Proc II

DECISION

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

9272

FILE: B-192696, B-194037, B-194103 DATE: February 27, 1979

MATTER OF: Donald W. Close Co. and others

DIGEST: [Protest ALLEGATION ~~CONCERNING~~ THAT Solicitation Requirements ~~ARE~~ Competitively ARE RESTRICTIVE]

1. GAO will consider protest by subcontractor that requirement in prime contract solicitation directly affects subcontractor and is unduly restrictive of competition.

2. Protest of Navy's allegedly restrictive approach to subcontracting is timely where protester learned of approach after bid opening and filed protest within 10 working days thereafter. timeliness

3. Navy did not act illegally or improperly in considering the use of only first tier minority subcontractors in measuring contractor's compliance with minority subcontracting goal in prime contract, since administration of subcontracting programs essentially is matter within discretion of Navy. discretion

4. Policy of requiring compliance with minority subcontracting clause at first tier subcontractor level is not unduly restrictive and does not foreclose lower tier minority subcontracting. compliance

5. Solicitation requirement for identifying minority subcontractors after bid opening was for purpose of determining bidder responsibility, not to prevent bid shopping. Consequently, rejection of bid which did not contain commitment to particular subcontractors would be improper.

(17)

6. Where solicitation allows contractors to rely on written representations of subcontractors to determine their minority status, reliance on a letter from subcontractor to Navy is proper.

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7. Since minority status of proposed subcontractors is matter of bidder responsibility, Navy properly refused protesters' request to determine, prior to bid opening, minority status of particular potential subcontractor.

These cases concern the Navy's policy of considering only first tier subcontractors in determining the prime contractor's compliance with a specified percentage goal (11 percent) for minority subcontracting. We conclude that the Navy has a reasonable basis for its policy.

The first protest, B-192696, concerns Invitation for Bids (IFB) No. 68248-76-B-6035 issued by the Navy for equipment-installation and building construction at the Naval Submarine Base Bangor in Bremerton, Washington. Donald W. Close Co. and Wright, Inc. protested as potential subcontractors for this project, and were joined in the protest by Hoffman Construction Company, the second low bidder on the prime contract. Close later protested IFB Nos. N68248-76-B-6046 and N68248-77-B-7099, issued for other work at the same facility. The work under these IFBs is related to the Trident submarine program.

The IFBs required the apparent low bidder, prior to award, to submit its plan for complying with a minority subcontracting program and to identify in the plan the minority subcontractors with which firm commitments had been made.

The protesters believe that Pacific Ventures, Inc., the low bidder under IFB 68248-76-B-6035, originally planned to use Close as a first tier electrical subcontractor with Wright, a minority-owned firm, as a second tier subcontractor, but arranged to subcontract with Rosenden Electric, Inc., a minority-owned electrical subcontractor, and so indicated in its plan, when it learned that the Navy would consider only first tier subcontracts in measuring compliance with the minority utilization goal. The protesters thus object to the Navy's willingness to consider only first tier subcontractors in connection with that goal.

In addition, Close, Wright, and Hoffman protest the award to Pacific because Pacific allegedly changed its intended subcontractors after bid opening. The protester's assert this is tantamount to "bid shopping" which rendered Pacific's bid nonresponsive.

The Navy suggests that Close and Wright should not be regarded as "interested parties" within the meaning of 4 C.F.R. § 20.2(a) (1978), our Bid Protest Procedures, because they only "had a mere expectance of receiving a subcontract." However, where a firm is precluded from receiving a subcontract because of allegedly unduly restrictive provisions in a prime contract solicitation, we regard the firm as an interested party to protest those provisions. See Abbott Power Corporation, B-186568, December 21, 1976, 76-2 CPD 509. Here, Close and Wright claim to have lost subcontracting opportunities as a result of the Navy's approach to its minority subcontracting program; we believe they are interested parties under 4 C.F.R. § 20.2(a).

The Navy believes the protests are untimely because they were not filed within 10 days after the basis for protest was known or should have been known, as required by our Bid Protest Procedures, 4 C.F.R. § 20.2(b)(2). The prime contractor, Pacific, after discussions with the Navy, submitted its minority subcontracting plan by letter dated July 28, 1978. Its plan named Rosenden as the minority electrical subcontractor. The Navy argues that Close and Wright knew or should have known at that point that they were no longer being considered for the electrical subcontracting work, thereby rendering untimely this protest filed more than 10 working days thereafter.

However, there is no evidence in the record that either Close or Wright received a copy of this letter from Pacific to the Navy, and the affidavit of Close states that its first knowledge of the Navy's approach was from telephone conversations on August 14 with Pacific and the Navy. Since the protests were received within 10 days of these telephone conversations, they were timely filed. The Navy suggests additional reasons for regarding the protests of Wright and Hoffman as untimely. However, since those protests raise no issues other than those raised by Close, the Navy's reasons are academic.

The solicitation contained a bidding information document, which gave notice of the minority subcontracting program and stated:

> "For the purpose of this program, the term 'subcontract' includes all construction, alterations, repairs, materials, supplies, and service work contracted for by the prime contractor in the prosecution of the work." (Emphasis added.)

However, in yet another portion of the solicitation, the general provisions, this notice was repeated but the underlined word, by, was omitted. The protesters argue that the notice in the general provisions does not make any distinction between different tiers of subcontractors.

Although it may not have been clear to the protesters from the general provisions that the Navy would insist that the minority subcontracting goal was to be satisfied at the first tier level, there can be little doubt from the bidding information document which specifically defines the term subcontract as a contract awarded by the prime contractor. A second tier subcontract, by definition, is not awarded by the prime contractor. The requirement in the bidding information document that the goal be met by the prime contractor's subcontract awards is more specific than the general provisions and it is a well established principle of contract interpretation that a specific provision will prevail when there is a conflict between that provision and a more general one. Total Leonard, Inc., 56 Comp. Gen. 307 (1977), 77-1 CPD 62.

