DECISION

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

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FILE: B-218268.2 **DATE:** August 29, 1985

MATTER OF: J.W. Bateson Company, Inc.

DIGEST:

> In a procurement for the construction of a composite medical facility, a requirement that only prequalified subcontractors be used for 10 specialty trade areas of the project cannot be reasonably read as precluding the prime contractor from performing a certain specialty area with its own forces if, in fact, capable of doing so. Although the prime contractor was not prequalified for such work during the actual prequalification process, the agency's subsequent qualification of the firm in the specialty area was directly related to its affirmative determination of the firm's responsibility to perform the contract.

J.W. Bateson Company, Inc., protests the award of a contract to Newberg-Brinderson, A Joint Venture, under invitation for bids (IFB) No. N62474-84-B-4352, issued by the Department of the Navy for the construction of a composite medical facility. Bateson contends that the award was improper because Newberg-Brinderson is not utilizing a prequalified subcontractor to perform the mechanical portion of the project as mandated by the solicitation. We deny the protest.

Background

On December 5, 1984, the Navy published a notice in the Commerce Business Daily of its intent to construct the composite medical facility and informed potential bidders that the IFB would only be issued to those firms which had prequalified as prime contractors. To this end, the Navy issued a "General Construction Contractor Prequalification Questionnaire" on December 11, in which firms interested

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in the project were to provide the Navy with information as to their prior experience in performing construction projects of similar scope. The questionnaire provided that the prime contractor would be required to perform at least 20 percent of the work itself, and responding firms were to indicate in the questionnaire those areas they proposed to accomplish with their own forces to meet the 20 percent requirement. Further, because of the magnitude and complexity of the project, the questionnaire provided that subcontractors proposed for the project's 10 specialty trade areas[1/] would also have to be prequalified:

> ". . . Your prequalification proposal must include as a minimum the required information for the subcontractors that your firm will employ for the . . . specialty trade areas. . . . [F]inal award will be contingent on the use of prequalified subcontractors in the specified specialty trade areas. . . ."

In its response to the questionnaire seeking prequalification as a prime contractor, Newberg-Brinderson stated:

> "One of the major strengths involved with the joint venture of Newberg-Brinderson lies in the ability [of the two component firms] to perform, with their own forces, much of the work normally subcontracted by other contractors in the industry. This includes the areas of Mechanical Work. . . ."[2/]

However, Newberg-Brinderson also proposed certain subcontractors to perform the mechanical work.

On March 11, 1985, the Navy issued a letter to those firms, including Newberg-Brinderson and Bateson, which had prequalified as prime contractors to bid for the contract.

1/ The 10 specialty trade areas were: (1) heating, ventilation, and air conditioning (HVAC); (2) plumbing; (3) fire protection; (4) electrical; (5) energy monitoring and control systems; (6) elevators; (7) radio frequency interference (RFI) shielding; (8) communications; (9) radio paging; and (10) closed circuit television.

2/ The term "mechanical" work means the two specialty trade areas of heating, ventilation, and air conditioning (HVAC) and plumbing.

Attached to the Navy's letter was a list of the subcontractors prequalified for the 10 specialty trade areas. The Navy's letter informed the firms that:

> "The list includes all of the subcontractors submitted by your firm, and by other prime contractors, that have been pre-qualified. You may propose any combination of pre-qualified subcontractors, without regard as to whether you or another prime contractor proposed them originally, and without regard to whether or not you included those particular subcontractors in your request for pre-qualification. You may use any contractual structure you choose with your subcontractors to accomplish the work, as long as each of the ten specialty areas . . . are accomplished by a subcontractor prequalified in that area. . . ."

The March 11 letter also provided that the firms would be required to list the names of their chosen subcontractors for the specialty areas during the Navy's preaward survey.

The IFB was issued on March 26 to those firms prequalified as prime contractors. The IFB provided that:

> "Only prequalified subcontractors shall be used for the ten (10) areas specified. Pre-qualification shall remain in effect for the duration of this contract. Any prequalified subcontractor replaced shall be replaced by another subcontractor on the prequalified list."

As amended, the IFB further provided that the prospective contractor would be required to make a written presentation to the contracting officer within 10 days after bid opening as part of the Navy's preaward survey, furnishing at that time a list of its chosen prequalified subcontractors for the specialty areas.

