The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: R. J. Crowley, Inc.

File: B-229559

Date: March 2, 1988

DIGEST

Protest against a negative determination of responsibility is sustained where the determination is based primarily on unreasonable or unsupported conclusions of a pre-award survey.

DECISION

R. J. Crowley, Inc. protests the determination by the United States Government Printing Office (GPO) that it is non-responsible under invitation for bids (IFB) No. 50898 for the replacement of the existing roof at the GPO Headquarters in Washington D. C. The determination that Crowley was nonresponsible was based primarily on a pre-award survey conducted by GPO. Crowley's bid was substantially lower than the next lowest bid.

Crowley asserts that the negative determination of responsibility is not supported by the facts or the definitive responsibility criteria contained in the IFB and is therefore without reason. We sustain the protest.

The solicitation required the contractor to furnish all labor, materials, and equipment and to perform all work required to replace approximately 78,000 square feet of the existing roof of the GPO with a new single ply Ethylene Propylene Diene Monomer (EPDM) roofing system. On July 22, 1987 GPO received eight responsive bids, including Crowley's low bid. On October 16, however, the contracting specialist declared Crowley nonresponsible based upon a pre-award survey of Crowley conducted by a civil engineer from the GPO engineering division. The pre-award survey included visits to the facilities of both Crowley and its proposed subcontractor, Northern Virginia Consultants (NVC), and recommended that the contracting officer reject Crowley's bid.

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The pre-award survey focused primarily on the requirements of the IFB, particularly the provisions relating to quality assurance. Section 14 of the "Additional Representations and Certifications" portion of the IFB was captioned "LIST OF COMPLETED SIMILAR PROJECTS, SHOWING CUSTOMER NAME AND DATE." Three lines were then provided under this caption for bidders to complete. In addition, section 12 of the specifications, "Quality Assurance," required the "contractor/installer and the material manufacturer" to have been "in the business of manufacturing and installing elastomeric roofing materials for . . . not less than five . . . years." Section 12 also included three subsections. Section 12.1 required the contractor/installer to be able to produce a certificate stating that the contractor has passed a prescribed training course, attends on-going training programs and is reviewed for performance annually by the manufacturer. Section 12.2 stated that the materials and installation used shall essentially duplicate a system that has been in successful field use under similar climactic conditions for a period of not less than 3 years. Section 12.3 is not relevant here.

In its letter notifying Crowley of the nonresponsibility finding, GPO listed three areas where Crowley allegedly failed to comply with the IFB. GPO stated first that Crowley did not comply with the requirement to list three similar previously completed roof projects; second, that Crowley did not comply with the requirement that the roofs constructed in those previous jobs be in successful operation for not less than 3 years; and third, that neither Crowley nor NVC, when requested, was able to produce a certificate from a manufacturer of EPDM stating that it was certified to install EPDM materials.

We generally will not question a negative determination of responsibility unless the protester can demonstrate bad faith on the agency's part or a lack of any reasonable basis for the contracting officer's determination. Alan Scott Industries, B-225210.2, Feb. 12, 1987, 87-1 CPD ¶ 155. Crowley has not alleged bad faith on the part of the agency. The issue, then, is whether the determination that Crowley was nonresponsible was reasonable.

In this respect, while a contracting officer has significant discretion in this area, a nonresponsibility determination will not be found to be reasonable where it is based primarily on unreasonable or unsupported conclusions reached by the pre-award team. Decker and Co., et al., B-220807 et al., Jan. 28, 1986, 86-1 CPD ¶ 100; Dyneteria Inc., B-211525, Dec. 7, 1983, 83-2 CPD ¶ 654. We believe that Crowley has demonstrated that the conclusions of the pre-award team are unreasonable and unsupported by the facts.

