

DOCUMENT RESUME

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[Bid Defects Did Not Render Bid Nonresponsive]. B-192954.
December 13, 1978. 6 pp.

Decision re: Iannuccillo Construction Co.; ACHAT Corp.; by
Robert F. Keller, Deputy Comptroller General.

Contact: Office of the General Counsel: Procurement Law II.
Organization Concerned: General Services Administration.
Authority: 43 Comp. Gen. 206. 55 Comp. Gen. 443. 44 Comp. Gen.
386. 40 Comp. Gen. 321. 54 Comp. Gen. 320. -41 C.F.R. 5.
B-185792 (1976). B-190191 (1978). S-146343 (1961). F.P.R.
1-2.405.

A low bidder protested the rejection of its bid as nonresponsive, and the second low bidder protested the subsequent acceptance of the low bid. The agency's determination after the bid opening that funds were available for certain alternate items was proper. Minor informalities or irregularities in bids may be either cured or waived, whichever is to the advantage of the Government. Bid defects may be waived for work in an item which will not be awarded and for one concerning a subcontractor listing requirement for a category of work comprising less than three and one half percent of the estimated contract price. An alternate item for which the agency determines that funds were insufficient and for which funds will not be obtained after the award may not be evaluated for purposes of award. (HTW)

H. Helmsman 1-1-83

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20540**

8578

FILE: 192954

DATE: December 13, 1978

MATTER OF: Iannuccillo Construction Co.
and ACHAT Corporation

DIGEST.

1. Federal Procurement Regulations do not prohibit procuring agency from determining after bid opening the amount of funds available for award and, consequently, the determination as to which alternate items will be awarded may be made after bid opening.
2. Defect in bid for work in alternate bid item which will not be awarded because of unavailability of sufficient funds may be waived as immaterial and bid may be considered responsive.
3. Defect in bid concerning subcontractor listing requirement may be waived where category of work concerned comprises less than 3-1/2 percent of estimated contract price because listing should not have been required in such circumstances.
4. Minor informalities or irregularities in bids are required either to be cured or waived, whichever is to the advantage of Government.
5. Where civilian agency makes determination at the time of award that amount of funds available for project is insufficient to cover alternate item in question, and agency does not expect to obtain funds for alternate item after award, such alternate may not be evaluated for purposes of award.

Iannuccillo Construction Co. initially protested the rejection of its low bid as nonresponsive by the contracting officer of the General Services Administration (GSA) Region 1 under Project IRI 77653 for

air conditioning and building modernization of the Federal Building in Providence, Rhode Island. Subsequently GSA Headquarters has taken a position contrary to the contracting officer's decision and determined that Iannuccillo's bid properly could be accepted. ACMAT Corporation, the second low bidder, has protested the proposed acceptance of Iannuccillo's bid on the ground that the bid did not comply with the subcontractor listing requirement of the invitation for bids (IFB). Award is being withheld pending resolution of this protest.

The IFB required a base bid and bids for certain add-on alternates for additional work. In Section 01000 of the IFB, Clause 11, the Government reserved the right to accept "any, some or all" of the bids on the alternate work in making an award. The IFB also contained a subcontractor listing provision which required each bidder to furnish with its bid the name and address of the subcontractor which would perform each of certain specified categories of work. If a specified category was not to be performed by subcontract, the bidder had to list its own name for that category. If a category was to be performed in part by the bidder and in part by another firm, the bidder had to describe the portion of work to be performed by each. The IFB warned that failure to comply with the subcontractor listing requirement of the invitation would require rejection of the bid as non-responsive.

For two of the categories of work on the subcontractor listing form, the wood windows and metal doors and frames categories, Iannuccillo entered the names of subcontractors with the notation "furnish only" and did not enter the names of subcontractors or its own name for the balance of the work (installation) for these two categories. The contracting officer rejected Iannuccillo's bid as nonresponsive for failure to comply with the subcontractor listing requirement of the IFB. Iannuccillo protested the rejection of its bid, arguing that because it entered its own name for the carpentry category it was unnecessary to list itself again for the installation of wood windows and metal doors and frames, since it is trade practice for carpenters to make such installations.

For the following reasons we agree with GSA Headquarters and hold that Iannuccillo's bid may be considered for award.

