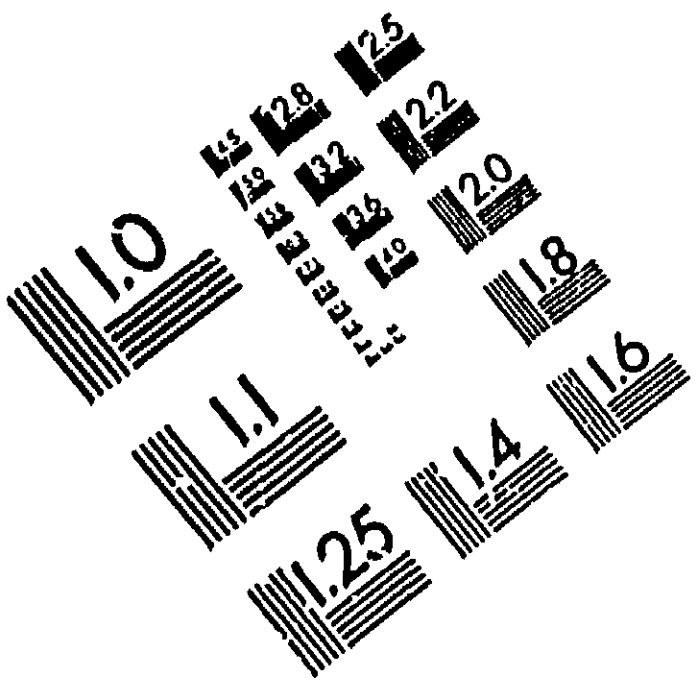


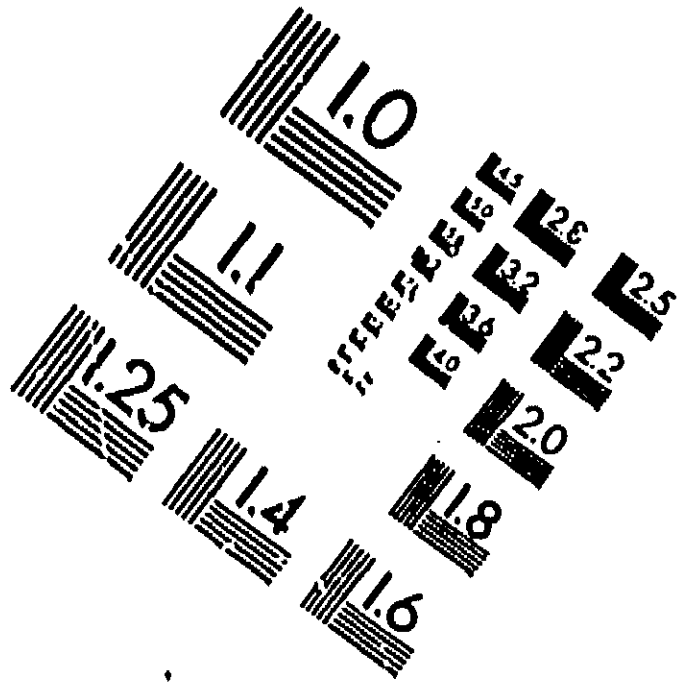
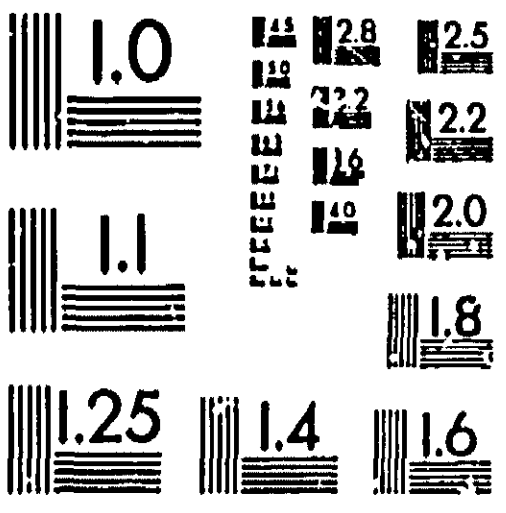
