Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: HAP Construction, Inc.

File: B-278515

Date: February 9, 1998

Theodore M. Bailey, Esq., for the protester.
Christopher E. Kohler for National Environmental Services Corporation, an intervenor.
Sherry Kinland Kaswell, Esq., Department of the Interior, for the agency.
Robert C. Arsenoff, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. General licensing requirement is a performance requirement, not a definitive responsibility criterion, and need not be satisfied prior to award.

2. Protest that awardee did not satisfy various definitive experience criteria is denied where record establishes that the contracting officer had a reasonable basis for concluding that criteria were met prior to award.

DECISION

HAP Construction, Inc. protests the award of a contract to National Environmental Services Corporation (NESC) under invitation for bids (IFB) No. 1425-97-S1-81-90001, issued by the Bureau of Reclamation, Department of the Interior, for certain demolition and construction work in the United States Virgin Islands. HAP principally contends that NESC did not satisfy various definitive responsibility criteria set forth in the solicitation.

We deny the protest.

BACKGROUND

The IFB, issued on March 6, 1997, was amended four times, and opening occurred on July 1. The specifications called for the removal of a catchment basin, the demolition of a hotel complex, and the replacement of a dock at Water Island in the Virgin Islands. In the "Foreword" to the solicitation the estimated "cost range" of the project was listed as $1,000,001 to $5,000,000.

Section I.66 of the IFB set forth the clause contained in Federal Acquisition Regulation (FAR) § 52.236-7, entitled "Permits and Responsibilities," which provides in pertinent part: "The Contractor shall, without additional expense to the Government, be responsible for obtaining any necessary licenses and permits, and for complying with any Federal, State, and municipal laws, codes, and regulations applicable to the performance of the work." The clause goes on to list various other contractor obligations during the performance of the contract.

In addition, IFB section M.2 (a), entitled "Additional Definitive Responsibility Criteria--Bureau of Reclamation," required each offeror or, if applicable, its subcontractor to have at least 5 years experience as a "licensed contractor" in asbestos remediation, hazardous material remediation and in building demolition. Further, the clause required each offeror (or subcontractor), to have completed in the last 5 years at least three asbestos remediation projects of similar magnitude to the current project; at least three hazardous remediation projects, with multiple waste streams, of similar magnitude to this project; and at least three building demolition projects of similar magnitude to this project.

Thirteen bids were received ranging from NESC's low bid of $1,135,659 to the high bid of $4,537,989; HAP's bid of $3,222,027 was eleventh low. NESC proposed Lepi Enterprises, Inc. as its asbestos removal subcontractor, and proposed to do the hazardous materials work and the building demolition work itself. This protest was filed on October 30 and award was made to NESC on November 26.

PROTEST AND ANALYSIS

HAP's protest consists of three sets of allegations: (1) neither NESC nor Lepi possessed valid Virgin Island licenses necessary to perform the contract prior to award; (2) neither NESC nor Lepi met the definitive experience requirements set forth in Section M.2(a); and (3) the agency treated HAP unfairly.[1]

Licenses

HAP argues that possession of valid Virgin Islands licenses was a definitive responsibility criterion which was required to be satisfied prior to award. The protester further alleges that neither NESC nor Lepi had valid Virgin Islands licenses before the November 26 award date and, therefore, they were ineligible for award.

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[1]HAP also protested the responsibility of 11 of the 13 bidders, 10 of which had submitted bids lower than HAP's. The only other bidder HAP considered responsible was a licensed Virgin Islands contractor which submitted the only bid higher than HAP's.

Notwithstanding HAP's understanding to the contrary, the IFB did not require that the bidders provide evidence of licensing with their bids, rather the IFB simply used standard FAR language calling for compliance with any applicable licensing requirements during the performance of the contract. A general requirement such as this to comply with federal, state or local laws and to obtain necessary local licenses does not itself render the requirement a definitive responsibility criterion even if local statutes require licenses as a precondition to submitting a bid. International Serv. Assocs., Inc., B-253050, Aug. 4, 1993, 93-2 CPD ¶ 82 at 3-4. Rather, the requirement is a performance requirement which may be satisfied during contract performance and does not affect the decision to award except as a general responsibility matter. Id.; Restec Contractors, Inc., B-245862, Feb. 6, 1992, 92-1 CPD ¶ 154 at 4.

HAP argues that an answer to a bidder's question contained in amendment No. 003 to the IFB concerning licensing converted the general requirement into a definitive responsibility requirement. The answer was as follows: ". . . [licensing] will be part of the responsibility determination prior to award." To make this kind of performance requirement a definitive responsibility criterion, the language of the solicitation must specifically require submission of evidence that a bidder meets the requirement prior to award. Restec Contractors, Inc., supra, at 3-4; Honolulu Marine, Inc., B-248380, Aug. 6, 1992, 92-2 CPD ¶ 87 at 3-4. The language pointed to by HAP merely refers to the general affirmative responsibility determination required for any award decision; it does not impose the requirement of pre-award submission of licensing documentation necessary to convert the licensing requirement into a definitive responsibility criterion. Restec Contractors, Inc., supra, at 3-4. Affirmative determinations of general responsibility are not reviewable by this Office absent a showing of possible bad faith on the part of government officials. Bid Protest Regulations, 4 C.F.R. § 21.5(c) (1997). Although HAP has alleged bad faith in this matter, as discussed below, there is no evidence of bad faith on the part of the agency.