Moreover, we point out that even if the protesters were misled by the solicitation, there is no indication that the prime contract bidders, to the extent any of them might have been misled, suffered any prejudice as a result of the alleged solicitation defect such as would warrant cancellation and readvertising. See Union Carbide Corporation, 56 Comp. Gen. 487 (1977), 77-1 CPD 243.

The protesters also object that measuring compliance with the minority subcontracting goal through first tier subcontracts only would result in

discrimination in favor of the largest, best-financed minority enterprises with the least need of the program. The protesters assert that the Navy's approach encourages the general contractor not to incur the added expenses and risks of contracting directly with a greater number of minority firms for smaller portions of the work.

The Navy states that its insistence on satisfying the minority subcontracting goals at the first tier level is the only practical way to administer the program. We understand that shortly after contract award, the Navy requests the prime contractor to provide a copy of each minority subcontract so that the Navy can verify compliance with the minority subcontracting plan submitted previously. We further understand that if there is an unjustified deviation from that plan, a termination for default could result. The Navy suggests that since lower level subcontractors are not in privity with the Government, and are not subject to the Government's enforcement sanctions, there could be difficulty in its obtaining those lower level subcontracts to verify compliance with the minority subcontracting plan.

We do not completely understand the Navy's rationale, since it is not clear to us why the taking into account of minority subcontractors below the first tier level would bring about the problems mentioned. It would seem that it should be the prime contractor's responsibility to provide the Navy with whatever the Navy reasonably needs to measure the prime's compliance with its own minority subcontracting program, so that the Navy would not have to concern itself with the problems associated with a lack of privity.

Nonetheless, we cannot say that the Navy's approach is illegal or improper. How the Navy chooses to administer its minority subcontracting program is a matter within the discretion of the Navy, subject only to basic Federal procurement principles requiring contracting officials to act in good faith, maintain the integrity of the competitive system, and not unduly restrict competition. While the protests, in effect, allege such an undue restriction on competition because certain subcontractors are excluded as a result of the

Navy's approach, we note that no firm is, in fact, precluded from possible participation as a subcontractor in these procurements because of the Navy's approach. Rather, it is the prime contractor, in determining how it will comply with the minority subcontracting program requirements, that decides whether to subcontract with a minority firm for work in one category (such as electrical) or another. One prime contractor may choose to achieve the program goal by engaging minority subcontractors in two particular categories; another prime may select minority firms for work in two other categories; still another prime may subcontract directly with minority firms in three or four work categories. In short, it is solely as a result of the prime contractor's approach to meeting the minority subcontracting goal that determines which firms will have opportunities to participate in the procurement. While in some geographical areas at any given time a prime contractor may not have a significant choice because of the limited availability of qualified minority firms, that by itself does not, in our view, render the Navy's approach overall to be unduly restrictive.

Moreover, we also point out that lower tier minority subcontracting is not foreclosed by the Navy's policy, since nothing precludes awards of lower tier subcontracts to minority firms. In fact, clause 108(d)(6) of the contract requires the prime contractor to include the provision at Defense Acquisition Regulation 7-104.36(a) in its subcontracts; that provision requires the first tier subcontractor to use "best efforts" to insure minority participation in lower tier subcontracts.

With regard to the allegation of bid shopping, we point out that the General Services Administration imposes a subcontractor listing requirement to prevent bid shopping (selecting subcontractors after bid opening), but there is no general policy against bid shopping, and other agencies generally do not prohibit the practice. Here, the minority subcontractor listing requirement is not related to preventing bid shopping, but is part of the requirement for the apparent low bidder to show after bid opening how it intends to insure that a certain percentage of subcontracted work

will be performed by minority-owned firms. As such, and since bidders were not required to identify or to commit themselves to particular subcontractors in their bids, the subcontractor information was required for use by the Navy in determining bidder responsibility, and was not related to bid responsiveness. Thus, the Pacific bid could not properly be rejected because it did not include a commitment to particular subcontractors. Dubicki & Clarke, Inc., B-190540, February 15, 1978, 78-1 CPD 132.

Protesters also question the basis for regarding Rosenden Electric as a minority subcontractor. They claim the only basis given was a letter to the Navy from Rosenden dated March 31, 1976, in which Rosenden claimed that it was a minority firm. However, the solicitation provides that "* * * [C]ontractors may rely on written representations by subcontractors regarding their status as minority business enterprises in lieu of an independent investigation." In relying on the March 31 letter from Rosenden, the Navy and Pacific complied with the terms of the solicitation regarding the status of minority subcontractors.

Close also objects to the Navy's refusal, prior to bid opening, under IFB N68248-76-B-6046 and IFB N68248-77-B-7099 to determine whether Rosenden is a qualified minority firm. As indicated above, compliance with the minority subcontracting requirements of the solicitation is a matter of bidder responsibility, which is to be determined after bid opening and prior to award. There is no assurance, of course, that Rosenden's status before bid opening would be the same after bid opening. See Harper Enterprises, 53 Comp. Gen. 496 (1974), 74-1 CPD 318. Thus, Rosenden's minority status prior to bid opening would not necessarily be relevant to the post bid opening determination of responsibility, which would have to be based on the information current at that time. Therefore, the Navy did not act improperly in refusing to determine prior to bid opening whether Rosenden is a qualified firm.

The protests are denied.

R. F. Keller

Deputy Comptroller General
of the United States