

145 70-1



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Mitchell Construction Co., Inc.

File: B-245884; B-245884.2

Date: January 17, 1992

Robert O. Fleming, Esq., Smith & Fleming, for the protester.
Michael J. Adams, Esq., Department of the Army, for the agency.

Henry J. Gorczycki, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protester has abandoned protest that low bidder should not be permitted to correct its bid based upon a claimed mistake where the agency specifically addressed the issue in its report and the protester failed to rebut the agency's response in its comments.

2. Protester's assertion that the low bidder does not intend to comply with Federal Acquisition Regulation § 52.236-1 limitation on subcontracting concerns a matter of affirmative responsibility and contract administration not for consideration by our Office under the circumstances alleged.

DECISION

Mitchell Construction Co., Inc. protests the proposed award to Howard Management Group, Inc. of a contract issued under invitation for bids (IFB) No. DACA21-91-B-0118 by the United States Army Corps of Engineers, Savannah District, to upgrade bridges at Fort Stewart and Hunter Army Airfield, Georgia.

We dismiss the protests.

Bid opening was September 13, 1991. Howard submitted the low bid of \$3,097,310. Mitchell was the second low bidder at \$3,377,389. On September 20, Howard notified the Army that it made an error in its bid price and requested to correct its bid. Howard submitted its bid preparation worksheets to support its claim. On September 26, the Army determined that Howard's claimed error in computation was supported by Howard's worksheets and, pursuant to Federal

Acquisition Regulation (FAR) § 14.406-3, permitted Howard to increase its bid by \$61,900 to \$3,159,210.

On September 27, Mitchell protested to our Office that Howard's bid should be rejected because Howard could not prove its alleged mistake with clear and convincing evidence. The Army's report issued in response to the protest completely explained why the correction was appropriate and provided copies of the materials provided by Howard to support the request for error correction. Mitchell's comments to the report did not comment in any way on the Army's explanation as to why the correction of Howard's bid was appropriate. Instead, Mitchell raised a new protest issue that the material included with the Army's report to support Howard's mistake showed that Howard did not intend to comply with FAR § 52.236-1. The IFB incorporated FAR § 52.236-1, which requires the contractor to perform at least 20 percent of the contract through its own organization.

Where, as here, an agency specifically addresses an issue raised by a protester in its initial protest and the protester fails to rebut the agency's response, we consider the protester to have abandoned the issue. TM Sys., Inc., B-228220, Dec. 10, 1987, 87-2 CPD ¶ 573. Mitchell failed to rebut the Army's explanation of why the correction of Howard's claimed mistake was appropriate. Therefore, we dismiss this aspect of Howard's protest.

Mitchell's second protest is that Howard's documentation to support its mistake claim shows that it will not comply with the limitation on subcontracting contained in FAR § 52.236-1. Since there was nothing in Howard's bid that indicated that it did not intend to comply with this provision, Howard's bid was responsive¹ and Mitchell's protest as to whether Howard will comply with the subcontracting limitations concerns Howard's responsibility or is a matter of contract administration. Liberty Excavators, Inc., B-212520, Aug. 22, 1983, 83-2 CPD ¶ 224.

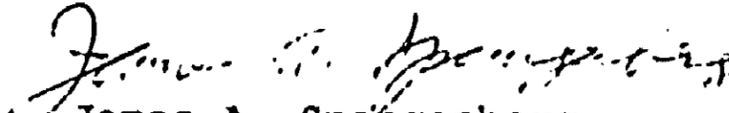
The agency responded to the protest by requesting Howard to confirm its intent regarding the subcontracting limitation. Howard stated that it did intend to comply with the subcontracting limitation contained in the contract. The agency has reviewed Howard's bid, references, and assurances, and determined that Howard is a responsible contractor.

¹Responsiveness concerns whether a bidder has unequivocally offered to provide or perform services in accordance with the solicitation. Atlantic Co. of Am., Inc., B-241697, Jan. 16, 1991, 91-1 CPD ¶ 49.

A determination that a bidder is capable of performing a contract is based, in large measure, on subjective judgments which generally are not susceptible to reasoned review. Thus, an agency's affirmative determination of a contractor's responsibility 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 may have been misapplied. 4 C.F.R. § 21.3(m)(5) (1991); King-Fisher Co., B-236687.2, Feb. 12, 1990, 90-1 CPD ¶ 177. Where, as here, there is no showing of possible fraud or bad faith, or that the definitive responsibility criteria have been misapplied, we have no basis to review the protest.

Moreover, whether a contractor acts in violation of the requirement limiting subcontracting is a matter of contract administration. Shelf Stable Foods Inc., B-222919, June 24, 1986, 86-1 CPD ¶ 586. We generally do not exercise jurisdiction to review matters of contract administration, which are within the discretion of the contracting agency and for review by a cognizant board of contract appeals or the United States Claims Court. See 4 C.F.R. § 21.3(m)(1), as amended by 56 Fed. Reg. 3759 (1991); Specialty Plastics Prods., Inc., B-237545, Feb. 26, 1990, 90-1 CPD ¶ 228.

The protests are dismissed.


James A. Spangenberg
Assistant General Counsel