The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Antenna Products Corporation

File: B-227116.2

Date: March 23, 1988

DIGEST

1. The General Accounting Office will not consider a challenge to the Small Business Administration's (SBA) determination that a bidder is a small business concern since by statute the SBA has conclusive jurisdiction in such matters.

2. Small business bidder's status as a regular dealer or manufacturer under the Walsh-Healey Public Contracts Act is not a matter of bid responsiveness, but of bidder eligibility, and is reviewable by the Small Business Administration and the Secretary of Labor, not the General Accounting Office.

3. Solicitation provision requiring that the bidder's steel fabricator "should" have been continuously engaged for 2 years in the fabrication of structural steel, and "shall" furnish experience information with respect to towers not less than 600 feet high, is a definitive responsibility criterion. Small business bidder's failure to meet the criterion thus renders the firm nonresponsible, and the matter must be referred to the Small Business Administration under the certificate of competency procedures.

DECISION

Antenna Products Corporation protests the eligibility of Tower Engineering and Construction, Inc., for award of a contract under invitation for bids (IFB) No. DTCG50-87-B-00095, a small business set-aside issued by the United States Coast Guard for the design and fabrication of four radio transmission towers. Antenna Products alleges that: (1) the Small Business Administration (SBA) should not have found that Tower was a small business concern; (2) Tower's bid was nonresponsive because Tower proposed to use a subcontractor that could not qualify as a small business; (3) Tower's bid was nonresponsive because Tower's initial plan of performance precluded Tower from qualifying as eligible for award under the provisions of the Walsh-Healey

Public Contracts Act, and (4) the Coast Guard erroneously determined that Tower is a responsible bidder under the terms of the solicitation.

Although we dismiss the protest on the first three issues, we sustain Antenna Products' protest that Tower should have been found nonresponsible.

Antenna Products first alleges that the Coast Guard and the SBA failed to comply with the procedural requirements applicable to the evaluation of Tower's status as a small business concern. In our view, no useful purpose would be served by our consideration of this allegation. The SBA, whose determinations are conclusive with respect to size-status issues, 15 U.S.C. § 637(b) (1982), has held that Tower is in fact a small business for this procurement. As the General Accounting Office cannot overturn such a determination, our Office is an inappropriate forum in which to challenge the procedures through which the SBA arrived at its determination. This part of Antenna Products' protest therefore is dismissed.

Antenna Products next alleges that because this procurement was restricted to small businesses, Tower's reference in its bid to a subcontractor that is not a small business rendered Tower's bid nonresponsive. Responsiveness, however, concerns whether a bidder has unequivocally offered to provide supplies in conformance with all terms and conditions of a solicitation. The ARO Corp., B-222486, June 25, 1986, 86-2 CPD ¶ 6. The reference to the subcontractor, which was later held by the SBA not to affect Tower's status as a small business, does not affect the bid's responsiveness because it is not relevant to the determination of whether the bid meets the IFB's material requirements. Therefore, this part of Antenna Products' protest also is dismissed.

Antenna Products next protests that because Tower's initial intended performance plan was found to preclude Tower from qualifying as a manufacturer or regular dealer under the Walsh-Healey Public Contracts Act, 41 U.S.C. §§ 35-45 (1982), Tower's bid was nonresponsive as submitted. Where, as here, a bidder properly certifies compliance with the Walsh-Healey Act, its bid is responsive. Whether in fact a bidder is eligible under Walsh-Healey is not an element which affects a bid's responsiveness. See Y.T.&T. Corp., B-208924, Mar. 22, 1983, 83-1 CPD ¶ 283. Further, our Office will not consider a protest alleging that a small business bidder does not meet the requirements of the Walsh-Healey Act, since that is a matter for the consideration by the SBA and the Secretary of Labor. 4 C.F.R. § 21.3(f)(9) (1987).

Finally, Antenna Products argues that the Coast Guard contracting officer otherwise erroneously determined that Tower is a responsible bidder under the terms of the solicitation. Responsibility refers to a bidder's apparent ability and capacity to perform all contract requirements, and is determined not at bid opening, but at any time prior to award based on any information received by the agency up to that time. Great Lakes Dredge & Dock Co., B-221768, May 8, 1986, 86-1 CPD ¶ 444. Because a contracting agency's determination that a particular bidder or offeror is responsible is based in large measure on subjective judgments, this Office generally does not review affirmative responsibility determinations. 4 C.F.R. § 21.3(f)(5).