The requirement for listing subcontractors is designed to eliminate the practice of bid shopping and is considered a material requirement of the invitation. 43 Comp. Gen. 206 (1963). Bidders' compliance with this requirement, therefore, is treated as a matter of bid responsiveness. For the purpose of this decision, however, we need not decide whether Iannuccillo's failure to list itself for the installation work in the wood windows and metal doors and frames categories materially affected the responsiveness of its bid. GSA reports that the estimated cost of the metal doors and frames category is less than 3-1/2 percent of the total estimated contract price. Assuming, arguendo, that Iannuccillo's bid is defective for failure to list itself for this category, we have held such defects may be waived where the affected category of work comprises less than 3-1/2 percent of the total estimated cost of the project. George E. Jensen, Contractor, Inc., Shelby-Skipwith, Inc., B-185792, July 9, 1976, 76-2 CPD 27. GSA's regulations provide that general construction categories estimated to cost less than 3-1/2 percent of the entire contract shall not be included where subcontractor listing is required. 41 C.F.R. 5B-2.202-70(-) (1977).

As noted above, Iannuccillo also failed to list itself for the installation portion of the wood windows category. This category is work covered entirely by Alternate No. 8. Subsequent to bid opening, GSA determined that sufficient funds were available for an award of all the additional work covered by the add-or Alternates except for Alternate No. 8. Iannuccillo's bid is lowest on the aggregate of the base bid plus all of the alternates excluding No. 8; its bid is responsive with respect to all bidding requirements on the work to be included in such award.

There is no requirement in the Federal Procurement Regulations (FPR), as there is in the Defense Acquisition Regulation (DAR), that the contracting officer establish prior to bid opening the amount of funds available for

award of base bids and alternates when the amount of funding is in doubt. Similarly, there is no requirement in the FPR for the procuring activity to disclose prior to bid opening the order of selection priority of additive or deductive items. Park Construction Company, B-190191, July 18, 1978, 78-2 CPD 42. Therefore, in the case of a civilian agency, the determination of the amount of available funding, and the determination as to which alternates, if any, will be awarded may be made after bid opening. Sterling Engineering and Construction Company, Inc., 55 Comp. Gen. 443 (1975), 75-2 CPD 293.

In this case, due to funding constraints, GSA has made a determination to award the work included in the basic bid and all of the alternates except No. 8. As noted above, the IFB permitted GSA to make an award for "any, some or all" of the alternates. Therefore, any defect in Iannuccillo's bid with respect to the wood windows category, work covered by Alternate No. 8, is immaterial and the bid on the remaining work is responsive. 44 Comp. Gen. 386 (1965).

ACMAT contends that the contracting officer has discretion whether or not to waive a defect in a bid which relates to the responsiveness of the bid. ACMAT focuses on the language in 44 Comp. Gen. 386 (1965) citing 40 Comp. Gen. 321 (1960) which states,

"* * *the failure of a bidder to comply with the provision may be considered as a minor deviation which can be waived and the bid considered responsive." (Emphasis supplied.)

It argues that the contracting officer's rejection of Iannuccillo's bid should be sustained as being within the discretion of that officer. However, notwithstanding the permissive language used in our prior decisions cited by ACMAT, Section 1-2.405 of the FPR requires the contracting officer either to give the bidder an opportunity to cure any deficiency resulting from a minor

informality or irregularity in a bid or to waive such deficiency, whichever is to the advantage of the Government. Our prior decisions should not be construed as permitting bid rejection for minor informalities or irregularities in bids.

ACMAT also urges that the determination by GSA to forego an award to Iannuccillo for Alternate No. 8 raises the spectre of favoritism. ACMAT speculates that additional funding may become available after award and that GSA would then modify the contract to include Alternate No. 8.

In addressing similar contentions of favoritism in our prior decisions we have stated:

"While it may be, as in this case, that different combinations of items will result in different low bidders, we can see no basis for claiming that this is discriminatory as between bidders. Each bidder is competing against each other bidder on each possible combination of items, and the comparative desirability of different items may well depend on the prices quoted therefor. It is obvious that award could not be made on any combination of items to a bidder whose aggregate price for those items was not low, merely because he happened to have offered an offsetting lower price for work which is not to be performed.* * *" H. M. Byars Construction Company, 54 Comp. Gen. 320 (1974), 74-2 CPD 233; B-146343, November 1, 1961.

The same rationale holds for a bid which may be nonresponsive with respect to one item in the schedule.

With respect to the possibility of funds later becoming available, we need point out only that evaluation and award is to be based on the circumstances existing at the time of award. Here,

GSA reports that funds are not available for this work and does not expect them to be available at some future date. Therefore, we believe GSA properly excluded Alternate No. 8 in evaluating bids.

The protest of Iannuccillo Construction Co. is sustained; the protest of ACMAT is denied.


Deputy Comptroller General
of the United States