DECISION

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

FILE: B-219629.2 **DATE:** *October 25, 1985*

MATTER OF: Bender Shipbuilding & Repair Co., Inc.

DIGEST:

1. Where bidder excludes no end products from Buy American certificate in bid and submits no additional information that otherwise would indicate that it is offering anything other than domestic end products, acceptance of bid results in obligation of bidder to furnish domestic end products. Compliance with that obligation is matter of contract administration which has no effect on the validity of contract award, and is not for consideration under GAO's bid protest function.

2. Where the protester has not shown that the prospective awardee's bid on its face reflects anything other than an unqualified offer to comply with the essential terms of the solicitation, the prospective awardee's bid must be deemed responsive.

3. GAO will not review an agency's affirmative responsibility determination absent fraud or bad faith on the part of government officials, or a failure to apply definitive responsibility criteria. An invitations requirement to furnish bonds is not a definitive criterion, but instead involves bid responsiveness (the bid bond) and contract administration (the performance and payment bonds).

4. Protest that prospective awardee's subcontract with large business will result in a de facto joint venture is, in effect, a challenge to the size status of the prospective awardee as a small business. GAO does not consider protests involving small business size status because the Small Business Administration has conclusive authority to determine the matter.

Bender Shipbuilding & Repair Co., Inc. (Bender), the second low bidder, protests the proposed award of a contract to Eastern Marine, Inc. (EMI), the low bidder, under invitation for bid No. N62472-83-B-1470, issued by the Department of the Navy as a total small business set-aside for floating cranes and related technical services for use at various Naval Shipyards.

Bender contends that EMI was not really the low bidder because the Navy improperly neglected to add a Buy American Act evaluation differential to EMI's bid for supplies of foreign origin. Alternatively, Bender contends that EMI intends to provide floating cranes that are nonresponsive to the IFB's technical requirement, and that EMI itself is financially incapable of performing any contract awarded under the IFB.

Subsequent to the filing of the protest, Bender filed suit in the United States Claims Court against the government (No. 497-85C) seeking injunctive and declaratory relief. The court has suspended proceedings in the case pending the receipt of our decision on Bender's protest.

We find no merit in the protest. Further, the protest raises certain matters which we dismiss.

Buy American Act

Bender asserts that a Buy American Act evaluation factor equal to 12 percent of EMI's bid price must be added to the company's bid for award purposes because EMI's floating cranes are foreign-manufactured. Specifically, Bender alleges that EMI's cranes are to be manufactured in Japan entirely of Japanese parts and shipped to the United States for assembly and incorporation into barges to become floating cranes. Bender notes that under the Buy American Act regulations, an end product, here the floating cranes, is domestic only if the cost of the components manufactured in the United States exceeds 50 percent of the cost of all its components. See Federal Acquisition Regulation (FAR), 48 C.F.R. § 25.101 (1984). Since Bender estimates that the cost of EMI's domestic-made barges is less than 50 percent of the total cost, the firm argues that EMI's floating cranes are foreign. According to Bender, the Navy was probably unaware that EMI intended to supply foreign end products because the agency was allegedly misled by the certification in EMI's bid that EMI was offering a domestic source end product.

Our Office generally will not consider a protest that challenges a representation in a bidder's Buy American Act certificate that domestic end products will be supplied. See Autoclave Engineers, Inc., B-217212, Dec. 14, 1984, 84-2 C.P.D. ¶ 668. This is because where, as here, a bidder excludes no end products from the Buy American Act certificate in its bid and does not indicate that it is offering anything other than domestic end products, the agency's acceptance of the bid results in an obligation on the part of the bidder to furnish domestic end products. Id.

Bender argues that our Office has indicated in prior decisions that it will not review the accuracy of a low bidder's Buy American Act certificate only where the application of the evaluation differential would not displace the bidder from being low. Bender cites our decision in Bell Helicopter Textron, 59 Comp. Gen. 158 (1979), 79-2 C.P.D. ¶ 431, and Ampex Corp., B-203021, Feb. 24, 1982, 82-1 C.P.D. ¶ 163, as examples of where we did review the accuracy of the low offeror or bidder's Buy American Act certificate because, according to Bender, the application of the Buy American Act differential would displace the low offeror or bidder.

