B-178287

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

November 13, 1973

Matzkin & Day
Attorneys at Law
1730 M Street, NW.
Washington, D.C. 20036

Attention: Sheldon I. Matzkin, Esq.

Gentlemen:

Reference is made to a telegram of March 26 and a letter dated March 27, 1973, from The Southern Plate Glass Co. (Southern), and to your subsequent correspondence on its behalf, protesting the award of General Services Administration (GSA) contract No. GS-00B-01351 to H. H. Robertson Company, Cupples Products Division (Robertson).

The invitation for bids on contract No. GS-00B-01351 for the window walls, National Air & Space Museum, was issued on February 22, 1973. The bids were opened on March 8, 1973. Robertson submitted the low bid while Southern submitted the second low bid.

Paragraph 2 of section 0890 of the invitation contained the following pertinent requirements:

"2. QUALIFICATIONS AND RESPONSIBILITIES

2.1 To be eligible for award, the contractor shall have a minimum of five years experience as a designer, fabricator, and erector of window walls, entrances, sliding and rolling doors, of a type similar to those specified herein. In addition, the contractor shall have installed at least three window wall installations of a size equal to that specified herein.

2.1.1 The purchase of components for use in fabrication of window walls, entrances, sliding

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and rolling doors, shall not be deemed to disqualify an otherwise qualified bidder who performs the actual fabrication himself as well as the design and erection.

2.1.2 The bidder shall furnish a list of the prior installations, he has made, with the names and addresses of the building and the names of the owners or managers thereof. The bid may be rejected if the bidder has established, on previous jobs, a record of unsatisfactory installations or otherwise fails to meet the requirements of this clause with respect to the bidders qualifications.

2.2 All references made to window wall shall mean all work herein specified (window walls, entrances, rolling doors and sliding doors).

2.3 Contractor for window wall work shall be responsible for the design of all component members to meet the performance requirements hereinafter specified. Window wall details indicated on drawings are intended to establish overall appearance and dimensions.

2.4 Make all modifications which are required to achieve satisfactory results in testing. Maintain the overall appearance, unless tests show that sizes of members or profiles need to be increased or modified. Any such modification shall be approved by the Architect."

In an earlier invitation for a prior contract for the same work which was cancelled, paragraph 2.1 stated, in pertinent part, as follows:

> "Window walls, entrances, sliding and rolling doors shall be designed, manufactured and erected by a single firm to ensure an undivided responsibility. * * *" (Emphasis added.)

However, it is reported that this provision was inadvertently omitted from the present procurement.

In addition, paragraph 31 of section 0110 of the present procurement contained the following requirement:

"31. INSURANCE

Verification by the bidders insurance carrier of the bidders experience modification factor for Workmen's Compensation must be submitted with each bid. Contracts will be awarded taking into consideration the cost to the Government for providing Insurance under the directed insurance plan, included in these specifications as 'Insurance Guide for Contractors working on National Air & Space Museum.' Failure to include the Insurance experience modification factor will be cause for rejection of the bid.* * *"

The following notation appeared on the face of Robertson's bid:

"Subcontractor: F.H. Sparks Co., Inc.
6320 Howard Lane
Baltimore, Maryland 21227"

Robertson also submitted a letter from Sparks' insurance broker giving Sparks' insurance experience modification factor.

The Board of Award met on March 12, and again on March 16, 1973, to consider whether Robertson had submitted evidence of having all of the qualifications necessary to be eligible for award and whether the notation on the face of Robertson's bid constituted a qualification of its bid. The Board concluded that Robertson had the necessary experience and that the requirement that the bidder have 5 years' experience in designing, fabricating and erecting walls, did not require the successful bidder to perform all contract requirements with its own forces.

The Board also concluded that the intent of the insurance provisions was to require each bidder to furnish information which will enable the Government to ascertain the cost it would incur in providing insurance coverage for the bidder awarded the contract. The Board reasoned that if a bidder intended to subcontract for site work, the insurance cost to the Government would be based on the subcontractor's insurance rating and that this was the reason that Robertson had submitted an insurance rating for the Sparks firm rather than its own insurance ratings. Finally, the Board noted that Southern had failed to enter its minority employment goals on its Washington Plan bid annex and, therefore, its bid was considered to be nonresponsive.

It is your contention that Southern was the low qualified bidder and that the bid submitted by Robertson was nonresponsive to the invitation in several respects. In support of this position you point out that GSA's report states that the work is to be performed "* * * by a firm with sufficient experience as to give the Government reasonable assurance against leakage, as might occur if the work were performed by a firm lacking sufficient prior experience." (Emphasis supplied.) You state that this provision, coupled with the quoted language of the solicitation and oral instructions of the contracting officer, makes it clear that no subcontracting was to be permitted and Robertson's naming of a subcontractor to do the erection work conditioned its bid.

