

DECISION



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

60830

FILE: B-184865

DATE: May 3, 1976 98992

MATTER OF: Houghton Elevator Division,
Reliance Electric Company

DIGEST:

1. Cases which hold that in absence of finding of nonresponsibility, bid may not be rejected solely for bidder's failure to meet literal requirement of responsibility criteria set forth in solicitation will no longer be followed. Meeting such definitive criteria of responsibility, either precisely or through equivalent experience, etc., is actual prerequisite to affirmative determination of responsibility, since waiver of such requirement may prejudice other bidders or potential bidders who did or did not bid in reliance on its application.
2. Experience of corporate officials prior to formation of corporation can be included when examining corporation's overall experience level for bidder responsibility determination. Therefore, mere fact that corporation had only existed since early 1975 is not determinative of its ability to meet "approximately 5 years" experience requirement.
3. Record does not support affirmative responsibility determination where agency made sub silentio finding that bidder had demonstrated level of achievement equivalent to or in excess of minimum level of experience set forth in IFB, i.e., that it had worked on more complex equipment for requisite length of time (approximately 5 years) wherein same sort of expertise needed in instant contract was brought to bear, since record indicates only that bidder (1) had some experience with equipment; (2) had some experience with highly sophisticated equipment; and (3) had 5 years' general experience, and does not indicate extent of experience with either specific or more complex equipment.
4. Since agency's determination as to small business firm's responsibility was not reasonable, options should not be exercised and future needs resolicited based upon proper statement of actual needs in clear and precise terms.

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Invitation for bids (IFB) No. 664-9-76AT was issued on June 9, 1975, by the Veterans Administration (VA) Hospital, San Diego, California. The IFB sought bids on the furnishing of all labor, equipment and supplies necessary to inspect, clean, adjust and lubricate the elevators and dumbwaiter located in the hospital and to replace defective parts as specified in the contract. The period of this contract was to have been from July 1, 1975, through September 30, 1976, with the Government having the right to renew the contract for two successive 1-year periods.

The IFB states on page 16 under Special Conditions:

"QUALIFICATIONS OF BIDDERS: (a) Upon request of the Government, Bidder shall be able to show evidence of his reliability, ability and experience by furnishing (1) a list of personnel who will perform under the contract showing the length and type of experience of such personnel and (2) the names and addresses of other concerns and/or Government Agencies for which prior comparable services were rendered by the bidder. Generally, the bidder shall have had approximately 5 years successful experience in repairing and servicing the specified equipment. (b) Ability to meet the foregoing experience requirements and the adequacy of the information submitted will be considered by the Contracting Officer in determining the responsibility of the bidder." (Emphasis added.)

The IFB also stated on page 11 under the heading of "FURNISHING AND INSTALLING DEFECTIVE PARTS":

"* * * The following list of repair parts constitute a level of reliability which will permit dependable operation. These parts shall be available in the San Diego area to meet emergency repair demands of the Contract.
* * *"

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The IFB thereafter listed two full pages of parts and the quantity thereof required for each particular part.

Four responses were received to the IFB. The two lowest bids on a monthly basis were:

Reliable Elevator Corp. (Reliable) (a small business)	\$3,441.00 (less one-tenth 1 percent prompt-payment discount)
Haughton Elevator Division (Haughton) (a large business)	4,170.90

Subsequent to bid opening Reliable submitted a letter dated June 27, 1975, setting forth the history and qualification of the personnel who would be assigned to the contract. That letter set forth the following information regarding Reliable's personnel:

"ANDY NEUMANN

"Mr. Neumann will be the man we put into your facility to service and trouble shoot your equipment. He is a graduate electrical engineer specializing in solid state circuit design. He has five years experience in the elevator industry and during this time he worked on some of the most sophisticated control equipment ever installed in an elevator system. Mr. Neumann serviced and shot trouble on the Haughton Gearless equipment located within Caesars Palace in Las Vegas. Within the same complex U. S. Elevator installed a full one hundred percent solid state job complete with Commercial Computer Control. This particular system is probably the most sophisticated elevator control system in today's market and Mr. Neumann was able to handle it without a problem.

