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DECISION

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

FILE: B-190540 DATE: February 15, 1978

MATTER OF: Dubicki & Clarke, Inc.

DIGEST:

1. Failure to complete Minority Business representation and Small Business representation in IFB is minor informality not rendering bid nonresponsive and bidder may be permitted to satisfy requirements prior to award.

2. Where clause requesting that bidders list subcontractors does not contain provisions showing intent to preclude use of subcontractors other than those listed and does not indicate that failure to provide information will render bid nonresponsive, information is to aid agency in determining bidder responsibility and may be provided any time before award.

Dubicki & Clarke, Inc. (DCI), has protested the proposed award of a contract for installation of an air-conditioning system to C. V. Carlson Co., Inc. (Carlson), under invitation for bids (IFB) No. 16177, issued by the Government Printing Office (GPO).

DCI contends that Carlson's bid was nonresponsive for failure to execute a written representation regarding minority business enterprise status, for failure to list organizations to be used on the project and for failure to indicate that "Johnson controls" would be provided, all of which were required by the IFB. Additionally, DCI contends that Carlson was permitted to modify its bid after opening by completing the listing requirement and that even as modified the bid was still nonresponsive for failure to indicate that Johnson controls would be provided. DCI also alleges that it was informed after bid opening that Johnson controls were not going to be

required for the project and that the matter of controls would be "negotiated" with Carlson. DCI, therefore, requests that Carlson's low bid be rejected as nonresponsive and that it be awarded the contract.

The contracting officer considered the omissions minor informalities and irregularities and permitted Carlson to cure the defects after bid opening pursuant to Federal Procurement Regulations (FPR) § 1-2.405 (1964 ed. circ. 1).

Minority Business Enterprise Representation

The IFB contained the Minority Business Enterprise representation clause required by, and set forth in, FPR § 1-1.1303 (1964 ed. amend. 148). The clause requires that the bidder check one of two boxes to indicate whether it is or is not a minority business enterprise. The FPR provision further states:

> "Failure to execute the representation will be deemed a minor informality and the bidder or offeror shall be permitted to satisfy the requirement prior to award (see § 1-2.405)"

FPR § 1-2.405 (1964 ed. circ. 1), in pertinent part, provides:

> "A minor informality or irregularity is one which is merely a matter of form and not of substance or pertains to some immaterial or inconsequential defect or variation of a bid from the exact requirement of the invitation for bids, the correction or waiver of which would not be prejudicial to other bidders. The defect or variation in the bid is immaterial and inconsequential when its significance as to price, quantity, quality, or delivery is trivial or negligible

> when contrasted with the total cost or scope of the supplies or services being procured. The contracting officer shall either give the bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or waive such deficiency, whichever is to the advantage of the Government."

Our Office has consistently held that completion of the Minority Business Enterprise representation and other similar representations and certifications is not required to determine whether a bid meets the requirements of the specifications or other solicitation provisions and, therefore, does not affect responsiveness of the bid, with the result that the failure to complete such items may be waived or cured after bid opening. City Ambulance of Alabama, Inc., B-187964, January 13, 1977, 77-1 CPD 29; Bryan L. & F.B. Standley, B-186573, July 20, 1976, 76-2 CPD 60. Therefore, post-opening completion of this representation is not legally objectionable.

Although the protester has not raised the issue, GPO, in its report on the protest, states that Carlson also failed to complete the Small Business representation. GPO states that this may be cured after bid opening since it is also a minor irregularity. We have held that failure to complete this representation may be cured after bid opening. Tennessee Valley Service, Inc., B-186380, June 25, 1976, 76-1 CPD 410. Therefore, GPO's statement is correct.

Listing of Organizations

The IFB contained the following clause to be read in conjunction with Standard Form 22 (Instructions to Bidders):

> "List of Individuals, Firms or Manufacturers
>
> "Please list below the names and business addresses of the organizations to be used on this project, including equipment manufacturers.
>
> Item (s) Name and Business Address"

Carlson's bid did not list any of the organizations that it planned to use. GPO has stated that the sole purpose of the clause is to gather information to aid in determining bidder responsibility. GPO contends that this clause is different from the General Services Administration (GSA) "subcontractor listing" clause, 41 C.F.R. § 5B-2.202-70 (1977), which we have generally held is a matter pertaining to bid responsiveness. See e.g., James and Stritzke Construction Company, 54 Comp. Gen. 159 (1974), 74-2 CPD 128. According to GPO, significant differences between the GSA clause and this clause are:

