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DECISION



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

FILE: B-219632 **DATE:** December 9, 1985
MATTER OF: J.A. Jones Construction Company

DIGEST:

1. Solicitation provision that bidder may be required to demonstrate previous experience in performing comparable work involves bidder responsibility that GAO does not review absent a showing of possible fraud on the part of contracting officials or that definitive responsibility criteria were not applied.
2. Solicitation provision that bidder must have performed similar construction services within the United States for 3 prior years must be met as a condition of award; the similarity of prior work, however, is essentially within the discretion of the contracting a reasonable agency.
3. Allegation that agency's affirmative determination of responsibility was based on fraud or bad faith is without merit where record indicates a reasonable basis for agency's determination.
4. Protest that subcontractor of awardee does not comply with nationality provisions included in the contract is dismissed since compliance with the provisions is a matter of contract performance not for GAO consideration.

J.A. Jones Construction Company (Jones) protests the award of a contract under invitation for bids (IFB) No. N62470-85-B-5065 by the Department of the Navy for port rehabilitation in Kismayo, Somalia. Jones contends that none of the bidders that submitted lower bids than Jones meets experience and eligibility requirements contained in the contract.

We dismiss the protest in part and deny it in part.

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The IFB was issued on March 26, 1985, by the Naval Facilities Engineering Command, the construction agent for the Agency for International Development (AID) which is financing the port rehabilitation project. The work includes construction of a steel sheet wharf, repair of an existing breakwater, dredging and filling, slope protection, demolition, mooring systems, navigational aids, provision of utilities and related work. The Navy received eight bids, with the George A. Fuller Company (Fuller) submitting the apparent low bid of \$19,990,000. Jones, the apparent fourth low bidder, subsequently filed a protest with this Office against the award of the contract to either Fuller or the two other lower bidders, C.D.K. Construction Co., Inc. (C.D.K.), and Coutinho Construction Inc. (Coutinho). The Navy nevertheless determined that it was necessary to award the contract prior to our deciding the protest, and made the award to Fuller.

Jones first protests that neither Fuller, C.D.K. nor Coutinho could demonstrate previous experience in performing comparable work as required by the IFB in paragraph 4 ("Bidder's Qualifications") of the IFB's "Instructions to Bidders." That paragraph states in part that "before a bid is considered for award, the bidder may be requested by the government to submit a statement regarding his previous experience in performing comparable work." Jones also alleges that neither Fuller, C.D.K. nor Coutinho meets the requirement that it have "performed within the United States similar . . . construction services under a contract or contracts for services and derived revenue therefrom in each of the 3 years prior to the date" of the IFB. This requirement is contained in paragraph 3, subsection 3.0, section D of the IFB, as amended, entitled "Source and Nationality Requirements for Procurement of Goods and Services." The requirement is derived from a standard clause prescribed by the AID Acquisition Regulation, 48 C.F.R. § 752.7004 (1984). See AID Handbook 1, Supp. B, § 5D (Apr. 1984).

The first provision clearly involves bidder responsibility. The contracting agency must make an affirmative determination of a bidder's responsibility prior to awarding the contract. Federal Acquisition Regulation, 48 C.F.R. § 9.103(b) (1984). Our Office will not review an agency's affirmative determination of responsibility, however, unless possible fraud on the part of contracting officials is shown, or the solicitation contains definitive responsibility criteria

that allegedly have not been applied. Vulcan Engineering Co., B-214595, Oct. 12, 1984, 84-2 CPD ¶ 403. Definitive responsibility criteria are specific and objective qualifications necessary for adequate contract performance that a bidder must meet to be eligible for award. Id. The provision here does not require any specific experience or other qualification; it merely states that the contracting officer "may" require a statement of previous experience in comparable work. See Weldtest, Inc.--Reconsideration, B-216747.2, Dec. 3, 1984, 84-2 CPD ¶ 612.

The second provision establishes eligibility requirements that we view as also bearing on responsibility.^{1/} This provision does contain definitive responsibility criteria since it requires that bidders have performed similar construction services over a specific time period (3 years) and in a specific place (the United States). See Urban Masonry Corp., B-213196, Jan. 3, 1984, 84-1 CPD ¶ 48. A determination of what constitutes "similar" construction services, however, is left to the discretion and business judgment of the contracting officer. See Mosler Airmatic Systems Div., B-187586, Jan. 21, 1977, 77-1 CPD ¶ 42.

