8691

N. Boyle Proc L

DECISION

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

[Reconsideration of Claim for Bid Preparation and Related Costs]

FILE: B-184662 DATE: December 27, 1978

DLG-00506

MATTER OF: United Power & Control Systems, Inc; Department of the Navy--Reconsideration

DIGEST:

1. Prior decision's holdings--that (1) protester's bid should not have been rejected as nonresponsive for failure to list three substations which performed successfully within certain parameters, (2) solicitation was unnecessarily ambiguous, and (3) termination for convenience could not be recommended since contract was almost complete --are affirmed.

2. Claim for bid preparation and related costs is denied, because, although protester/claimant's bid was arbitrarily rejected as nonresponsive, ~~agency~~ Navy had reasonable basis to conclude that protester/claimant was nonresponsible; thus, protester/claimant was not deprived of award to which it was otherwise entitled.

ABC00001

The Department of the Navy and United Power & Control Systems, Inc. (United), requested reconsideration of our decision in the matter of United Power & Control Systems, Inc., B-184662, May 25, 1976, 76-1 CPD 340. In addition, United claimed bid preparation costs and costs incurred as a result of the protest, reconsideration and claim in the amount of $13,209.40.

I. Background

Invitation for bids (IFB) No. N62578-75-B-0123 expressed the Navy's requirement for eight electrical substations to be designed, manufactured, and delivered in accordance with the purchase description in the IFB. The Navy did not intend the purchase description to specify every detail of the required equipment, but only to establish minimum performance requirements. However, the Navy desired to ensure that this critical equipment would be professionally manufactured and timely delivered by a firm which would be capable

~~002051~~

DLC

of incorporating the latest state-of-the-art technology, thus maximizing equipment utility and minimizing cost. To that end, the IFB included an "operational experience" provision which required bidders to describe in their bids the substation to be provided and to identify at least three substation installations that (a) have performed successfully for not less than 10,000 hours each and (b) have included a "15KV and/or 5KV switchgear section, a 2,000 to 2,500 KVA transformer section, and a 480 volt, circuit protective switchgear section" in each. The IFB warned that bids not containing the requested information may be rejected as nonresponsive and that, prior to award, the successful bidder would be required to produce evidence demonstrating that the units identified in its bid met the operational experience requirements.

United's low bid was rejected as nonresponsive because the Navy determined that none of the eight substations listed by United satisfied the operational experience requirement. Specifically, the capacity of three units was too small and only one 2,500-KVA substation was operated for over 10,000 hours and all listed 2,500-KVA substations contained substantial technical deficiencies and were not considered by the Navy as having performed successfully. Subsequently, the next low bidder, Abbott Power Corporation (Abbott), was awarded the contract.

United protested contending that (1) Navy personnel had informed United prior to submitting its bid that five of the eight substations had operated at least 10,000 hours and (2) any problems with operation of the listed substations were caused by the Navy's specifications.

The earlier decision concluded that (1) United's bid should not have been rejected for failure to list three substations that had operated for over 10,000 hours because the information in United's bid was based on information peculiarly within the Navy's possession and provided by cognizant Navy officials; (2) if United's listed substations performed their intended functions for over 10,000 hours, it must be concluded

that their operation was successful; (3) the substations listed in Abbott's bid did not meet the salient minimum performance characteristics and should have been rejected; and (4) the performance specifications of the operational experience requirement and purchase description seemed to conflict, thus making it unclear as to what was required and, further, the purchase description included new features which were not incorporated in substations operating over 10,000 hours, making compliance with both the experience and purchase description requirements impossible. We also concluded that corrective action could not be recommended because the contract had been substantially completed.

II. United's Request for Reconsideration

United contends that the prior decision was correct with the exception that corrective action should have been recommended. United essentially argues that the integrity of the competitive bidding system is undermined when an agency can (1) act arbitrarily toward a bidder, (2) boldly contend during the protest process that it's action was proper, (3) award the contract before the adverse decision is rendered, and (4) avoid corrective action because the awardee rapidly incurred costs, thus inflating potential termination costs.

United's argument is a restatement of the facts as we knew them when the prior decision was rendered. We thoroughly considered United's argument then. As indicated in the prior decision, at the time our decision was rendered the contract was almost complete. In such circumstances, it is not in the Government's best interest to terminate for convenience and award the contract work to another firm. Accordingly, the prior decision's conclusion not to disturb the award is affirmed.

