DECISION

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

G1155

FILE: B-185157 DATE: July 19, 1976

97909

MATTER OF: Frank Coluccio Construction Company, Inc.

DIGEST:

Where agency reverses its policy of requiring subcontractor listing by terminating its implementing regulation, previously authorized deviation from terminated regulation which permitted listing of pipe suppliers is also terminated.

The Frank Coluccio Construction Company, Inc. (Coluccio) requests reconsideration of our decision of April 1, 1976, B-185157, wherein we denied its protest of any award to the Perini Corporation (Perini) by the Bureau of Reclamation, Department of Interior (Interior), under Specification No. DC-7155 for the construction of the Spring Hill Distribution System, Tualatin Project, Oregon.

Coluccio, the second low bidder, had contended that Perini's low bid should be rejected as nonresponsive for failure to comply with the pipe supplier listing requirement specified in the solicitation. We denied its protest and Coluccio now asserts three grounds for reconsideration. They are: first, that Coluccio will be prejudiced if Perini's bid is accepted; second, that the listing requirement is necessary and serves a valid purpose; and finally that inadvertent inclusion of the listing requirement does not justify its waiver. In support of its last position Coluccio has submitted evidence that Interior continued to use the pipe supplier listing requirement in solicitations issued subsequent to Coluccio's protest notwithstanding Interior's avowal that the requirement was experimental and its use was to be discontinued in the event of a protest.

We believe Coluccio's last-mentioned argument, that inadvertent inclusion of the listing requirement does not justify its waiver, in conjunction with its first argument, that Coluccio has been prejudiced, present the key and dispositive issue for purposes of this reconsideration. It is not unusual for solicitation documents to require the submission of information by bidders. In most instances the information is supplied for use by contracting officers in making determinations of responsibility or in contract administration. We

have held that a bidder's failure to furnish with its bid information relating to its responsibility rather than responsiveness is not a basis for rejecting the bid. B-177984, July 30, 1973. However, the listing requirements here under consideration differ in that they demand that full compliance be made with their provisions upon submission and acceptance of the bid. We have held that generally they constitute a material requirement of the bid and can not be waived. B-166066, February 11, 1969. Thus, with few exceptions, anything less than total compliance with the dictates of the provision has resulted in a finding of nonresponsiveness and rejection of the bid. This course of action follows from the purpose of the listing requirement. It is designed to do more than aid in the assessment of responsibility or in the administration of the contract. Its purpose is to lock the prime contractor into a relationship with a particular group of subcontractors prior to the agency making the award of the contract. 43 Comp. Gen. 206 (1963). Against this background Coluccio asserts that the inadvertence of the clause's inclusion does not alter its essential nature and that Perini's low bid should be rejected as nonresponsive.

This aspect of the issue is perhaps better framed in terms of whether it was within the scope of the contracting officer's authority to include the pipe supplier listing requirement in the solicitation in the first instance. If he had authority and he inadvertently included it, that is one thing. However, were he lacking in such authority and, ignorant of this fact for whatever reason, inadvertently included the requirement, that is an entirely different matter. Schoenbrod v. United States, 410 F. 2d 400, 404 (Ct. Cl. 1969). We find for the reasons set forth below that the latter is the situation which obtained at the time of the issuance of the protested solicitation.

Our April 1, 1976, decision expressed our conviction that the listing requirement was inadvertently included in the solicitation. We therein noted, at the conclusion of the opinion, that:

> "* * * /p/rior to issuance to this solicitation, Interior had revoked 41 CFR 14-7. 602-50(1), which authorized the listing of subcontractors. 40 Fed. Reg. 29722 (1975). Interior has pointed out that the reasons for this change in policy were published in 40 Fed. Reg. 17848 (1975) and included many of the problems that have surfaced here. The publication cited the fact that bidders

> had difficulty understanding and complying with the requirement, which resulted in the submission of nonresponsive low bids, numerous protests against award and delays in programs. It is significant from the point of view of the integrity of the bidding system that the Department had changed its overall policy with respect to the need to prevent bid shopping prior to issuance of the solicitation. We trust this change of policy will be consistently adhered to in its future procurements and we are recommending that the agency take appropriate corrective action."

