

Gilbert



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Tama Kensetsu Co., Ltd., and Nippon Hodo
File: B-233118
Date: February 8, 1989

DIGEST

Protest that awardee did not meet definitive responsibility criterion concerning experience in performing similar services is denied where record indicates awardee submitted adequate objective evidence of its past experience from which the contracting officer could reasonably conclude that criterion had been met.

DECISION

Tama Kensetsu Co., Ltd., and Nippon Hodo, a joint venture, protest the award of a contract by the Corps of Engineers, Department of the Army, to Tokai Denki Koji K.K., under request for proposals (RFP) No. DACA79-88-R-0058. Tama contends that definitive responsibility criteria in the RFP were misapplied because Tokai does not possess the experience required by the RFP.

We deny the protest.

The RFP solicited offers for asbestos removal and upgrade, Phase II, Kubasaki High School, Camp Foster, Okinawa, Japan. The RFP, as amended, included Clause 39, "Certification of Qualifications and Experience," which provides in relevant part:

"a. The purpose of this Qualification Statement is to assure the Government that the offeror is qualified in the removal, treatment, handling and disposal of asbestos-containing material, and subsequent cleaning of affected environment. This requirement is essential for assuring a timely and safe completion of work to the Government. All offerors must possess adequate management, organization, technical and financial capability, and equipment necessary to ensure satisfactory

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completion of the work within the performance period set forth herein. All offerors must complete the certification set forth below or a certification in the same format and attach to their offer. The fact that the offeror submitted the certification will not limit the Government's right to verify the certification or to perform a pre-award survey to determine the offeror's qualification for the work.

"b. The offeror certifies as part of its offer that it has been engaged in asbestos abatement and removal work or similar work for the three years immediately preceding the date of this offer, has satisfactorily completed an accredited Environmental Protection Agency (EPA) Contractor/Supervisor Asbestos Abatement Course outlined by Asbestos Hazardous Emergency Response Act of 1986 (AHERA) and completed the following contracts for asbestos abatement and removal work:

<u>Date Awarded</u>	<u>Date Completed</u>	<u>Description of Project</u>	<u>Location</u>
<u>Amount</u>	<u>Contracting Agency</u>	<u>To Verify, Contact Name/Phone No."</u>	

Thirteen offers were received by the August 3, 1988, closing date. The contracting officer determined on September 30 that the offeror which had submitted the lowest priced initial proposal was nonresponsible. The Army awarded a contract to the second low offeror, Tokai, on September 30. The third low offeror, Tama, protested the award to our Office on October 7, contending that neither Tokai nor its subcontractor has the experience required by Clause 39.

We generally do not review affirmative responsibility determinations since a contracting agency's determination that a particular bidder or offeror is responsible is based in large measure on subjective judgments. Bid Protest Regulations, 4 C.F.R § 21.3(m)(5) (1988). One exception to this rule is where a solicitation contains definitive responsibility criteria, which are specific and objective standards established by an agency to measure a bidder's or offeror's ability to perform the contract. Calculus, Inc., B-228377.2, Dec. 7, 1987, 87-2 CPD ¶ 558. These special standards put firms on notice that the class of prospective contractors are limited to those who meet qualitative or quantitative criteria deemed necessary for adequate

performance. Antenna Products Corp., B-227116.2, Mar. 23, 1988, 88-1 CPD ¶ 297. A solicitation requirement, as is present here, that the prospective contractor have a specified number of years of experience in a particular area is one such criterion.^{1/} Topley Realty Co., Inc., 65 Comp. Gen. 510 (1986), 86-1 CPD ¶ 398.

Where an allegation is made that definitive responsibility criteria have not been satisfied, we will review the record to ascertain whether evidence of compliance has been submitted from which the contracting officer reasonably could conclude that the definitive criteria have been met. BBC Brown Boveri, Inc., B-227903, Sept. 28, 1987, 87-2 CPD ¶ 309. While definitive responsibility criteria establish a minimum standard which is a prerequisite to an affirmative determination of responsibility, we have recognized that there are situations where an offeror may not meet the specific letter of such criteria, but has clearly exhibited a level of achievement either equivalent to or in excess of the specified criteria, and thus properly may be considered to have satisfied the definitive responsibility criteria. Unison Transformer Services, Inc., B-232434, Nov. 10, 1988, 68 Comp. Gen. ____, 88-2 CPD ¶ 471. We believe this principle is applicable here notwithstanding the certification language in Clause 39, since literal compliance with such clauses is not required by our cases and, in the words of the clause, "The purpose of this Qualification Statement is to assure . . . that the offeror is qualified . . ." We believe this assurance can be obtained without literal compliance.