III. Navy's Request for Reconsideration

Regarding the first conclusion of the earlier decision, the Navy states that, although United was

given the numbers of five units that might have 10,000 hours, the Navy personnel involved did not have, and could not have, accurate information on hour usage of units scattered throughout the world; only after a worldwide survey was the correct number of usage hours known.

We view the Navy's position on the first conclusion as merely providing additional information and not as the focus of its request for reconsideration. Moreover, the Navy has not offered any additional facts or legal arguments on this point; therefore, we will not reconsider our first conclusion.

The Navy focuses its reconsideration request on the second conclusion in the earlier decision. The Navy argues that United's bid was properly rejected because all units, having the requisite capacity, cited from the earlier procurement had been found unsafe and unsatisfactory and had been restricted in operation so that they could not satisfy the express IFB prerequisite of having performed successfully. In the Navy's view, this was thoroughly considered and copiously documented so that the determination was not "arbitrarily" made.

Specifically, Navy reports, previously furnished, list 18 United substations that had failed in operation, and at that time not all 41 United substations had been delivered and put into operation. The Navy also quoted a professional engineer's final report that operation of United's units of above 5,000 volts was hazardous and that failures could occur with explosive force; prior to bid evaluation such an explosive failure did occur. The Navy again points out that all United units (even those twice retrofitted) had been removed from operation above 5,000 volts even though originally specified for use to 15,000 volts, or, alternatively, the units must be rewired and operated only at the high voltage. The Navy also points out other technical deficiencies: principally, United used cables (sizes of conductors

and insulation) contrary to manufacturers' instructions, crowded cables together and had bends and corners in the cables; the results were corona effects outside the insulation, overheating, deterioration of insulation, generation of gases and explosions. Further, the Navy submitted two documents which, in its view, represented United's admission of the defects.

The prior decision noted that (1) United listed (after bid opening) three units that performed over the low and high voltage ranges for 10,000 hours before being restricted and (2) the performance can only be described as successful. This is a key point of the earlier decision--all 41 substations may have been unsatisfactory at the time of the Navy report but at least three units performed successfully for over 10,000 hours. Thus, United's bid could not have been rejected as "nonresponsive" because United met the literal requirements of the operational experience clause. Accordingly, the earlier decision is affirmed with regard to the second conclusion.

The earlier decision noted, however, that United could have been rejected as nonresponsible but the prior decision did not consider this point. United's responsibility will be considered in connection with United's claim for bid preparation costs, infra.

With regard to the prior decision's third conclusion--Abbott's bid did not meet the salient characteristics--the Navy contends that the bid conformed and the prior decision was wrong on its engineering facts. The Navy notes that we found noncompliance because Abbott's low voltage sections were rated at 460 volts rather than the 480-volt minimum stated in the operational experience clause and the purchase description. The prior decision also found Abbott's bid noncompliant because its substation transformer section was rated 2,000 to 2,300 KVA, whereas the operational experience clause required 2,000 to 2,500 KVA.

The prior decision's third conclusion was based on a point observed by our Office and was not raised by the parties. However, this matter was not essential to our consideration of United's compliance with the IFB and it is not essential to United's claim for bid preparation costs. At present, it is sufficient to state that in future solicitations, for the purpose of clarity, where the Navy's minimum needs permit bids based on a different rate than specified, the solicitation should state the acceptable range.

The Navy contends that the fourth conclusion of the prior decision--the IFB contained ambiguous specifications and an impossible compliance requirement--is incorrect. In support, the Navy explains that the prior decision described five times the operational experience clause as requiring "identical" units to be furnished but the Navy states that the word "identical" does not appear in the clause. In the Navy's view, the prior decision puts undue emphasis upon that standard in judging compliance so that any fault in requiring "identical" units does not lie in the clause itself.

With regard to the impossibility of the experience clause, the Navy explains that six bids were received, no bidder complained of the experience clause being an enigma to them, and any complaint as to the clause in the IFB, under the Bid Protest Procedures, should have been filed before bid opening. The Navy submits that the experience clause did not require identical units and, in actual application, the Navy has not required such units. The Navy also submits that it fairly applied the clause--not imposing higher standards on the protester--and that it looked to the bidders' ability to list units of the same capacity which had successfully operated 10,000 hours.