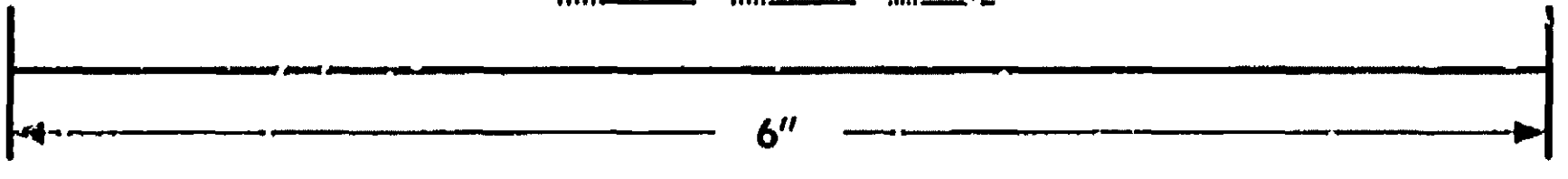
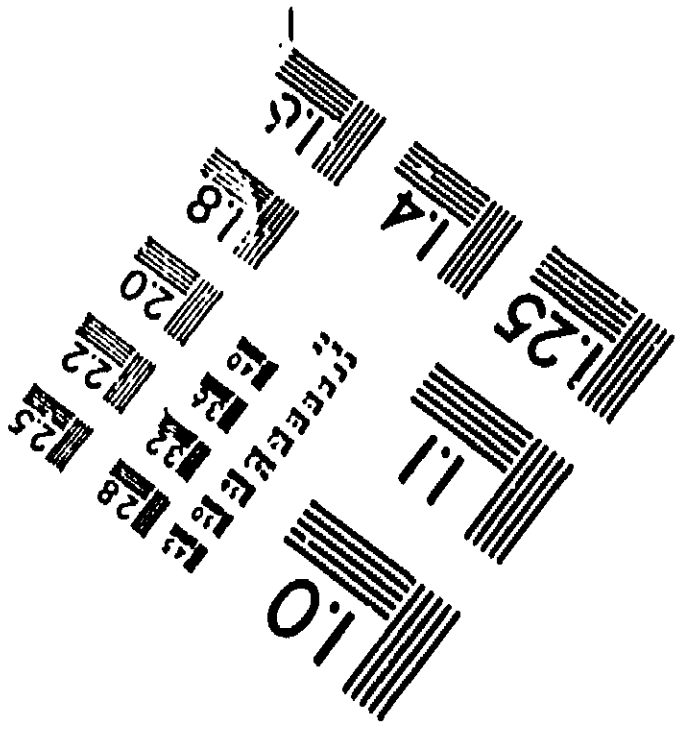
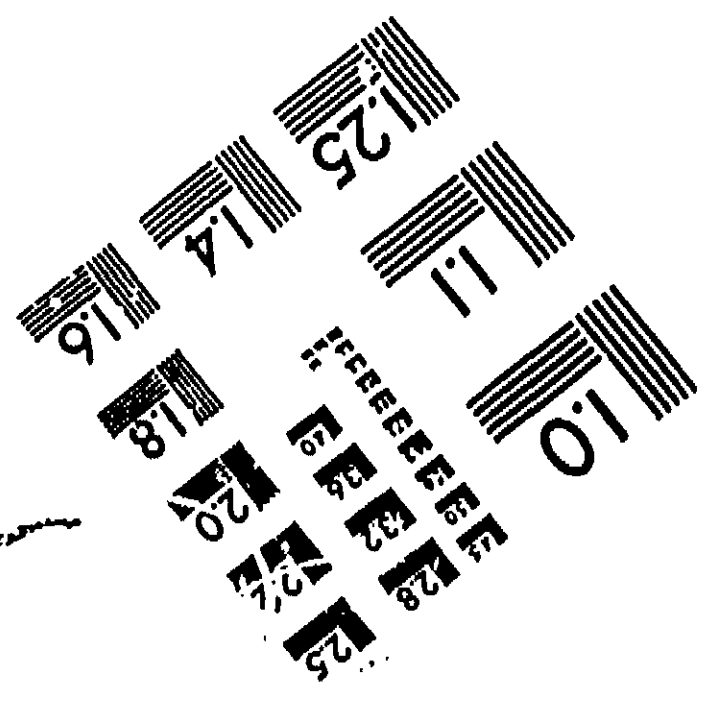