"TAKASHI SHIMIZU

"Mr. Shimizu has basically the same background as Mr. Neumann and in fact was also involved with the equipment located in Caesars Palace. He also worked ten years for North American as an Electrical Engineer as well as a Design Engineer. Mr. Shimizu has worked on Haughton Gearless equipment at Loma Linda Hospital as well as Caesars Palace.

"RICHARD MAXEY

"Mr. Maxey is known as one of the top trouble shooters and technicians in the elevator industry. He has worked in the elevator trade for twenty seven years as a Elevator Journeyman and Chief Adjuster. He has extensive background in relay circuitry and mechanical repairs. Mr. Maxey was the man who was used to rectify problems encountered with Houghton equipment at the Loma Linda Hospital as well as the American Cement Building.

"JOHN TAYLOR

"Mr. Taylor's reputation in the elevator industry is almost identical to Mr. Maxey's. He has been in the elevator trade for over twenty nine years and has worked on several Houghton jobs including but not limited to Loma Linda Hospital, American Cement Building, Disney World Hotel and the General Insurance Building. It might be well to mention that both Mr. Taylor and Mr. Maxey were involved in extensive work for the V. A. Hospitals located in San Fernando, Sawtelle, Sepulveda and Long Beach.

"TONY BECHTLER

"Mr. Bechtler is one of the top elevator servicemen in the area. He is an expert troubleshooter and has an enormous amount of knowledge with Houghton, Otis, Westinghouse and U. S. Elevator equipment."

On July 23, 1975, Reliable furnished the VA with a list of 30 jobs presently under contract. The list was stated as representing a cross-section of the total jobs Reliable then had.

The agency's report states that:

"Prior to the contingent award to Reliable, a thorough investigation of the contractor's ability to perform under the terms of the contract was made. That investigation indicated to the Contracting Officer that Reliable Elevator was qualified and could perform satisfactorily."

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Therefore, on August 12, 1975, the VA sent Reliable the following letter:

"Your offer for maintenance service on elevators at this hospital in accordance with IFB 664-9-76AT for the period September 1, 1975 through September 30, 1976 has been accepted contingent on the following:

"1. Physical evidence of inventory of parts available locally.

"2. Copies of Purchase orders placed with Haughton for their parts indicating anticipated delivery date.

"3. Andy Neumann to be assigned to our hospital and in the event he leaves your employ his replacement subject to approval by the VA."

Thereafter, to substantiate the hospital's requirement for physical inventory of parts and copies of orders placed, the contracting officer had an impartial firm verify the inventory and orders. Reliable was requested to furnish by September 9, 1975, a copy of all orders issued for parts together with an acknowledgment of the orders from the supplier confirming a firm delivery date. The contracting officer stated that in the event Reliable was unable to comply with these requirements, the Government would have no other recourse but to proceed with default action under the terms of the contract. The agency report states that:

"Reliable was found to be responsible after satisfying the aforementioned inspections and requirements. As a result, award was finalized and Reliable began performance on September 1, 1975. * * *"

Subsequently, Haughton filed a protest in our Office against the award to Reliable on the bases that: (1) the qualification statement submitted by Reliable did not contain proof that the company had previously successfully maintained equipment similar to that referenced in the IFB. Moreover, Reliable's qualification statement did not describe either the type of elevators previously serviced by the personnel to be employed by Reliable or the number of years of their experience; (2) Haughton does not believe that Reliable can satisfy the IFB requirement that a specific inventory of replacement parts be maintained in the San Diego area; and

(3) since Reliable was incorporated on March 11, 1975, this fact alone precludes a finding it met the experience requirement.

This Office has stated that we will not review affirmative determinations of responsibility unless the solicitation contains definitive criteria of responsibility. Pammar Private Cab Corp., B-184371, December 9, 1975, 75-2 CPD 380; Yardney Electric Corporation, 54 Comp. Gen. 509 (1974), 74-2 CPD 376; Data Test Corporation, 54 Comp. Gen. 499 (1974), 74-2 CPD 365, affirmed 54 Comp. Gen. 715 (1975), 75-1 CPD 138. We believe that the requirement here that "Generally, the [successful] bidder shall have had approximately 5 years successful experience in repairing and servicing the specified equipment" is such a definitive criteria so as to allow our review. See Yardney Electric Corporation, *supra*; Pammar Private Cab Corp., *supra*.

