Curcio

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Hardie-Tynes Manufacturing Company

File: B-237938

Date: April 2, 1990

L. Stephen Quatannens, Esq., Gardner, Carton & Douglas, for the protester.
Douglas K. Olson, Esq., Kilcullen, Wilson and Kilcullen, for IMPSA-International, Inc., an interested party.
Justin P. Patterson, Esq., Department of the Interior, for the agency.
Mary G. Curcio, Esq., Peter A. Iannicelli, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where the identity of the bidder is clear from the bid as submitted and there is no indication that the bidder will not perform in accordance with the requirements of the solicitation, the bid is responsive.

2. Agency may properly consider manufacturing experience of parent corporation in finding that awardee subsidiary corporation met definitive responsibility criterion (5-year manufacturing experience requirement), where bid stated that product would be manufactured at parent corporation's facilities.

DECISION

Hardie-Tynes Manufacturing Company protests the award of a contract for flow gates under invitation for bids (IFB) No. 9-SI-30-07760/DS-7800, to IMPSA International, Inc. (IMPSA-International), by the Bureau of Reclamation, Department of the Interior. Hardie-Tynes alleges that IMPSA-International submitted a nonresponsive bid and is a nonresponsible bidder.

We deny the protest.

Issued on July 28, 1989, the IFB solicited bids to design, furnish and deliver flow gates for the Roosevelt Dam, Salt River Project, Arizona, and the Hoover Dam, Boulder Canyon Project, Arizona-Nevada. Section L-22 of the IFB provided:

> "The bidder shall have experience in the manufacture of high-head 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."

At bid opening on September 28, the Bureau received six bids; IMPSA-International submitted the low bid of $3,430,012, and Hardie-Tynes submitted the second-low bid of $4,730,976. IMPSA-International, a Pennsylvania corporation with no manufacturing facility, stated in its bid that the gates would be manufactured in Argentina at the manufacturing facilities of its parent corporation, Industrias Metalurgicas Pescarmona S.A. (IMPSA-Argentina).

On October 5, Hardie-Tynes protested to the Bureau that IMPSA-International was ineligible for award because the firm did not meet the 5-year manufacturing experience requirement set out in section L-22 and was not a manufacturer for purposes of the Walsh-Healey Public Contracts Act. 41 U.S.C. §§ 35-45 (1982 and Supp. V 1987). The Bureau initially agreed that IMPSA-International was ineligible for award because it was not a manufacturer under the Act. Subsequently, IMPSA-International submitted three corporate documents (a power of attorney and agency agreement, a special power of attorney, and a document entitled "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 in contracts for projects in the United States. The Bureau then determined that, because the equipment would be manufactured in Argentina and shipped directly to the United States government installations, the Walsh-Healey Public Contracts Act was not applicable. On November 27, the Bureau awarded the contract to IMPSA-International. Hardie-Tynes filed its protest with our Office on December 1.

Hardie-Tynes first alleges that the bid submitted by IMPSA-International is nonresponsive because it does not contain an unequivocal commitment to perform the contract. Specifically, Hardie-Tynes argues that, because IMPSA-International relied on the manufacturing experience of

IMPSA-Argentina, it could have chosen to avoid the contract by not disclosing its relationship with IMPSA-Argentina. Hardie-Tynes also argues that the bid is nonresponsive because it is ambiguous as to whether IMPSA-International or IMPSA-Argentina is the bidding party, and, therefore, it is not clear which firm is obligated to perform the contract.

The test for responsiveness is whether a bid as submitted represents an unequivocal commitment to provide the requested supplies or services at a firm, fixed-price. Unless something on the face of the bid either limits, reduces or modifies the obligation of the prospective contractor to perform in accordance with the terms of the solicitation, the bid is responsive. Haz-Tad, Inc., et al., 68 Comp. Gen. 92 (1988), 88-2 CPD ¶ 486. The determination as to whether a bid is responsive must be based solely on the bid documents as they appear at the time of bid opening. Id.

Here, the bid was submitted in the name of IMPSA-International and there was nothing on its face to indicate that IMPSA-International would not perform in accordance with the terms of the solicitation. Consequently, the bid as submitted was responsive. In examining the responsiveness of the bid, it would have been improper for the contracting officer to have relied on post-bid opening submissions concerning whether IMPSA-International met the solicitation requirement for manufacturing experience since, as explained below, that requirement relates to responsibility and has no bearing on the responsiveness of the bid. Insofar as Hardie-Tynes is arguing that the bid is ambiguous as to whether IMPSA-International or IMPSA-Argentina is the bidding party, it is clear from the bid itself that IMPSA-International was the bidder and that, even though the flow gates will be manufactured by IMPSA-Argentina, IMPSA-International is obligated to supply the flow gates to the government under the contract.

Furthermore, we find unpersuasive Hardie-Tynes' argument that IMPSA-International could have chosen not to disclose its corporate affiliation with IMPSA-Argentina in order to avoid being awarded the contract. IMPSA-International's bid clearly disclosed the only critical relationship between the two firms--that is, that IMPSA-Argentina would be doing the actual manufacturing for IMPSA-International, which had agreed to furnish the gates to the government. Theoretically, any bidder could attempt to be found nonresponsible by not cooperating with contracting officials who ask for relevant financial or corporate documents during the course of a responsibility determination. However, here, IMPSA-International cooperated fully by furnishing the corporate

documents and, once found responsible and awarded the contract, was bound to perform the work.

