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DECISION

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

FILE: B-186748 DATE: March 2, 1977

MATTER OF: C&C Enterprises, Inc.

DIGEST:

1. Protest decision reconsidered on basis of failure to address important specific contentions raised by protester. New contention raised for first time in request for reconsideration is considered.

2. No law or regulation prohibits opening bid under second step of two-step procurement which is marked as if bid was from firm which did not participate in first step, notwithstanding that firm's apparent ineligibility to compete on second step in its own right.

3. Where IFB limits step two bids to those firms having submitted acceptable first step proposals, bid by joint venture may be accepted notwithstanding only one firm of joint venture submitted acceptable step one proposal. Assertion by unsuccessful bidder of prejudice on basis that joint venture was not one of bidders in competition after step one is not determinative since member of joint venture which submitted acceptable step one proposal is severally liable under contract and competitive effect of second joint venture member's entry is speculative.

4. Anti-assignment statute policy rationale applicable in preaward situations to transfers of bids and proposals is not applicable to formation of joint venture to compete on second step under two-step procurement consisting of firm submitting acceptable first step proposal and first step nonparticipant.

G&C Enterprises, Inc. (G&C), by counsel, has requested that we reconsider our decision denying its protest in G&C Enterprises, Inc., B-186748, October 28, 1976, 76-2 CPD 367.

In our prior decision, we found that the low bid of the joint venture of A. Neri, Inc. (Neri), and Craft Electric Corporation (Craft) under the second step of a two-step formally advertised procurement could be accepted for award. In the first step of the procurement, Craft had submitted an acceptable proposal; however, neither Neri nor the joint venture participated. Armed Services Procurement Regulation (ASPR) § 2-503.2(ii) (1976 ed.) requires that the second step invitation for bids (IFB) include the following provision:

> "Bids will be accepted and considered only from those firms who have submitted acceptable technical proposals pursuant to the first step of such procedures, as initiated by the [Request for Technical Proposals]."

Since the purpose of step two to solicit firm bids by formal advertising only from those firms which submitted acceptable technical proposals during the first step was accomplished because the members of a joint venture are jointly and severally liable for the joint venture's obligations, award could be made to the joint venture based on Craft's technical proposal without violating this provision. We also found that the addition of another firm as a principal in Craft's bid for the second step did not give Craft an opportunity to control its eligibility for award after bid opening to the prejudice of other bidders because the change in legal entity occurred prior to bid submission. In addition, we found no merit to the other protest basis that the joint venture's bid bond was so insufficient as to render its low bid nonresponsive.

G&C's counsel has asked that we reconsider our decision based on the following three contentions: (1) since the joint venture's bid on the second step was delivered in an envelope which apparently was marked as if the bid was from Neri—which did not compete in the first step--it was improper for the contracting officer to open that bid; (2) G&C was prejudiced by the consideration of the joint venture's bid because the G&C bid was prepared, in view of the IFB limitation on the second step competition, based upon competing only against the other four firms which submitted acceptable first step proposals; and (3) since the legal entity awarded the contract was different from the entity submitting the acceptable technical proposal, there was an improper transfer of rights in contravention of the rationale of the anti-assignment statutes, 41 U.S.C. § 15 (1970) and 31 U.S.C. § 203 (1970).

The Air Force has asserted that we should not reconsider our prior decision since counsel for the protester has not specified "any errors of law made or information not previously considered." See section 20.9(a) of our Bid Protest Procedures, 4 C.F.R. § 20.9(a) (1976).

Although the first and second contentions were raised by G&C in its protest to our Office, we did not explicitly discuss them in our prior decision. Therefore, we believe that a specific discussion of these two important contentions would be an appropriate matter for reconsideration of our prior decision.

The Air Force has also asserted that the first contention was untimely raised by G&C. That is, although the second step bids were opened on June 11, 1976, G&C first explicitly questioned the opening of the envelope marked Neri in a letter of August 24, 1976, responding to the Air Force report on the protest to our Office. G&C's initial protest communication (received in our Office on June 18, 1976) stated in pertinent part:

> "* * * A. NERI INCORPORATED WAS NOT ONE OF THE FIVE FIRMS WHO SUBMITTED AN ACCEPTABLE TECHNICAL PROPOSAL AND, IN FACT, SUBMITTED NO TECHNICAL PROPOSAL UNDER STEP ONE."

We believe that it can be implied from this communication questioning a proposed award to Neri that G&C was objecting to the consideration of a Neri bid, i.e., opening the envelope marked Neri.

The third contention was not specifically raised by G&C during the course of the protest, nor was it explicitly discussed in our prior decision. However, inasmuch as this contention is within the narrow ambit of and is necessary to the resolution of the basic issue, we believe it appropriate, under the circumstances of this case, to reconsider our decision in light of this contention.

