DCCUMENT RESUME

02098 - [A1322274]

[Reconsideration of Decision Finding Contractor Responsive]. B-187407. May 4, 1977. 5 pp.

Decision re: Prince Construction Co., Inc.; by Paul G. Dembling (for Elmer B. Staats, Comptroller General).

Issue Area: Federal Procurement of Goods and Services (1900).
Contact: Office of the General Counsel: Procurement Law II.
Budget Function: General Government: Other General Government (806).
Organization Concerned: General Services Administration; Weiss Construction Co.
Authority: F.P.R. 1-18.104. 41 C.F.R. 5B-2.202-70. 53 Comp. Gen. 167. 53 Comp. Gen. 172. 49 Comp. Gen. 553. 49 Comp. Gen. 556. 50 Comp. Gen. 839. 50 Comp. Gen. 842. 51 Comp. Gen. 264. 53 Comp. Gen. 586. 53 Comp. Gen. 591. B-175172 (1972). B-187814 (1977).

Reconsideration was requested of a decision holding a contract awardee responsive in spite of failure to list itself as subcontractor. GAC affirmed its decision that the solicitation did not suggest that requirements for 12% of work to be performed on-site referred only to categories included in subcontractor listing. The solicitation, which excluded listings of certain categories of work, was not found defective. (RTW)

02098

DECISION

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

FILE: B-187407 DATE: May 4, 1977

MATTER OF: Prince Construction Company, Inc.
(Reconsideration)

DIGEST:

1. Contractor who named subcontractors rather than itself, for all categories of work for which listing was required by IFB, but who did not take exception to requirement that work equal to 12 percent of total work under contract be performed on site and with its own forces, is responsive. Nothing in solicitation suggested that 12 percent requirement referred only to categories of work included in subcontractor listing.

2. GSA regulations do not require subcontractor listing for categories of work comprising less than 3.5 percent of estimated cost of entire construction contract. IFB which excluded particular category of work from listing requirement, based on reasonable Government estimate made before IFB was issued, is not defective although revised estimate shows category exceeds 3.5 percent.

Prince Construction Company, Inc. (Prince) has requested reconsideration of our decision of March 3, 1977, Prince Construction Company, Inc., B-187407, 77-1 CPD ____.

In that decision, we held that although Weiss Construction Company (Weiss), the low bidder for installation of automatic sprinklers in two buildings of the Department of Health, Education and Welfare, Washington, D.C., had not listed itself as a subcontractor for any portion of the contract work, the contracting agency, the General Services Administration (GSA), could reasonably determine that Weiss intended to perform at least 12 percent of the work on site and with its own organization, as required by the invitation for bids (IFB). Supervision and coordination, we stated, could be combined with other categories

of work for which no subcontractor listing was required to meet the 12 percent requirement.

This 12 percent requirement was included in the IFB pursuant to Federal Procurement Regulations (FPR), § 1-18.104 (1964 ed.). The section states that in order to insure adequate supervision, when specialty work such as plumbing, heating, and electrical work is to be subcontracted, a construction contract may contain a clause requiring the prime contractor to perform work equivalent to a certain percentage of the total amount of work under the contract.

The IFB in question also included a clause requiring each bidder to name either its subcontractors or itself (or both) who will perform certain principal categories of work. GSA procurement regulations, published at 41 C.F.R. 5B-2.202-70 (1976 ed.), require listing for mechanical, electrical, elevator and/or escalator work, and for all other categories of work which the contracting officer determines will comprise at least 3.5 percent of the estimated cost of the entire contract.

In its bid, Weiss named subcontractors for all listed categories of work. Prince protested, arguing that by not listing itself for at least 12 percent of the work, Weiss was nonresponsive to that requirement of the solicitation.