The record shows that in finding Fuller responsible, the Navy relied upon evidence that Fuller had performed two construction projects in the United States during the prior 3 years--the Meadowlands Sports Complex in New Jersey and the Lake Development in Las Vegas, Nevada--that involved similar construction in a marine environment. In

^{1/} The Navy maintains that the provision only imposes performance requirements and does not apply to construction contracts. The IFB specifically states, however, that a firm is "eligible as a contractor" only if it meets the provision's requirements, and the provision itself expressly requires that the bidder have previously performed comparable "construction services."

addition, the Navy cited several other construction projects that were comparable in scope outside of a marine environment. The protester alleges that Fuller subcontracted for the entire construction services in the two projects involving marine environments and served only as a manager. Even if Jones is correct, the decision that those projects, as well as the projects in nonmarine environment, were sufficiently similar to the work covered by the IFB was essentially within the agency's discretion. See Mosler Airmatic Systems Div., supra; Vector Engineering, Inc., B-200536, July 7, 1981, 81-2 CPD ¶ 9. There is nothing in the record, which contains objective evidence concerning the scope of the prior projects, to indicate that the agency went beyond the proper exercise of discretion here.

Jones does allege that the Navy's affirmative determination of Fuller's responsibility constituted fraud or bad faith. It cites in particular an October 1983 trade journal article stating that Fuller is controlled by foreign interests, which, Jones maintains, makes Fuller ineligible for award. We note that Jones failed to raise the issue of Fuller's alleged foreign control in the initial protest, but instead waited until responding to the agency report on the protest. Assuming the protester learned of the above-mentioned article shortly after its October 1983 publication, Jones should have raised the issue of Fuller's foreign control within 10 days after becoming aware that Fuller was being considered for award in order to comply with our Bid Protest Regulations. See 4 C.F.R. § 21.2(a)(2) (1985).

In any event, we find no basis to conclude that fraud or bad faith played a role in the responsibility determination. Even if the Navy had reason to believe that Fuller was controlled by foreign interests, we do not view such control as rendering Fuller ineligible under the AID requirements. These requirements, as apply here, include: (1) incorporation in the United States for more than 3 years, (2) performance of similar services within the United States for the 3 previous years, and (3) employment of United States citizens in more than half of the employer's permanent full-time positions in the United States. The Navy had evidence of Fuller's compliance with these requirements including Fuller's articles of incorporation in Maryland, the previously-discussed evidence of similar construction projects, and certifications and documentation pertaining to the composition of Fuller's workforce in the United States.

Given the evidence of Fuller's compliance with the applicable eligibility requirements, we cannot say that the affirmative determination of Fuller's responsibility constituted fraud or bad faith. Contracting officials are presumed to act in good faith, and in order to show otherwise the protester must submit virtually irrefutable proof that they had a malicious and specific intent to harm the protester. See J.F. Barton Contracting Co., B-210663, Feb. 22, 1983, 83-1 CPD ¶ 177. Jones' protest submission does not suffice to meet the high standard of proof required to show fraud or bad faith. Since Fuller received the award, we need not consider the eligibility of C.D.K. or Coutinho.

Finally, in light of documents made available to Jones by the Navy in the course of this protest, Jones also alleges that Fuller's chosen subcontractor and construction agency, Archirodon Construction (Overseas) Co., S.A. of Panama (Archirodon) fails to meet a nationality requirement in the IFB. Specifically, paragraph (1X), as amended, of the "Source and Nationality Requirements for Procurement of Goods and Services," supra, states in pertinent part:

"(1X) Procurement

"All . . . services provided by the contractor and any subcontractors under this contract for incorporation into the project or for use in performing the contract shall have their nationality, source, and origin in those countries listed in the . . . AID Geographic Codes . . ."

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"(b) Suppliers of services other than prime Contractor shall be of Code 941 or Somalia nationality."

Jones contends that although Panama is an acceptable nationality for subcontract construction work, the subcontractor Archirodon is in fact either a holding

company in Monaco or a construction company in Greece. As both of these countries are excluded from the Code 941 classification set forth in the IFB, Jones maintains Archirodon is an ineligible subcontractor.

Since the IFB did not require bidders to list proposed subcontractors and their nationalities, the requirement that the awardee select a subcontractor in compliance with the nationality requirements relates to contract performance. See Hatch & Kirk, Inc., B-214024, June 11, 1984, 84-1 CPD ¶ 614. Compliance with the contract performance obligation involves a matter of contract administration that is the responsibility of the contracting agency, not our Office. Advanced Electronic Applications, Inc., B-219997, Sept. 25, 1985, 85-2 CPD ¶ 339. We therefore dismiss this aspect of Jones' protest.

The protest is dismissed in part and denied in part.

for *Seymour Efraim*
Harry R. VanCleve
General Counsel