Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: MEI, Inc.

File: B-277235.2

Date: November 12, 1997

Conrad C. Ledoux, Esq., and Herman M. Braude, Esq., Braude & Margulies, P.C., for the protester.
Maj. Jonathan C. Guden and Col. Nicholas P. Retson, Department of the Army, 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

Protest that awardee does not meet solicitation's definitive responsibility criterion requiring proof of 5 years of experience for the type of work to be performed is sustained where record shows the contracting officer did not have adequate, objective evidence the bidder satisfied the criterion; contracting officer improperly considered qualifications of bidder's subcontractor in determining bidder's responsibility; and, in any event, contracting officer did not have adequate, objective evidence that the subcontractor satisfied the criterion on behalf of bidder.

DECISION

MEI, Inc. protests the award of a contract to Solutions to Environmental Problems, Inc. (STEP) under invitation for bids (IFB) No. DABAT10-97-B-0008, issued by the Department of the Army for the inspection and repair of storm and sanitary sewer lines at Fort Benning, Georgia. MEI argues that STEP does not meet the solicitation's definitive responsibility criterion and is thus ineligible for award.

We sustain the protest.

The successful bidder was to be awarded a fixed-price requirements contract to provide an array of services associated with the inspection and repair of storm and sanitary sewer lines. The type of work to be performed includes sewer line cleaning; television inspection of sewer lines; testing, grouting, and retesting of joints; repair of point deficiencies; sliplining; pipe bursting and relining; manhole work; excavation, trenching, and backfilling; replacement of building service laterals; concrete and asphalt work; and site work. Paragraph H.26 of the IFB

required the contractor to "provide proof of (5 years) experience for the type of work to be performed under this contract . . . ."[1]

The Army received four bids by the June 4, 1997, bid opening. STEP submitted the apparent low bid of $5,641,861 and MEI submitted the apparent second low bid of $7,123,012. On June 10, MEI filed a protest in this Office arguing that STEP did not have the experience required under paragraph H.26 of the IFB and thus had not met a definitive responsibility criterion and was ineligible for award. MEI withdrew the protest pending the Army's final award determination and reinstated the protest after learning that award was made to STEP on September 5.

The contracting officer's determination that STEP satisfied the requirements set forth in paragraph H.26 was based upon his review of promotional material, resumes, and prior contracts performed by both STEP and J.L. Young Enterprises, Inc., a firm identified after bid opening as STEP's subcontractor. In its comments, MEI argues that this evidence was insufficient to show that STEP satisfied the definitive responsibility criterion in its own right; that the contracting officer improperly considered the qualifications of J.L. Young because there was no pre-award evidence of that firm's commitment to STEP's successful performance of the contract; and that, in any event, the evidence reviewed was insufficient to show that J.L. Young satisfied the criterion on STEP's behalf. The Army declined the opportunity to rebut any portion of MEI's legally and factually detailed comments, which we conclude are supported by the record in every respect.

Definitive responsibility criteria are specific and objective standards designed to measure a prospective contractor's ability to perform the contract. Such criteria, which must be met as a precondition to award, limit the class of contractors to those meeting specified qualitative and quantitative qualifications necessary for adequate performance, e.g., unusual expertise or specialized facilities. Topley Realty Co., Inc., 65 Comp. Gen. 510, 512-513 (1986), 86-1 CPD ¶ 398 at 4. There is no dispute that paragraph H.26, which requires the prospective contractor to have a specified number of years of experience in a particular area, is a definitive responsibility criterion.

Where a protester alleges 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; generally, a contracting agency has broad discretion in determining whether bidders meet definitive responsibility criteria since the

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[1]In addition to the general responsibility determination and paragraph H.26, paragraph 1.4 of the project specifications for pipe bursting requires the contractor to have a minimum of 5 years experience in pipe bursting and to have completed at least two jobs of a similar nature.

agency must bear the burden of any difficulties experienced in obtaining the required performance. Prime Mortgage Corp., 69 Comp. Gen. 618, 620 (1990), 90-2 CPD ¶ 48 at 3-4. While the relative quality of the evidence is a matter within the contracting officer's judgment, the contracting officer may only find compliance with the definitive responsibility criterion based on adequate, objective evidence. T. Warehouse Corp., B-248951, Oct. 9, 1992, 92-2 CPD ¶ 235 at 5.

The Army concedes, with ample support in the record, that STEP's qualifications were not sufficient for the firm to meet the criterion in its own right, and that the firm's compliance rests upon the experience of the subcontractor, J.L. Young. We therefore turn our attention to the contracting officer's review of the evidence with respect to J.L. Young's qualifications.

As a general rule, the experience of a technically qualified subcontractor may be used to satisfy definitive responsibility criteria relating to experience for a prospective prime contractor. Tutor-Saliba Corp., Perini Corp., Buckley & Co., Inc., and O & G Indus., Inc., A Joint Venture, B-255756, Mar. 29, 1994, 94-1 CPD ¶ 223 at 4-5. In considering whether the experience of a third party subcontractor may be relied upon by a prime contractor to meet an experience criterion, we examine the record for evidence of a commitment by the third party to the bidder's successful performance of the work. Id. at 6. While identifying or otherwise referencing the third party in the bid documents is considered to be reliable (indeed, preferable) evidence of compliance with an experience criterion, since it constitutes a matter of responsibility, identification of the third party or evidence of a firm commitment between the third party and the prime bidder need not be present in the bid and may be submitted after bid opening. Id.