Specifically, you maintain that paragraph 2.1, quoted above, required the contractor (no reference being made to a subcontractor) to have 5 years' experience as a: (1) designer; (2) fabricator; (3) erector of window walls, entrances, sliding and rolling doors similar to those specified in the contract. You also argue that the language of paragraph 2.1.1, quoted above, clearly states that the bidder must perform the erection work and it could not be done by a subcontractor. You point out that paragraph 2.1.2, also quoted above, states that a bid may be rejected where it fails to meet the requirements of that clause with respect to the bidder's qualifications and that the language of this clause clearly addresses itself to the bidder's qualifications to install and not to a subcontractor's qualifications. Also, you state that since the invitation did not require the listing of subcontractors, the act of listing a subcontractor also made Robertson's bid nonresponsive.

You also allege that Robertson, having no field erection forces of its own in the Washington, D.C., area, inserted the name of its subcontractor for the field erection of the window walls to avoid any misunderstanding as to who was to perform the erection. To further substantiate the fact that field erection in Washington was to be done by the subcontractor, you maintain that Robertson submitted the insurance experience modification factor for the subcontractor rather than for itself. This, you contend, is evidence that Robertson did not plan to do any work on site in Washington, D.C., thereby further conditioning its bid insofar as the requirement set forth in paragraph 32 of the General Conditions that at least 12 percent of the contract be performed by the contractor with its own forces. It is your view that an award to Robertson on the basis of its bid as submitted would be tantamount to a constructive approval of Robertson's performance of less than 12 percent of the contract by its own field

organization. You also allege that Robertson lacks the required experience in erection, designing, fabricating and erecting revolving entrance doors.

Additionally, you contend that Robertson's bid was nonresponsive for the reasons that its subcontractor, who will actually be performing a major portion, if not all, of the site work in Washington, D.C., failed to execute a "Washington Plan" to commit itself to the required minority hiring goals. You maintain that while Robertson is committed to specific minority hiring goals, since it executed and submitted the Washington Plan bidding annex with its bid, the subcontractor is not so committed. Moreover, you state that there is no way of enforcing Robertson's minority hiring goals against the subcontractor. You assert that this is contrary to the provision in paragraph 1 on page 4 of appendix "A", under the caption "Requirements, Terms and Conditions," wherein it states in effect that no contract or subcontract shall be awarded for Federal construction in the Washington, D.C., area unless the bidder completes and submits, prior to bid opening, the documents designated as appendix "A."

Regarding the determination that Southern's bid was nonresponsive for failure to include minority hiring goals, you state that Northeast Construction Co. v. Romney, C.A. No. 71-1891 (D.C.Cir. 1973), in which it was held that failure to enter the bidder's goals renders the bid ineligible for acceptance, was not decided until March 6, 1973. You point out that this was only 2 days before bid opening and at least 20 days before the legal community had knowledge of this decision, which reversed an earlier District Court decision. You also point out that prior to the Court of Appeals decision in the Northeast case, GSA was taking the position in another protest that failure to include these goals in a bid was a minor informality or irregularity which did not render a bid nonresponsive. You state that Southern relied on GSA's position in the latter protest when it prepared its bid for the present procurement. Thus, Southern did not believe that it was necessary to include the minority hiring goals.

In regard to your contention that the instant solicitation required that all work be performed by the contractor, there is no question that the solicitation for the previous contract, mentioned earlier, did require all of the work to be done by a single firm. However, the language in that invitation, which reportedly was inadvertently omitted from the present invitation, specifically stated that "Window walls, entrances,

sliding and rolling doors shall be designed, manufactured and erected by a single firm." In the absence of such specific language in the present invitation, we do not believe that the language of paragraph 2, section 0890, can be interpreted to mean that subcontracting is prohibited. We view paragraphs 2.1 through 2.1.2 as requiring the contractor to have certain experience qualifications in order to be eligible for award. In B-176951(1), April 4, 1973, it was stated:

> "* * * the matter of experience presents a question of responsibility and does not relate to * * * responsiveness of the bid. B-170099, January 22, 1971. In that connection, our Office has held that the bids of responsible bidders may not be rejected for failure to meet the literal requirements of experience qualification clauses. 45 Comp. Gen. 4, 7 (1965)."

The Board of Award concluded that Robertson met the specific experience requirements. Also, we have been advised that Sparks had bid on this job on a prior procurement and was determined at that time to meet the experience requirements applicable to the present procurement.

While you contend that the contracting officer orally advised Southern that all of the work was to be done by the contractor, there is no evidence of record, other than the uncorroborated statement of Southern, that the contracting officer gave such advice and the contracting officer denies having given such advice. In that regard, paragraph 1 of the Instructions to Bidders provided that "oral explanations or instructions given before award of the contract will not be binding."