The prior decision's fourth conclusion concerned solicitation defects which, as the Navy points out, in the circumstances would have been untimely under our Bid Protest Procedures if raised by a protester; however, the solicitation defects involved were not bases of protest but were noticed by our Office and

merely added to the decision in an effort to assist the Navy in preparing future similar solicitations. Our concern with the solicitation arose because the operational experience requirement provided that "Bids must set forth in the space provided a description of the substation to be provided" and "The substations to be described in the bid and furnished under the contract must have performed successfully" under specified constraints. Specifically, the underlined words, literally interpreted, required a bidder to (1) repeat the IFB's purchase description and (2) provide a substation that was used at least 10,000 hours. Even the contracting officer, in his letter of rejection to United Power, spoke of the "identicality" required by the operational experience clause. See also the Naval Facilities Engineering Command report which states that the United Power bid was rejected "for failure to identify, in the bid, units which are identical to those to be furnished under the contract." Further, the Navy determination and findings authorizing award prior to resolution of the protest stated that the IFB called for furnishing eight 2,500-KVA substations and that the "IFB required each bidder to list in his bid no fewer than three identical units which had operated satisfactorily at least 10,000 hours." Therefore, at the time of the procurement, the Navy also considered the operational experience clause as requiring identical units. We also noted that the experience requirement involved a substation description below the minimum specifications in the purchase description, for example 2,000- to 2,500-KVA capacity was required in the experience requirement and no less than 2,500 KVA was required by the purchase description. While we recognize that no bidders protested these requirements, we continue to believe that they are unnecessarily ambiguous and should be clarified in future solicitations. However, this finding does not affect the ultimate conclusion of the prior decision or our present need to consider United's claim for bid preparation costs.

IV. United's Claim for Bid Preparation Costs

Our prior decision stated that "the Navy acted arbitrarily in rejecting United's bid as nonresponsive to the experience clause requirements when it did not reject Abbott's bid." The instant decision does not consider the "responsiveness" of Abbott's bid since that conclusion has no bearing on United's claim.

The standards for recovery applicable to United's claim for bid preparation costs were established by the courts and followed by this Office. This Office first permitted recovery of bid preparation costs in our decision in T&H Company, 54 Comp. Gen. 1021 (1975), 75-1 CPD 345, wherein we adopted the standards announced by the Court of Claims in Keco Industries, Inc. v. United States, 492 F.2d 1200 (Ct. Cl. 1974). The ultimate standard is whether the procurement agency's actions were arbitrary and capricious towards the bidder-claimant. It is equally clear that not every irregularity gives rise to the right to be compensated for the expense of undertaking the bidding process. Keco Industries, Inc. v. United States, supra; William F. Wilke, Inc., 56 Comp. Gen. 419 (1977), 77-1 CPD 197. A second requirement which we apply is whether the agency's actions deprived the bidder-claimant of an award to which it otherwise was entitled. Morgan Business Associates, B-188387, May 16, 1977, 77-1 CPD 344; Spacesaver Corporation, B-188427, September 22, 1977, 77-2 CPD 215; Documentation Associates--Reconsideration, B-190238, August 7, 1978, 78-2 CPD 93; System Development Corporation, B-191195, August 31, 1978, 78-2 CPD 159.

To be successful, therefore, United must show that, but for the Government's arbitrary or capricious action, it would have been awarded the contract. McCarty Corporation v. United States, 499 F.2d 633 (Ct. Cl. 1974); Base Information Systems, Inc., B-186932, October 25, 1978, 78-2 CPD 299. In that regard, the Navy contends that United was not eligible for award because it was nonresponsible. As noted, the prior decision did not consider United's responsibility.

The record shows that on August 26, 1975, during the pendency of United's protest, the contracting office determined that under an existing contract United produced substations with gross defects in design and operation resulting in a poor performance record; accordingly, the contracting officer was unable to make an affirmative responsibility determination. The Navy's responsibility determination, however, was not referred to the Small Business Administration (SBA) until after our prior decision was rendered. Thereafter, the Defense Contract Administration Services (DCAS) conducted a preaward survey of United's capability from a technical and financial standpoint and recommended complete award to United. Later, the SBA reviewed the record, including the DCAS report, and on December 6, 1976, concluded that United was capable of performing the work.