IMAGE EVALUATION
TEST TARGET (MT-3)









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UNITED STATES
GENERAL ACCOUNTING OFFICE

Has further
118584

DECISION

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

FILE: B-204420 DATE: June 2, 1982

MATTER OF: Dineen Mechanical Contractors, Inc.

DIGEST:

1. Compliance of low bidder with definitive responsibility criterion requiring that bidder list prior projects in which it had "constructed or replaced [similar equipment] as Prime or [equipment] Subcontractor" may be determined by considering projects on which bidder accomplished work through subcontractors rather than through bidder's own organization.

2. Where contention that agency promised not to award contract prior to issuance of GAO decision on protest is based upon mere assertions, denied by agency, protester has not met burden of affirmatively proving its case. In any event, issue does not affect propriety of award which cannot be questioned.

Dineen Mechanical Contractors, Inc. (Dineen), protests the award of a contract for the "updating of the air conditioning systems" at Seneca Army Depot, Romulus, New York, to the Iversen Construction Corporation (Iversen) under Army invitation for bids No. DAAG38-81-B-0065. We deny the protest.

Dineen contends that the award was improper because Iversen does not meet the following definitive responsibility criterion set forth in the invitation:

> "IN ORDER FOR THE CONTRACTING OFFICER TO DETERMINE IF AN OTHERWISE RESPONSIVE BIDDER HAS THE ABILITY TO MEET THESE TECHNICAL STANDARDS, THE PROSPECTIVE CONTRACTOR SHALL SUBMIT WITHIN TEN CALENDAR DAYS AFTER OPENING

> "A LIST OF 2 PROJECTS COMPLETED WITHIN THE LAST THREE YEARS, 1978 THROUGH 1980, IN WHICH THE BIDDER HAS CONSTRUCTED OR REPLACED [Heating, Ventilation, and Air Conditioning] HVAC OF AN INDUSTRIAL OR INSTUTITONAL TYPE AS PRIME OR HVAC SUBCONTRACTOR, * * *"

This criterion is allegedly not met because Iversen has in the past performed the installation of HVAC systems through subcontractors rather than through its own organization. Further, Dineen also maintains that a policy has been set forth in Defense Acquisition Regulation (DAR) § 18-104 (Defense Procurement Circular No. 76-6, January 31, 1977), in favor of the Government awarding contracts to contractors who will perform a significant portion of the work with their own organization. This policy was allegedly ignored when the award was made to Iversen.

It is the position of the Army that Iversen does satisfactorily comply with the above criterion. The Army contends that the words "PRIME OR HVAC SUBCONTRACTOR" do not require the bidder to have actually done the work itself in the past on the projects listed, but rather permitted the successful bidder to have been a prime contractor (as Iversen admittedly has been) on projects in which HVAC systems were actually repaired or replaced by subcontractors. As stated by the Army:

> "The referenced language cannot reasonably be read as requiring the successful bidder to have itself actually constructed or replaced HVAC systems for a number of reasons:
>
> "(a) The reference to 'PRIME,' particularly when used in government contracting, unquestionably refers to the contractor that is actually awarded a contract and is in privity of contract with the government. * * * The alternative provided allowed bidders to present evidence of past experience either as a 'PRIME' or 'HVAC SUB-CONTRACTOR.' In this context, the designation 'PRIME' clearly referred to the bidders' having

