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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Tennier Industries, Inc.

File: B-239025

Date: July 11, 1990

Ruth E. Ganister, Esq., Rosenthal and Ganister, for the protester.
Michael Trovarelli, Esq., Defense Logistics Agency, for the agency.
Catherine M. Evans, and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that low and second-low bids are nonresponsive for bidders' failure to complete certification regarding statutory limitation on use of appropriated funds for lobbying activities is denied where certification imposed no additional material obligation upon bidders beyond those imposed by the statute itself.

DECISION

Tennier Industries, Inc. protests the award of a contract to any other offeror under invitation for bids (IFB) No. DLA100-90-B-0121, issued by the Defense Personnel Support Center (DPSC) for 10,875 coat liners. Tennier, the third low bidder, principally contends that the two low bids are nonresponsive for failure to certify compliance with new statutory restrictions on lobbying.

We deny the protest in part and dismiss it in part.

The solicitation, issued on February 14, 1990, included a new clause entitled "Certification for Contracts, Grants,

Loans, and Cooperative Agreements," developed by DPSC to implement the lobbying restrictions of Public Law No. 101-121, 31 U.S.C. § 1352 (the Act).1/ The Act, also known as the Byrd Amendment, generally prohibits recipients of federal contracts and subcontracts from using appropriated funds for lobbying the government in connection with a specific contract, and requires anyone requesting or receiving a federal contract for more than $100,000 to disclose any lobbying conducted with other than appropriated funds. The IFB clause essentially reiterates the provisions of the statute. The clause is followed by a certification, to be signed by the bidder, stating that the bidder has not and will not use federal appropriated funds for lobbying purposes, and will disclose to the agency any lobbying that it conducts with other than federal funds. The certification also requires that the bidder include the certification in all subcontract award documents. It provides that submission of the certification is a prerequisite to award of the contract, and prescribes a range of monetary civil penalties for failure to do so.

Both the low bidder, Hope Manufacturing, Inc., and the second low bidder, Universal Unlimited, Inc., failed to sign the certification before submitting their bids. After bid opening on March 16, Tennier filed this protest on March 22 alleging, among other things, that the two low bids must be rejected as nonresponsive because they do not contain signed lobbying certifications.

In general, to be responsive, a bid must be an unequivocal offer to perform without exception the exact thing called for in the solicitation so that upon acceptance the contractor will be bound to perform in accordance with all of the IFB's material terms and conditions; a bid that is not such an unequivocal offer at bid opening must be rejected. See Van Ben Indus., Inc., B-234875, July 17, 1989, 89-2 CPD ¶ 52. Our consideration of whether a solicitation certification is a matter of responsiveness thus has focused principally on the effect the certification would have on the obligation of the bidder if it received the award. The certification is necessary for a bid to be

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1/ Section 319 of Pub. L. No. 101-121, the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1990, amended title 31 of the United States Code by adding section 1352, entitled "Limitation on use of appropriated funds to influence certain Federal contracting and financial transactions." The section took effect with respect to any contracts entered into after December 23, 1989.

responsive only if the certification provision imposes requirements materially different from those to which the contractor is otherwise bound, either by its offer or by law. See Woodington Corp., B-235957, Oct. 11, 1989, 89-2 CPD 339; Mak's Cuisine, B-227017, June 11, 1987, 87-1 CPD ¶ 586.

The lobbying certification here does not impose any new obligations on the contractor; it essentially states only that the bidder agrees to comply with the terms of the Act. In other words, whether or not a bidder signs the certification, it is bound by law to perform in accordance with the terms of the certification and is subject to the stated penalties for failing to do so. The certification does impose one additional obligation on the contractor--to include the certification in all subcontracts. However, we think this additional requirement alone does not materially affect a bidder's agreement since, again, the certification otherwise merely restates the Act, and subcontractors are subject to the Act whether or not the certification appears in the subcontract.2/

Tennier argues that our Mak's and Woodington decisions support its position that the lobbying certification is a matter of responsiveness rather than responsibility. We held in those cases that bids were nonresponsive for failure to include signed certifications of compliance with the Anti-Kickback Act of 1986, 41 U.S.C. §§ 51-58 (1988), and the procurement integrity provisions of the Office of Federal Procurement Policy Act, 41 U.S.C.A. § 423(d) (West Supp. 1989). Both decisions, however, turned on our findings that the certifications imposed obligations on the contractor that the statutes did not (implementation of system for seeking out and reporting violations of statute), and provided for contractual penalties for violation of the provisions (monies owed to contractor offset by amount of kickback; denial of payment of profit component). Bidders thus were required to certify compliance with the provisions in order to evidence agreement to be bound by them. Again, the lobbying certification is different; since the Act and certification impose the same material obligations, the certification provisions are applicable to contractors and subcontractors with or without a bidder's certification in its offer.

2/ We note that this issue will not arise where the Federal Acquisition Regulation (FAR) version of the certification is used, as the FAR certification provides that the offeror, by signing its offer, certifies compliance with all provisions. FAR § 52.203-11 (FAC 84-55, Jan. 30, 1990).

Tennier also argues that because the Act requires submission of the certification "with each submission" by a bidder, it implicitly requires rejection of bids that are submitted without a completed certification, and is therefore a matter of responsiveness. We disagree. While the Act does contain this requirement, it also provides for submission of the certification upon award if it was not submitted with the bid, indicating that submission of a completed certification was not intended as a prerequisite to consideration of a bid. Pub. L. No. 101-121, § 319(b)(4). In this same vein, the certification itself provides that it is a prerequisite to award of a contract, suggesting, again, that the relevant point in time for purposes of the certification is the time of award, not bid opening.

We conclude that because the certification does not materially affect the bidder's ability to be bound to perform the contract as required, and because the Act does not require rejection of bids that do not contain completed certifications, the two low bidders' failure to submit signed certifications with their bids did not render the bids nonresponsive.

Tennier also alleges that Universal failed properly to complete a clause regarding disclosure of textile suppliers. However, the agency informs us that Universal in fact properly completed this clause. Tennier did not pursue the matter in its comments, and we therefore will not consider it further. See Universal Hydraulics, Inc., B-235006, June 21, 1989, 89-1 CPD ¶ 585.

Because we find Universal's bid responsive, Universal and not Tennier would be in line for award if for some reason Hope were not awarded the contract. Therefore, Tennier is not an interested party for the purpose of protesting award to Hope and we need not consider that aspect of the protest. See James McGraw, Inc., B-236974.2, Jan. 24, 1990, 90-1 CPD ¶ 99.

The protest is denied in part and dismissed in part.

James F. Hinchman
for General Counsel