

L. Lebowitz



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Atlantic Company of America, Inc.

File: B-241697

Date: January 16, 1991

Andrew L. Ehrlich, Esq., Stovall & Spradlin, for the protester.
Daniel J. Katz, Esq., for Ronald Hsu Construction Co., Inc., an interested party.
Gary F. Davis, Esq., and Kathleen McCartney, Esq., General Services Administration, for the agency.
Linda S. Lebowitz, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

A proposed awardee's failure to include required information with its bid concerning its competency to perform the contract involves the issue of the awardee's responsibility. An affirmative determination of responsibility is a prerequisite to any award and the General Accounting Office will not review such a determination absent a showing of possible fraud or bad faith on the part of procurement officials, or that definitive responsibility criteria in the solicitation were misapplied.

DECISION

Atlantic Company of America, Inc. protests the proposed award of a contract to Ronald Hsu Construction Co., Inc. under invitation for bids (IFB) No. GS-11P87MKC0217, issued by the General Services Administration for repair and restoration of the Lafayette Building, Washington, D.C. Atlantic essentially challenges the acceptability of Hsu's bid.

We dismiss the protest.

The solicitation was issued on June 19, 1990. Section 00900, captioned "Competency of Bidder," listed exterior masonry repair and restoration, exterior masonry chemical cleaning, interior masonry repair and restoration, and bronzework cleaning as four categories of specialty work for which the agency would make a competency determination of the low priced bidder. For each specialty category of work, a bidder, as the general contractor, and its respective subcontractors, were each required to complete qualification data forms concerning the firm's background, three examples of projects completed by

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the firm on properties listed in the National Register of Historic Places, a list of specialist technicians who may perform the work, and a qualifications certification. The solicitation advised that failure of the bidder to submit these forms with the bid would result in the bidder being found nonresponsible. Section 00800 also required the bidder, as the general contractor, to perform 55 percent of the total amount of work under the contract. The award of the contract would be made to the low priced, responsive, responsible bidder.

Nine bids were received at the time of bid opening on July 19. Hsu was the apparent low bidder, and Atlantic was the second low bidder. In its bid, Hsu indicated, as the general contractor, that it intended to subcontract exterior masonry cleaning to Mr. Powerwash and both exterior and interior masonry repair and restoration to Universal Waterproofing Service, Inc. On July 24, Atlantic filed an agency-level protest challenging the acceptability of Hsu's bid, alleging that Hsu's proposed subcontractors did not properly complete the qualification data forms and that Hsu, as the general contractor, did not establish that it would perform 55 percent of the total amount of work under the contract as required by the solicitation.

Pursuant to the agency's request on August 9, Hsu and its subcontractors submitted supplemental qualification data. Hsu replaced Mr. Powerwash with Universal for exterior masonry cleaning. The agency concluded that Universal was a competent and acceptable subcontractor for exterior masonry cleaning and for exterior and interior masonry repair and restoration based on its past successful completion of five historical preservation projects.^{1/} Hsu listed project management and supervision, regrouting of interior marble joints, and other repair and restoration work as satisfying the requirement that it perform 55 percent of the total amount of work as the general contractor for the project. On September 21, the agency determined that Hsu fulfilled the competency requirements of the solicitation. Upon Atlantic's filing of this protest with our Office on October 16 challenging the acceptability of Hsu's bid, the agency realized that Hsu now intended to perform some of the interior masonry work. The agency requested further supplemental qualification data from Hsu concerning examples of past completed projects and Hsu's specialist technicians in order for the agency to affirm its

^{1/} Although these projects involved exterior masonry repairs, the agency determined that there was really no difference between exterior and interior masonry repairs, and Universal's experience in performing exterior masonry repairs was relevant to its ability to perform interior masonry repairs.

previous determination that Hsu was competent to perform. A final determination regarding Hsu's competency is pending.

Atlantic argues that the agency should reject Hsu's bid because Hsu did not submit with its bid at the time of bid opening all of the qualification data for itself and its subcontractors as required by the solicitation in order for the agency to make a competency determination. Atlantic alleges that the agency improperly allowed Hsu to submit supplemental qualification data after bid opening. Atlantic also argues that the agency should reject Hsu's bid because after bid opening, Hsu substituted one subcontractor for another for exterior masonry cleaning and Hsu indicated it would perform some of the interior masonry work as one aspect of its performance as the general contractor of 55 percent of the total amount of work for the project.

Generally, a bid with a material omission cannot be corrected after bid opening; such a bid is regarded as nonresponsive and must be rejected. Responsiveness concerns whether a bidder has unequivocally offered to provide or perform services in accordance with the solicitation. D.M. Wilson Lumber, Inc., B-239136, Apr. 12, 1990, 90-1 CPD ¶ 386.2/ Not all information requested with a bid involves responsiveness. Instead, the information may relate to bidder responsibility, that is, the bidder's ability to perform. Id. This type of information may be furnished up to the time of award. Id.; Southern Ambulance Builders, Inc., B-236615, Oct. 26, 1989, 89-2 CPD ¶ 385.

Here, the submission of qualification data to determine the bidder's competency clearly is not related to a bidder's performance obligation under the contract, but is a matter of a bidder's responsibility, that is, its ability to perform the work. Although the solicitation stated the qualification data was to be submitted with the bid, because this information did not involve a bidder's obligation to perform, Hsu's failure to furnish this information with its bid by bid opening did not render its bid nonresponsive and its furnishing of the supplemental information after bid opening in order for the agency to determine that Hsu is competent to perform is not precluded.

Further, a solicitation provision which requires a contractor to perform a certain percentage of the work with its own forces is a contract performance requirement which states how

2/ Hsu did not take any exception to the specifications in its bid. Therefore, as Hsu has obligated itself to perform in accordance with the terms of the solicitation, its bid is responsive.

the work is to be accomplished. Therefore, compliance with such a provision relates to bidder responsibility, not responsiveness. Norfolk Dredging Co., B-229572.2, Jan. 22, 1988, 88-1 CPD ¶ 62.

Because a determination that a bidder is competent and capable of performing a contract is based in large measure on subjective judgments, an agency's affirmative determination of responsibility, which is a prerequisite to award, will not be reviewed by our Office absent a showing of possible fraud or bad faith on the part of procurement officials, or that definitive responsibility criteria in the solicitation were misapplied. Bid Protest Regulations, 4 C.F.R. § 21.3(m) (5) (1990); King-Fisher Co., B-236687.2, Feb. 12, 1990, 90-1 CPD ¶ 177. Atlantic does not allege, and there is no evidence in the record to indicate, fraud or bad faith on the part of the procurement officials in determining that Hsu is a competent and responsible bidder which can perform in accordance with the terms of the solicitation.

Also, since the IFB did not prohibit substitution of subcontractors after bid opening, there was nothing improper in HSU's subsequent substitution of subcontractors.

Accordingly, the protest is dismissed.



Michael R. Golden
Assistant General Counsel