Bids were opened on May 23. Newberg-Brinderson was the apparent low bidder at $144,377,000; Bateson's bid was second low at $155,957,000. Newberg-Brinderson made its preaward survey presentation on June 7, at which time Newberg-Brinderson indicated its intent to perform the mechanical portion of the project with its own forces, listed a prequalified subcontractor for only one specialty

area, and stated that the remaining specialty areas would be assigned to prequalified subcontractors.

On June 14, after denying Bateson's agency-level protest which had alleged that any award to Newberg-Brinderson would be improper because Newberg-Brinderson was not prequalified as an entity to perform the mechanical portion of the work, the Navy made an affirmative determination of Newberg-Brinderson's responsibility to receive the contract. Subsequently, in response to the Navy's request, Newberg-Brinderson provided its full list of chosen prequalified subcontractors to the Navy on June 19, but again stated that the mechanical specialty areas would be performed with its own forces. On June 28, the Navy awarded Newberg-Brinderson the contract, despite the pendency of Bateson's later protest to this Office [3], on the ground that urgent and compelling circumstances significantly affecting the interests of the United States would not permit waiting for our decision on the protest.[4]

Bateson's primary contention is that the award to Newberg-Brinderson is improper because the express language of the prequalification questionnaire and the IFB, as set forth at length above, mandated that the project's 10 specialty trade areas be performed only by prequalified subcontractors. Therefore, according to Bateson, the Navy has compromised the integrity of the sealed bidding process by allowing Newberg-Brinderson to perform the mechanical work with its own forces, rather than insisting that the mechanical work be assigned to a subcontractor or subcontractors from the March 11 prequalified list.

Alternatively, Bateson urges that even if the specialty areas could be performed by the prime contractor, Newberg-Brinderson's failure to prequalify itself prior to bid opening for the mechanical portion of the work precludes the Navy from awarding it the contract. Bateson also urges in this regard that the Navy could not properly qualify Newberg-Brinderson for the mechanical work long after the prequalification process ended on March 11 in order to accept Newberg-Brinderson's lower

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[3] Bateson had protested to the Navy on June 6, and the protest was denied on June 11. Bateson then protested to this Office on June 13.

[4] See 31 U.S.C. § 3553(c)(2)(A), as added by section 2741(a) of the Competition in Contracting Act of 1984, Pub. L. No. 98-369, 98 Stat. 1175, 1199.

bid. Bateson points to the fact that Newberg-Brinderson did not submit its list of prequalified subcontractors for the specialty areas (other than mechanical) until after the Navy had determined Newberg-Brinderson to be responsible to receive the contract and asserts that the Navy's action in accepting the complete list of subcontractors well after the time specified in the IFB for furnishing such a list likewise tainted the procurement.

Analysis

We do not accept Bateson's contention that the procurement mandated that the specialty areas only be performed by prequalified subcontractors. As the Navy has indicated, it was assumed that, given the magnitude and complexity of the project, the specialty areas would be assigned to subcontractors with expertise in those specific trades. Accordingly, the Navy required that any proposed subcontractors be prequalified at the same time that the prime contractors were prequalified, and the March 11 list of prequalified subcontractors in each of the specialty trade areas was thus established. However, we believe it is unreasonable to contend that this assumption necessarily precluded a prime contractor with expertise in a particular specialty area from performing that work with its own forces. We note that the prime contractor was required to perform at least 20 percent of the project itself, a requirement fully in accordance with the Federal Acquisition Regulation (FAR), 48 C.F.R. § 36.501(a) (1984), which provides that to assure adequate interest in and supervision of all work involved in larger construction projects, the prime contractor shall be required to perform a "significant part" of the work (ordinarily not less than 12 percent) with its own forces. We find nothing in either the prequalification questionnaire or the IFB that limited the prime contractor's required level of self-performance to only the nonspecialty areas of the project.

We think it would be illogical to require performance by only specialty subcontractors, despite the prime contractor's capability to do the specialty work itself, since such a requirement would undoubtedly only serve to increase costs and, therefore, would not be in the government's best interest. Furthermore, such a requirement might well be found to restrict the competition unduly. Although the Navy freely admits that performance of any specialty area by a prime contractor was not contemplated when the procurement was initiated, we disagree with Bateson's position that it was improper to allow

Newberg-Brinderson's performance of the mechanical work with its own forces. The only reasonable interpretation of the procurement language is that the specialty areas, if subcontracted, could only be assigned to subcontractors on the March 11 list.