We stated in Bell Helicopter that notwithstanding the awardee's certification, we were considering whether the awardee was offering a domestic source end product because the agency itself had requested additional Buy American Act information from the awardee during negotiations and it was appropriate for us to determine whether the agency made a proper award evaluation in light of the additional information. Similarly, in Ampex, the proposed awardee had furnished information on its own after bid opening concerning the domestic nature of its products.

The Navy does state in its protest report that EMI has informed it that the crane portion of the crane barge will be assembled in Florida. However, this information appears to have been generated by the agency merely for purposes of preparing a response to Bender's protest rather than for use in making an award evaluation. In any event, we find nothing in this very general information which calls into question the representation in EMI's Buy American Act certificate that the company is furnishing domestic source end products, especially since the Navy's report also emphasizes that less than 50 percent of the crane-barge components are manufactured outside the United States.

Further, Bender's allegation that EMI's floating cranes are foreign essentially is based on Bender's unsupported estimate of what EMI's large business subcontractor likely is charging EMI for the crane component. Bender asserts that it had its own negotiations with this subcontractor, and theorizes that if the negotiations had continued the subcontractor would have reduced its initial price for the cranes to a certain stated figure. Bender claims that its estimated price for the allegedly foreign made cranes of EMI's subcontractor shows that this price is more than 50 percent of its total bid price since, in Bender's view, there is no reason to believe the subcontractor made different price offers to EMI and Bender.

A protester, however, has the burden of proving its case. Kisco Co. Inc., B-216646, Jan. 18, 1985, 85-1 C.P.D. ¶ 56. Bender's position, based on a speculative analysis of what EMI's subcontractor is charging EMI for the cranes, clearly does not satisfy that burden. Francis Technology, Inc., B-205278.2, Aug. 29, 1983, 83-2 C.P.D. ¶ 265.

Responsiveness of EMI's Bid

Bender argues that EMI's bid was nonresponsive because the particular type of cranes that EMI intends to furnish do not meet the IFB's performance requirements regarding strength and durability. Bender alleges that during the course of the prior negotiations it had with EMI's subcontractor, the company became concerned that design of the subcontractor's cranes would not meet the IFB's requirements. Bender has provided us with an affidavit of one of its engineers asserting that, although the IFB permits the type of design for the cranes EMI intends to furnish the Navy, the bearings and gear teeth in these cranes nevertheless will not last the minimum time required by the IFB because of the stress put on these parts by this particular design.

In general, responsiveness refers to a bidder's unconditional agreement to supply precisely what is called for in a solicitation. See Raymond Engineering, Inc., B-211046, July 12, 1983, 83-2 C.P.D. ¶ 83. In order to be responsive, a bid must contain an unequivocal offer to provide the items called for in total conformance with the solicitation's material terms. Atco Surgical Supports Co., 63 Comp. Gen. 559 (1984), 84-2 C.P.D. ¶ 247. Bender has not shown that EMI's bid was other than an unqualified offer to

comply with all the essential terms and conditions of the IFB. We note in this regard that the IFB did not require the bidders to identify the cranes that they intended to supply or to provide any descriptive literature regarding their cranes. See Bay Decking Co., Inc., B-216248, Jan. 22, 1985, 85-1 C.P.D. ¶ 77. EMI's bid on its face was responsive.

As to whether EMI actually supplies the items in conformance with it contractual obligation, including complying with the Buy American Act certification, that is an issue of contract administration, which has no effect on the validity of an award. See Autoclave Engineers, Inc., B-217212, supra. Our Office does not review post-award matters of contract administration under our Bid Protest Regulations, 4 C.F.R. part 21 (1985), which are reserved for considering whether an award or proposed award of a contract complies with statutory, regulatory and other legal requirements.

Financial Capability of EMI

Bender claims that EMI lacks financial responsibility because EMI, according to Bender, was unable to obtain bid, performance and payment bonds without the financial assistance of EMI's subcontractor for the cranes. Bender has provided us with an affidavit of its general sales manager which states that during the course of the negotiations that Bender had with EMI's subcontractor, Bender learned that the subcontractor, also negotiating simultaneously with EMI, was concerned about EMI's financial condition and whether EMI would be able to obtain the above-described bonds. The affidavit further states that in order to obtain the bonds, EMI and the subcontractor were going to enter into an arrangement under which the subcontractor and EMI jointly would indemnify the bonding companies. Bender argues that the subcontractor would not have made the extraordinary agreement to underwrite the bonds jointly had it been clear that EMI was able to obtain them on its own.