First, with respect to the list of three similar roof jobs, Crowley did list three jobs, but GPO concluded that similar meant EPDM roofs and that two of those listed did not involve that type. Crowley admits that one listed job was not an EDPM job, but asserts, and supports with affidavits from project managers, that the other two listed were, in fact, EPDM roof installations. Crowley points out that it could have listed a third EPDM job (the specifications for an EPDM job at the U.S. Naval Academy are included in the protester's comments), but it instead listed a roofing project which was similar in scope and size to the one it was bidding on for GPO. Crowley therefore believes that it satisfied the requirement. We agree.

GPO takes the position that "similar projects" means only EPDM projects. However, because the term "similar" was nowhere defined in the solicitation nor was it specified that the previous projects had to be EPDM projects, it was unreasonable for the pre-award survey team and the contracting officer to fault Crowley for failure to list only EPDM projects. There is nothing in this record to indicate that bidders should have known that "similar projects" could mean only EPDM projects. Accordingly, before GPO properly could reject Crowley for not furnishing a list of the type of projects in which it was interested, it at least should have asked for additional information from Crowley that it could evaluate.

Second, GPO states that the IFB contained a requirement that the roofs constructed in the previous jobs listed be in successful operation for at least 3 years. There is simply no such requirement in the solicitation. Section 12.2 of the solicitation, the section to which the pre-award surveyor referred, states: "The materials and installation used shall essentially duplicate a system that has been in successful field use . . . for a period of not less than three (3) years." This provision is unrelated to the requirement to list three previous jobs which appears in a different section of the IFB; rather, this provision seeks to ensure that the materials and installation used for the project will be well-proven by experience. GPO's construction of the contract joining these provisions to require that the roofs constructed in the three jobs listed be in existence for not less than 3 years is without merit and flies in the face of any reasonable interpretation. GPO's conclusion that Crowley had not complied with section 12.2, therefore, is unsupported by the express language of the IFB.

Third, GPO states that both Crowley and NVC were asked to produce a manufacturer's certificate establishing their certified installer status and both failed to do so. As indicated above, section 12.1 stated that "the contractor/ installer shall be able to produce" such a certificate. Based on the affidavits provided by Mr. Bair, President of NVC and Mr. Redd, Vice President of Crowley, the veracity of which has not been questioned by GPO, we find that Crowley and NVC were not asked for, and therefore were not unable to produce, the certification.

In his memorandum regarding the pre-award survey, the surveyor states that he asked Mr. Redd if R. J. Crowley was a certified roofing contractor and that Redd replied "No, that they were primarily a general contractor. . . ." In his affidavit, however, Mr. Redd states that "(h)e asked me about certification and I told him that I wouldn't know about that because I didn't work in that area." He further states that the entire conversation lasted approximately 5 minutes and that they did not discuss Crowley's roofing work.

Furthermore, the surveyor states that when he asked Mr. Bair whether NVC is a certified single-ply (EPDM) roofing contractor, he replied "yes." The surveyor reports, however, that "he (Bair) could not name the manufacturer that certified them nor could he show me the certification." In his affidavit, Mr. Bair "disagrees completely" with this account of the survey. He states that when he was asked whether he was a certified installer for EPDM he said, "yes, I'm a certified installer and have a certificate and I'll be happy to give it to you if we can get together later this week, but I can't stop to get it right this minute."

In our opinion, neither of these encounters constitutes a request and failure to produce a manufacturer's certificate. In the case of Crowley, a request was never made, and in the case of NVC, there was not a failure, but a willingness to produce the certificate. In both situations, the surveyor's conclusions that section 12.1 was not complied with were unreasonable and unsupported by the facts.

Furthermore, we agree with Crowley that the requirement of 12.1 that the contractor/installer be able to produce a certificate means that either the contractor or the installer shall be able to produce the certificate. Consequently, a failure by Crowley to produce a certificate would not be a violation of this provision if NVC is the installer of the EPDM materials and is certified by the manufacturer. The protester's comments include copies of such certificates for NVC.