Federal Procurement Regulations (FPR) § 1-1.1203-3 (1964 ed. amend. 95) states:

"When the situation warrants, contracting officers shall develop with the assistance of technical personnel or other specialists, special standards of responsibility to be applicable to a particular procurement or class of procurements. Such special standards may be particularly desirable where a history of unsatisfactory performance has demonstrated the need for insuring the existence of unusual expertise or specialized facilities necessary for adequate contract performance. The resulting standards shall form a part of the solicitation and shall be applicable to all bidders or offerors."

In 37 Comp. Gen. 196 (1957) this Office, citing a number of decisions, stated that the award of a contract properly could be limited to a class of bidders meeting specified qualitative and quantitative experience requirements in a specialized field where the invitation so provides and where the restriction is properly determined to be in the Government's best interest. See 37 Comp. Gen. 420 (1957). See, also, Paul R. Jackson Construction Company, Inc., and Swindell-Dressler Company, 55-Comp. Gen. 366 (1975), 75-2 CPD 220; Descomp, Inc., 53 Comp. Gen. 522 (1974), 74-1 CPD 44. Plattsburgh Laundry and Dry Cleaning Corp., 54 Comp. Gen. 29 (1974), 74-2 CPD 27.

However, in 39 Comp. Gen. 173, 178 (1959), we stated:

"When, as in the present case, there appears to be reasonable ground for doubt as to a low bidder's lack of responsibility, even though the bidder may fail to meet some of the qualifications prescribed by the invitation, we believe that rejection of the low bid and award to any other bidder should be supported by a specific determination, based upon consideration of the qualifications of the particular bidder, that the low bidder was not a 'responsible' bidder within the meaning of the statute. If such a determination cannot be made, the qualifications prescribed by the invitation must be regarded as unreasonably restrictive. In that event, it would appear that the invitation should be canceled and the procurement readvertised under proper specification requirements."

This case, as properly interpreted, indicates that where a bidder is found to be responsible, even though it does not meet specified definitive criteria of responsibility set out in the IFB, the inclusion of those criteria must be deemed unduly restrictive of competition and the IFB should be canceled. B-147028, October 31, 1961. We have, however, recognized situations where no useful purpose would be served by a cancellation and resolicitation and, thus, permitted award to be made to the low responsible bidder in circumstances where the inclusion of the offending provision did not prevent any potential bidder from participating. 43 Comp. Gen. 275 (1963); B-147664, March 1, 1962; and B-144646, February 8, 1961. Further, where we have concluded that the criteria in question do not appear to be unduly restrictive, we have held that their being met is a necessary prerequisite to award under the IFB. B-160152, October 7, 1966. See also B-152896, February 13, 1964.

However, a review of our cases involving specified definitive criteria of responsibility indicates a number of cases have not comported with the foregoing rules. Generally, these cases have held that even though a bidder did not meet the prescribed criteria of responsibility set forth in the solicitation, a proper award could be made to that bidder provided the agency determined the bidder to be otherwise responsible. These, and other similar cases, listed below, will no longer be followed to the extent they are inconsistent with the foregoing rules: B-157149, February 16, 1966; B-155990,

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June 8, 1965; 53 Comp. Gen. 36, 40 (1973); 52 id. 647, 653 (1973); 49 id. 4 (1965); B-176961, January 2, 1973; B-176801, November 22, 1972; B-168589(2), February 11, 1970; B-159607, September 14, 1966; B-156999, October 1, 1965; B-154243, June 1, 1964; B-153340, March 20, 1964; B-164931, September 5, 1968; B-162321, December 21, 1967; B-155581, January 15, 1965; B-154787, September 4, 1964; and B-151580, June 4, 1963.