One exception to this rule is where a solicitation contains a definitive responsibility criterion. See 4 C.F.R. § 21.3(f)(5). Definitive responsibility criteria are specific and objective standards established by an agency for use in a particular procurement to measure a bidder's ability to perform the contract. BBC Brown Boveri, Inc., B-227903, Sept. 28, 1987, 87-2 CPD ¶ 309. These special standards put firms on notice that the class of prospective contractors is limited to those who meet qualitative or quantitative criteria deemed necessary for adequate performance. Provost's Small Engine Service, Inc., B-215704, Feb. 4, 1985, 85-1 CPD ¶ 130. We have found a requirement that a contractor possess specific experience in a particular area to be a definitive responsibility criterion. Topley Realty Co., Inc., 65 Comp. Gen. 510 (1986), 86-1 CPD ¶ 398.

Antenna Products contends that paragraph L.3 of the solicitation contains a definitive responsibility criterion regarding the bidder's experience in the fabrication of radio towers. Paragraph L.3 provides in part:

> "The following requirements concern the bidder's responsibility. . . .
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> . . . . .
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> "b. The steel fabricator should have been continuously engaged, for at least two years, in the fabrication of structural steel, both welded and bolted, whose fabrication necessitated the use of jigs or shop assembly for the purpose of meeting the design-tolerance requirements of tall guyed towers. Information concerning this experience shall include description of previous work which includes the successful shop-welded fabrication of

> the steel framework of shop-welded, field-bolted guyed towers not less than 600 feet in height . . . . " (Emphasis added.)

The record indicates that the largest tower made by the subcontractor that Tower intends to use as its steel fabricator is approximately 475 feet in height. Antenna Products argues this should disqualify Tower under paragraph L.3, as Tower therefore does not have the requisite tower fabricating experience. Antenna Products notes in its protest that towers 600 feet in height are more structurally complex than towers 475 feet in height, specifically requiring the fabrication of solid rod legs rather than the tubular-type tower legs used in the construction of smaller towers.

The Coast Guard responds that use of the word "should" in paragraph L.3 renders the terminology permissive rather than mandatory, and the provisions of the paragraph therefore cannot be considered to establish a definitive responsibility criterion. The Coast Guard argues that the amount of experience a bidder "should" have in tower fabrication thus is only a factor to be considered, at the Coast Guard's discretion, in determining the bidder's responsibility.

The Coast Guard also contends that the experience referenced in paragraph L.3 is not sufficiently specific to constitute a definitive responsibility criterion. The agency argues that the paragraph does not identify whether the steel fabricator must be the bidder, an employee, or a subcontractor, and that the paragraph does not adequately define the phrase "continuously engaged for at least 2 years"; the Coast Guard suggests that the phrase could be read to refer to historical, recent, or current experience in steel fabrication.

We find no merit in the Coast Guard's position. Notwithstanding the use of the word "should" at the beginning of paragraph L.3, the paragraph also requires that information concerning the bidder's experience "shall include" a description of successful fabrication of a tower of at least 600 feet in height. We think it is logically inconsistent to conclude that the only information as to a bidder's experience that the contracting officer will accept concerns the fabrication of towers at least 600 feet tall, yet this experience is not required for award.

We also do not think the experience requirement lacks enough specificity to constitute a definite criterion. Simply put, whoever will be fabricating the steel is the steel fabricator for the purposes of this solicitation, and this steel fabricator must have 2 continuous years of experience

in fabricating steel, including towers of at least 600 feet. This experience requirement is, in our view, sufficiently specific and objective.

In sum, paragraph L.3, read in its entirety, contains an experience criterion which is specific, objective, and mandatory and therefore constitutes a definitive responsibility criterion. Since the paragraph requires that the steel fabricator have experience in the fabrication of towers not less than 600 feet in height, and Tower's steel fabricator's experience is limited to 475-foot towers, Tower did not meet the solicitation's definitive responsibility criterion.

We sustain the protest on this basis. Since no award yet has been made, and since Tower is a small business concern, by separate letter to the Secretary of Transportation we are recommending that the matter be referred to the SBA for review under the certificate of competency procedures. See Warfield & Sanford, Inc., B-224465, Sept. 3, 1986, 86-2 CPD ¶ 256. If the SBA does not certify that Tower is responsible, the contract should be awarded to the protester, if otherwise appropriate.

for Comptroller General
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