Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Hardie-Tynes Manufacturing Company--
Request for Reconsideration

File: B-237938.2

Date: June 25, 1990

James J. Hennigan, Esq., Gardner, Carton & Douglas, for the protester.
Mary Curcio, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Decision that procuring agency properly considered the manufacturing experience of a parent corporation in finding the awardee, a subsidiary corporation, met definitive responsibility criterion requiring 5 years of manufacturing experience is affirmed where the protester has not demonstrated that the decision is factually or legally erroneous.

2. Protest that the General Accounting Office improperly permitted agency to change its position concerning the propriety of its actions is denied where the protester had an opportunity in its conference comments to fully respond to the agency's later position.

3. Protest that protester was denied the right to a full review of its protest because the case was reassigned to an attorney who was not present at the bid protest conference is denied because General Accounting Office protests are decided on the written record and all issues were thoroughly addressed by the protester and the agency in their respective conference comments.

DECISION

Hardie-Tynes Manufacturing Company requests reconsideration of our decision in Hardie-Tynes Mfg. Co., B-237938, Apr. 2, 1990, 69 Comp. Gen. ____, 90-1 CPD ¶ 347.

We affirm our decision.

Hardie-Tynes protested the award of a contract for flow gates under invitation for bids (IFB) No. 9-SI-30-07760/DS-7800 to IMPSA-International, Inc., by the Department of the Interior, Bureau of Reclamation.

The IFB solicited bids to design, furnish, and deliver flow gates for the Roosevelt Dam, Salt River Project, and the Hoover Dam, Boulder Canyon Project, Arizona, Nevada. Section L-22 of the IFB provided that the bidder must have experience in the manufacture of high-lead slide gates and hydraulic hoists and in this respect shall have had equipment of similar complexity to that required by this solicitation/specifications in satisfactory operation for not less than 5 years.

The low bid was submitted by IMPSA-International, a Pennsylvania corporation with no manufacturing facility. IMPSA-International stated in its bid that the gates would be manufactured in Argentina at the manufacturing facilities of its parent corporation, Industrias Metalurgicas Pescamona S.A. (IMPSA-Argentina). After Hardie-Tynes protested to the Bureau that IMPSA-International did not meet the 5-year experience requirement, IMPSA-International submitted three corporate documents (a power of attorney and agency agreement, a special power of attorney, and a unanimous written consent of sole shareholder in lieu of annual meeting) to show that IMPSA-International represented IMPSA-Argentina and was authorized to bind IMPSA-Argentina to projects in the United States. Based on this information, the Bureau awarded the contract to IMPSA-International.

Hardie-Tynes protested to our Office that the bid submitted by IMPSA-International was nonresponsive and that IMPSA-International was not a responsible bidder. Concerning responsibility, Hardie-Tynes alleged that IMPSA-International did not have the manufacturing experience required by the IFB. Hardie-Tynes contended that while IMPSA-Argentina, the parent corporation, is a manufacturing company, IMPSA-International cannot rely on the experience of IMPSA-Argentina to meet the experience requirement. According to the protester, under Federal Acquisition Regulation (FAR) § 9.104-3(d) (FAC 84-39) affiliated concerns are separate entities in determining whether a contractor meets applicable standards of responsibility, and the corporate documents submitted by IMPSA-International do not establish that IMPSA-Argentina is committed to perform the contract.

We concluded that since IMPSA-International represented in its bid that the manufacturing would be performed by IMPSA-Argentina at its facilities in Argentina, the Bureau properly permitted IMPSA-International to rely on the experience of its parent corporation, IMPSA-Argentina, to satisfy the experience

requirement in the IFB. The expertise of a technically qualified subcontractor may be used to satisfy definitive responsibility criteria relating to experience of a prime contractor. Here, a subsidiary corporation is relying on its parent corporation to perform the work in question. While evidence of a firm commitment from a subcontractor to the prime contractor is not a prerequisite to considering the subcontractor's experience in determining that the prime contractor is responsible, IMPSA-International had such a commitment. The documents submitted by IMPSA-International demonstrate that IMPSA-Argentina is committed to IMPSA-International to manufacture the flow gates. Those documents give IMPSA-International the power to do all things necessary and to execute all agreements and documents in the name of IMPSA-Argentina which IMPSA-International deems necessary or advisable in order to submit bids for projects in the United States as well as to sign contracts of any kind on behalf of IMPSA-Argentina. Thus, IMPSA-International has the authority to bind IMPSA-Argentina to manufacture the flow gates and in fact indicated its intention to do so by specifying in its bid that the flow gates would be manufactured by its parent.

Contrary to the protester's contention, FAR § 9.104-3(d) does not preclude a contracting agency from considering the experience of a parent corporation to find a subsidiary responsible. While affiliated concerns are "normally" considered separate entities in determining whether the firm to perform meets the applicable standards of responsibility, a contracting agency may rely on an affiliate to find that a prospective contractor is responsible. FAR § 9.104-3(b) recognizes that a contractor may be found responsible through its own resources or through those of a subcontractor or by otherwise demonstrating that it has the ability to obtain needed resources.

In its request for reconsideration Hardie-Tynes again alleges that the Bureau could not rely on the experience of IMPSA-Argentina to find that IMPSA-International meets the 5-year experience requirement. Citing a recent decision of this Office, Barnes & Reinecke, Inc., and FMC Corp., B-236622; B-236622.2, Dec. 20, 1989, 89-2 CPD ¶ 572, Hardie-Tynes argues that evidence of a firm commitment from the subcontractor to the prime contractor in the prime contractor's bid is a prerequisite to considering the subcontractor's experience in finding the prime contractor responsible. Hardie-Tynes contends that IMPSA-International's bid does not commit IMPSA-Argentina's resources because it does not state that IMPSA-Argentina will perform the work. Hardie-Tynes further argues that the corporate documents submitted by IMPSA-International do not give IMPSA-International the authority to bind IMPSA-Argentina when IMPSA-International is acting in its own name.

