



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: M&M Welding & Fabricators, Inc.--Reconsideration

File: B-271750.2

Date: March 26, 1997

Richard L. Moorhouse, Esq., and Stacey E. Young, Esq., Holland & Knight, for the protester.

Tania L. Calhoun, Esq., and Christine S. Melody, Esq., Office of the General Counsel, participated in the preparation of the decision.

DIGEST

General Accounting Office (GAO) will not consider, upon request for reconsideration, arguments that could have been, but were not, raised during initial consideration of the protest since to do so would undermine the goal of GAO's bid protest forum--to produce fair and equitable decisions based on consideration of the parties' arguments on a fully developed record.

DECISION

M&M Welding & Fabricators, Inc. requests that we reconsider our decision in M&M Welding & Fabricators, Inc., B-271750, July 24, 1996, 96-2 CPD ¶ 37, in which we denied its protest of the award of a contract to American Combustion Industries, Inc. (ACI) under invitation for bids (IFB) No. 9639, issued by the Architect of the Capitol for the retubing of one or more coal/gas-fired boilers in the United States Capitol Power Plant.

We deny the request for reconsideration.

The solicitation included the following "Qualification of Bidders" paragraph:

"Firms shall be regularly engaged in the installation and service of coal/gas-fired boilers. Each bidder shall furnish a list of not less than three (3) similar boiler rehabilitation projects (at least one of which must be a steam boiler) completed satisfactorily by the Contractor during the past five (5) years. . . ."

The agency determined that ACI, the apparent low bidder, met the IFB's qualifications, and awarded the firm the contract. M&M protested that the agency had unreasonably determined that ACI satisfied the solicitation's definitive responsibility criteria.

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. Federal Acquisition Regulation § 9.104-2. These special standards of responsibility limit the class of bidders to those meeting specified qualitative and quantitative qualifications necessary for adequate contract performance. Topley Realty Co., Inc., 65 Comp. Gen. 510 (1986), 86-1 CPD ¶ 398.

During our initial consideration of the protest, both the agency and M&M divided the qualification of bidders paragraph into two qualifications: first, regular engagement in the installation and service of coal/gas-fired boilers; and, second, a listing of not less than three similar boiler rehabilitation projects. The agency initially took the position that each qualification was a definitive responsibility criterion, but subsequently shifted its view to maintain that the first qualification--regular engagement in the installation and service of coal/gas-fired boilers--was not a definitive responsibility criterion because it was not a specific and objective standard.¹

We agreed with the agency. The requirement that a bidder be "regularly engaged in the business" merely advises potential bidders that past performance will be considered in deciding whether the contractor has the capacity to perform in a satisfactory manner. Rolen-Rolen-Roberts Int'l; Rathe Prods., Inc./Design Prod., Inc., B-218424 *et al.*, Aug. 1, 1985, 85-2 CPD ¶ 113; E.J. Murray Co., Inc.; W.M. Schlosser Co., Inc., B-212107; B-212107.2, Mar. 16, 1984, 84-1 CPD ¶ 316. Such a requirement does not set out a specific, objective standard measuring the bidder's ability to perform; rather, the provision expresses in general terms a factor which is encompassed by the contracting officer's subjective responsibility determination.² Our Bid Protest Regulations preclude us from reviewing a contracting officer's affirmative responsibility determination absent a showing of possible bad faith on the part of government officials or that a definitive responsibility criterion was not met. 4 C.F.R. § 21.5(c) (1996). Since these circumstances were not present here, we did not consider M&M's allegations with respect to this aspect of the qualification provision.

In its request for reconsideration, M&M argues that we made a material error of law in determining that the requirement to be "regularly engaged in the installation and

¹The agency did not dispute that the second qualification was a definitive responsibility criterion, and our determination as to that matter is not at issue here.

²In contract, requirements that firms be regularly engaged in a business for a specific period of time are definitive responsibility criteria. See, e.g., Topley Realty Co., Inc., *supra*; Townsco Contracting Co., Inc., B-240289, Oct. 18, 1990, 90-2 CPD ¶ 313; Calculus, Inc., B-228377.2, Dec. 7, 1987, 87-2 CPD ¶ 558.

service of coal\gas-fired boilers" was not a definitive responsibility criterion. M&M abandons its prior interpretation of the qualification of bidders paragraph and now argues that "the only reasonable interpretation" of the paragraph is that it constitutes one definitive responsibility criterion requiring evidence of regular engagement in the installation and service of coal\gas-fired boilers to be shown quantitatively by proof that, over the past 5 years, the bidder successfully completed three boiler rehabilitation projects involving equipment similar to the boilers at issue here.

