Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: M&M Welding & Fabricators, Inc.

File: B-271750

Date: July 24, 1996

Richard L. Moorhouse, Esq., Holland & Knight, for the protester.
William L. Ensign, Acting Architect of the Capitol, for the agency.
Tania L. Calhoun, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Solicitation provision requiring bidders to be regularly engaged in the installation and service of coal/gas-fired boilers does not constitute a definitive responsibility criterion--since it does not set out a specific, objective standard for determining a bidder's capability to perform--but is a component of the contracting officer's affirmative determination of responsibility, and thus not for consideration by General Accounting Office.

2. Protest that agency unreasonably determined that the awardee satisfied a definitive responsibility criterion is denied where the record supports the agency's determination that the bidder exhibited a level of achievement either equal to or in excess of the specific criterion.

DECISION

M&M Welding & Fabricators, Inc. protests the award of a contract to American Combustion Industries, Inc. (ACI) under invitation for bids (IFB) No. 9639, issued by the Architect of the Capitol for the retubing of one or more coal/gas-fired boilers in the United States Capitol Power Plant, Washington, D.C. M&M argues that the agency unreasonably determined that ACI satisfied the solicitation's definitive responsibility criteria.

We deny the protest.

The boilers contain numerous water pipes which, over time, corrode, weaken, and leak. The successful contractor here is required to investigate and determine the exact quantity of tubes required to "completely retube" the boiler; remove the existing tubes and replace them with new tubes; and perform various associated tasks. The solicitation includes the following paragraph under the heading, "Qualification of Bidders":

> "Firms shall be regularly engaged in the installation and service of coal/gas-fired boilers. Each bidder shall furnish a list of not less than three (3) similar boiler rehabilitation projects (at least one of which must be a steam boiler) completed satisfactorily by the Contractor during the past five (5) years. . . . "

ACI's bid of $920,000 was the lowest priced of the 10 bids received. After contacting ACI's references, the agency determined that the firm met the IFB's qualifications and awarded ACI the contract. M&M's agency-level protest was denied, and the firm filed the instant protest in our Office.[1]

Definitive responsibility criteria are specific and objective standards established by an agency for use in a particular procurement to measure a bidder's ability to perform the contract. Federal Acquisition Regulation § 9.104-2. These special standards of responsibility limit the class of bidders to those meeting specified qualitative and quantitative qualifications necessary for adequate contract performance. Topley Realty Co., Inc., 65 Comp. Gen. 510 (1986), 86-1 CPD ¶ 398.

In its report to our Office, the agency took the position that the IFB's qualification provision contained two definitive responsibility criteria: first, regular engagement in the installation and service of coal/gas-fired boilers; and, second, a listing of not less than three similar boiler rehabilitation projects. The agency subsequently shifted its view, and now maintains that the first component of the qualification provision--regular engagement in the installation and service of coal/gas-fired boilers--is not a definitive responsibility criterion because it is not a specific and objective standard. The agency does not dispute that the second component of the qualification is a definitive responsibility criterion.

The agency is correct. The requirement that a bidder be "regularly engaged in the business" merely advises potential bidders that past performance will be considered in deciding whether the contractor has the capacity to perform in a satisfactory manner. Rolen-Rolen-Roberts Int'l; Rathe Prods., Inc./Design Prod., Inc., B-218424 et al., Aug. 1, 1985, 85-2 CPD ¶ 113; E.J. Murray Co., Inc.; W.M. Schlosser Co., Inc., B-212107, B-212107.2, Mar. 16, 1984, 84-1 CPD ¶ 316. Such a requirement does not set out a specific, objective standard measuring the bidder's ability to perform;

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[1]While the Architect of the Capitol is not a federal agency within the purview of our Bid Protest Regulations, 4 C.F.R. § 21.5(g) (1996), the agency has nevertheless agreed to have our Office consider bid protests concerning its procurements. 50 Fed. Reg. 30,293 (July 25, 1985). In cases where, as here, the basic procurement statutes do not apply to a protested procurement, we review the actions taken by the agency to determine whether they were reasonable. Kennedy & Assocs. Art Conservation, 68 Comp. Gen. 261 (1989), 89-1 CPD ¶ 186.

rather, the provision expresses in general terms a factor which is encompassed by the contracting officer's subjective responsibility determination.[2] Repco, Inc., B-225496.3, Sept. 18, 1987, 87-2 CPD ¶ 272. Since we will not review a contracting officer's affirmative responsibility determination absent circumstances not present here, 4 C.F.R. § 21.5(c), we will not consider M&M's allegations with respect to this aspect of the qualification provision.

