is to preclude a prime contractor from bid shopping after contract award, and considering that the provisions do not impose any requirement on bidders to list subcontractors below the first tier, in general our Office is in agreement with the Architect's position that so long as a bidder enters the name of the subcontractor on the bid form with whom it proposes to subcontract for performance of the respective category of work, the bidder is in full compliance with the IFB's subcontractor listing requirement and the bid is responsive.

However, our Office also indicated in Edgemont Construction Company, supra, citing 47 Comp. Gen. 644 (1968), that where a bidder acts "in the guise of his own subcontractor with the intention to bid shop among bona fide subcontractors, as evidenced by the expressed belief prior to award that no limitation is imposed upon the amount of work a listed subcontractor may award to a second-tier subcontractor, an award to such a bidder would be improper." We further stated that it would circumvent the purpose of the subcontractor listing requirement to permit a bidder to list a subcontractor whom it knew would engage in bid shopping upon contract award and concluded that rejection of a

bid as nonresponsive would be proper if the agency "definitely establishes that a bidder's named subcontractor clearly intends to sub-subcontract an entire work category or a substantial portion thereof, so as to circumvent the spirit and purpose of the subcontractor listing requirement." Edgemont Construction Company, supra.

It is clear from the record that although GW will perform the majority of the work in three of the eight categories and at least some of the work in the remaining categories that the Architect knew before it awarded the contract to Cornell that its listed subcontractor intended to further subcontract a substantial portion of five of the eight work categories in question. However, we do not believe that this fact alone necessitates a finding that Cornell's bid is nonresponsive. The critical element in such a finding is that the bidder is acting in "the guise of his own subcontractor", i.e., the prime contractor retains some control (either by listing an affiliate as subcontractor, 47 Comp. Gen. 644, supra, or by some other means) over the selection of the sub-subcontractor who will actually do the work. In the case at hand the Architect made no such finding nor does the record indicate that GW is other than a bona fide subcontractor who will perform at least some of the work in each category or that Cornell has made any attempt to control the selection of second-tier subcontractors. Therefore, we do not believe that the agency acted improperly in finding Cornell's bid responsive.

Further, in connection with the Section 2.17.1 definition of subcontractor we find that this provision relates to the general responsibility of subcontractors rather than to the responsiveness of Cornell's bid. In this regard we note that Section 2.17.1 lists no special criteria which must be met by a subcontractor for a particular work category but sets forth the general requirement that the subcontractor "shall be regularly engaged in either manufacturing or fabricating items required by the contract * * * or otherwise performing work required by the contract * * * etc." The Architect found that, in general, GW meets this criteria and we find no basis to question the agency's determination in this respect. In this regard we have taken the position we will not review the contracting agency's affirmative determination of a proposed contractor's or subcontractors general responsibility barring fraud on the part of the contracting activity. Inseco, Inc., B-188471, August 8, 1977, 77-2 CPD 87.

In response to MCI's protest Cornell challenged the authority of our Office to decide protests which involve procurements made

by the Architect. We have traditionally heard protests involving the Architect (See B-171918, March 24, 1971), MCI has prevailed on the merits and the Architect acknowledges our role in reviewing its procurements. Furthermore, considering that our role in this regard has been acknowledged by the courts, United States ex rel. Brookfield Construction Co. v. Stewart, 234 F. Supp. 94 (1964) we do not believe the issue need be further discussed.

In view of the above the protest is denied.

R.F. Keller

Deputy Comptroller General
of the United States