While we do agree that, as stated in 39 Comp. Gen., supra, a matter of responsibility cannot be made into a question of responsiveness by the terms of the solicitation, we do not feel that definitive criteria of responsibility specifically and purposely placed in a solicitation by an agency can be waived as the contracting officer sees fit. Data Test Corporation, supra. In fact to do so would be misleading and prejudicial to other bidders which have a right to rely on the wording of the solicitation and thus to reasonably anticipate the scope of competition for award. See Instrumentation Marketing Corporation, B-182347, January 28, 1975, 75-1 CPD 60. If an IFB were to require 5 years of relevant experience as a prerequisite to an affirmative determination of responsibility, but an award was made to a firm with less than that experience level, or its equivalent, participants with the specified experience may have been prejudiced in that had they realized that the competition would include firms with less experience and thus perhaps lower overhead, etc., those firms may have refrained from bidding or bid lower in an attempt to secure the award. Moreover, other firms which did not participate because of the experience requirement might also have been prejudiced.

That is, contrary to the view expressed in the cases noted above, that these criteria are no more than aid to help the contracting officer reach his conclusion that the bidder is responsible, we believe that meeting such definitive criteria of responsibility, either precisely or through equivalent experience, etc., is actually a prerequisite to an affirmative determination of responsibility. See Pammar Private Cab Corp., supra, at page 4; B-160152, supra. See, also, Oscar Holmes & Son, Inc., B-184099, October 24, 1975, 75-2 CPD 251; FPR § 1-1.1203-3, supra. To hold otherwise would make such criteria mere surplusage, for even under more general statements of responsibility criteria, the bidder must be found to have the ability to comply with the contract provisions. However, where special standards of responsibility, e.g., definitive criteria of responsibility, are used the agency is attempting to insure "* * * the

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existence of unusual expertise or specialized facilities necessary for adequate contract performance." (Emphasis added.) FPR § 1-1.1203-3, supra. See FPR § 1-1.1203-1 (1964 ed. amend. 95).

Therefore, we believe that definitive criteria of responsibility, which the agency has determined necessary by placing them in the solicitation, should be read as outlining a minimum standard of experience or expertise which is a prerequisite to an affirmative determination of responsibility. We recognize that there may be situations where a bidder may not have met the specific letter of such criteria but has clearly exhibited a level of achievement either equivalent to or in excess of that minimum level specified and may thus properly be deemed responsible. This is where, for example, the solicitation specifies that the successful bidder must have a given number of years of experience relative to a particular item and the bidder does not literally meet this standard but does have the requisite number of years' experience with respect to more complicated items of the same general type, wherein the same sort of expertise must be brought to bear.

With regard to the instant case, we note that while counsel for Houghton points out, and the agency report reflects, that Reliable was incorporated only on March 11, 1975, this fact alone does not provide a basis to conclude that Reliable did not meet the specific experience requirement set forth in the IFB. This Office has recognized on many occasions that the experience of corporate officials prior to the formation of the corporation can be included when examining a corporation's overall experience level. See Baldwin Ambulance Service, Inc., B-184384, December 15, 1975, 75-2 CPD 392; Hydromatics International Corporation, B-180669, July 29, 1974, 74-2 CPD 66; 38 Comp. Gen. 572 (1959); 36 id. 673 (1957). Cf. Kan-Du Tool & Instrument Corporation, B-183730, February 23, 1976, 76-1 CPD 121. Therefore, the mere fact that the corporation had only been in existence since early 1975 is not determinative of its ability to meet the "approximately 5 years" experience requirement.

We construe the instant experience requirement quoted above to mean that, absent unusual circumstances, a bidder must as a condition precedent to an affirmative determination of responsibility, and hence award, have approximately 5 years' successful experience in repairing and servicing the specified equipment, or equivalent experience.

The equipment specified in the IFB was as follows:

"Electric Passenger Elevators No. P-1 through P-6, gearless traction type; with generator field control; group automatic operation; car leveling device, signal system power operated center opening car and hoistway doors. Manufacturer: Haughton

"Electric Service Elevators No. S-1 through S-4, gearless traction; and No. S-5 geared traction type; with generator field control; group automatic for No. S-1 through S-4 and two stop collective automatic operation for No. S-5; car leveling device, signal system, power operated two speed car and hoistway doors. Manufacturer: Haughton

"Electric Dumbwaiter No. DW-1, geared traction type; with rheostatic control; call-send operation; and manually operated hoistway doors and car doors. Manufacturer: Matot"

As can be seen, the description indicates the specific manufacturer and type of elevators in use at the hospital. When viewed in conjunction with the IFB's experience clause, it is clear that the clause goes to experience related to the specific make and type of equipment in use rather than to more generalized experience.

