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*Support  
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**DECISION**



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

**FILE: B-192196**

**DATE: August 21, 1977**

**MATTER OF:**

**Burn Construction Company, Inc.**

**DIGEST:**

1. Under Optimum Systems, Inc., 54 Comp. Gen. 767 (1975), 75-1 CPD 166, protest against award made by prime contractor will be considered since circumstances indicate Government's active and significant involvement, prior to approval of subcontract, in subcontractor selection in form of thorough review of procurement which resulted in rejection of protester's bid.

2. Where formally advertised solicitation contains mandatory subcontractor listing requirement to preclude bid shopping which requires subcontractors listed to perform work on project, low bid which listed alternate subcontractors under one category of work was nonresponsive as it afforded bidder opportunity to select after bid opening which of two firms listed would be subcontractor.

3. Whether contractor has obtained state license is matter between contractor and state officials and has no bearing on bidder responsibility or award of contract.

Burn Construction Company, Inc. (Burn), has protested to our Office the award of a subcontract to any other bidder by Associated Universities, Inc. (AUI), for work at the Very Large Array Project (VLA) in New Mexico.

AUI is a prime contractor to the National Science Foundation (NSF) for the management, operation and maintenance of the National Radio Astronomy Observatory (NRAO) a Government facility which includes the VLA. Among other things, the cost-plus-a-fixed-fee contract between AUI and NSF calls for AUI, subject to NSF approval, to design, construct and operate the VLA radio telescope system. Under the contract, NSF requires AUI to provide advance notification of any proposed subcontract for construction

and written approval of NSF is required before the award of any subcontract for construction in excess of \$10,000.

NSF is of the view that our Office should not assume jurisdiction with respect to this subcontract protest on the grounds that the facts in this case do not come within the criteria set forth in Optimum Systems, Incorporated, 54 Comp. Gen. 767 (1975), 75-1 CPD 166 where we indicated the following circumstances when we will consider the merits of a subcontract protest: (1) where the prime contractor is acting as the purchasing agent of the Government; (2) where the active or direct participation of the Government in the selection of a subcontractor has the net effect of causing or controlling the rejection or selection of potential subcontractors, or of significantly limiting subcontractor sources; (3) where fraud or bad faith in the approval of the subcontract award by the Government is shown; (4) where the subcontract award is "for" the Government; or (5) where a Federal agency entitled to the same requests an advance decision.

NSF states that AUI is not and has not acted as an agent for the Government. AUI is an independent contractor and NSF states that its role in this matter has been limited to functions in connection with the subcontract approval requirement of the prime contract between NSF and AUI. Burn is of the view that our Office should exercise jurisdiction in this case on the grounds that the procurement by AUI was "for" the NSF and that AUI was acting as a purchasing agent for the Government.

In our view, the facts in this case indicate that NSF so directly or actively participated in the selection of the subcontractor that the net effect of the Government participation was to cause or control the rejection or selection of the subcontractor. Prior to its approval of the subcontract award to Pacific Railroad Constructors, Inc. (Pacific), the NSF was apprised of and thoroughly reviewed the bid protest filed with AUI

by Pacific against the award of a subcontract to Burn on the grounds that Burn had violated the bidding instructions by listing two subcontractors for one category of work. Pacific argued and AUI agreed that in listing two subcontractors, Burn had established a possible subcontractor shopping situation. In response to a letter from a member of Congress regarding the bidding procedures used on the contract with the NRAO, the NSF replied that its representatives had met with representatives of AUI and were proceeding with a review into the legal and contractual aspects of the matter. The AUI invitation for bids and other documents relating to the work were being reviewed by NSF to judge the nature of any irregularities made in filling out bid documents. NSF also informed the member of Congress that its approval of an AUI subcontract award would only be made after the NSF General Counsel and the contracting officer had assured themselves that an open, unbiased, and exhaustive review of the contractual procedures used had been made. Shortly thereafter, NSF approved the award of the subcontract to Pacific.

We believe the above facts indicate the NSF's active and significant involvement in the selection of the awardee and therefore we will assume jurisdiction and consider the merits of this subcontract protest. See Brown Boveri Corporation, B-187252, May 10, 1977, 77-1 CPD 328.

Burn's protest is based on the contention that its bid was improperly rejected as nonresponsive for failure to comply with the subcontractor listing requirements. Burn submitted a bid in response to AUI's invitation for bids (IFB) to perform the work of constructing approximately 72,000 feet of double railroad track, earth work, foundation work and certain electrical work.

The Instructions to Bidders, page 1B-3, provides:

"Subcontractors

Names of principal subcontractors must be listed on the form attached hereto and returned with

the bid. Only one subcontractor shall be listed for each classification. (Emphasis supplied).

Further, the IFB provided that Each bid shall include a completed List of Subcontractors Form and a Representations, Certifications and Acknowledgements Form. The List of Subcontractors form provided: "The following subcontractors and subsubcontractors will work on the construction of the above - named project if my proposal is accepted." (Emphasis supplied). Burn's bid listed two subcontractors, "W.A. Smith or Southwestern" under the railroad work category.