> to prove satisfactory performance of prior contracts involving HVAC work where the bidder was the prime contractor. Whether the work was accomplished solely by use of the prime contractor's organization or with the aid of subcontractors [is] not dispositive because full responsibility for satisfactory performance [will] be placed upon the prime contractor, and satisfactory performance of prior contracts involving HVAC work as the prime would be indicative of the bidder's competency and responsibility. * * *
>
> "(b) There is no general prohibition on the use of subcontractors to perform portions of government contracts. Presentations South, Inc., B-196099, March 18, 1980, 80-1 CPD 209. * * * there was not anything in the solicitation prohibiting the use of subcontractors, nor does it appear that any such prohibition was required by regulation or otherwise. This being the case, if the protester's interpretation of the experience requirement is accepted we would be put into the situation of having an experience criterion which requires a bidder to provide evidence of the bidder itself having actually performed HVAC work, without the use of subcontractors, in order to receive an award of a contract which contains no prohibitions against subcontracting * * *."

Further, DAR § 18-104, supra, the Army notes, requires that a prime contractor perform a significant part of the work on construction projects; however, this requirement is mandatory only for contracts whose cost is estimated to be in excess of $1 million. Use of the requirement is optional for contracts whose cost is estimated to be less than $1 million. Since the contract to be awarded under the above invitation was estimated at a cost of less than $500,000, the contracting officer determined not to include the requirement in the invitation.

In reply to the position of the Army, Dineen maintains that the contracting officer's interpretation of the term "prime" is not "correct or all encompassing," and it "demonstrates only one way in which the word prime is used." However, as regards its specific use in this instance, Dineen states, the term "prime" suggests an interpretation of the term as it is used in the context of "multi-prime" projects where a number of contractors are directly in privity with the Government but only one of those "prime" contractors is responsible for the HVAC work. The latter is the correct interpretation, Dineen believes, because the entire purpose for imposing an HVAC experience requirement for bidding on this contract is to require the party which contracts directly with the Government to have the expertise itself to insure that this project, which involves primarily HVAC work, is performed properly. Further, Dineen continues:

> "If the contracting officer's interpretation of the requirement were correct, it would mean that any general contractor who has in the past functioned as a prime on a project which involved in part HVAC work could qualify for this contract. This interpretation defeats the purpose of an experience requirement totally, because a prime contractor who subcontracts out his HVAC work might never be in a position to learn the specifics of how mechanical systems are constructed, and hence would be totally lacking in the 'experience' which the Invitation for Bid obviously intended to require."

Dineen also argues that in concentrating on the term "prime," the language "THE BIDDER HAS CONSTRUCTED OR REPLACED HVAC" is ignored. This language allegedly requires the bidder, itself, either to have constructed or replaced HVAC as a prime or to have constructed or replaced HVAC as a subcontractor. The requirement is not that the bidder must have acted as a prime contractor on a project where an HVAC subcontractor has constructed or replaced HVAC. The existence in the requirement of the verbs "constructed or replaced," Dineen concludes, does not permit the bidder merely to have subcontracted for construction or replacement of HVAC by others.

Generally, our Office does not review affirmative determinations of responsibility. Central Metal Products, 54 Comp. Gen. 66 (1974), 74-2 CPD 64. An exception, applicable in this case, to the general rule occurs when the solicitation contains a definitive responsibility criterion which allegedly has not been applied. Haughton Elevator Division, 55 Comp. Gen. 1051 (1976), 76-1 CPD 294; A.R. & S. Enterprises, Inc., B-201924, July 7, 1981, 81-2 CPD 14.

As noted by the Army, there is no general prohibition on the use of subcontractors to perform all, or nearly all, of the work bid upon by a prime contractor absent an express limit set forth in the solicitation document for the prime contract. To the extent the present protest asserts the solicitation should have contained a limit on subcontracting of the kind mentioned in DAR § 18-104, supra, this aspect of the protest is untimely and will not be considered. See 4 C.F.R. § 21.2(b)(1) (1981).