This Office, in our decision of August 22, 1963, 43 Comp. Gen. 206, supra, initially approved, on a trial basis, the procedure of requiring bidders, on pain of being found nonresponsive, to furnish with their bids a list of proposed subcontractors. See B-166006, February 11, 1969. The General Services Administration was then testing the concept for practicality and feasibility on several of its projects. GSA at that time stated that "/i/f it proves to be unworkable, does not accomplish its desired ends and is found not to be in the best interests of the Government, its use can and will be discontinued." 43 Comp. Gen. 206, supra.

The Federal Procurement Regulations § 1-1.008 require agencies to publish implementing regulations which explain to the public "basic and significant agency procurement policies and procedures which implement, supplement, or deviate from the FPR."

When Interior first published its version of the subcontractor listing requirement in May of 1968, 33 Fed. Reg. 7432, its definition of subcontractor was virtually identical to the GSA experimental definition which we considered in our above cited August 22, 1963 decision. The one difference was with regard to when suppliers would be deemed to be included within the scope of the term subcontractor. Interior's definition expressly excluded suppliers "unless the supplier and installer are one individual or firm by reason of construction practice." 33 Fed. Reg. 7432, 7433-7434 (1968).

Thus Interior's procurement policy, as implemented in its regulations, was to supplement the FPR by requiring bidders in certain circumstances to list the subcontractor which they intended to use should they receive the award. Interior did not, however, require the listing of suppliers unless they, by reason of construction practice, were also the installers.

On April 10, 1974, the Commissioner of Reclamation requested permission to deviate from the Interior clause as published by modifying it so as to include suppliers of pipe. On April 22, 1974, the appropriate Deputy Assistant Secretary of Interior authorized the requested deviation from Interior's subcontractor listing requirement on an experimental program basis. The deviation as authorized does not use the term subcontractor but uses instead the term "suppliers" which is defined as:

> "* * * any person or persons including the bidder, if appropriate, supplying pipe and pipe fittings to be incorporated in the work to be performed under this contract."

It is our opinion that this authorized deviation for pipe suppliers legally continued in operation until July 15, 1975, which was the effective date of Interior's total reversal of its policy with regard to listing requirements. 40 Fed. Reg. 29722 (1975). We have noted that Interior published its reasons for the policy reversal in April 1975 at 40 Fed. Reg. 17848 (1975). The reasons which were a reflection of Interior's unhappy experience with listing requirements concluded with the finding that "* * * there is no substantial evidence that the requirement has been beneficial to the best interests of the Government."

FPR § 1-1.009-1(e) defines the term deviation as including:

> "(e) When a policy or procedure is prescribed, use of any inconsistent policy or procedure."

When, by its publication in the Federal Register, Interior reversed its old policy of requiring listing requirements, it in effect prescribed a new policy of not authorizing listing requirements. This had the necessary side effect of turning what was originally an authorized deviation from an extant Interior policy into an unauthorized deviation within the ambit of the above definition. We believe that once an agency has duly and publicly reversed an agency policy in the Federal Register because of its determination that the policy was not in the best interest of the Government, it should not continue to be bound by its earlier such policy merely because its agents in the field were not personally aware of the limited scope of their authority.

However, we have also observed, in a situation where the requirements of the solicitation at the time it was issued where in contravention of a newly implemented regulation, that:

> "* * * bidders normally compute their bids on the basis of the terms and conditions stated in the invitation, and will otherwise rely on these provisions and that it is a serious matter to vary or disregard any of the stated terms and conditions of the solicitation after bids have been opened. In 17 Comp. Gen. 554 (1938) it was stated that to permit public officers to permit bidders to vary their proposals after bids are opened would soon reduce to a farce the whole procedure of letting contracts on an open competitive basis. Changing the ground rules upon which bidders are requested to bid after opening of bids is subject to the same criticism." 50 Comp. Gen. 42, 43-44 (1970).

The case was then decided not on the issue of whether the regulation or the solicitation was controlling, or as presented here on whether the contracting officer was empowered to include in a solicitation that which was not authorized by regulation, but rather upon the issue of whether there was prejudice. 50 Comp. Gen. 42, 44, supra. In this context we construe prejudice to mean either that the complained of action can reasonably be assumed to have deterred otherwise-interested potential bidders from bidding the solicitation or that but for the complained of action a bidder on the solicitation would have bid differently.

We have examined the record and are unable to conclude that prejudice, thus construed, existed.

Regarding the existence of certain other solicitations which contained the unauthorized supplier's listing requirement, we have been advised by Interior that these solicitations have been amended to delete the unauthorized requirement.

The request for reconsideration is for the reasons given denied.

R. F. Keller

Deputy Comptroller General
of the United States