It is NSF's contention that the listing of two subcontractors for the railroad work was contrary to the above-quoted provision and rendered Burn's bid nonresponsive since Burn retained the option to decide after bid opening which of the two listed subcontractors would receive the award. Burn contends that its departure from the subcontractor listing requirements is a minor deviation which should have been waived. Further, counsel contends that no bid shopping could or did occur since the circumstances are such that Burn was contractually obligated to award the subcontract to only one of the two subcontractors listed. Counsel also contends that NSF's approval of subcontractors is intended to insure NSF of the responsibility, not responsiveness of the subcontractor.

The subcontractor listing requirement is intended to preclude post-award "bid shopping," i.e., the seeking after award by a prime contractor of lower price subcontractors than those originally considered in the formulation of its bid price. Failure of a bid to comply with the listing provision is a material deviation rendering the bid nonresponsive. 50 Comp. Gen. 839, 842 (1971). Moreover, the deficiency may not be remedied after bid opening. B-166006, February 11, 1969.

Burn contends that our decision in Dubicki & Clarke, Inc., B-190540, February 15, 1973, 78-1 CPL 132, controls here and that Burn's subcontractor listing irregularity may be cured after bid opening and prior to award. We do not agree with Burn's position. In the cited case, the IFB contained a clause requesting, with precatory language ("please list"), the bidders to list the organizations to be used in the project. We stated that the clause was intended to aid the agency in determining bidder responsibility and therefore a bidder's failure to complete that list could be cured at any time before award. Our decision in that case was based on the fact that the listing clause merely requested that subcontractors be listed and did not evidence a further intent that the subcontractors must be used. We noted a distinction in that case from other cases where the IFB contained provisions specifically precluding the use of subcontractors other than those listed or which specifically stated that failure to comply with the provision would result in the rejection of the bid as nonresponsive. The language contained in the subject IFB regarding subcontractor listing is mandatory, not "precatory" as in Dubicki & Clarke, Inc., supra and therefore that case is distinguishable.

In our view, the only reasonable interpretation which can be given to the IFB provisions relating to the "subcontractor listing requirements" is that bidders must comply with such requirements in submitting their bids in order to be considered responsive to the IFB. Although the IFB did not state that failure to comply with the subcontractor listing requirements would result in the rejection of the bid as nonresponsive, we believe that such a statement is unnecessary where, as in this case, the IFB makes it clear that bidders "must" list the subcontractors on the bid and that the subcontractors listed will be the subcontractors performing the work. See Coronis Construction Company, et.al, B-186733, August 19, 1976, 76-2 CPD 177; Dubicki & Clarke Inc., supra.

The listing by Burn of two subcontractors under one category of work is ambiguous, contrary to the IFB provisions, and its bid was properly determined to be nonresponsive. See James and Stritzke Construction Company, 54 Comp. Gen. 159, 160 (1974), 74-2 CPD 128, where the bidder listed subcontractors in the alternative and the bid was found to be nonresponsive. In that case, as here, the bidder, contrary to the terms of the IFB, could select after bid opening the firm with which it would subcontract and could engage in the practice of bid shopping. See also John Grace & Co., Inc., B-190439, February 15, 1978, 78-1 CPD 131; Coronis Construction Company, et. al, supra.

Our Office has held that the test to be applied in determining the responsiveness of a bid is whether the bid as submitted is an offer to perform, without exception, the exact thing called for in the invitation, and upon acceptance will bind the contractor to perform in accordance with all the terms and conditions thereof. 49 Comp. Gen. 553, 556 (1970). When applying the test, the determining factor is not whether the bidder intends to be bound but whether this intention is apparent from the bid as submitted. Piland Construction Company, Inc., E-183977, April 25, 1975, 75-1 CPD 262. Therefore, Burn's reasons for listing alternate subcontractors are immaterial in determining the responsiveness of the bid, as are matters extraneous to the bid documents.

Burn also contends that Pacific failed to comply with the New Mexico statute which provides that no person or corporation can perform construction work or bid for construction work in New Mexico without having first obtained a contractor's license from the state. Burn contends that any violation of the New Mexico law is a criminal act. The terms and conditions of the IFB contained a clause placing responsibility for obtaining any licenses which might be needed in the prosecution of the work on the contractor. Construing similar clauses, we have held that compliance with state licensing requirements is a matter between the appropriate state officials and the contractor.

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Whether Pacific has obtained a license has no bearing on the award of the contract or bidder responsibility. See Halifax Engineering, Incorporated, B-190405, March 7, 1978, 78-1 CPD 178.

For the reasons stated, Burn's protest is denied.

Burn's request for bid preparation costs will not be considered in view of our conclusions.

*P. A. K. S. W.*  
Deputy Comptroller General  
of the United States



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

*J. Ruppel*  
*PL I*

IN REPLY  
REFER TO: B-192196

August 21, 1973

The Honorable Pete V. Domenici  
United States Senate

Dear Senator Domenici:

We refer to your interest in the protest of  
Burn Construction Company, Inc. concerning the  
award of a subcontract under National Science  
Foundation contract NSF AST 74-13427 with  
Associated Universities, Inc.

By decision of today, copy enclosed, we have  
denied the protest.

Sincerely yours,

*R. F. Kisten*  
Deputy Comptroller General  
of the United States

Enclosure