Under our Bid Protest Regulations, to obtain reconsideration, the requesting party must either show that our prior decision contains errors of fact or law, or present information not previously considered that warrants reversal or modification of our decision. 4 C.F.R. § 21.14(a). We will not consider arguments that could have been, but were not, raised during our initial consideration of the protest since to do so would undermine the goal of our bid protest forum--to produce fair and equitable decisions based on consideration of the parties' arguments on a fully developed record. Liebig Int'l, Inc.; Defense Logistics Agency--Recon., B-265662.2, B-265662.3, Mar. 28, 1996, 96-1 CPD ¶ 169; Ford Contracting Co.--Recon., B-248007.3; B-248007.4, Feb. 2, 1993, 93-1 CPD ¶ 90. This request does not meet the standard for reconsideration of our decision.

During the pendency of the protest, M&M clearly formulated its interpretation of the qualification of bidders paragraph. The firm's comments on the agency report set forth what it termed two "key" definitive responsibility criteria and discussed them separately:

- "(i) a showing of the offeror's regular engagement in the installation and service of coal\gas-fired boilers, and
- "(II) a listing by the offeror with its bid of not less than three similar boiler rehabilitation projects satisfactorily completed within the past five years."

In a supplemental filing, the agency concurred with M&M's interpretation of the paragraph as consisting of two criteria, but disagreed with the protester as to their nature. M&M did not introduce the integrated interpretation it now espouses in its response to this filing, but again discussed the paragraph as though it consisted of two criteria. M&M provides no explanation of why it did not raise this new interpretation during the pendency of the protest, and, as the protester characterizes this interpretation as "the only reasonable one," we can think of no credible explanation for its failure to do so. Since this argument could have been, but was not, raised during the protest, it does not provide a basis for reconsideration of our decision. Ford Contracting Co.--Recon., *supra*; The Dep't of the Army--Request for Recon., B-237742.2, June 11, 1990, 90-1 CPD ¶ 546.

M&M also challenges our conclusion that the requirement that a bidder be "regularly engaged in the business" is not a definitive responsibility criterion because it does not set out a specific, objective standard measuring the bidder's ability to perform. M&M cites two cases in which we purportedly found that bidder qualifications provisions lacking a quantitative standard were definitive responsibility criteria.

This is another argument that could have been, but was not, raised during the pendency of the protest. In its supplemental filing, the agency put M&M on notice that it did not consider the requirement to be "regularly engaged in the service and installation of coal/gas-fired boilers" to be a definitive responsibility criterion because it was not a qualitative or quantitative standard, but was informational. In response, M&M did not raise the legal argument it now raises, or any other legal argument, but merely disputed the agency's view that the requirement was informational. Parties that withhold or fail to submit all relevant evidence, information, or analyses for our initial consideration do so at their own peril. Griffin-Space Servs. Co.--Recon., 64 Comp. Gen. 64 (1984), 84-2 CPD ¶ 528; Dep't of the Air Force--Recon., B-244007.3, Mar. 17, 1992, 92-1 CPD ¶ 287. In any event, while the bidders' qualifications in the cases cited by M&M may not be quantitative standards, they are qualitative standards, compliance with which at least in part can be determined objectively.³ See The Mary Kathleen Collins Trust, B-261019.2, Sept. 29, 1995, 96-1 CPD ¶ 164. Even now, M&M makes no such case for the qualification at issue here.

As a final matter, M&M urges us to revise our Bid Protest Regulations through this decision to allow us to review affirmative determinations of responsibility in all cases, including this one. For more than 20 years, our Office has declined to review affirmative determinations of responsibility except in limited circumstances because such determinations are based in large measure on subjective judgements which generally are not readily susceptible of reasoned review. Because the burden upon the protester of showing that the contracting officer acted arbitrarily is so high, we concluded that no significant purpose would be served by our review of these

³The cases cited by M&M are Westinghouse Air Brake Co., B-191537, Feb. 15, 1979, 79-1 CPD ¶ 109 ("The bidder . . . shall not perform any field installation work but shall also have commitments that such field installation work be performed by a qualified contractor regularly engaged in railroad or rapid transit signal system installation work and who is skilled and experienced in performing field installation work on high speed railroad passenger or freight lines of a nature and quantity similar to that required to be performed under this contract, and who can meet all of the requirements for installation work on this contract") and Mosler Airmatic Sys. Div., B-187586, Jan. 21, 1977, 77-1 CPD ¶ 42 ("The successful contractor shall make available to the U.S. Mint, proof of successful installations similar in nature").

matters absent the circumstances set forth in our regulations. See 4 C.F.R. § 21.5(c); Yardney Elec. Corp., 54 Comp. Gen. 509 (1974), 74-2 CPD ¶ 376; Central Metal Prods., Inc., 54 Comp. Gen. 66 (1974), 74-2 CPD ¶ 64. In the absence of any argument or evidence that the concerns underlying our regulation are now invalid, we see no basis to change our long and consistent precedent in this regard.

The request for reconsideration is denied.

Comptroller General
of the United States