It is undisputed that STEP's bid documents made no reference to J.L. Young or to any intention to utilize a subcontractor for this effort. On June 5, the day after bid opening, STEP sent a letter to J.L. Young stating that it had received the firm's bid for this project and that if STEP, the low bidder, was awarded the contract, "it [was] STEP's intention to enter into a similar contract with J.L. Young Enterprises, Inc. to assist STEP in the accomplishment of this work." The only communication from J.L. Young reviewed by the contracting officer is a July 10 letter addressed "To Whom It May Concern." In the letter, J.L. Young states that it can successfully complete this project because, relevant here, its employees have the necessary technical expertise and experience. The letter contains no reference to any intended relationship with STEP; indeed, it contains no reference to STEP at all.

The Army asserts that the content of these two letters was sufficient to justify the contracting officer's consideration of J.L. Young's experience in making his responsibility determination. MEI disagrees, arguing that the letters do not evidence a commitment by J.L. Young to STEP's successful performance of the work. We agree.

STEP's June 5 letter to J.L. Young evidences the bidder's intention to subcontract with the firm if awarded the contract, not the requisite commitment on the part of J.L. Young to STEP's successful performance of the contract. Nor is this requisite commitment found in J.L. Young's July 10 letter, which is merely a statement of the firm's purported qualifications to perform this work. Since the contracting officer had no pre-award evidence of any commitment on J.L. Young's part to STEP's successful performance of the contract--and, thus, no way to establish that STEP and, by extension, the Army, would reap the benefit of J.L. Young's experience--he could not properly consider J.L. Young's capabilities in making his responsibility determination. See Townsco Contracting Co., Inc., B-240289, Oct. 18, 1990, 90-2 CPD ¶ 313 at 6, aff'd, B-240289.2, Mar. 15, 1991, 91-1 CPD ¶ 290.

Even assuming that the contracting officer properly could consider J.L. Young's capabilities, our review of the record leads us to agree with MEI that the evidence of these capabilities--promotional materials, personnel resumes, and prior contracts--is insufficient to show that J.L. Young could satisfy the definitive responsibility criterion in STEP's stead.

The contracting officer's conclusion that J.L. Young has performed sewer repair and rehabilitation type projects and can provide closed-circuit television inspection, pressure grouting, internal line repair, joint testing, and other sewer/sanitary repair and rehabilitation services is derived, in part, from the firm's promotional materials. Setting aside the fact that promotional materials are hardly objective evidence of a firm's capabilities, a firm's statement that it "can" perform various services is not evidence of its experience, the "proof" of which is required by paragraph H.26.

The contracting officer also reviewed three resumes submitted by J.L. Young and concluded that the firm employs personnel with "extensive" backgrounds in the sewer and sanitary field and that its proposed field superintendent performed similar projects at Fort Benning in 1984 and 1991 while employed by Astor Bolden Enterprises.

The conclusion that these individuals have "extensive" backgrounds in the sewer and sanitary field is based upon general language found in each resume which characterizes the firm as a "construction and sewer rehabilitation company, focusing on utility and sewer rehabilitation projects," whose "[p]rojects include sewer line television inspection, cleaning, manhole repairs, slip lining, point repairs, etc." These general assertions about the firm's experience are not accompanied by any objective information--such as the identification of particular projects--that would have allowed for verification, and shed little light on the qualifications of the individuals. The resume of the proposed field superintendent indicates he has experience in this area with other firms, but the information is similarly general and unsupported. Moreover, the contracting officer's statement that this person performed similar projects at Fort Benning in 1984 and 1991 while employed by

Astor is drawn not from objective evidence, but from J.L. Young's July 10 letter.[2] There is no evidence that the contracting officer made any effort to obtain support for this assertion, despite the fact that these two projects were allegedly performed at Fort Benning itself. In sum, these resumes simply cannot be said to provide the proof required by paragraph H.26.

The contracting officer also concluded that a survey of J.L. Young's prior contracts shows the firm has the experience required by paragraph H.26. We disagree.

The contracting officer relied upon his review of four contracts, one each for golf course irrigation; installation of water line piping and fire hydrants; removal of old storm sewer piping and installation of new piping; and videotaping and clearing of sewer systems. As MEI's unrebutted comments point out, there are no line items here for any task referenced under the former two contracts, and there is no evidence that the work is related to the type of work required here. The latter two contracts address some of the work to be performed here, but there is no indication that the firm obtained experience in the work encompassed by the majority of the line items here, such as those for joint testing and grouting, repair of point deficiencies, sliplining, and pipe bursting and relining. At any rate, the oldest of these contracts was commenced less than 5 years ago, and the total duration of all of the contracts is far less than 5 years. Even if the marginal evidentiary adequacy of the resumes is combined with the marginal evidentiary adequacy of the prior contracts, we believe there is insufficient objective evidence to show that J.L. Young's experience satisfied the requirements of paragraph H.26.

For the reasons above, we find that the contracting officer lacked objective evidence upon which he could reasonably find that STEP met the IFB's definitive responsibility criterion. As a result, he should have found STEP nonresponsible. We sustain the protest. Since STEP is a small business, we recommend that the matter be referred to the Small Business Administration (SBA) for review under the certificate of competency procedures. See The Mary Kathleen Collins Trust, B-261019.2, Sept. 29, 1995, 96-1 CPD ¶ 164 at 4 n.4. If SBA does not certify that STEP is responsible, the contract should be awarded to MEI, if otherwise appropriate. We also recommend that MEI be reimbursed its costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1) (1997). MEI should submit its certified claim for costs to the Army within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

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[2]This person's resume also indicates that he was not employed by Astor in 1984.