

18156 *Walderspoon*

DECISION



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

FILE: B-200660.2

Request For DATE: May 19, 1981

MATTER OF: Contra Costa Electric, Inc. *Reconsideration*

DIGEST:

1. Decision that contract experience of proposed subcontractor may be used in determining whether bidder/prime contractor meets solicitation experience requirement when bidder was also prime contractor on previous similar contracts is affirmed since protester did not show that GAO improperly applied key precedent.
2. Request for conference is denied, since Bid Protest Procedures do not explicitly provide for conference on reconsiderations of decisions, and matter can be resolved without conference.

Contra Costa Electric, Inc. (Contra Costa), requests reconsideration of our decision in Contra Costa Electric, Inc., B-200660, March 16, 1981, 81-1 CPD 196. In that decision, we found that the experience of a proposed subcontractor could be considered in determining whether the bidder met an experience requirement in the solicitation, if the bidder had been the prime contractor with the proposed subcontractor on the contracts relied on to satisfy the experience requirement. In reaching that result, we relied on 39 Comp. Gen. 173 (1959).

Contra Costa contends that we misapplied the decision in 39 Comp. Gen. 173. The protester points out that the solicitation in that case specifically provided that subcontractors' experience could be used to determine bidders' experience, while in the present case the solicitation provision refers only to the contractor. Therefore, Contra Costa asserts, a fair reading of 39 Comp. Gen 173 would be that

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unless the solicitation specifically provides that subcontractors' experience may be used to meet the experience requirement, it may not be considered. The following quotation from that case is cited in support of this proposition:

"Does Phoenix [the low bidder] qualify as competent and qualifying bidder under Section 2-22 [the definitive experience requirement] of the specifications? [which] ... necessarily involves consideration of whether experience of the subcontractors proposed to be used by the bidder may be imputed to the bidder under Section 2-22."

We do not understand the relevance of this quotation to the protester's assertion. It is nothing more than a statement of the first issue of the decision with a reference to the experience provision of the solicitation. It does not indicate that the decision's conclusion is limited to procurements in which the solicitation experience provision is substantially similar. As we showed in our initial decision, 39 Comp. Gen. 173 specifically stated that the experience provision's reference to subcontractors was unimportant. Contra Costa claims that the quotation from 39 Comp. Gen. 173 which we used to support that proposition was taken out of context. In the interest of clarification, we will examine 39 Comp. Gen. 173 in greater detail.

The solicitation provision in 39 Comp. Gen. 173 stated that bidders "either with their own organizations or through the subcontractor they will use on this project" must have had certain experience in elevator installation. The low bidder, Phoenix, had no experience installing the required type of elevator either by itself or as a prime contractor using a subcontractor. However, Phoenix proposed using a subcontractor that had the requisite experience. The General Services Administration (GSA) asked us whether Phoenix, through its proposed subcontractor, met the experience requirement.

In resolving this question, we first discussed the experience clause which had been used by GSA in the past. That clause:

"* * * referred only to the bidder himself, and no mention was made of the use, qualifications or experience of subcontractors. * * * Presumably this was because full responsibility for satisfactory performance would be placed upon the prime contractor, and because satisfactory performance of prior contracts, whether accomplished solely by use of the prime contractor's organization or with the aid of subcontractors, would be indicative of the prime contractor's competency and responsibility." (Emphasis added.) (We quoted this portion of 39 Comp. Gen. 173 in our initial decision.)

We then stated that the provision in question could not be viewed as a relaxation of the former requirement. That is, the experience provision mentioning only the bidder and the experience provision explicitly permitting subcontractors' experience to be considered required the same thing. What both clauses require is that the bidder must meet the experience requirement by having performed the requisite work on the prior contracts either alone or as a prime contractor using subcontractors.

Contra Costa quotes the following portion of the same decision in support of its contention that proposed subcontractors' experience cannot be considered in determining bidders' experience:

"The justification for inclusion in an invitation for bids of any experience requirement designed to indicate a bidder's competency to perform the contract must necessarily be based upon determining whether the bidder himself has the qualifications required, and not upon a determination of whether the

bidder is capable of, or intends to, procure the services of a number of subcontractors whose combined experience is sufficient to meet the experience requirements set out in the invitation for bids. ... This must be determined in the first instance by the performance of the bidder's own organization and only secondarily by the qualifications of said contractors which the bidder proposes to use. [Emphasis supplied] 39 Comp. Gen. at 176.'"

While Contra Costa has asserted that our initial decision quoted portions of 39 Comp. Gen 173 out of context, it is the above quotation by Contra Costa that has been taken out of context. That quotation follows the portion of the decision quoted by us. In that context, it is clear that the phrase "whether the bidder himself has the qualifications" refers back to the earlier statement that the experience of the "bidder himself" means with the bidder's own organization or as a prime contractor. The rest of the quotation essentially states that a bidder that has not had experience on similar contracts as a prime contractor cannot meet the experience requirement by hiring experienced subcontractors. To conclude otherwise would render the earlier portion of 39 Comp. Gen. 173 a nullity. Our reading of the case is confirmed by the holding that Phoenix was not a qualified bidder because of its:

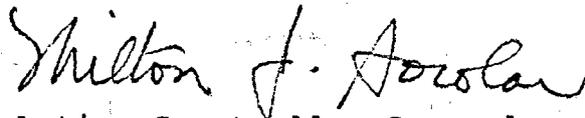
"* * * failure * * * to have previously made such installations, either with its own organization or by using the subcontractors now proposed * * *" 39 Comp. Gen. 173, at 176.

Contra Costa also argues that by permitting consideration of subcontractor experience where the experience clause only mentions the contractor, our decision does not require a finding that the subcontractor proposed is committed to doing the work for

which the experience is required. This, however, is no different from the situation where the solicitation explicitly permits subcontractor experience to be considered, as was the case in 39 Comp. Gen. 173. The only requirement in either case is that the contracting officer have some evidence from which to conclude reasonably that the bidder, with its proposed subcontractors, meets the experience requirement. See Westinghouse Air Brake Company, B-191537, February 15, 1979, 79-1 CPD 109.

Contra Costa has requested a conference on this reconsideration. Our Bid Protest Procedures do not explicitly provide for conferences on reconsiderations. 4 C.F.R. § 20.9 (1980). We believe that a conference should be granted only where the matter cannot be resolved without a conference. In our judgment, this is not such a case. Serv-Air Inc.--Reconsideration, 58 Comp. Gen. 362 (1979), 79-1 CPD 212.

Our decision is affirmed.



Acting Comptroller General
of the United States