Timmerman

The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Bryant Organization, Inc.

File: B-228204.2

Date: January 7, 1988

DIGEST

1. Federal procurement statutes and regulations do not apply, per se, to cost reimbursement, no fee, prime contractor, rather, under such a contract the prime contractor must conduct procurements according to the terms of its contract with the agency and its own agency-approved procedures. General Accounting Office review is to determine whether the procurement conforms to the federal norm, i.e., the policy objectives in the federal statutes and regulations.

2. Where bidder does not take exception to the solicitation's Buy American Act requirement that it use only domestic construction material, it is obligated to do so upon acceptance of its bid, and whether the firm in fact meets its obligation is a matter of contract administration which the General Accounting Office does not review.

3. Whether a bidder has the ability to supply domestic construction materials in compliance with the solicitation's Buy American Act requirement is a matter of responsibility. The General Accounting Office does not review an agency's affirmative determination of responsibility absent a showing of possible agency fraud or bad faith or that definitive responsibility criteria were not applied.

DECISION

Bryant Organization, Inc., protests the award of a subcontract to Southern California Roofing Company by General Dynamics Corp. under solicitation No. 6E-1511-B-05/12 for the replacement of building roofs at the Naval Industrial Reserve Ordnance Plant, Pomona, California. General Dynamics is the prime contractor under Navy contract No. N00024-85-E-5426 for facilities maintenance.

We deny the protest.

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The prime contract held by General Dynamics is a cost, no-fee, reimbursement contract for production/support modernization of buildings at the Naval Industrial Ordnance Plant. Generally, our Office does not review subcontract awards by government prime contractors, except where the award of the subcontract is by or for the government. Bid Protest Regulations, 4 C.F.R. § 21.3(f)(10) (1987). Here, the contractor is managing on a cost reimbursement basis the renovation of a government-owned facility and is thus acting "for" the government. See University of Michigan et al., B-225756 et al., June 30, 1987, 66 Comp. Gen. ___, 87-1 CPD ¶ 643. We therefore will review the procurement to determine whether it was consistent with and achieved the policy objectives of the "federal norm," the fundamental principles of federal procurement law as set forth in the statutes and regulations that apply to direct federal procurements. Id.

The solicitation specified that generic hypalon must be used for the covering membrane on the new roofs. Paragraph 1.24 of the solicitation required bidders to submit, as part of their bids, a letter from Factory Mutual Engineering to the bidder's hypalon supplier indicating that Factory Mutual had reviewed and accepted the "complete roof assembly" on which the firms had based their bids "including any and all potential component suppliers and materials." Additionally, that paragraph provided "only those component suppliers in acceptable combination with each other will be allowed. There will be no deviation allowed after submission of bid." The solicitation documents also contained a Buy American Act clause in essence requiring the subcontractor to use only domestic construction material in performance of the subcontract. The Factory Mutual letter that Southern California submitted with its bid indicated that Factory Mutual had tested and approved hypalon manufactured by Dunlop Construction Products.

Bryant argues that Southern California's bid should be rejected as nonresponsive because Dunlop is a Canadian manufacturer of hypalon and Southern California will therefore be using foreign construction materials in violation of the solicitation's Buy American Act requirement or will substitute materials in violation of paragraph 1.24. According to Bryant, it is well known in the roofing industry that Dunlop is a Canadian supplier and in fact the contracting officer knew this prior to award.

The General Dynamic's contracting officer states that at the opening on May 19, 1987, he realized that Southern California's bid specifying Dunlop hypalon presented a "responsiveness problem." Counsel for General Dynamics then reviewed the matter and indicated in a letter to the Navy that they believed Southern California's bid was

nonresponsive due to the Canadian material specified and that General Dynamics would award to Bryant, the second-low bidder, unless the Navy directed otherwise. Subsequently, Southern California confirmed to General Dynamics by letter of August 25, that Dunlop would supply Southern California with Dunlop hypalon manufactured in the United States using domestic materials. The Navy responded that General Dynamics should make award to Southern California because its bid did not take exception to the Buy American Act requirement. The Navy noted, however, that if Southern California attempted to use foreign materials, those materials should be rejected. General Dynamics awarded the contract to Southern California on October 15.