> "1. The dollar value - GSA Clause states that it is to be used only when the estimate is above $100,000. In our case, the original estimate was not expected to be anywhere near $100,000. Therefore, the GSA clause would not have been applicable.
>
> "2. Percentages of Work - GSA clause calls for percentages of work by all parties to include the prime contractor. All figures must add to 100%. GPO clause did not require this because our purpose was to gain information regarding responsibility.
>
> "3. Responsive v. Nonresponsive - GSA clause states that failure to provide list would render the bid nonresponsive. GPO clause in no way infers that this would be grounds for considering the bid nonresponsive."

GPO asserts that, since this clause is a matter of responsibility, the information requested by it may be provided any time before award.

DCI, however, argues that the clause here is the equivalent of the GSA subcontractor listing clause and that failure to complete the clause renders the

bid nonresponsive. DCI alleges that allowing Carlson to cure the omission after bid opening permits it to "bid shop" and is prejudicial to DCI and the other bidders who completed the clause and committed themselves to use the firms listed. DCI also alleges that the technical representative listed in the IFB was contacted concerning the listing requirement and told DCI that failure to complete the requirement would result in disqualification. DCI, while recognizing that such oral statements cannot be used to vary the written terms of the IFB, argues that this advice evidences GPO's intent to treat the listing requirement as a matter of responsiveness.

DCI contends that solicitations containing listing clauses fall into two categories: (1) those without supplementary provisions explaining that the requirement may be completed before award or that it relates to responsibility; and (2) those with such supplementary provisions. According to DCI, GAO has consistently interpreted the listing requirement in the first category to be a material requirement of a responsive bid, a defect which may not be cured after bid opening. DCI argues that the GPO clause falls into this category because there is no indication in the IFB that the clause is a matter of bidder responsibility and no indication that the information may be provided after bid opening.

DCI cites our decisions Coronis Construction Company, et al., B-186733, August 19, 1976, 76-2 CPD 177; Piland Construction Company, Inc., B-183077, April 25, 1975, 75-1 CPD 262; James and Stritzke Construction Company, supra; 50 Comp. Gen. 839 (1971); B-169974, August 27, 1969; B-166971, June 27, 1969; 47 Comp. Gen. 644 (1968); and 43 Comp. Gen. 206 (1963); as supporting the proposition that subcontractor listing clauses that do not contain specific provisions stating that they relate to responsibility or that completion after bid opening is acceptable are a material requirement of a responsive bid. While the clauses discussed in those decisions in fact do not contain provisions stating that they relate to responsibility, that is not the reason that we found them to go to the issue of responsiveness. In every one of the above-cited decisions, except one, the subcontractor

listing clause contained a specific provision stating that failure to properly complete the requirement would result in rejection of the bid as nonresponsive. In the one case that did not contain such a provision, Coronis Construction, supra, the structure of the listing clause itself and the wording of two amendments to the IFB made it clear that failure to comply with the listing requirement would render the bid nonresponsive.

DCI cited our decisions Titan Southern States Construction Corporation, B-189844, November 15, 1977, 77-2 CPD 371, and Air Products and Chemicals, Inc., B-186962, May 6, 1977, 77-1 CPD 315, as examples of the second category of subcontractor listing cases--those in which we found that the listing clause was a matter of responsibility because there was a supplementary provision explaining that the clause related to responsibility or that the information could be furnished up to award.

While the solicitation in Titan Southern States, supra, did specifically permit information to be provided after bid opening, the clauses in Air Products, supra, and 51 Comp. Gen. 329 (1971) did not.

DCI argues that the decision in Air Products, supra, turned on the inclusion in the IFB of the clause "* * * [n]o contract will be signed until the Engineer has accepted the manufacturers or suppliers of all major equipment items offered by the Bidder." While this was one factor in our finding that the clause was a matter of responsibility, we also stated:

> "[T]he solicitation does not contain clauses analogous to the federal clauses which require subcontractor listing in order to preclude the practice of bid shopping."

