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

B-157279

AUG 17 1965

Dear Mr. Knott:

This is in reply to a letter dated August 12, 1965, from your General Counsel, furnishing a report on the rejection of a bid submitted by John G. Apfel Construction Company on Project No. GS-05BC-4016A for construction of a United States Post Office and Federal Building in Marcellous, Michigan.

The project was originally advertised for bidding on August 14, 1964. Two bids were received in response thereto, one from John G. Apfel Construction Company in the amount of \$134,119 and the other from John T. Hains Construction Company in the amount of \$155,000. Since only \$94,100 had been appropriated for the project, award was not possible and the invitation was cancelled.

In the Second Supplemental Appropriation Act, 1965, approved April 30, 1965, Public Law 89-16, 79 Stat. 83, additional funds for the project were made available. The project was thereupon re-advertised on May 7, 1965, with the requirement that bidders list their proposed subcontractors pursuant to General Services Administration Procurement Regulation 5B-2.202-70 (41 CFR 5B-2.202-70).

Bids were opened as scheduled on June 8, 1965. Although Apfel Construction again submitted the lowest base bid, the contracting officer rejected the bid as nonresponsive for failure to list the proposed subcontractor for structural steel.

In its letter dated June 19, 1965, the protesting bidder states:

"It is our understanding that this sub-contractors list is generally only compulsive on projects of \$150,000.00 or more and that generally, specific sections of the specifications are included on this list that exceed 3% of the total bid.

- "1. According to the invitation for bids the estimated cost range was between \$115,000.00 and \$140,000.00 and our bid was \$138,548.00
- "2. Structural Steel, section 12, was far under the 3% amount, in fact less than 1% of the total amount of the bid."

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In support of the rejection your General Counsel's letter states:

" * * * under the rulings by the Comptroller General in 43 Comp. Gen. 206 and Decision No. B-156194 of March 4, 1965, an incomplete listing of subcontractors renders a bid non-responsive, and that such a defect can neither be waived nor cured after bid opening since it would permit bid shopping, the practice which the requirement for listing is intended to forestall. A similar letter was sent to John G. Apfel Construction Company on June 30, 1965, in response to the latter's protest lodged with our Regional Office in Chicago, Illinois.

"The Invitation contained the following provisions, with respect to the listing of subcontractors, in Sec. 2-10 of the Special Conditions as modified by Amendment No. 1:

'a. For each of the categories of work contained in the list included as part of the Bid Form, the bidder shall submit WITH HIS BID the name and address of the firm to whom he proposes to subcontract the work. Except as otherwise provided herein, the successful bidder agrees that he will not have any of the listed categories of work involved in the performance of this contract performed by any subcontractor other than the subcontractor named for the performance of such work.

'c. The bidder may list himself if it is his intention to perform one or more of the listed categories of work....

'i. In the event the bidder fails in connection with this bid (1) to identify the subcontractors as required by subparagraph a., or (2) to comply with subparagraph c. if the bidder himself intends to perform one or more listed

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categories of work, the bid will be rejected as non-responsive to the invitation.

"Since Apfel neither listed a proposed subcontractor nor its own name for the Structural Steel category, it seems clear that Apfel's bid was non-responsive under the terms of the Invitation and the above-cited Comptroller General decisions holding that the requirement imposes a material obligation affecting responsiveness of bids. In Decision No. B-156194 of March 4, 1965, involving an incomplete list of subcontractors, it was stated that 'we do not believe that a degree of responsiveness cures the overall non-responsiveness of the...bid.'

" * * * General Services Procurement Regulation 58-2.202-70(b) which was promulgated on November 4, 1964 (29 F.R. 15026-15027, November 6, 1964) reads as follows:

'Contracting officers shall determine the work categories for which subcontractors' names are to be submitted. Generally the listing of the categories of work would include plumbing, heating, airconditioning, electrical, elevators, and other general construction categories the value of which is estimated to be at least 3 1/2 percent of the estimated cost of the entire contract. The list of categories of work will be included as part of the Bid Form.' (Emphasis supplied.)

"As will be noted from the foregoing, the discretion of selecting categories for inclusion on the list is vested in the contracting officer and only a guide line for making the selection is indicated. The quoted wording does not make the 3 1/2 percent criteria either exclusive or all-inclusive.

"While it might be questionable whether it is necessary or useful in preventing possible bid shopping to include on the list a minor category, the value of which is less than 3 1/2 percent of the total estimated cost, we believe that once the selection has been made and the category has been included in an invitation which sets out requirements binding upon all bidders alike, it is mandatory that each bidder comply therewith, by the terms of the regulations, the Invitation, and the Comptroller General decisions cited. * * *"

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Personnel familiar with the protest also informally advise that while subcontractors' lists are required on projects estimated to cost in excess of \$150,000, there is nothing in the regulations which would preclude asking for a list of subcontractors where the estimated cost is less than \$150,000.

As a general rule we agree that failure to furnish the name of a proposed subcontractor, if required, renders an otherwise acceptable bid nonresponsive. 43 Comp. Gen. 206. We recognize that the regulation appears to give the contracting officer unlimited discretion in not only determining whether subcontractor listing will be required where the estimated cost of a project is less than \$150,000, but also which categories of work will be included in the subcontractor's list. However, we see no useful purpose in requiring the listing of every possible subcontractor nor do we believe that the regulations were ever intended to require subcontractor listing under the factual situation here presented. Since the facts show that Apfel was low on two advertisements for this project, that the proposed award is for an amount less than \$150,000, and that the structural steel subcontractor is going to furnish an item (including labor) the cost of which is estimated by the contractor to be less than one-half of one percent of the entire cost of the project, we do not believe that the best interests of the competitive bidding system require that the bid be rejected merely because of this minor deficiency. Consequently, it is our recommendation that award be made to Apfel Construction Company if their bid be otherwise acceptable.

In order to avoid similar problems, in the future, it is suggested that more explicit guide lines be established for aiding the contracting officer in making determinations in this area.

Your enclosures are returned as requested.

Sincerely yours,

FRANK H. WEITZEL

Acting Comptroller General
of the United States

Enclosures

The Honorable Lawson B. Knott, Jr.
Administrator, General Services Administration