In a direct federal procurement, the test applied in determining responsiveness is whether the bid as submitted is an offer to perform without exception the exact thing called for in the solicitation and upon acceptance will bind the contractor to perform in accordance with all of the material terms and conditions of the solicitation. Contract Services Co., Inc., B-226780.3, Sept. 17, 1987, 87-2 CPD ¶ 263. There is nothing in Southern California's bid that takes specific exception to any of the requirements of the solicitation. Southern California did not take exception to the clause in the solicitation by which the contractor agreed that only domestic construction material would be used in the project nor did it indicate that its hypalon was excluded from the requirement. Thus, acceptance of its bid obligated the awardee to use only domestic construction material. See Summit Construction Co., B-227491.2, Sept. 14, 1987, 87-2 CPD ¶ 244.

Nevertheless, we have held that an agency should not automatically rely on a bidder's offer of compliance with the Buy American Act when as here it has reason to question whether domestic material will be furnished. See Yale Materials Handling Corp.--Reconsideration, B-226985.2, June 17, 1987, 87-1 CPD ¶ 607. Such questions which concern the firm's ability to meet the solicitation's requirements are a matter of responsibility not responsiveness. See Brussels Steel America, Inc., B-223974, Oct. 24, 1986, 86-2 CPD ¶ 453. An agency may permit a prospective awardee a reasonable period of time after bid opening to supply information related to responsibility since contract award, and not bid opening, is the critical time for determining the firm's ability to perform. Atlantic-Corey Crane Service, Inc., B-224253, Dec. 4, 1986, 86-2 CPD ¶ 644. In this case, prior to award, General Dynamics inquired and received additional assurance from Southern California that they would comply with the Buy American Act requirement and only use domestic construction material. In fact, Southern California submitted a letter from Dunlop stating that

California submitted a letter from Dunlop stating that Dunlop will supply Dunlop hypalon manufactured in the United States. Consequently, we have no basis upon which to object to the conclusion of the Navy and General Dynamics that Southern California does indeed have the capability of supplying the required domestic product.1/

Further, we do not agree with Bryant that the solicitation requires that the hypalon sample submitted (which apparently was manufactured in Canada) and approved by Factory Mutual must itself have been made in the United States. The solicitation only required that materials actually used in the construction be domestic. Nor do we agree with the protester that the awardee was prevented by the solicitation from submitting domestic materials because the sample had been made in Canada. Paragraph 1.24 of the solicitation which prohibits substitution of material suppliers or materials after bid opening does not prohibit that supplier from changing its manufacturing location of the materials.

In any event, our Office does not review an affirmative responsibility determination absent a showing of possible fraud or bad faith or that definitive responsibility criteria were not applied. 4 C.F.R. § 21.3(f)(5) (1987). To make this showing, the protester has a heavy burden of proof; it must demonstrate by virtually irrefutable proof that the procuring officials had a specific and malicious intent to injure the protester. Seaward International, Inc., B-224497, Oct. 31, 1986, 86-2 CPD ¶ 507. No such showing has been made here. Finally, whether Southern California actually complies with its obligation to supply domestic materials is a matter of contract administration which our Office does not review. 4 C.F.R. § 21.3(f)(1); Dura Electric Flourescent Starter Division, B-225323, Mar. 2, 1987, 87-1 CPD ¶ 234.

We deny the protest.

James F. Hinchman
General Counsel

1/ Before the contracting officer can make award, he must make an affirmative determination of responsibility. See Federal Acquisition Regulation (FAR), 48 C.F.R. § 9.105-2(a)(1) (1986). The award of a contract constitutes such a determination. The ARO Corp., B-222486, June 25, 1986, 86-2 CPD ¶ 6.