In addition to the reasons given by GPO to Crowley in its letter, we must also examine whether the additional information in the pre-award survey which the contracting officer relied on was reasonable or supported by the facts. It appears that one major reason for the finding of nonresponsibility was the belief that "(b)oth Crowley and their subcontractor were planning on doing the old roof removal and having the other one do the installation." This information, "learned" during the pre-award survey, however, is not borne out by the record. Mr. Redd in his affidavit states that when he was asked how the work was to be performed, he told the surveyor that "he would have to talk to Peter Crowley, but if it was like our other roofing jobs, we pretty much shared the work with a specialty subcontractor, Northern Virginia." According to the affidavits submitted, however, the surveyor made no attempt to speak with Peter Crowley.

Mr. Bair, in his affidavit, reports that when he was asked how the work was to be performed, he replied, "we would be sharing the work with R. J. Crowley, the prime, and we (pre-award surveyor and Mr. Bair) could talk about it in detail later in the week." Again, the pre-award survey is misleading and unsupported by the facts.

Another important reason for the negative determination was the contracting officer's belief that Crowley had a poor performance record. The memorandum regarding the pre-award survey begins by referring to the previous similar jobs listed and states: "The most often mentioned complaint was lack of supervision and poor workmanship." Crowley has submitted affidavits from the three project managers whom GPO contacted. One of the affiants stated that he told the GPO representative that Crowley did an "acceptable" job and that he was not questioned about the specific type of roofing work Crowley had performed or any other details regarding that job. Another affiant stated that "I told the GPO representative that the work was of excellent quality and workmanship and completed on time." The third project manager similarly stated that "I told the GPO representative that the roofing work performed by R. J. Crowley for the IRS contract was excellent and on schedule." Again, GPO has not attempted to dispute the veracity of these affidavits. Here, the conclusions of the pre-award survey are not only unsupported in the record, but are also contradicted by the sworn statements of the project managers.

The pre-award survey memorandum also suggests that Crowley is nonresponsible because it does not comply with section 12's requirement for "the contractor/installer (to) have been in the business of manufacturing and installing elastomeric roofing materials" for at least 5 years. Again,

we agree that the designation "contractor/installer" indicates either contractor or installer and refers to the party that will actually be working with the EPDM materials.

It appears from the affidavits submitted that both Crowley and NVC were in the business of installing elastomeric roofing for at least 5 years. Rebecca Crowley, President of Crowley, explicitly states this in her affidavit which GPO did not rebut. Mr. Bair, in his affidavit, states that although his company has only been in existence for 3 years, he has been in the roofing business for 8 years and in that time "has done hundreds of EPDM jobs." Our cases hold that in evaluating the experience of a corporation, an agency may properly consider the experience of a predecessor firm or of the corporation's principal officers which was obtained prior to the incorporation date. S.C. Jones Services, Inc., B-223155, Aug. 5, 1986, 86-2 CPD ¶ 158. In any event, it was unreasonable in both cases for the surveyor to conclude, based on his limited inquiry, that either Crowley or NVC did not meet the IFB requirements.

Because the contracting officer's determination that Crowley was nonresponsible was based primarily on unreasonable and unsupported conclusions, we sustain the protest. GPO has failed to provide a reason for the negative determination that withstands scrutiny and has not attempted to rebut the evidence offered by Crowley. The contract with Function Enterprise, Inc. should be terminated and awarded to Crowley, the lowest bidder, if that firm is in fact found to be a responsible prospective contractor. In this regard, the record indicates that GPO has directed the contractor "to incur no costs until further notice."

With respect to the protester's request for reasonable costs of filing this protest, including attorney's fees, the Bid Protest Regulations applicable to this protest provide that the costs of filing and pursuing a protest may be recovered where the agency has unreasonably excluded the protester from the procurement, except where our Office recommends that the contract be awarded to the protester and the protester receives the award. See 4 C.F.R. § 21.6(e) (1987). Because we are recommending that Crowley be awarded the contract, the recovery of costs is an inappropriate remedy here. See Nicolet Biomedical Instruments, B-219684, Dec. 23, 1985, 85-2 CPD ¶ 700.

The protest is sustained.

for Milton J. Socolar
Comptroller General
of the United States