Regarding Southern's allegation in its letter of March 27, 1973, that Robertson's submission of Sparks' insurance rating, rather than its own, conditioned its bid since section 0110, paragraph 31, specifically states that "Failure to include the Insurance experience modification factor will be cause for rejection of the bid," we do not believe Robertson's submission of Sparks' insurance rating made its bid nonresponsive. As can be seen from a review of the insurance provisions set forth at pages 0110-24 through 0110-34, of the "Specification and Bid Forms," the Government, through its construction manager, was to provide certain insurance coverage (including Workmen's Compensation) to contractors working on the site, while the contractors themselves were required to furnish other specified insurance. Paragraph 31, on page 0110-24, required each bidder to submit with the bid its experience modification factor for Workmen's Compensation, so that the contract could be awarded by taking into consideration the cost of Government-provided insurance. A percentage

of the base bid representing the cost of labor (in this case, 30 percent of the bid, pursuant to paragraph 16 of the Supplemental Special Conditions), was to be multiplied by the standard insurance rate, then adjusted by the bidder's modification factor. Since the purpose of requiring the insurance rating information was to enable the Government to ascertain the identity of the bidder whose bid, if accepted, would obtain the least cost to the Government, taking into account a cost factor outside the bid itself, Robertson's submission of Sparks' insurance rating appears to be a submission of the requested information.

In order to strictly conform to the requirements of the solicitation, Robertson should have also submitted its own rating, since paragraph 32 of the "General Conditions" does require that the contractor perform on site, with its own organization, at least 12 percent of the total contract work, unless the contracting officer approves performance on a lesser percentage. In fact, we have been advised that Robertson is expected to perform 85 percent of the site work with its own forces.

After reviewing the method used in determining the insurance rating, we are of the view that it is not something which Robertson could have changed or influenced subsequent to bid opening to the prejudice of Southern. According to GSA's insurance broker, the rates are based on trade experience by state as modified by the individual contractor's experience. These are objectively determinable factors not influenced by anything which may or may not be included in any bid. Moreover, even had Robertson submitted its insurance rating, the bid amounts would have been changed only slightly and Robertson would still be low by a considerable margin. Robertson's insurance rating was subsequently determined to be 1.19, compared with Southern's rating of 1.06 and Sparks' rating of 1.07.

The procuring activity has taken the position that Robertson's failure to submit its insurance rating resulted in a defect or variation in the bid which is "trivial" or "negligible" when contrasted with the total cost or scope of the work to be performed under the contract and, as such, could be waived as a minor informality in accordance with section 1-2.405 of the Federal Procurement Regulations (FPR). FPR sec. 1-2.405 defines a minor informality as:

> "* * * one which is merely a matter of form and not of substance or pertains to some immaterial or inconsequential defect or variation of a bid from the exact requirement of the invitation for bids, the correction or waiver of which would not be prejudicial to other bidders. The defect or variation in the bid is immaterial and inconsequential when its significance as to price, quantity, quality, or delivery is trivial or negligible when contrasted with the total cost or scope of the supplies or services being procured. * * *"

You have furnished nothing that refutes the contracting agency's determination in this regard. Therefore, there is no basis for our Office to object to the determination made.

Further, Robertson did not take any exception to the requirement that it perform at least 12 percent of the work with its own forces and we do not view the naming of a subcontractor as an indication that all the work is being subcontracted. Although it is true that it did not provide its own insurance rating factor, we do not consider that to be an indication that it did not intend to comply with the 12-percent requirement.

Regarding Sparks' failure to execute a "Washington Plan" to commit itself to the required minority hiring goals, we note that Robertson submitted a fully executed "Washington Plan" wherein it states, in paragraph 8, that:

> "* * * whenever a prime Contractor * * * subcontracts a portion of the work in any trade designated herein, he shall include in such subcontract his commitment made under this Appendix * * * which will be adopted by his subcontractor, who shall be bound thereby and by this Appendix to the full extent as if he were the prime Contractor * * *." (Emphasis added.)

Thus, it does not appear that there is anything in the appendix that required the bidder on the prime contract to submit anything more than his own goals as part of his bid. Apparently, Robertson met its "Washington Plan" bidding requirements applicable to it in its bidding on the prime contract and, upon being awarded the contract, was required to impose the above-quoted obligation upon Sparks which is bound by Robertson's commitment.

While you contend that Robertson is ineligible for award because of lack of erection experience and lack of experience in designing, fabricating and erecting revolving entrance doors, no evidence was introduced in support of this contention, whereas the procuring activity determined that Robertson did, in fact, meet the specified experience requirements.

For the above reasons, the protest is denied.

Sincerely yours,

Paul G. Dembling

For the Comptroller General
of the United States