As to Bateson's alternative argument, it is clear from the record that Newberg-Brinderson did not prequalify as an entity to perform the mechanical work at the time the prequalification process was completed on March 11. In fact, there is substantive evidence that Newberg-Brinderson did not seek prequalification in this area, but rather that it intended to assign the work to a prequalified subcontractor from the list. However, as the Navy states, Newberg-Brinderson had furnished enough information in its response to the prequalification questionnaire to establish that the firm would have qualified as an entity to do the mechanical work if the Navy had reviewed the submitted information prior to March 11. Although the Navy did not expressly examine Newberg-Brinderson's qualifications in the mechanical area until after bid opening, both in response to the protest and as part of its responsibility determination, we do not think that this taints the procurement. In our view, it was sufficient that the Navy determined Newberg-Brinderson to be responsible to perform the contract prior to the June 28 award, FAR, 48 C.F.R. § 9.103; see also Marathon Enterprises, Inc., B-213646, Dec. 14, 1983, 83-2 CPD ¶ 690, and the fact that Newberg-Brinderson had not been prequalified in the mechanical area by March 11 does not obviate the effect of the Navy's affirmative determination. As we stated in an earlier decision regarding this same procurement, the prequalification criteria and the responsibility standards are cumulative requirements, all of which must be met before a firm may receive the award. Santa Fe Engineers, Inc., B-218268, June 3, 1985, 85-1 CPD ¶ 631. Even though the prequalification criteria may have been applied retroactively in this unusual circumstance, this does not establish that the Navy disregarded those criteria for Newberg-Brinderson's exclusive benefit. (Significantly, we note that Bateson has never alleged that Newberg-Brinderson is not qualified to perform the mechanical work.)

Moreover, even if we accept Bateson's argument that prequalification in the mechanical specialty areas constituted a definitive responsibility criterion--that is, an objective standard included in the solicitation that establishes a measure by which a prospective

contractor's ability to perform the contract may be judged, Provost's Small Engine Service, Inc., B-215704, Feb. 4, 1985, 85-1 CPD ¶ 130, and which necessarily must be met as a prerequisite to award, Yardney Electric Corp., 54 Comp. Gen. 509 (1974), 74-2 CPD ¶ 376--Newberg-Brinderson fully met that criterion by qualifying as an entity to perform the mechanical work prior to award, albeit well after March 11.

We fail to see how Newberg-Brinderson's failure to furnish its complete list of chosen prequalified subcontractors within 10 days after bid opening prejudiced Bateson or any other bidder. The requirement to make a written presentation to the contracting officer and to furnish the list in question as part of the Navy's pre-award survey was solely the burden of the prospective awardee, Newberg-Brinderson. Since Newberg-Brinderson ultimately furnished the complete list of subcontractors to the contracting officer prior to award, its rather dilatory compliance is not a legal ground upon which to question the propriety of that award.

Despite any minor irregularities in the conduct of this procurement, we cannot accept Bateson's contention that it was competitively disadvantaged by the Navy's action in allowing Newberg-Brinderson to perform the mechanical work itself. In this regard, Bateson urges that it would have bid differently had it known that it did not have to utilize subcontractors for the specialty areas of the project. The firm asserts that, had it known prior to submitting its prequalification questionnaire that subcontracting of the specialty areas was not required, it might have attempted to form a joint venture with a mechanical contractor, or, if it had had this knowledge after March 11 but prior to bid submission, it might have been able to obtain a far lower subcontractor quote in exchange for its commitment to employ only that firm for the mechanical portion of the project if awarded the contract.

In our view, however, Bateson's assertions are mere speculation at this point, and we regard them as self-serving. In any event, Bateson has failed to submit any evidence to demonstrate that the more than $11 million difference between the bids could have been overcome through knowledge that specialty-area subcontracting was

not a mandatory feature of the procurement. Cf. Wheeler Brothers, Inc., et al.--Request for Reconsideration, B-214081.3, Apr. 4, 1985, 85-1 CPD ¶ 388 (substantive evidence that protester was displaced due to unfair competitive advantage afforded to contract awardee).

The protest is denied.

Harry R. Van Cleve
General Counsel