It appears that on the basis of Reliable's June 27, 1975, letter, the agency made a sub silentio finding that Reliable had demonstrated a level of experience equivalent to or in excess of the minimum level of experience set forth in the IFB, i.e., that it had worked on more complex equipment for the requisite length of time wherein the same sort of expertise needed to perform the instant contract must have been brought to bear. This view is reinforced by the agency's letter of August 12, 1975, which imposed the condition that Reliable's Mr. Neumann, who had such experience, be specifically assigned to the hospital and that in the event he left Reliable's employ VA had to approve his replacement.

As we analyze the information contained in the June 27 letter, we believe it indicates that the people who Reliable proposed to use (1) had some experience with Haughton gearless equipment; (2) had some experience with highly sophisticated elevator control systems; and (3) had at least 5 years of general experience

in the elevator industry. The letter does not, however, indicate either the length of time or experience these people had with Haughton elevators, or with other elevators of equal or greater complexity. Therefore, in the absence of more, we do not see how the agency could reasonably have made the necessary determination that Reliable had experience equivalent to that stated in the IFB.

Furthermore, the fact that Reliable apparently did not meet the IFB's experience requirement and is presently satisfactorily performing the subject contract is not determinative of the propriety of the award to it, but rather does indicate to us that the agency did not need the experience level stated in the IFB. In this regard, the procuring agency must be very cautious in setting forth any such experience requirement and must be sure that such a requirement is, in fact, necessary in the best interest of the Government.

Where, as here, the IFB contained such an unnecessary requirement, the criteria must be construed as being unduly restrictive of competition and the IFB should have been canceled before award since we believe that both bidders which participated in the procurement, and those which did not, may have been prejudiced by the inclusion of restrictions that were unnecessary and which the agency apparently did not intend to rigidly enforce. Cf. Instrumentation Marketing Corporation, supra. Had Haughton known that the 5-year experience criterion was not a requirement to be enforced it may have bid lower in view of the anticipated competition, and other firms may have participated which did not do so because of the misleading statement of the responsibility criteria. See Instrumentation Marketing Corporation, supra.

We did state in Edward B. Friel, Inc., 55 Comp. Gen. 231, 237 (1975), 75-2 CPD 164, that "The fact that the terms of an IFB are deficient in some way does not necessarily justify cancellation after bids have been opened and bidders' prices exposed." See Joy Manufacturing Company, 54 Comp. Gen. 237 (1974), 74-2 CPD 183. However, in determining if such a cogent and compelling reason exists to justify cancellation two factors must be examined: (1) whether the best interest of the Government would be served by making an award under the subject solicitation, and (2) whether bidders would be treated in an unfair and unequal manner if such an award were made. Here, as noted above, we believe that the IFB was both misleading and unduly restrictive of competition to the prejudice of others in that it indicated that consideration would be limited to bidders having a minimum of approximately 5 years' experience when in fact

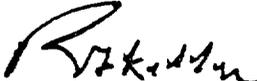
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no such level of experience was needed. Accordingly, a cogent and compelling reason did exist and the IFB should have been canceled.

In view of our conclusion that the solicitation was defective and thus resulted in an improper award, we recommend that the VA not exercise the existing options under Reliable's contract but rather resolicit its need for elevator repair services based upon a proper statement of its actual needs.

In this regard, we note that the experience clause in the instant IFB was somewhat unclear and could have been drafted more precisely. We believe that it is incongruous for the expression of an IFB experience clause to, on the one hand, utilize broad terms such as "generally" and "approximately" and, on the other hand, to make the meeting of these rather broadly stated criteria mandatory, i.e., "* * * the bidder shall have etc." We believe that in the future if the VA chooses to utilize such an experience clause, it should avoid similar incongruities and make its requirements clear and precise as to the experience level required.

In view of our recommendation that VA not exercise any option of Reliable's contract, we see no need to discuss Haughton's additional arguments.


Deputy Comptroller General
of the United States