HAP also argues that, since the agency in some cases began to treat licensing as a definitive responsibility criterion when it asked firms for licenses prior to award, the requirement was converted to one of definitive responsibility. We are unaware of any legal support for this position, and the agency's actions merely reflect a response to the protest issues raised by HAP in the context of the agency's general responsibility determination.

Definitive Responsibility Criteria--Experience

HAP alleges that the contracting officer had insufficient evidence prior to award from which to conclude that Lepi and NESC met the definitive experience criteria relating to asbestos removal, hazardous material removal, and demolition. In this regard, HAP asserts that neither firm had the requisite 5 years experience as a

licensed contractor and that Lepi's three asbestos projects were not similar in magnitude to the Virgin Islands project.

Literal compliance with definitive responsibility criteria is not required where there is evidence that an offeror has exhibited a level of achievement equivalent to the specified criteria. Western Roofing Serv., B-232666.3, Apr. 11, 1989, 89-1 CPD ¶ 368 at 4. Whether sufficient evidence exists to conclude that an offeror has met such a criterion is subject to considerable discretion; the relative quality of the evidence of compliance is a matter for the judgment of the contracting officer and the extent to which investigation may be required is a matter for the contracting officer to determine, not this Office. Id. at 3.

HAP's first allegation in this regard is that the contracting officer could not reasonably conclude that Lepi had been a licensed asbestos contractor for 5 years as required by section M.2 of the IFB[2] based solely upon information indicating that the firm was incorporated in 1986. In our view, the contracting officer reasonably relied on NESC's signed certification that Lepi met the requirement in conjunction with the description of the three asbestos projects performed by Lepi--in a field requiring licensure--in determining that the firm was licensed for at least 5 years notwithstanding that the agency did not have copies of Lepi's licenses in its possession prior to award.[3]

HAP's second allegation is that Lepi's three described projects were not sufficiently similar in scope to the Virgin Islands project, which called for the removal of 90,000 square feet of asbestos, because they consisted of projects involving between 3,000 and 45,000 square feet of asbestos removal. The agency states that it considered the projects sufficiently similar because they all involved the removal of friable material under sealed conditions while the Virgin Islands project calls for the removable of non-friable material in open-air conditions. Friable asbestos is a form of asbestos that crumbles. Because of that property, friable asbestos can easily become airborne during renovation/demolition projects. Accordingly, its removal entails specialized procedures and techniques such as sealed negative pressurized environments. Because Lepi's experience is with this more complicated removal process, the agency reasonably concluded that this experience was equivalent to what was required for the Virgin Islands project which involves non-friable asbestos, a less dangerous material, which may be removed in an open environment involving less complex safety precautions. While HAP disagrees with this technical

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[2]HAP also argues that section M.2 requires licensure specifically by the Virgin Islands for 5 years. This argument is entirely without foundation because the language of the section imposes no such requirement.

[3]We note that, following award, the agency obtained licenses from Lepi covering the listed projects in NESC's proposal.

assessment, we find no basis for disturbing the determination of sufficient similarity based on the inherently more dangerous and complex nature of the projects from which Lepi's experience was derived.

Finally, HAP alleges that since NESC has been in business only since 1993, the firm does not meet the 5-year licensed experience requirements for hazardous material remediation and demolition. The agency based its determination on evidence that NESC's predecessor company was in existence since 1988. HAP argues that both firms still exist and there is no evidence that individuals with asbestos experience continued with NESC. As NESC explained, at one point there was one firm which performed both railroad and asbestos work which was divided into two companies for liability insurance purposes in 1993 when NESC was created. Based on this explanation, the contracting officer reasonably relied on the 1988 incorporation date of the predecessor firm.

Bad Faith

HAP alleges that the agency acted in bad faith by delaying its response to an agency-level protest filed on August 24 challenging the responsibility of all firms with lower bids than HAP until late in 1997. HAP also alleges that the agency unduly delayed the award pending continuing efforts to permit NESC to obtain Virgin Islands licenses.[4]

What transpired between August 24 and the November 26 award date reflects the agency's concerns with HAP's licensing allegations and its efforts to ensure that NESC was licensed prior to award. In fact, NESC was not required to possess Virgin Island licenses prior to award. Thus, while the agency engaged in a protracted and unnecessary effort to save a considerable amount of money as represented by the difference in bid prices in order, in part, to respond to HAP's protest, this action provides no basis to conclude that the agency acted in bad faith.

The protest is denied.

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[4]HAP also alleges that the agency acted improperly and in bad faith by accepting a bid well under $3 million, when it had earlier informed HAP when canceling an 8(a) acquisition for the project that the work could not be performed for under $3 million. This allegation involves a separate procurement action, and is untimely because the IFB at issue clearly indicated a cost range of between $1 million and $5 million. Allegations of improprieties which are apparent from the face of an IFB must be protested prior to bid opening, 4 C.F.R. § 21.2(a)(1) (1997), and HAP first protested to the agency after bid opening.