GSA, in its reply, stated that Prince's protest was based on the premise that the categories of work for which subcontractor listing was required were equal to the total work required; GSA pointed out that there were four additional minor categories of work for which listing was not required. Moreover, GSA noted that contractors would incur costs complying with the Special Conditions section of the contract. The agency concluded that costs of supervision and coordination, major elements in determining whether the 12 percent requirement would be met, were included in Special Conditions. A GSA estimate, made after bid opening, calculated these combined costs as either 14 or 15 percent of the estimated cost of the entire contract, depending upon whether materials were included. On the basis of these estimates, GSA argued that Weiss could satisfy the 12 percent requirement, an interpretation we found reasonable.

Prince contends, as it did initially, that it is inconsistent to treat Special Conditions as a separate category of work for meeting the 12 percent requirement, but not as a separate category of work requiring subcontractor listing. Prince states that supervision and coordination are similar to overhead and profit in that they are distributed among all categories of work, and should not be treated separately. It argues, however, that if Special Conditions is to be treated as a separate category of work, it should be subject to the subcontractor listing requirement because it involves costs equal to more than 3.5 percent of the costs of the entire contract.

As stated in our prior decision, nothing in the solicitation 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. The IFB did not require bidders to describe the actual work which they proposed to perform themselves. Weiss' bid did not reduce, limit or modify its offer to perform at least 12 percent of the site work with its own organization. Therefore, the bid as submitted was responsive. See 53 Comp. Gen. 167, 172 (1973); 49 Comp. Gen. 553, 556 (1970).

In our decision of March 3, 1977, we recognized that the word "work" in the clause requiring the contractor to perform work equivalent to at least 12 percent of the work under the entire contract was subject to more than one interpretation, e.g., whether it included only on-site labor, or materials, supervision, and coordination as well. Our Office recommended that this be clarified, and the matter was referred to GSA's Committee on Federal Procurement Regulations on March 14, 1977.

Prince's argument that Special Conditions, if a separate category of work, should be subject to the subcontractor listing requirement is based on the Government's revised estimate, made after bid opening. It shows that Special Conditions, estimated at $35,000, comprised 8.38 percent, and that one other category, Disposition, Demolition, Protection, and Restoration, estimated at $21,182, comprised 5.07 percent of the estimated cost of the entire contract. Prince contends that Weiss was nonresponsive because it failed to list

itself as intending to perform these categories of work, or alternatively, that GSA ignored its own regulations requiring subcontractor listing for all categories of work comprising at least 3.5 percent of the total cost of the contract and issued a defective solicitation. Consequently, Prince concludes, GSA should cancel the award to Weiss (made March 31, 1977) and resolicit

We do not believe Weiss can be held nonresponsive for failing to list subcontractors or itself for categories of work where listing was not specifically required by the IFB. The purpose of subcontractor listing is to prevent post-award bid shopping; the contracting officer, not the bidder, must determine which categories are to be listed for this purpose. 50 Comp. Gen. 839, 842 (1971); B-175172, September 28, 1972.

The GSA's failure to require prospective contractors to list either subcontractors or themselves as intending to perform Special Conditions, as noted above, stems from the fact that this was not considered a separate category of work for subcontractor listing purposes. As for Disposition and Demolition, we note that the Government estimate made before the IFB was issued was $638,500. If the estimated cost for this particular category remained unchanged (the record does not show), it would have comprised only 3.17 percent of the original estimated total, and subcontractor listing would not have been required. Because bids ranged from $396,000 to $699,950, we are unable to conclude that the Government's original estimate was unreasonable or that failure to include Disposition and Demolition among the categories of work requiring subcontractor listing violated GSA regulations. Compare 51 Comp. Gen. 264 (1971), in which the Government's original estimate was held to be unreasonable for purposes of determining whether subcontractor listing was required.

Finally, neither Prince nor any other prospective contractor was prejudiced by GSA's failure to include these categories of work among those requiring subcontractor listing. In the absence of prejudice, cancellation

and resolicitation after award would not be justified. 53 Comp. Gen. 586, 591 (1974); Engineering Research Inc., B-187814, February 14, 1977, 77-1 CPD 106.

Accordingly, our prior decision is affirmed.

For the Comptroller General
of the United States