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DECISION

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

FILE: B-190614 DATE: May 10, 1978

MATTER OF: John W. Cowper Company

DIGEST:

Contrary to position of complainant, solicitation clause which requires listing of major equipment suppliers of system and does not contain provisions showing intent to preclude use of subcontractor or suppliers other than those listed and does not indicate that failure to provide information will render bid nonresponsive relates to responsibility.

John W. Cowper Company (Cowper) has requested our Office to review the award of a contract to Grumman Ecosystems Corporation (Grumman) by Fairfax County, Virginia, pursuant to a grant by the Environmental Protection Agency (EPA) under title II of the Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C. § 1251, et seq. (1970)).

The contract is for the construction of the final advanced wastewater treatment plant at the Lower Potomac Pollution Control Plant in Fairfax County, Virginia. Bids were opened on October 13, 1977. The low bid was submitted by Grumman in the amount of $24,786,000. Cowper was the second low bidder at $25,474,000.

On October 14, 1977, Cowper filed a protest with the grantee contending that the bid of Grumman was nonresponsive and should not be considered for award.

The solicitation contained the following clause:

"The foregoing bid prices are based on the equipment and materials as required by the Contract Documents, including the following items. The Construction Contractor shall list below the manufacturers of the equipment items that he proposes to furnish and install under this contract.

Item	Manufacturer's Name
Carbon Regeneration Equipment (Sec. 15I)	_____
Granular Activated Carbon (Sec. 15T)	_____
Data Logging and Process Monitoring System (Sec. 15R)	_____"

With regard to the Data Logging and Process Monitoring System, section 15R of the specifications stated:

> "1.2.7 Equipment and services to be provided hereunder shall be as available from BIF-Fisher Controls Co.; Fisher Porter Co.; Honeywell; Leeds and Northrop; Taylor Instrument Division, Sybron Corp.; or approved equal, and provided all of the technical and performance requirements of these specifications are fully met."

Cowper contended that the listing in Grumman's bid of Robertshaw Controls Company (Robertshaw), a firm not listed in the above clause, as supplier for the system, rendered Grumman's bid nonresponsive.

On October 28, 1977, the grantee issued its decision on the protest in which it found that:

> "* * * the naming of Robertshaw Controls Company as a proposed supplier is in accordance with the Contract Documents.
>
> "The Contract Documents for the subject project are silent on the prequalification of bidder and/or equipment supplier nor do the contract documents provide a means for an unnamed supplier to be approved as 'an equal' prior to receipt of bids. Thus, the approval procedures for an unnamed supplier described in Section C, Item 32 of the Contract Specifications are applicable only after the award of a construction contract."

On November 4, 1977, Cowper appealed the grantee's determination to the EPA Regional Administrator pursuant to 40 C.F.R. § 35.939(e) (1977). On December 30, 1977, the Regional Administrator affirmed the grantee's determination that Grumman's bid was responsive in a summary decision and on the same day award was made to Grumman. On January 4, 1978, Cowper requested our Office to review these actions. On March 17, 1978, the Regional Administrator issued a full opinion in the matter.

As noted above, Cowper argues that the listing requirement was a matter of bid responsiveness and, therefore, Robertshaw had to be approved as a supplier prior to bid opening. Cowper further states that, even if this requirement was one of bidder responsibility, Robertshaw would have to have been approved as "an equal" prior to the award to Grumman, which the grantee did not do.

Section C32 of the solicitation contained the following "Or Equal" clause:

> "Whenever in these Contract Documents a particular brand, make of material, device or equipment is shown or specified, such brand, make of materials, device or

> equipment should be regarded merely as a standard. If two or more brands, makes or material, devices or equipment are shown or specified each should be regarded as the equal of the other. Any other brand, make of material, device or equipment, which in the opinion of the Owner or his authorized agent is the recognized equal of that specified, considering quality, workmanship, and economy of operation and is suitable for the purpose intended will be accepted. * * **

Cowper's contention that the supplier should have been approved prior to bid opening to avoid "bid shopping" by bidders is not supported by the clause contained in the solicitation.

Our Office has held that the inclusion in an IFB of a subcontractor listing requirement which contains certain caveats is a matter of responsiveness. For example, the clause used by the General Services Administration which reads, in part, as follows:

> "(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).

See analysis in Dubicki & Clarke, Inc., B-190540, February 15, 1978, 78-1 CPD 132.

There is nothing in the present solicitation analogous to the provisions in the GSA clause specifically precluding the use of any subcontractor or supplier other than those listed or indicating that failure to complete the clause will render the bid nonresponsive. Here, the listing requirement does not evidence a concern that a particular firm actually perform the work or supply the item in question. Therefore, we do not find the instant solicitation to contain a prohibition against bid shopping and we find the listing requirement relates to a bidder's responsibility. See Dubicki & Clarke, Inc., supra, and Air Products and Chemicals, Inc., B-186962, May 6, 1977, 77-1 CPD 315.

The solicitation does not indicate why the bidder is asked to identify in his bid the proposed manufacturer of designated equipment. Paragraphs 1.2.7 and 32 of the solicitation clearly indicate that the contractor will be required to meet all of the specification requirements regardless of the equipment identified. Thus, the purpose cannot be to establish the acceptability of the offered item. Given the circumstances we believe the information was requested to establish the responsibility of the proposed supplier, i.e., the apparent ability of the firm designated in the appropriate blank to provide an acceptable product. In this case the grantee is apparently satisfied with the responsibility of Robertshaw with respect to the item for which it was designated as the source by Grumman. Whether the item actually offered meets the specification requirements will have to be decided when it is tendered. We see nothing in the solicitation which

demands an item in existence or in production at the time of bid submission. Indeed, we understand it is unlikely that the item in the precise form called for was available from any source at the time for bid submission.

While it might have been desirable for the solicitation to have indicated the purpose for which the information was to be furnished, we find nothing in the Grumman bid with respect to the designation of Robertshaw requiring its rejection.

Finally, Cowper contends that, since Grumman warranted that its bid price was based on Robertshaw furnishing the system in question, a post-award approval would render this warranty useless. We note that bids were requested on a lump-sum basis and a bidder did not have to furnish supplier's quotes. We also note that Grumman took no exception to the specifications. Therefore, Grumman, once awarded the contract, is obligated to furnish an acceptable Robertshaw system, a system from one of the listed suppliers or an approved equal. If Robertshaw's system is rejected by the grantee, the change by Grumman to an approved system will have to be made with no change in contract price. See Dubicki & Clarke, Inc., supra, and W.M. Lyles Company, B-139441, February 14, 1978, 78-1 CPD 123.

Accordingly, our Office finds nothing improper in the award to Grumman.

R.F. Keller

Deputy Comptroller General
of the United States