Hardie-Tynes also protests that IMPSA-International, a Pennsylvania corporation with approximately 12 employees and no manufacturing facilities, is not a responsible bidder because it does not meet the manufacturing experience requirement of the IFB. Hardie-Tynes contends that while IMPSA-Argentina, the parent corporation, is a manufacturing company, IMPSA-International cannot rely on the experience of IMPSA-Argentina to meet the 5-year manufacturing experience requirement. To support this position Hardie-Tynes cites Federal Acquisition Regulation (FAR) § 9.104-3(d), which provides that affiliated concerns are normally considered separate entities in determining whether a contractor meets applicable standards for responsibility. Hardie-Tynes also argues that while the experience of a nonbidding entity can be used to determine the responsibility of a bidding party in appropriate circumstances, the bid must first establish that the nonbidding entity whose experience is being relied upon is committed to perform the contract. Hardie-Tynes contends that the corporate documents submitted by IMPSA-International do not establish that IMPSA-Argentina made any commitment to manufacture flow gates for IMPSA-International when IMPSA-International acts in its own name; thus, Hardie-Tynes argues that the documents provide no basis for the Bureau to rely upon the experience of IMPSA-Argentina to find IMPSA-International responsible.

The Bureau agrees that IMPSA-International alone does not meet the experience requirement. The Bureau argues, however, that IMPSA-International properly may satisfy the 5-year experience requirement based on the manufacturing experience of its parent corporation, IMPSA-Argentina. According to the Bureau, it determined from the documents submitted by IMPSA-International--the unanimous written consent of sole shareholder in lieu of annual meeting, the special power of attorney, and the power of attorney and agency agreement--that IMPSA-Argentina was bound to manufacture the flow gates which IMPSA-International agreed to provide under the contract.

The Bureau further argues that the FAR does not prohibit using a parent corporation's experience to determine that a subsidiary corporation is responsible. In this connection, the Bureau cites FAR § 9.104-1, which provides in part that to be responsible, a prospective contractor must have the necessary experience or the ability to obtain it, and the necessary production facilities or the ability to obtain

them. The Bureau concludes that it properly found IMPSA-International responsible based on the experience of IMPSA-Argentina, because the corporate documents provided to the Bureau by IMPSA-International clearly showed that IMPSA-International had the ability to obtain both the required manufacturing experience and facilities from the parent corporation.

Our Office does not generally 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. Tama Kensetsu Co., Ltd., and Nippon Hodo, B-233118, Feb. 8, 1989, 89-1 CPD ¶ 128. 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 an offeror's ability to perform the contract. Id. A solicitation requirement that the prospective contractor have a specified number of years of experience in a particular area is a definitive responsibility criterion. DJ Enters., Inc., B-233410, Jan. 23, 1989, 89-1 CPD ¶ 59. Where an allegation is made that definitive responsibility criteria have not been satisfied, the scope of our review is limited to ascertaining whether sufficient evidence of compliance has been submitted from which the contracting officer reasonably could conclude that the criteria have been met. Id.

In the present case the parties agree that IMPSA-International does not meet the experience requirement on its own, nor is there any dispute that IMPSA-Argentina does meet the experience requirement. The issue for resolution thus is whether IMPSA-International properly may be found responsible by considering the manufacturing experience of IMPSA-Argentina.

The experience of a technically qualified subcontractor may be used to satisfy definitive responsibility criteria relating to experience for a prime contractor-bidder. Tama Kensetsu Co., Ltd., and Nippon Hodo, B-233118, supra; Allen-Sherman-Hoff Co., B-231552, Aug. 4, 1988, 88-2 CPD ¶ 116; BBC Brown Boveri, Inc., B-227903, Sept. 28, 1987, 87-2 CPD ¶ 309. We see little difference in this situation, where a subsidiary corporation is relying on its parent corporation to perform the work in question. See Unison Transformer Servs., Inc., 68 Comp. Gen. 74 (1988), 88-2 CPD ¶ 471 (in performing a technical evaluation under a negotiated procurement, the procuring agency may consider the experience of a parent company where the offeror's subsidiary company represents that the resources of the parent

company will be available to it). Accordingly, as IMPSA-International represented in its bid that the manufacturing would be performed by IMPSA-Argentina at the facilities in Argentina, we believe the Bureau properly considered IMPSA-Argentina's experience in determining that IMPSA-International met the experience requirement.

In reaching this conclusion, we note that, contrary to Hardie-Tynes' position, evidence of a firm commitment from the subcontractor to the prime contractor is not a prerequisite to considering the subcontractor's experience in determining that the prime contractor is responsible. See Allen-Sherman-Hoff Co., B-231552, supra; Contra Costa Elec., Inc.--Reconsideration, B-200660.2, May 19, 1981, 81-1 CPD ¶ 381. Nevertheless, from IMPSA-International's bid and the corporate documents submitted to the Bureau, it is clear that IMPSA-Argentina was committed to IMPSA-International to manufacture the flow gates. The power of attorney and agency agreement, and the unanimous written consent of the sole shareholder in lieu of an annual meeting, 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. In addition, the special power of attorney gives IMPSA-International's president the power to sign contracts of any kind on behalf of IMPSA-Argentina. Thus, IMPSA-International had the authority to commit 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.

Finally, we do not agree that FAR § 9.104-3(d) precludes a contracting agency from considering the experience of a parent corporation to find a subsidiary corporation responsible. While the provision does state that affiliated concerns are normally considered separate entities in determining whether the firm that is to perform meets the applicable standards of responsibility, it does not provide that a contracting agency may never rely on an affiliate to find a prospective contractor responsible. In our view, the provision would preclude using an affiliate's experience simply because it was an affiliate. However, where, as here, the bidder represents that the parent-affiliate will be performing the contract, we think the affiliate's experience properly may be considered. See FAR § 9.104-3(b), which recognizes that a contractor may be

found responsible through its own resources or those of a subcontractor or by otherwise demonstrating that it has the ability to obtain the needed resources.

The protest is denied.

for James F. Hinchman
General Counsel