We then quoted, as an example of such a clause, the following portion of the standard GSA subcontractor listing clause:

> "(e) Except as otherwise provided herein, the successful bidder shall not have any of the listed categories involved in the performance of this contract performed by any individual or firm other than those named for the performance of such categories.
>
> * * * * *
>
> "(j) No substitutions for the individuals or firms named will be permitted except in unusual situations and then only upon the submission in writing to the contracting officer of a complete justification therefor and receipt of the contracting officer's written approval. * * * In the event the contracting officer finds that substitution is not justified, the contractor's failure or refusal to proceed with the work by or through the named subcontractor shall be grounds for termination of the contract * * *." General Services Procurement Regulation § 5B-2.202-70(f).

We went on to summarize, stating that, unlike the quoted GSA clause, the clause in the case "* * * does not evidence a concern that the particular firm listed actually perform the work." Thus, the decision was based more on the absence of the kinds of specific requirements contained in the GSA clause than on the presence of the statement quoted by DCI.

In 51 Comp. Gen., supra, the solicitation required that bidders submit a plan or schedule for accomplishing the work, including "* * * [a] list of lower tier subcontractors." In deciding that this requirement was a matter of responsibility, we stated:

> "* * * While we have upheld the rejection of bids founded upon the failure of bidders to supply listings of lower tier subcontractors, in such cases the listings were required to prevent "bid shopping" and the use of subcontractors other than those listed in the bid was specifically precluded. See,

> for example, 43 Comp. Gen. 206 (1963) and the standard clause in 41 CFR 5B-2.202-70 [the GSA clause]. However, no such intention is evident from the clause used in the present case.* * **
> (Emphasis supplied.)

It is our opinion that our decisions concerning subcontractor listing clauses do not support the general rule posited by DCI. Rather, our decisions have generally held that the GSA clause and clauses like it which contain provisions specifically precluding the use of subcontractors other than those listed or which specifically state that failure to comply with the provision will result in rejection of the bid as nonresponsive are material requirements of a responsive bid. On the other hand, if the listing clause merely requests that subcontractors be listed and evidences no further intent that the subcontractors must be used, we have found them to be related to the question of bidder responsibility and have permitted the information to be provided up to the time of award.

The listing clause in this case merely requests with precatory language ("please list") that the bidder list the organizations to be used in the project. There is nothing analogous to the provisions in the GSA clause specifically precluding the use of any subcontractors other than those listed for the project or indicating that failure to complete the clause will result in rejection of the bid as nonresponsive. In short, this clause is nothing like the GSA listing clause, but rather is similar to clauses that we have found to pertain to bidder responsibility. Therefore, it is our opinion that the clause in this case is intended to gather information to aid GPO in determining bidder responsibility and that Carlson's failure to complete the list may be cured any time before award.

Regarding DCI's argument that the GPO technical representative's oral representation to DCI that failure to complete the clause would result in disqualification is indicative of GPO's intent concerning the clause, we note that clause 1 of Standard Form 22, Instructions to Bidders, provides that questions concerning the solicitation must be in writing and interpretation of the IFB will be in

the form of amendments. The clause further provides that oral explanations prior to award will not be binding. We do not think that such an unauthorized, nonbinding, oral statement in these circumstances can be characterized as indicative of GPO's intent regarding the purpose of the listing clause.

Failure to Indicate Johnson Controls

Section B, clause 1.3, of the IFB states that "[a]ll controls shall be Johnson Controls * * *." DCI has argued that since Carlson did not list the Johnson Controls Corporation in the subcontractor listing clause, it does not intend to provide the controls. DCI has also alleged that it learned after bid opening that Johnson controls were not required and the matter of controls would be "negotiated" with Carlson.

GPO has stated that Johnson Controls are required and that Carlson must provide them. GPO also denies that it indicated to anyone that the matter of controls would be "negotiated" after bid opening.

Since we have decided that the subcontractor information may be provided any time up to award, the failure of Carlson to list Johnson controls on its bid or modified bid does not render Carlson's bid nonresponsive. Moreover, even though it does not specify that it will furnish Johnson controls, it has stated no exception in the bid to the specifications and it is bound to furnish them under the terms of the specifications. Overseeing the actual installation of the required controls is a matter of contract administration not for consideration by our Office. Crowe Rope Company, B-187092, August 18, 1976, 76-2 CPD 174.

Accordingly, the protest is denied.

R.F.Keller

Deputy Comptroller General
of the United States