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

B-178423 July 16, 1973 31188

Earl P. Dolven, Esquire
601 California Street
Suite 1204
San Francisco, California 94108

Dear Mr. Dolven:

This is in reply to your letter of April 11, 1973, and subsequent correspondence, protesting on behalf of Transport Tire Company, Incorporated, against the award of contracts to two other firms under invitation for bids (IFB) No. GS-09-BP-(P)-303 issued by the General Services Administration (GSA), San Francisco, California.

The solicitation, for an indefinite requirements type one-year term contract for retreading pneumatic tires, requested prices for various categories of work in several geographical service areas and provided for multiple awards. Special Provision #10 of the IFB required each successful bidder to limit sub-contracting to not more than 50 percent of the work called for by the contract. That provision also called for the listing of subcontractors in the bid. You claim that the failure of two bidders to comply with the listing requirement renders their bids nonresponsive. Award has not been made pending resolution of your protest.

The procurement file shows that the bid submitted by McCoy's Super Tread Tire Company does not contain any subcontractor listing, and that the name of one subcontractor is included in the bid of Bay Area Tire Company. You claim that Bay Area's listed subcontractor recaps only passenger tires and that Bay Area does not have the in-house capability of performing the remainder of the work bid upon. You further claim that both bidders do not have the capacity to perform 50 percent of the work bid upon or upon which they may be the low bidders. You assert that the "50% 'in-house' rule contained in the second paragraph of Special Provision 10(a) notifies offerors that a per se objective test of responsibility will be adopted" and that this "converts what appears to be at first glance a question of responsibility into a question of responsiveness." You say that this interpretation is supported by the statement in the GSA report that a contractor could be terminated for default if it did not adhere to the 50 percent subcontracting limitation. You claim that this statement indicates that Special Provision 10 would be an essential

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provisions of any resulting contract and that all bids must be strictly adhere to the terms of that provision. In addition, you state that the "Firm Bid Rule" requires that full and correct information be submitted as required by Special Provision #10 and that bidders must be bound by that information.

We have held that a subcontractor listing may be related to a material requirement of a solicitation, so that a bid submitted without such a listing should be viewed as nonresponsive. 43 Comp. Gen. 206 (1963); 45 id. 177 (1965); 47 id. 644 (1968). However, we have also recognized that where subcontractor listings are required "for the purpose of determining the bidder's qualifications and responsibility" a bid may not be regarded as nonresponsive merely because such a listing is not included. 51 Comp. Gen. 329, 334. Here we think the solicitation made it eminently clear that the subcontractor listing was related to bidder responsibility. Special Provision #10 was captioned "Determining Responsibility of Offerors," and provided in subparagraph (a) for pre-award inspection of bidders and "contemplated subcontractors." It further provided that:

> No offeror will be regarded as responsible where pre-award inspection discloses that the offeror proposes to furnish the services required under the contract through subletting over fifty percent (50%) of the entire contract. (See 10 (b) (10) below).

Subparagraph (b) stated:

> (b) Offeror Information Required. To assist the contracting officer in determining the responsibility of the offeror, each offeror is requested to furnish the following information and may furnish any additional data believed pertinent:
>
> * * * * *
>
> (10) * * * Also, if offeror sublets any portion of his contract, which cannot exceed fifty percent (50%) of the entire contract, the sub-contractor(s) assigned DOT Code Number, Name, and address must be furnished.

There followed spaces for the insertion of this subcontractor information.

We do not agree that the 50 percent limitation on subcontracting had the effect of converting the subcontractor listing requirement to a matter of bid responsiveness. The listing was clearly required so that GSA could determine bidder capability to perform the contract, and such

information may be provided subsequent to bid opening. 51 Comp. Gen. 329, supra; 39 id. 655 (1960). Furthermore, even if GSA is correct in believing that a default termination could result if a contractor subcontracted more than 50 percent of its contract work, we do not see how a bid without a listing of proposed subcontractors under this solicitation can be regarded as nonresponsive. We see nothing in the bids submitted by McCoy's Super Tread and Bay Area Tire Company to indicate any intent not to be bound by all the requirements of the invitation. Accordingly, we do not believe there is any basis to view either bid as nonresponsive.

You further argue that treating the requirements of Special Provision #10 as a matter of responsibility rather than bid responsiveness violates the "Firm Bid Rule" in that a low bidder could effectively withdraw its bid by stating at the time of pre-award inspection that it intended to subcontract more than 50 percent of the work. Such an argument, of course, can be made with respect to any factor bearing on responsibility, and we do not find it persuasive. Rather, we agree with GSA that responsibility requirements are for the protection of the Government and may be waived by the Government if it deems it to be in its best interests to do so. 45 Comp. Gen. 4 (1965); B-175254, April 4, 1973 (52 Comp. Gen. ____). Accordingly, we do not believe that a bidder which submits a responsive bid and is otherwise responsible could necessarily escape a contract award by an attempt to make itself appear nonresponsible. The cases you cite as authority for the "Firm Bid Rule" and its application to this case, Scott v. United States, 44 Ct. Cl. 524 (1909); Refining Associates, Incorporated v. United States, 114 Ct. Cl. 145 (1953), merely stand for the proposition that a bidder is not free to withdraw its bid on a Government contract once bids have been opened, and that acceptance of a bid, notwithstanding an attempted revocation, results in a binding contract.

GSA has reported that preaward surveys of McCoy's Super Tread and Bay Area Tire Company indicate they can perform in excess of 50 percent of the services bid upon. Accordingly, we need not consider whether the subcontracting limitation of Special Provision #10 applies to all services bid upon, as you contend, or whether GSA is correct in believing it applies only to the services covered by the contract as awarded to any individual bidder. With respect to your contention that these two bidders do not have the capacity to perform 50 percent of the work under any contracts that would be awarded to them, we have always held that a prospective contractor's ability to perform

a contract is a matter primarily to be determined by the contracting agency, and absent a showing of bad faith or lack of reasonable basis therefor, we will not question that determination. 43 Comp. Gen. 228 (1963). There has been no such showing here.

For the foregoing reasons, your protest is denied.

Sincerely yours,

PAUL G. DEMBLING
For the Comptroller General
of the United States