The Navy did not dispute United's capacity or credit capabilities but concluded that United's past unsatisfactory performance was due to United's failure to apply the necessary tenacity or perseverance to do an acceptable job. After considering SBA's report and DCAS's report, on December 20, 1976, the Navy under then existing law and regulations issued its final determination that at the time of award United was nonresponsible because: (1) on a recent contract, 41 substations which United had furnished thereunder were not operable in accordance with the contract specifications--the deficiencies which precluded such operation were also entirely the result of design errors by United; the specification was a performance specification requiring design to be accomplished by the contractor; and (2) the volume of the repair and rework necessary was ample evidence that the units were not correctly designed and assembled from the start; this is especially true when compared to the performance records of units furnished by other manufacturers.

In a separate action on that recent contract, the Navy contracting officer issued a final determination holding United in breach of the warranty clause. United appealed that determination to the Armed Services Board of Contract Appeals (ASBCA), claiming entitlement to $500,000 for extra work, and argued that the following Navy actions resulted in the performance problems:

(1) encouraging and demanding design of a compact unit when the Navy knew that the specifications would be changed;

(2) asserting that there were deficiencies in the high and intermediate voltage compartments 3-1/2 years after specifying such a configuration;

(3) failing to recognize deficiencies in the high and intermediate voltage compartment until 3-1/2 years after knowledge of and after numerous warnings by United;

(4) overreaching by insisting in documentary form that United take full responsibility for the second retrofit when, in fact, United recommended separation in the voltage compartment;

(5) unconscionability on the part of the Navy in declaring the second retrofit to be in breach of the contractor's warranty after the Navy drafted and approved the second retrofit agreement;

(6) unconscionability on the part of the Navy in declaring the contractor to be in violation of the warranty provisions of the contract when the contract 1-year warranty provisions had clearly expired in the face of United's expressed dissatisfaction of the requirements of the specification and without providing any guidance as to the rework desired to meet the contractual requirements;

(7) imposing requirements for a second retrofit on United by means of economic duress; and

(8) the Navy has failed to indicate what changes are desired.

Subsequently, on June 20, 1977, we note that the contract in question was modified by the Navy to include an increase in price of $475,000 and the appeal to the ASBCA was dismissed. This fact, however, has no bearing on the reasonableness of the nonresponsibility determination

made much earlier. Our concern here relates to the initial nonresponsibility determination made by the contracting officer and the final nonresponsibility finding made by the designee of the head of the procuring activity on December 20, 1976, and the circumstances known to them at that time.

The Armed Services Procurement Regulation (ASPR) requires that purchases be made only upon an affirmative demonstration of a prospective contractor's responsibility. Past unsatisfactory performance due to failure to apply necessary tenacity and perseverance to do an acceptable job is sufficient to justify a finding of nonresponsibility. The determination of nonresponsibility for lack of tenacity and perseverance must be supported by substantial evidence in the record. Generally, since a determination of a prospective contractor's responsibility is subject to the considerable discretion of the contracting officer, GAO will not question the determination of lack of tenacity and perseverance where substantial evidence of record reasonably provides a basis for such determination. Kennedy Van & Storage Company, Inc., B-180973, June 19, 1974, 74-1 CPD 334; 51 Comp. Gen. 288 (1971); 49 Comp. Gen. 139 (1969). However, where a determination is made based upon an alleged lack of tenacity and perseverance and the evidence does not either relate to these factors or does not adequately establish a reasonable basis for the determination, our Office will not uphold such a determination. 49 Comp. Gen. 600 (1970); 39 Comp. Gen. 868 (1960).

The evidence in support of the determination must be germane to the inquiry and a mere assertion that poor performance resulted from a lack of tenacity and perseverance will not suffice without inquiry into the nature of the poor performance. 49 Comp. Gen. 600, supra. While poor performance may not have resulted from a single deficiency, the continued practice of countenancing minor deficiencies may cumulatively add unduly to the administrative burden of the Government and adversely impact upon a firm's tenacity

and perseverance. 49 Comp. Gen. 139, supra; and 43 Comp. Gen. 257 (1963). We have recognized that poor business practices affect one's tenacity and perseverance. The Transport Tire Company, Inc., B-179098, January 24, 1974, 74-1 CPD 27; B-161806, February 26, 1968. What is required to sustain a determination of nonresponsibility for lack of tenacity and perseverance to do an acceptable job is a clear showing that a prospective contractor did not diligently or aggressively take whatever action was reasonably necessary to resolve its problems. B-170224(2), October 8, 1970. We are concerned not with whether a firm is or will become capable to perform, but with whether a firm that is deemed to possess adequate capability applies it in sufficient measure to insure satisfactory completion of the contract. 51 Comp. Gen. 288, supra.