With regard to the merits of G&C's first contention, although it appears that the contracting officer opened the joint venture's envelope which was marked as if the bid of a firm which did not participate in the first step, we have found no rule or regulation which prohibits the opening of such a bid, notwithstanding that firm's

apparent ineligibility to compete in its own right on the second step. Counsel for G&C has analogized this situation to 53 Comp. Gen. 348 (1973). However, in that case, we found that it was within the scope of a contracting agency's discretion in a procurement properly restricted to defense mobilization base producers to return unopened a package marked as the unsolicited proposal of a firm not in the mobilization base.

With regard to the second contention, G&C's counsel asserts that it and the other four acceptable firms were specifically apprised of whom they were going to compete against in the second step. G&C asserts that this was in accordance with ASPR § 2-503.2(iv) (1976 ed.), which required such a disclosure. G&C claims that it relied on competing against only these four firms in computing a bid price for the second step. In this regard, the protester has submitted a detailed explanation with documentation regarding how its bid price was computed which has been summarized by G&C's counsel as follows:

> "G & C specifically considered that it had beaten * * * [the fifth low bidder] on 21 out of 22 prior occasions where the two were in competition. Therefore, G & C felt that * * * [the fifth low bidder] represented no serious competition. With regard to * * * [the fourth low bidder], it was readily apparent to G & C that * * * [the fourth low bidder], lacking familiarity with Air Force specifications and procedures, was probably going to have to include a substantial contingency amount to cover itself for its lack of knowledge and/or sophistication. G & C, therefore, believed that this firm was not a serious competitor price-wise. * * * [The third low bidder] was regarded by G & C as a prime competitor for this procurement even though * * * [the third low bidder] had only battered the G & C price in two of the six bids on which the two had participated since 1974 but in each of those cases G & C's position was such that it did not choose to submit a lower, more realistic price because of other work which it had already obtained. With regard to Craft Electric Corporation, G & C obtained information that Craft, although having personnel knowledgeable in Air Force specifications and procedures, had only been organized in late January, 1976 and had less than five months time within which to demonstrate its performance capability and to accumulate a performance track record. Based on G & C's own experience, even with adequate capital and recognized responsible management, a bidder must have a demonstrated successful prior performance record as a

> prerequisite to obtaining the necessary performance and payment bonds that would be required in any construction contract of this magnitude. Since G & C knew that Craft, being in existence only five months, had no such demonstrated performance and since a reasonable price for the base bid would be $200,000 and that the total project would exceed $500,000 by a substantial amount, C & C thus concluded that Craft Electric Corporation was simply not in a position to acquire the necessary bonds from any approved surety company. Therefore, even though its price probably would be extremely low due to its very low overhead, Craft was eliminated from serious consideration as a competitor on this procurement. G & C priced its bid based in large measure on all of the above factors by which it assessed the four bidding entities against which it was competing. Had G & C, however, known that it was required to underbid yet a fifth entity, i.e., the joint venture of Craft-Neri, it would have bid differently because it would have recognized that the joint venture composed of one established firm, Neri, was capable of being bonded but yet that by virtue of newness of the other half of the joint venture (Craft) had overhead rates substantially below that of any of the other competitors and thus would be in a position to submit a low bid price. Under those circumstances, G & C could not reasonably have submitted a total bid of $565,159 and have believed that it would have received award absent some fluke. Clearly, if G & C had known that the joint venture entity was going to submit a bid, it would have been required to submit a bid substantially below that which it did."

G&C maintains that in view of the prejudice it suffered because the joint venture was allowed to compete, the mandatory language of the solicitation limiting second step competition to firms which submitted acceptable first step proposals should have been enforced to exclude the joint venture.

Notwithstanding G&C's contentions, we believe that the acceptance of the second step joint venture bid comported with the ASPR § 2-503(ii) (1976 ed.) requirement that bids could only be accepted from firms which

submitted acceptable first step proposals. This is so because a joint venture has joint and individual liability. See discussion above and in prior decision. Contrast Haughton Elevator Division, Reliance Electric Company, 55 Comp. Gen. 1051 (1976), 76-1 CPD 294 (cited by G&C's counsel), where we found that an award which was inconsistent with a definitive responsibility requirement that a bidder have 5 years' successful experience was improper.

Moreover, we regard G&C's stated prejudice as speculative, and not such that Craft should have been precluded from joining in a joint venture to bid on the second step. Although considerable analysis has been presented by G&C to show how its bid was prepared, we are not persuaded that G&C would have been the low bidder even if it had known of the joint venture's intended participation in the second step. In this regard, we note that the G&C analysis was prepared during the course of the protest at this Office.