We disagree with Hardie-Tynes's analysis. In Barnes & Reinecke, Inc., and FMC Corp., B-236622; B-236622.2, supra, the protester complained that in performing a technical evaluation of its proposal, the Army did not properly consider the resources available to the protester from its parent corporation which the Army should have understood would be available to the protester. We stated that a procuring agency could not just look at the fact that the subsidiary corporation had a relationship with the parent but had to consider whether the resources of the parent corporation were committed in the offer to perform the contract. In response to questions during discussions, and in its best and final offer, the subsidiary corporation emphasized its independence from the parent and stated that it had no written agreement with the parent. We thus found that the Army could reasonably conclude that the proposal essentially only offered the subsidiary's independent resources and that the proposal, at best, gave the subsidiary the discretion to involve or not involve the parent as it saw fit.

The case here involves a completely different issue. It concerns an IFB and a responsibility determination, not a technical evaluation under an RFP. A firm commitment from a subcontractor to the prime contractor is not a prerequisite to using the subcontractor's experience to determine if the prime contractor is responsible. See Allen-Sherman-Hoff Co., B-231552, Aug. 4, 1988, 88-2 CPD ¶ 116; Contra Costa Elec., Inc.--Reconsideration, B-200660.2, May 19, 1981, 81-1 CPD ¶ 381. More evidence of responsibility need not be present in the bid and may be submitted after bid opening. Scherr Constr. Co., Inc., B-234778, May 25, 1989, 89-1 CPD ¶ 509. Thus, the agency properly considered the corporate documents in determining that the experience of IMPSA-Argentina could be used to find that IMPSA-International met the experience requirement of the IFB. In our opinion, the bid statements that the flow gates will be manufactured in Mendoza, Argentina, at the facilities of IMPSA-Argentina, coupled with the documents which give IMPSA-International the power to bind IMPSA-Argentina, are sufficient for IMPSA-Argentina's experience to be considered in determining the responsibility of IMPSA-International.

Hardie-Tynes next complains that we improperly let the Bureau change its position concerning the propriety of its actions in awarding the contract to IMPSA-International. Specifically, in its report on the protest, the Bureau averred that IMPSA-International submitted the bid on behalf of IMPSA-Argentina and that IMPSA-Argentina was therefore bound by the bid. At the conference, however, and in its conference comments, the agency agreed that IMPSA-International was bound by the bid and that it merely considered the experience of IMPSA-Argentina in determining if IMPSA-International was

responsible. Hardie-Tynes asserts that it was prejudiced by the change in position because it established the factual and legal bases upon which our Office relied in reaching our decision. Hardie-Tynes also argues that since the agency's change in position demonstrates that its initial position was improper, Hardie-Tynes should be awarded the costs of protesting that issue.

While Hardie-Tynes asserts that "it is unfair to permit the agency to submit an altogether fresh statement of the case," we fail to see how it was prejudiced by the change in the agency's argument, since it was put on notice of the agency's position at the conference and fully responded to it in its own conference comments. More fundamentally, our decisions are not limited to consideration of the legal theories advanced by the parties, so that, even if the agency had relied solely on its initial argument, we nevertheless would have concluded that the award had been properly made based on the legal analysis set out in our decision. Finally, the fact that our decision did not rely on the agency's initial position provides no legal basis for awarding Hardie-Tynes its costs of responding to that position, given that we ultimately found that the award was proper. Our authority to award costs requires a determination that a procurement action violates a statute or regulation. 31 U.S.C. § 3554(c)(1) (1988); Bid Protest Regulations, 4 C.F.R. § 21.6(d) (1990).

Hardie-Tynes also complains we failed to discuss in our decision IMPSA-International's allegation that Hardie-Tynes improperly requested a senator and congressman to influence proceedings before the Bureau of Reclamation and the Department of Labor even though, at the conference, we asked Hardie-Tynes to address this issue in its conference comments. Hardie-Tynes requests that it be reimbursed the costs of addressing the issue. The reason we asked for the firm's view is that if we had sustained the protest, it would have been necessary for us to consider the issue and we wanted to be sure that we had Hardie-Tynes's position on the record. Since we denied the protest, however, there was no need for our Office to reach this issue. As discussed above, we have no authority to award fees in the absence of a violation of statute or regulation.

Finally, Hardie-Tynes complains that the case was improperly reassigned to and considered by a General Accounting Office (GAO) attorney after the protest conference at GAO. Hardie-Tynes reasons that because the attorney was not present at the conference, she was not familiar with the entire record. Hardie-Tynes therefore concludes that it was denied the right to a full review of its protest. Except where hearings are conducted on the record, GAO decides cases based on the written record, not on oral statements made during a

conference.1/ The conference comments submitted by Hardie-Tynes and the Bureau were complete and addressed each issue that was raised. Our Office thoroughly reviewed the entire record, including the conference comments and can see no prejudice which Hardie-Tynes suffered as a result of the reassignment.

James F. Hinchman
General Counsel

1/ Under the current proposed revisions to our Bid Protest Regulations, all hearings will be recorded or transcribed, with such record or transcript becoming part of the case record. See 55 Fed. Reg. 12,834 (1990).