Unquestionably, the Navy's nonresponsibility determination is subject to serious question when both the SBA and the DCAS reported that the low bidder was capable of performing the work in accord with Navy requirements; however, we have considered similar situations. For example, in The Transport Tire Company, supra, the procuring activity determined that the protester lacked tenacity and perseverance on its two prior contracts because of deficient workmanship and late deliveries and SBA did not agree. We could not find any arbitrary or capricious conduct on the part of the agency and we could not conclude that the determination was based on insubstantial evidence since poor business practices--as here, the apparent unwillingness of the protester to correct alleged deficiencies--concern tenacity and perseverance rather than capacity and credit. See B-161806, February 26, 1968. Also, in Kennedy Van & Storage Company, Inc., supra, we concluded that, even faced with SBA's views to the contrary, a protester's repeated specification deviations after various warnings, cure notices and contract terminations could reasonably lead the contracting officer to view the protester as having failed to apply the necessary tenacity and perseverance to do an acceptable job.

In District 2, Marine Engineers Beneficial Association--Associated Maritime Officers, AFL-CIO, B-181265, November 27, 1974, 74-2 CPD 298, we concluded that a prospective contractor's conduct (in not correcting engineering problems even after the contracting activity made several requests) unduly increased the administrative burden on the Government and amounted to substantial evidence of a lack of tenacity and perseverance. Further, in Propserv Incorporated, B-184698, December 22, 1975, 75-2 CPD 405, we held that a protester's minor deficiencies on prior contracts were sufficient when considered cumulatively to establish a pattern of poor workmanship and untimely performance, resulting in an increased administrative burden on the Government and a supportable lack of tenacity and perseverance finding by the contracting activity.

Another example of a similar situation was in A. C. Ball Company, B-187130, January 27, 1977, 77-1 CPD 67. There, the contracting activity rejected the protester's bid because its lack of tenacity and perseverance caused poor performance on two prior contracts for the same item. The protester acknowledged late deliveries but argued that erroneous and ambiguous specifications caused the problems. SBA disagreed with the procuring activity. We concluded that the contracting activity's determination was not unreasonable because (1) the cause of the protester's problems was not wholly the fault of the specifications, (2) substantial rework on some delivered items was required, and (3) the protester was plagued with delivery troubles when the determination was made. Finally, in Eastern Tank, Inc., B-188559, August 3, 1977, 77-2 CPD 76, SBA explained that the protester's poor performance record was caused by circumstances beyond its control and the protester had made great strides to improve; nevertheless, the contracting activity determined that the protester lacked tenacity and perseverance for delivering untimely on prior contracts. In the circumstances, we could not conclude that the contracting activity's determination was unreasonable.

In the instant matter, at the time when the Navy was required to make the responsibility determination, United's performance under the then current contract could not be ignored. Under that contract, the Navy had been delivered substations substantially similar to those involved in the instant procurement and the United substations did not meet performance specifications. It was the Navy's position then that United was wholly at fault; although it seemed clear that United had sufficient capacity and credit, the United substations did not completely meet performance specifications even after retrofit.

Our review of the Navy's nonresponsibility determination must be based on facts that were known by the Navy at the time the determination was made. In view of (1) the analysis of our prior decisions in this area, (2) the failure of the United units to meet all performance specifications, and (3) the Navy's view that such failure was United's fault, we cannot conclude that the Navy's nonresponsibility determination was without a reasonable basis, lacked substantial evidence, or was arbitrary.

The ultimate standard for recovery of bid preparation costs established by the courts and followed by this Office is whether an agency's arbitrary action deprived a bidder of an award to which it was otherwise entitled (see decisions, supra). With the benefit of hindsight not available to the contracting officer and the head of the procuring activity, we could say under the circumstances that the Navy was at least partially at fault for the failure of United substations to meet performance specifications. Since we cannot conclude that the Navy's nonresponsibility determination was arbitrary based on the facts available when the Navy's determination was made, we cannot say that United was arbitrarily deprived of an award. Therefore, United's claim for bid preparation and related costs is denied. See Bokonon Systems, Inc.--Reconsideration, B-189064, August 8, 1978, 78-2 CPD 101 (no legal authority exists for granting request for funds to engage counsel).

R. F. Keller

Acting Comptroller General
of the United States