01579

Robert Little
Proc. II

DECISION

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

FILE: B-187407 DATE: March 3, 1977

MATTER OF: Prince Construction Company, Inc.

DIGEST:

Although bidder did not list itself in its bid as a subcontractor for any portion of the contract work, agency's determination that bidder will perform with its own forces at least 12 percent of on-site contract work as required by clause in IFB is reasonable, since supervisory and coordinating on-site work may be performed by bidder in satisfaction of 12 percent requirement as well as minor categories of work which bidder was not required to list under subcontractor listing requirement. However, clarification of clause is recommended for future use.

Prince Construction Company, Inc. (Prince) has protested against award of a contract to Weiss Construction Company (Weiss) under General Services Administration invitation for bids (IFB) GS-00B-02815. Prince contends that Weiss' bid is nonresponsive in that it "failed to prove that it will perform the required twelve (12%) percent of the on-site work."

The IFB contains two clauses which affect the amount of work that contractors and subcontractors (if named) must perform. The "Performance of Work by Contractors" ("Performance") clause (Federal Procurement Regulations (FPR) § 1-18.104), when part of the awarded contract, requires the contractor to perform a percentage of work on the site with its own forces. The "Listing of Subcontractors" ("Listing") clause (41 CFR § 5B-2.202-70) requires bidders to name the organization or individual, including themselves, who will perform certain categories of work listed in the solicitation.

In this case, the performance clause provides as follows:

"The Contractor shall perform on the site, and with his own organization, work equivalent to at least twelve percent (12%) of the total amount of work to be performed under the contract * * *."

Prince contends that, although Weiss has agreed to perform 12 percent of the on-site work, it has, in effect, listed subcontractors who will perform more than 88 percent of the on-site work. Hence, argues Prince, the situation is analogous to the circumstances in 45 Comp. Gen. 177 (1965). In that case we held a bid to be nonresponsive to a "Performance" clause requiring 20 percent of the contract, because the bid also contained the bidder's representation that it would be subcontracting an estimated 90 percent of the contract work. For the following reasons, we believe that 45 Comp. Gen. 177, supra, is inapposite to the instant case.

In the prior case the insertion of the 90 percent figure cast doubt on the Government's right to have at least 20 percent of the work performed by the bidder's own forces. Here the record indicates that the bidder could comply with the 12 percent requirement if superintendence and coordination work were considered on site work for purposes of the Performance clause. In this regard, clause 11 of SF 23-A, which was included in the solicitation documents, states as follows:

> "The Contractor, at all times during performance and until the work is completed and accepted, shall give his personal superintendence to the work or have on the work a competent superintendent * * *."

Weiss has advised the contracting officer that it intends to perform 16.37 percent of the total work with its own forces (in terms of cost), and GSA assumes that Weiss has included supervisory and coordination costs in its estimate. In addition to supervision and coordination work, there are four categories of work required by the specification for which subcontractor listing is not required, and which Weiss states will be performed by its own forces (for example, demolition and temporary partitions). In this regard, GSA advises that the cost of the supervisory and coordination work "is one of the most important elements in making the calculations to determine compliance or noncompliance with the 12% [requirement]."

The protester contends that GSA's interpretation of the 12 percent performance requirement would defeat the purpose of that requirement as well as the subcontractor listing requirement. It points out that the intent of the 12 percent requirement is to insure that the bidder is not a mere "broker" who does not have the requisite expertise or intends to delegate supervision to subcontractors, and the intent of the subcontractor listing requirement is to prevent bid chopping. It argues that GSA's interpretation

would defeat the intent of these requirements by allowing insertion of a "fudge" factor after-the-fact. In the protester's view, the only interpretation which gives effect to both the wording and intent of these requirements is that supervision is not on-site work nor a category of work. In this manner, the protester argues the Government obtains a contractor "who has the requisite expertise and commitment to supervise the work because of its vested interest in the contract work on-site."

We agree with GSA's interpretation of the Performance clause. Nothing in that clause suggests that the on-site work which the contractor must perform with its own forces refers only to the categories of work which are included within the subcontractor listing requirement. As GSA states, categories of work which may be included in the subcontractor listing requirement are determined by the nature of the work. On the other hand, the work which a bidder may choose to perform with its own forces to meet the 12 percent requirement need not be a category of work within the meaning of the subcontractor listing requirement. Thus we think that a bidder can meet the 12 percent requirement by performing with its own forces a category of work which would be subject to the subcontractor listing requirement, a portion of a category of work which also would be subject to the subcontractor listing requirement, or categories or portions of categories not subject to the listing requirement. Therefore, we have no basis to conclude that Weiss is nonresponsive to the 12 percent on-site work requirement merely because it has listed subcontractors (other than itself) for all categories of work that were on the bid form or did not list itself as a subcontractor.

In this connection, we do not agree with the protester's argument that GSA's interpretation of the "Performance" clause allows the bidder "two bites of the apple". By agreeing to the clause the bidder has bound itself to perform the prescribed percentage of the contract work with its own forces. Accordingly, the protest is denied.

However, as GSA recognizes, the term "work" as used in the "Performance" clause could be interpreted in various ways. Therefore, we are recommending to GSA that the clause should be clarified for future use.

Acting Comptroller General
of the United States