Also, since there is no indication that Craft had experienced any particular financial difficulties, we do not see how G&C could assume that Craft could not procure the required bonds. Craft could have obtained additional resources or financial backing by means other than forming a joint venture with Neri, e.g., through a subcontractual or guaranteeship relationship. See B-171095, May 4, 1971; 52 Comp. Gen. 886 (1973); Harper Enterprises, 53 Comp. Gen. 496, 499 (1974), 74-1 CPD 31; and ASPR § 1-903.1(i) (1976 ed.). If Craft had elected to obtain additional resources through one of these alternative methods, G&C would have suffered the same "prejudice" it claims to have suffered here.

Furthermore, there were five apparently competitive firms which submitted acceptable proposals. Consequently, notwithstanding G&C's protestations to the contrary, it seems difficult to say, with any certainty, that any knowledge regarding the possible "addition to the competition" of one more bidder would have caused any of the other bidders to have so revised their bid price as to be low. Contrast Instrumentation Marketing Corporation, B-182347, January 28, 1975, 75-1 CPD 60. In that case, we sustained the protest of a camera supplier against an award to the only competing firm under a request for proposals because certain mandatory requirements were waived after award to allow the awardee to deliver its standard product. The protester was clearly prejudiced in that case due to Government's failure to properly state its requirements, which gave the protester the impression that the only competitor under the RFP could not offer its standard product.

Finally, although an effect of ASPR § 2-503.2(iv) (1976 ed.) (cited by G&C's counsel) is to inform the firms which submitted acceptable proposals of each other's eligibility to compete under the second step, its purpose is not to disclose all possible competitors so that bids could be prepared accordingly; rather, as indicated by the regulation's clear language, its purpose is to inform prospective subcontractors of potential subcontracting opportunities. See B-166315, August 15, 1969.

With regard to G&C's counsel's third contention, it is clear that the anti-assignment statutes, 41 U.S.C. § 15 (1970) and 31 U.S.C. § 203 (1970), are not applicable to the transfer or assignment of proposals and bids prior to the award of a contract. However, we have stated that the rationale for these statutes should be applied in preaward situations, "as a matter of public policy and a matter of sound procurement policy," to assignments of proposals and bids (after bid opening). 43 Comp. Gen. 353, 372 (1963); 51 id. 145, 148 (1971); Numax Electronics, Inc., 54 id. 581, 584 (1975), 75-1 CPD 21. As stated in Numax, supra, at 583, the purpose of the analogous anti-assignment statutes is as follows:

> "* * * to secure to the government the personal attention and services of the contractor; to render him liable to punishment for fraud or neglect of duty; and to prevent parties from acquiring mere speculative interests, Francis v. United States, 1875, 11 Ct. Cl. 638, and from thereafter selling the contracts at a profit to bona fide bidders and contractors * * * Thompson v. Commissioner of Internal Revenue. 205 F.2d 73, 76 (3rd Cir.1953)."

At 51 Comp. Gen., supra, at 148, we indicated that there was even greater reason to apply this position to the transfer of bids under formally advertised procurements for the following reason:

> "* * * To permit a party to enter into the competition after bids have been opened by virtue of taking over the bid of one whose situation makes its responsibility questionable would seem to provide an unwarranted option to the prejudice of other bidders. * * *"

Also see B-144012, November 7, 1960, which is distinguished in our prior decision.

We do not believe these policy constraints regarding the transfer of bids and proposals are applicable to the present situation involving two-step formal advertising. As indicated in our prior decision, two-step procurements are analogous to the use of qualified products lists (QPL). See 40 Comp. Gen. 35, 38 (1960); id. 40, 42 (1960). The purpose of the QPL qualification process:

> "* * * is to allow the Government to efficiently procure items on which substantial testing would be required to insure that they would meet the Government's requirements or critical items of which safe operation is imperative, by permitting the extensive tests needed to show that the particular product will meet the Government's requirements to be conducted prior to the actual procurement action. * * *"

D. Moody & Co., Inc., 55 Comp. Gen. 1, 10 (1975), 75-2 CPD 1. Similarly, the purpose of the first step request for technical proposals is to permit the Government to determine the acceptability of the technical proposals described by potential bidders, yet make the award selection on the second step under the preferred formal advertising procedures considering bid prices based on the technical proposals found acceptable in the first step. The policy concerns regarding the transfer of bids and proposals are not present in QPL procurements prior to the submission of proposals or bids under a solicitation or in two-step procurements prior to the second step. For example, neither a firm listed on a QPL nor a firm which has submitted an acceptable first step proposal is under any legal obligation to bid when firm bids are solicited. Moreover, we do not believe the formation of a joint venture in the present case to bid on the second step was really an "assignment" or "transfer" of a proposal at all, since Craft is still individually liable to perform in accordance with its acceptable first step proposal.

As discussed above and in our prior decision, not only is the Government assured of receiving performance in accordance with the first step proposal, but we can perceive no real prejudice to other bidders or the competitive bid system from permitting consideration of the joint venture's second step bid.

In view of the foregoing, our decision in G&C, supra, is affirmed.

Acting Comptroller General
of the United States