As the agency acknowledges, the second element of the qualification provision--completion of three similar boiler rehabilitation projects--is a definitive responsibility criterion since it sets out a specific and objective standard for measuring a bidder's ability to perform. See Gelco Servs., Inc., B-253376, Sept. 14, 1993, 93-2 CPD ¶ 163. M&M argues that one of ACI's listed projects, in which it field-erected a boiler, is not a similar boiler rehabilitation project and, thus, that the firm is ineligible for award.[3]

A contracting agency has broad discretion in making responsibility determinations, including whether bidders meet definitive responsibility criteria, since the agency must bear the brunt of any difficulties experienced in obtaining the required performance. Prime Mortgage Corp., 69 Comp. Gen. 618 (1990), 90-2 CPD ¶ 48. Nevertheless, the agency must obtain evidence that a bidder meets the criteria so that compliance with the requirement, which is a prerequisite to award, can be determined. Id. Where an allegation is made that a definitive responsibility criterion has not been satisfied, we will review the record to ascertain whether evidence of compliance has been submitted from which the contracting officer reasonably could conclude that the criterion has been met. BBC Brown Boveri, Inc., B-227903, Sept. 28, 1987, 87-2 CPD ¶ 309.

The agency concedes that ACI's experience with this field erection, documented in the chief engineer's evaluation memorandum, may not meet the letter of the criterion. However, the agency contends that field erection involves more exacting skills than those required by a boiler rehabilitation. The agency explains that, in a

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[2]In contrast, requirements that firms be regularly engaged in a business for a specific period of time are definitive responsibility criteria. See, e.g., Topley Realty Co., Inc., supra; Townsco Contracting Co., Inc., B-240289, Oct. 18, 1990, 90-2 CPD ¶ 313; Calculus, Inc., B-228377.2, Dec. 7, 1987, 87-2 CPD ¶ 558.

[3]M&M does not challenge the agency's determination as to ACI's other projects. Initially, M&M did argue that the IFB required that the projects listed by the bidders involve "complete" retubing, and that two of the projects listed by ACI involved only partial retubing. While the agency disagrees with the protester's interpretation of the IFB, it also asserts that each of the three projects listed by ACI involved complete tubing. M&M does not contest this assertion.

simple boiler rehabilitation project like this one, the tubes are already in place, supported by the boiler's drums, and the tubes need only be removed and replaced with new tubes. In contrast, a field-erection project requires the contractor to "start from scratch"--installing the drums to support the boiler tubes in the correct position and alignment, with the correct support; connecting various waterwall and steam-generating tubes and piping; and installing refractory insulation, casing, lagging, fans, flues, ducts, motors, burners, instrumentation, structural steel, and the stack. The agency asserts that, since the work involved in a field erection includes the activities required here, but is more extensive, it considers ACI's field erection experience to exceed the requirements inherent in the criterion.

While definitive responsibility criteria establish a minimum standard which is a prerequisite to an affirmative determination of responsibility, there are situations where an offeror may not meet the specific letter of such criteria, but has clearly exhibited a level of achievement either equivalent to or in excess of the specified criteria, and thus properly may be considered to have satisfied the definitive responsibility criteria. Unison Transformer Servs., Inc., 68 Comp. Gen. 74 (1988), 88-2 CPD ¶ 471. The protester has shown that there are differences between a boiler rehabilitation and a field erection[4]--a field erection involves a new boiler which comes with labeled components made of new materials, some pre-assembled sub-assemblies, and instructions, while a boiler rehabilitation involves an old boiler and the contractor must, without instructions, determine which components must be replaced or repaired, and disassemble and reassemble various boiler sections using, in some cases, worn or outdated parts. However, that these distinctions exist is not dispositive of whether the agency reasonably determined that the two experiences are equivalent under this solicitation. The work called for by the IFB principally requires the contractor to remove and replace the boiler's tubing, a skill clearly encompassed by a field erection. Accordingly, we see no basis to object to the agency's acceptance of that experience on the ground that the skills involved are at least equivalent to those called for by the definitive responsibility criterion.

Moreover, even if the field erection experience were discounted, we note that in connection with the other two listed projects ACI retubed seven separate boilers. The agency contends that, since the purpose of the qualification criterion is to gauge experience, which is measured by individual boilers, it would consider ACI as having met the criterion by virtue of its having retubed seven different boilers.

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[4]M&M continues to cast its argument in terms of whether or not a field erection is "similar" to a boiler rehabilitation project despite the agency's concession that ACI's project did not meet the letter of the criterion. However, the issue here is whether the agency has reasonably determined that ACI's achievement with respect to the field erection is equivalent to or in excess of the criterion.

While M&M counters that the requirement contemplates evidence of experience on three separate contracts, not simply three different boilers, we think the agency's position is reasonable under the circumstances here.

The protest is denied.

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