Since there was no express restriction on the right of a bidder to subcontract the work, we agree with the Army's view that it would be unreasonable to interpret the word "Prime" as excluding experience obtained by a bidder in completing work done as a "Prime" through HVAC subcontractors. Indeed, we interpret the phrase ("bidder has constructed or replaced HVAC * * * as PRIME"), cited by Dineen, as encompassing two, commonly understood ways a "prime" contractor accomplishes work, namely: through its own resources or through the resources of others (its subcontractors). Further, we think all bidders should have reasonably been on notice of this interpretation.

Although Dineen may be correct in assuming that a prime contractor who subcontracts HVAC work may not have the mechanical expertise of its HVAC subcontractor, this is not the Government's concern. The Government's sole concern is with obtaining satisfactory performance--not with obtaining the most mechanically knowledgeable company. And the prime's satisfactory performance of prior contracts through HVAC subcontractors is indicative of the prime's capability for securing additional satisfactory HVAC work even though the prime contractor may lack the mechanical knowledge of its HVAC subcontractors.

Nevertheless, an agency may, pursuant to a solicitation provision requiring the contractor to perform a certain percentage of work with its own organization, require a more stringent bidder experience requirement than was required here. For example, in 39 Comp. Gen. 173 (1959), we considered a requirement that bidders have as a prerequisite for award consideration "either with their own organizations or through the Subcontractor they will use on the project," a minimum of 3 years of specified experience. Thus, this provision effectively required a bidder--who could not prove experience through its own resources--to propose the subcontractors through whom the bidder had otherwise accomplished prior work unlike the experience provision in this procurement. Because the low bidder had no experience of any kind in dealing with the equipment in question and, consequently, because it had never performed any contracts covering the work in conjunction with its proposed subcontractors--who by themselves were responsible parties--we held that the low bidder did not meet the experience requirement and could not receive the award.

In Contra Costa Electric, Inc., B-200660, March 16, 1981, 81-1 CPD 196, the successful bidder (prospective "Contractor") was required to "have a 2 year experience record in the design and installation" of the particular systems being procured. This provision, therefore, did not require that the bidder was required to have previously worked with its proposed subcontractor--unlike the provision in 39 Comp. Gen., supra. Nevertheless, the prospective awardee proposed to complete the contract in the role of a prime contractor employing subcontractors whom it had used to perform identical work over the past 2 years. We stated in deciding the case that:

> "The narrow issue presented to us is whether the solicitation permits the use of subcontractors and, if so, whether the experience clause permits the use of subcontractors' experience in determining the bidder's responsibility. There is no general prohibition on the use of subcontractors to perform portions of Government contracts. * * * [and] we do not think that the use of the word 'contractor' * * *

> can reasonably be construed as prohibiting the use of subcontractors * * *."

Then we noted that the prospective awardee met the more restrictive subcontractor experience approach discussed in 39 Comp. Gen. 173, supra. Since the concern met the more restrictive experience approach, it complied with the experience provision actually involved in the procurement, and we denied the protest.

In view of this analysis, we reject Dineen's interpretation of the experience provision. Moreover, under the only reasonable interpretation of the provision, we see no basis to question the awardee's compliance with the provision.

Finally, Dineen argues that the Army promised that no award would be made prior to the issuance of a decision by our Office. However, the evidence as to this issue consists only of an assertion by Dineen that it was so promised and by the agency that no such promise was made. On the basis of this evidence, we do not believe that Dineen has met its burden of affirmatively proving its case. Custom Burglar Alarm, Inc., B-192351, January 18, 1979, 79-1 CPD 30. In any event, this issue does not affect the propriety of the award which we cannot question.

Accordingly, the protest is denied.

for Milton J. Socolar
Comptroller General
of the United States

END