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DECISION

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

FILE: B-215083 **DATE:** July 24, 1984

MATTER OF: D. J. Findley, Inc.

DIGEST:

The failure of a bidder's food preparation facility to pass a post-bid opening sanitary inspection concerned the bidder's responsibility rather than the responsiveness of its bid. Since the bidder was a small business, the matter was required to be referred to the Small Business Administration for consideration under the Certificate of Competency procedures.

D. J. Findley, Inc., protests the rejection of its bid as nonresponsive to invitation for bids (IFB) No. WRPMP-5224/IFB/SPD 84-24, issued by the Immigration & Naturalization Service (INS) as a small business set-aside for the provision of meals at the INS's Detention and Deportation Center in Los Angeles, California. Findley, a small business concern, alleges that the grounds for INS's rejection of its low bid in fact went to its responsibility and that therefore INS's failure to refer the matter to the Small Business Administration (SBA) was improper. We sustain the protest.

The IFB generally requires that the contractor's equipment and facilities must be adequate for satisfactory performance and specifically requires in the "Quality of Product" clause that:

> "Food shall be prepared in an establishment which is under permit and has been inspected by the Los Angeles County Health Department and in compliance with the California Health and Safety Code, and applicable County regulations."

The IFB, as originally issued, also contained the following Special Provision:

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"22. INSPECTION OF CONTRACTOR'S FACILITY

a. Prior to award: Prior to award of any resultant contract:

(1) An inspection of the contractor's plant will be made by the U.S. Army Medical Department Activity, Veterinary Activities, North Central Branch. This inspection will be conducted in accordance with the current edition of Military Standard No. 668B, Sanitary Standards for Food Plants. FAILURE OF THE CONTRACTOR'S FACILITY TO PASS THIS INSPECTION AT A MINIMUM OF 90 PERCENT WILL RESULT IN THE BID TO BE REJECTED AS NON-RESPONSIBLE. See Bidder's Qualifications."

We understand the reference to "Bidder's Qualifications" to refer to clause 34 of an attachment to Standard Form 33-A, which advised bidders that the government reserved the right, prior to award, to require the bidder to submit information showing that it had the experience, organization, plant, personnel, supplies and financial resources adequate to perform the work. In addition, clause 34 stated, "Prior to award, the Contractor's plant will be inspected by representatives of the Government to determine if the plant meets the minimum standards." The solicitation's "Evaluation Criteria" provided, in part, that the failure of the low bidder to pass the inspection required by Special Provision 22a "will cause its bid to be nonresponsible" and that a failure to have the equipment listed in the specifications on hand before award or to comply with clause 34 (among others relating to the bidder's ability to perform the contract satisfactorily) would cause the "bid to be rejected as nonresponsible."

Amendment No. 4 to the solicitation, however, changed the word "nonresponsible" to "nonresponsive" in both Special Provision 22.a.(1) and the Evaluation Criteria so that failure to pass the veterinarian's inspection with a score no less than 90 would render the bid "nonresponsive." On the other hand, the bidder's failure to demonstrate under several other IFB provisions that it, in effect, was

equipped and staffed to prepare wholesome food under sanitary conditions would result in a determination that the bidder was nonresponsible. There is no indication that any bidder objected to these terms prior to bid opening.

Although Findley submitted the apparent low bid, its facilities received only an 86 percent score in the sanitary inspection and the health inspectors recommended against approval of the facilities. Findley's bid was then rejected as nonresponsive.

INS, pointing to the language in the amended solicitation converting the sanitary inspection into a matter of responsiveness, argues that the protest is untimely. That would be true if the protest was against the terms of the solicitation. See 4 C.F.R. § 21.2(b)(1) (1984).

Findley, however, is protesting INS's rejection of its bid without first referring the matter to SBA. That protest is timely because it was filed within 10 days of the rejection of Findley's bid. See 4 C.F.R. § 21.2(b) (2).

It is not disputed that the IFB, as amended, described the sanitary examination as a matter of responsiveness, and the contracting officer appears to believe that the matter must be so viewed because that is what the solicitation said. It is well-settled, however, that a contracting agency cannot change a matter of responsibility into one of responsiveness merely by the terms of the solicitation. See Raymond Engineering, Inc., B-211046, July 12, 1983, 83-2 CPD ¶ 83. What must be determined here, then, is whether the results of the inspection properly could affect the responsiveness of the bid or whether they can properly be viewed only as a matter of bidder responsibility.

