BENJAM

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Gorman-Rupp Company

File: B-237429

Date: January 4, 1990

DIGEST

Contracting agency's omission of mandatory drug-free workplace clauses from solicitation and failure to obtain low bidder's agreement to clauses before award does not require termination of awardee's contract where no bidder was prejudiced by the omission, the actual needs of the government were met by the award and termination would serve no useful purpose.

DECISION

Gorman-Rupp Company protests the award of a contract to Reddy-Buffaloes Pump, Inc., under invitation for bids (IFB) No. DAAK01-89-B-0027, issued by the Army for water pumping assemblies. Gorman-Rupp asserts that Reddy-Buffaloes' contract should be terminated because the Army improperly omitted certain mandatory drug-free workplace clauses from the IFB and failed to incorporate the clauses into the contract before award.

We deny the protest.

The drug-free workplace clauses prescribed by Federal Acquisition Regulation (FAR) §§ 52.223-5,-6 implement the Drug-Free Workplace Act of 1988, Pub. L. No. 100-690, § 5152(a)(1), 102 Stat. 4304 (1988), and require each contractor (for contracts that equal or exceed $25,000) to certify compliance with the statute's provisions for a drug-free workplace. The Act and the FAR provisions provide that certifying compliance with the Act is a contractor responsibility requirement, and that certification is a condition for award. See FAR § 23.504. The FAR provisions were first published as interim rules on January 31, 1989, to be effective for contracts awarded on or after March 18, 1989. 54 Fed. Reg. 4,967 (1989).

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Here, the IFB, issued on February 16, did not contain the clauses. Although bid opening was scheduled for May 25, the IFB was not amended to include them. As a result, none of the four bids received by the Army contained the mandatory clauses. The Army awarded the contract to Reddy-Buffaloes, the low bidder, on September 21, without first incorporating the drug-free workplace clauses into the contract. On October 13, Gorman-Rupp, the second low bidder, filed a protest in our Office challenging award to Reddy-Buffaloes. On October 25, the Army and Reddy-Buffaloes modified the contract to include the required clauses.

Gorman-Rupp argues that the Army violated the Act and implementing regulations by failing to obtain Reddy-Buffaloes' agreement to the required clauses prior to award. According to Gorman-Rupp, the Army improperly awarded the contract since Reddy-Buffaloes was not a responsible contractor by virtue of its failure to certify compliance with the required drug-free workplace clauses prior to award. The protester argues that termination of the contract for convenience is the proper remedy, followed by award to Gorman-Rupp upon its submission of the required certification.

The Army concedes that the certification and compliance clauses were inadvertently omitted from the IFB but contends that such omission was not prejudicial to the bidders since the clauses had no bearing on the evaluation of bids. The Army argues that the omission was a harmless error that was properly cured by the modified contract.

The law and the implementing regulations require a drug-free workplace certification as a prerequisite to award, and we have recognized that a contractor's certification therefore may be submitted "up until the time of award." Universal Hydraulics, Inc., B-235006, June 21, 1989, 89-1 CPD ¶ 585. It is not disputed that the contractor here did not provide such a certification prior to award. It is also clear that this resulted from the Army's failure to include the appropriate clauses in the IFB. While the award resulting from this defective IFB therefore was technically inconsistent with the statutory and regulatory requirements for the drug-free workplace certification, we do not think that termination of Reddy-Buffaloes' contract is required.

The fact that an IFB is defective, standing alone, does not mean that any award under it is improper. Rather, award under the IFB is proper, even where a mandatory clause has been omitted, where it would serve the actual needs of the

government and would not prejudice other bidders. Tracor Jitco, Inc., B-220139, Dec. 24, 1985, 85-2 CPD ¶ 710; Linda Vista Indus., Inc., B-214447, B-214447.2, Oct. 2, 1984, 84-2 CPD ¶ 380. Here, there is no evidence that the protester, which participated in this procurement under the defective IFB, or any other bidder was prejudiced by the omission of the drug-free workplace clauses. Certainly, all bidders competed on an equal basis, with no bidder obtaining an advantage over another merely because the required clauses were not in the IFB. Moreover, the needs of the government here, to be assured that it had as a responsible vendor one that would maintain a drug-free workplace, ultimately were satisfied by the modification.

We note in this regard that this is not a case where one vendor refused to provide the certification while others did so. Rather, in this case no vendor provided the certification because the IFB did not call for it. The protester itself states that in light of this IFB deficiency it simply expected the agency to obtain the certification from the low bidder prior to award, and it is the agency's failure to do so that is the basis for protest. That failure, however, provides no basis for the relief requested by the protester--that the contract be canceled or terminated and award made to the protester upon the protester's submission of the certification. Since Reddy-Buffaloes did nothing to disqualify itself, we see no basis for concluding that the company is not entitled to award here and that the protester is. All that would be required here, for the Army to be in technical compliance with the law and FAR provisions, is for the Army to terminate the contract, obtain the drug-free workplace certification from Reddy-Buffaloes, the acknowledged low, responsive and otherwise responsible bidder, and then award the contract to the company again. Since the intent of the statute is essentially met by the Army's obtaining the certification shortly after contract award, we see no practical reason to require the Army to terminate the contract and award it anew simply so that, as a technical matter, it can be said that it obtained the certification prior to award.

The protest is denied.

James F. Hinchman
General Counsel