EMI's financial capability to perform the awarded contract is a matter of responsibility, that is, the firm's ability to perform as obligated by acceptance of the bid. Delta Data Systems Corp., B-213396, Apr. 17, 1984, 84-1 C.P.D. ¶ 430. Because responsibility determinations are inherently judgmental, contracting officers are afforded wide discretion in the area, and our Office will not review an agency's affirmative determination of responsibility absent

fraud or bad faith, or a failure to apply definitive responsibility criteria. 4 C.F.R. § 21.3(f)(5).

While Bender does not contend that contracting officials can find EMI responsible only if they act in bad faith, the firm argues, by referring to the sections of the IFB setting forth the bonding requirements and by alleging that EMI cannot meet them, that the Navy has failed to apply definitive responsibility criteria set out in the IFB. We find no merit to Bender's position.

Definitive responsibility criteria are specific and objective standards, established by an agency for a particular procurement, for use in measuring a bidder's ability to perform the contract. These special standards limit the class of bidders to those meeting specified qualitative and quantitative qualifications necessary for adequate contract performance. Vulcan Engineering Co., B-214595, Oct. 12, 1984, 84-2 C.P.D. ¶ 403. An example of a definitive criterion would be a requirement that a bidder have installed, on at least two prior projects, elevators comparable to those being bought and which have worked satisfactorily for at least 1 year. See George Hyman Construction Co. of Georgia; Westinghouse Elevator Co., B-186279, Nov. 11, 1976, 76-2 C.P.D. ¶ 401.

Clearly, Bender's argument as to EMI's alleged difficulty in obtaining bonds does not convert the invitation's bonding requirement into anything other than it is: a means to assure fulfillment of the contractor's obligations to the government. See FAR, 48 C.F.R. § 28.001. EMI submitted a proper bid bond with its bid, and the government thus is protected from any possibility that the firm will not furnish performance and payment bonds, or other contract documents. See FAR, 48 C.F.R. § 28.101-2. Any problems with meeting those post-award bonding requirements are matters within the Navy's purview in connection with its administration of the contract. Singleton Contracting Corp., B-212594, Jan. 23, 1984, 84-1 C.P.D. ¶ 96. The bonding requirements of the IFB simply do not constitute specific and objective standards for measuring performance capability, and thus are not definitive responsibility criterion.

Bender also complains that, in any case, the only way the Navy really can find EMI financially responsible is to base its decision on the combined finances of EMI and its subcontractor. Bender argues that since the subcontract thus

is critical to EMI's responsibility (and in view of the subcontractor's assistance to EMI in securing bonds), EMI and its subcontractor must be viewed as comprising a de facto joint venture. Bender argues that since the subcontractor is a large business, EMI thus should be found ineligible for award under this small business set-aside.

Initially, we point out that there is nothing improper in an agency's considering the impact of a subcontractor's responsibility in judging the responsibility of the prime; indeed, the procurement regulations expressly contemplate such consideration. FAR, 48 C.F.R. § 9.104-4.

As to EMI's eligibility for award, while a small business firm may subcontract with a large business a portion of a contract that was set aside for small business without endangering its eligibility, a small business cannot transfer or impute its small business status to an established joint venture composed of itself and a large business for purposes of competing for small business set-asides. Loyola College and NonPublic Educational Services, Inc., a Joint Venture; Johnson & Wales College, B-205994.2, et al., May 16, 1983, 83-1 C.P.D. ¶ 507. Unlike the situation in the cited case, however, here no joint venture has been expressly created. Rather, the express intention of the parties is a contractor/subcontractor arrangement. In such case, a protest allegation that the awardee's subcontract will result in a joint venture is, in effect, a challenge to the size status of the successful small business bidder. Mantech International Corp., B-216505, Feb. 11, 1985, 85-1 C.P.D. ¶ 176. Our Office does not consider protests involving small business size status, 4 C.F.R. § 21.3(f)(2), since under 15 U.S.C. § 637(b)(6) (1982), the Small Business Administration (SBA) has conclusive authority to determine this matter. See Ralph Construction, Inc., B-217264.2, Feb. 5, 1985, 85-1 C.P.D. ¶ 142. In this respect, the record shows that Bender currently has a size determination appeal pending with the SBA regarding EMI's alleged de facto joint venture affiliation between it and its large business subcontractor.

In view of the foregoing, the protest is without merit, and otherwise raises matters that we do not consider under our bid protest function.

Harry R. Van Cleve
General Counsel