DIGEST - L - Cont

DECISION

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

79-2 CPD 285

630

FILE: B-195110 DATE: October 24, 1979

MATTER OF: Todd Shipyards Corporation

DIGEST:

1. Protester's contention that awardee was nonresponsive because it insured for workmen's compensation with company not authorized by Department of Labor is without merit. Nothing on face of awardee's bid limited, reduced or modified its obligation under terms of solicitation. Therefore, GAO finds awardee's bid was responsive.

2. GAO does not review affirmative determinations of responsibility except where protester alleges fraud or where solicitation contains definitive responsibility criteria which allegedly have not been applied. Protester has not alleged fraud and GAO finds no definitive responsibility criteria in solicitation concerning procurement of workmen's compensation insurance.

Todd Shipyards Corporation (Todd) protests the award of a contract to San Francisco Welding and Fabricating, Inc. (San Francisco), under invitation for bids (IFB) N62798-79-B-0128 issued by the Supervisor of Shipbuilding, Conversion and Repair, United States Navy, San Francisco, California. The IFB, for repairs and alterations to the USS Flint (AE-32), was opened on June 4, 1979.

Todd contends that San Francisco failed to comply with the requirements of clause 10, "Liability and Insurance," of DD Form 731, Master Contract for Repair and Alteration of Vessels, which was incorporated into and made part of the IFB. In particular, paragraph (d) of clause 10 provides as follows:

"(d) The Contractor shall, at his own expense, procure, and thereafter maintain such casualty, accident and liability insurance, in such forms and amounts as may be approved by the Department, insuring the performance of his obligations under paragraph (c) of this clause. In addition, the Contractor shall at his own expense procure and thereafter maintain such ship repairer's legal liability insurance as may be necessary to insure the Contractor against his liability as ship repairer in the amount of $300,000 or the value of the vessel as determined by the Contracting Officer, whichever is the lesser, with respect to each vessel on which work is performed; provided, that in the discretion of the Contracting Officer, no such insurance need be procured whenever the job order requires work on parts of a vessel only and such work is to be performed at a Plant other than the site of the vessel. Further, the Contractor shall procure and maintain in force Workmen's Compensation Insurance (or its equivalent) covering his employees engaged on the work and shall insure the procurement and maintenance of such insurance by all subcontractors engaged on the work. The Contractor shall provide such evidence of such insurance as may be, from time to time, required by the Department."

Todd alleges that San Francisco has been insuring for workmen's compensation with United Marine Mutual Indemnity Association, Ltd. (UMMIA), a firm located in Bermuda. According to Todd, UMMIA is not authorized by the Office of Workers Compensation Programs, United States Department of Labor, to insure benefits under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901, et seq. (1976), as required by 20 Code of Federal Regulations (C.F.R.) part 703 (1978). Consequently, Todd believes that the bid of San Francisco and the bids of the other bidders

insured by UMMIA should have been rejected by the Supervisor of Shipbuilding as being nonresponsive to the IFB.

The Navy states that clause 10 merely sets forth all the insurance requirements for ship repair contracts. Paragraph (d) provides in part that the contractor shall procure and maintain workmen's compensation insurance covering his employees engaged in the contract work. The Navy points out that all employers or contractors having employees engaged in work on the navigable waters of the United States are required by Federal law to procure and maintain insurance coverage in accordance with section 32 of the Longshoremen's and Harbor Workers' Compensation Act, independent of any contractual requirement. See 33 U.S.C. § 932(a). In the Navy's opinion, paragraph (d) of clause 10 imposes no further obligation upon a contractor other than that to which he is already subject to under Federal law and regulation. Further, the paragraph does not require a bidder to submit any specific documentation or certification to the contracting agency relative to the obligation to provide workmen's compensation insurance. In view of the above, the Navy asserts that the bid of San Francisco was responsive and thus complied with the terms of the protested IFB.

The Navy also asserts that the contracting officer properly determined San Francisco was a responsible bidder pursuant to section 1, part 9, of the Defense Acquisition Regulation (DAR). In support of this position, the Navy states that for a prospective contractor to be found responsible, he must satisfy the contracting officer concerning certain matters specifically enumerated in the DAR. See DAR § 1-903.1 (1976 ed.). However, the DAR does not require the contracting officer to make any finding relative to a potential contractor's workmen's compensation insurance coverage. Moreover, the Navy claims that the question of whether the potential contractor has properly insured the payment of benefits under the Longshoremen's and Harbor Workers' Compensation Act bears no relationship to the determination of whether he has the ability to successfully perform the contract. Thus,

the matter would not, according to the Navy, be considered as an element of responsibility in the absence of a specific solicitation provision, departmental regulation, or Executive order making award of the contract contingent upon compliance with the act.

In response to the Navy's position as to the responsiveness of San Francisco's bid, Todd contends that when the contracting officer is informed that a bidder is not in compliance with a Federal statute, such notification is, in itself, sufficient cause for the contracting officer to find the bidder non-responsive since there is an underlying and inherent requirement in the Government procurement process that bidders comply with the law. In this regard, Todd refers to DAR § 1-403 which states that no contract shall be entered into unless all applicable requirements of law and the DAR have been met. Finally, Todd calls our attention to the fact that the Department of Labor has actively sought the Navy's compliance with the regulations pertaining to insurance coverage requirements under the Longshoremen's and Harbor Workers' Compensation Act.

There is a distinction between questions related to bid responsiveness and those concerned with bidder responsibility. As we stated in 49 Comp. Gen. 553 (1970), at page 556:

> "* * * 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. Unless something on the face of the bid, or specifically a part thereof, either limits, reduces or modifies the obligation of the prospective contractor to perform in accordance with the terms of the invitation, it is responsive. * * *"

Responsibility, on the other hand, concerns a bidder's ability to perform its obligations under the terms of its submitted bid. New Haven Ambulance Service, Inc., B-190223, March 22, 1978, 78-1 CPD 225. 57 C.G. 361

Since nothing on the face of San Francisco's bid limited, reduced or modified its obligation under the IFB, its bid was responsive.

With respect to San Francisco's ability to perform the obligations imposed by the IFB, our Office does not review affirmative determinations of responsibility except where the protester alleges actions by procuring officials which are tantamount to fraud, which has not been alleged, or where the solicitation contains definitive responsibility criteria which allegely have not been applied. See Central Metal Products, Incorporated Solicitation No. M2-40-74, 54 Comp. Gen. 66 (1974), 74-2 CPD 64.

Todd argues that the Department of Labor regulations referred to in clause 24 of DD Form 731 require, among other things, that workmen's compensation insurors be authorized to insure such payment pursuant to 20 C.F.R. part 703. However, our review of clause 24 shows that it deals only with the Department of Labor regulations contained in 29 C.F.R. part 1501. These regulations pertain to Public Law 85-742 (August 23, 1958), 33 U.S.C. § 941, which amended section 41 of the Longshoremen's and Harbor Workers' Act. Section 41, itself, covers health and safety rules at an employer's place of employment and, therefore, has nothing to do with insurance.

Since the solicitation contains no definitive responsibility criteria concerning the procurement of workmen's compensation insurance from companies authorized by the Department of Labor to insure payment of such compensation, the contracting officer's affirmative determination of San Francisco's responsibility and the sufficiency of its workmen's compensation insurance is not for our review. See Triple "A" South, B-193721, May 9, 1979, 79-1 CPD 324. Whether the contractor complies with the contractual requirement and applicable law in this regard is a matter

of contract administration which is the responsibility of the procuring agency.

The protest is denied.

Milton J. Socolar

For The Comptroller General
of the United States