^{1/} We note that the Army in its initial report to our Office stated that the requirements in RFP Clause 39 quoted above were definitive responsibility criteria. In comments to our Office following a conference on this protest, the Army suggests that its initial position was incorrect because the inclusion of the phrase "or similar work" results in the clause lacking the objectivity and specificity necessary for definitive responsibility criteria. However, we have frequently considered that a requirement for the same or "similar" experience constituted a definitive responsibility criterion. See, e.g., Allen-Sherman-Hoff Co., B-231552, Aug. 4, 1988, 88-2 CPD ¶ 116 (requirement that offeror have built an ash collection facility of similar magnitude and dollar value as that being solicited); J.A. Jones Construction Co., B-219632, Dec. 9, 1985, 85-2 CPD ¶ 637 (requirement that bidder have performed similar construction services within the United States for 3 prior years).

Tama is correct that Tokai did not meet the literal requirement of the definitive responsibility criterion for asbestos abatement and removal work or similar work experience for the 3 years "immediately preceding" the date of its offer, as some of the experience considered by the Army was outside the time frame established by the criterion. However, we conclude that the contracting officer reasonably considered that the experience of Tokai and its subcontractor, Hall Kimbrell, exhibited a level of achievement equivalent to the definitive responsibility criterion and thus met it.^{2/}

Tokai identified in its proposal six asbestos removal projects performed in Okinawa for the United States government, dating from June 1987 through August 1988, including the successfully completed Phase I contract for the Kubasaki High School asbestos removal project. Furthermore, the record indicates staff organizations telephonically related to the contracting officer the following information in their possession:

1. Tokai completed an asbestos project for the Corps of Engineers which was awarded in September 1983 and finished in May 1985.
2. A capability survey dated August 1983 listed 10 construction projects performed by Tokai for the Corps.

Moreover, the record indicates that Tokai's subcontractor, Hall Kimbrell, who was Tokai's subcontractor on the Phase I contract for the Kubasaki High School asbestos removal project, enjoyed an outstanding reputation in the area of on-site construction project management of asbestos removal projects. By letter dated October 6, Hall Kimbrell listed projects in Okinawa, the Pacific Basin and United States in which it had provided project management services during asbestos removal.

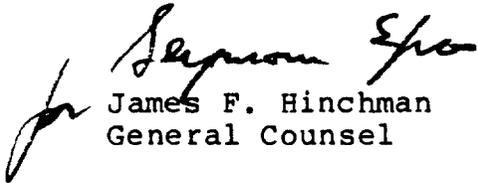
Though Tama contends that the construction projects listed by Tokai and project management services performed by Hall Kimbrell are not relevant experience, the decision that those projects and services were sufficiently similar to the work covered by the RFP was essentially within the agency's

^{2/} We have previously held that a technically qualified subcontractor may be eligible to satisfy the definitive responsibility criteria. See Allen-Sherman-Hoff Co., B-231552, supra.

discretion. See J.A. Jones Construction Co., B-219632, supra. There is nothing in the record to indicate that the agency went beyond the proper exercise of discretion here. Though Tama notes that the list of projects performed by Hall Kimbrell was submitted after award, Tama has not questioned the accuracy of the list.

Tama emphasizes its belief that the Corps intentionally required that the asbestos abatement and removal work or similar work must have occurred during the 3-year period immediately preceding the date of the offer in order to ensure the Corps obtained a contractor who had state-of-the-art experience in asbestos removal. We find that Tama's performance of six asbestos removal projects from June 1987 through August 1988, including the phase I portion of the Kubasaki High School asbestos removal project, reasonably could have addressed any concerns the Corps had in this regard.

The protest is denied.


James F. Hinchman
General Counsel