The purpose of this contract is to provide meals to persons detained by INS. The solicitation evidences a major concern that the food be wholesome and untainted. Toward that end, the solicitation included a number of provisions which would have the effect of assuring that the contractor selected was experienced and possessed a facility and staff capable of preparing the meals under

sanitary conditions. One of the key provisions was the preaward sanitary inspection which Findley's proposed facility failed to pass with a score of 90 or better.

We believe that whether a bidder's facilities pass the sanitary inspection required under this solicitation concerns the responsibility of the bidder, that is, the bidder's apparent ability and capacity to perform the contract requirements, rather than the responsiveness of its bid, which is concerned with whether a bidder has unequivocally offered to provide the supplies or services in conformity with the material terms and conditions of the solicitation. See A. Metz, Inc., B-213518, April 6, 1984, 84-1 CPD ¶ 386 (responsibility and responsiveness contrasted). In rare instances a matter regarding contractor facilities will involve the legal obligation to perform in accordance with solicitation requirements, so that the agency, as a contractual matter, required performance in a certain area so that bids indicating that the place of performance would be outside that area were rejected. In most cases, however, concerns about contractor facilities, particularly with respect to the adequacy of those facilities to support contract performance, involve the responsibility of the bidder. See, e.g., Connelly Containers, Inc., B-199180, June 19, 1981, 81-1 CPD ¶ 510. Moreover, since the sanitary inspection is conducted after bid opening, the results of that examination must concern a bidder's responsibility, since the responsiveness of a bid must be based on the bid itself and on what is submitted with it, rather than on information only available after bid opening, such as the current condition of the bidder's facilities at the time of inspection. See A. Metz, Inc., B-213518, supra, 84-1 CPD ¶ 386 at 10; Brady Mechanical, Inc., B-206803, June 7, 1983, 83-1 CPD ¶ 613.

Significantly, it is clear from the record that the agency originally viewed the inspection results as going to responsibility and attempted to convert the matter to bid responsiveness out of concern that the inspection might be nullified if it were second-guessed by the SBA in a COC proceeding. Under 15 U.S.C. § 637(b)(7) (1982), whenever a contracting officer makes a determination that a small business is nonresponsible, he must refer the matter to

SBA, which has conclusive authority to determine whether a small business bidder is nonresponsible. The contracting officer states as much in his report to our Office:

> "The sanitary inspection was changed from 'responsibility' to 'responsiveness' as this office required that a firm which was to supply lunches be able to pass the initial inspection with a minimum score of 90 percent, therefore ensuring that the facility that was used to prepare meals for detainees was maintained at all times in a sanitary manner which would reduce the hazard of tainted food. The Small Business Administration, San Diego, notified this office that as a part of the responsibility evaluation prior to issuing a Certificate of Competency the Contractor would be given a second inspection therefore negating the basic sanitary requirement. Therefore to stay with the requirement for a facility which was to be maintained at all times in a sanitary manner, this evaluation criterion was changed from 'responsibility' to 'responsiveness' to ensure the health of the detainees and to prevent any incident of unsanitary food being served to these detainees. The detainees are foreign nationals that are in the process of being returned to their country, and an incident of this type could be embarrassing to the Government."

Under the circumstances, we think it is clear that the matter under consideration properly involves only bidder responsibility and not bid responsiveness. Therefore INS in effect found Findley nonresponsible when it rejected its bid because of the failure of Findley's facilities to pass the sanitary inspection, and was required by statute to refer this matter to SBA. We therefore sustain the protest, and recommend that the referral be made now.

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Since this decision contains a recommendation that corrective action be taken, we are furnishing copies to the Senate Committees on Governmental Affairs and Appropriations, and to the House Committees on Government Operations and Appropriations in accordance with section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 720 (1982), which requires the submission of written statements by the agency to the committees concerning the action taken with respect to our recommendation.

for Milton J. Socolar
Comptroller General
of the United States