

M. Benjam



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Townsco Contracting Company, Inc.

File: B-240289

Date: October 18, 1990

LeRoy Powers, Esq., for the protester.
Carol L. Cooley for Jim Cooley Construction, Inc., and
Robert A. Hinton for T-G Excavating, Inc., interested parties.
Lt. Col. William J. Holland, Department of the Air Force, for
the agency.
Aldo A. Benjam, Esq., and Christine S. Melody, Esq., Office
of the General Counsel, GAO, participated in the preparation
of the decision.

DIGEST

1. Solicitation provision requiring that bidders certify that they have been "regularly engaged in airfield pavement work for the three years immediately preceding" their bid, and requiring that bidders submit a list of contracts for airfield pavement work completed within the "past three years," provides specific quantitative qualifications establishing definitive responsibility criteria.
2. Protest that proposed awardee does not meet definitive responsibility criteria in solicitation requiring experience in airfield pavement work is sustained since the proposed awardee provided no objective evidence upon which the contracting officer could reasonably determine that it satisfied the experience requirement.

DECISION

Townsco Contracting Company, Inc. protests any award to Jim Cooley Construction, Inc. under invitation for bids (IFB) No. 590-B, issued as a small business set-aside by Northrop Worldwide Aircraft Services, Inc. for replacement of slabs-apron and widening of taxiway No. 7 at Vance Air Force Base (AFB), Enid, Oklahoma. Northrop, a government prime contractor, manages, operates and maintains Vance AFB on behalf of the Department of the Air Force. Townsco alleges that Northrop erroneously determined that Cooley satisfied certain definitive responsibility criteria in the IFB.

We sustain the protest.

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Federal procurement statutes and regulations do not apply per se to a management contractor such as Northrop; such a prime contractor must conduct procurements according to the terms of its contract with the agency and its own agency-approved procedures. Our review is limited to determining whether the procurement conforms to the "federal norm," i.e., the policy objectives in the federal statutes and regulations. Merrick Eng'g, Inc., B-238706.2, June 14, 1990, 90-1 CPD ¶ 564.

The IFB was issued on March 23, 1990. Northrop received four bids by the amended bid opening date of May 2; Cooley submitted the low bid, while Townsco submitted the second-low bid. On May 3, Townsco protested to Northrop alleging that Cooley did not have the experience in airfield pavement work required by the IFB. In a letter dated June 22, the contracting officer^{1/} denied Townsco's agency-level protest, stating that based on the information provided by Cooley and its proposed subcontractors, Cooley "meets or exceeds" the requirements set forth in the IFB.

In its protest to our Office, Townsco reiterates that Cooley does not have the experience in airfield pavement work required by the IFB, and therefore maintains that Cooley should have been found nonresponsible.

The IFB contained the following provision:

"The offeror certifies as part of its offer that it has been regularly engaged in airfield pavement work for the three years immediately preceding the date of this offer and has satisfactorily completed the following contracts for airfield pavement work within the past three years. . . ."

In response to this requirement, Cooley submitted a list of 31 projects it had completed from 1970 to 1989. Six of the projects on Cooley's list were completed in the past 3 years; only one, completed in 1989 and described as "Army Aviation Support Facility, Tulsa," involved airfield pavement work. Cooley submitted no information concerning any proposed subcontractors with its bid.

Townsco contends that the IFB provision sets forth a definitive responsibility criterion that requires bidders to have been "regularly engaged in airfield pavement work" for the past 3 years in order to be eligible for award. Townsco argues that Cooley's completion of only one contract involving

^{1/} The term "contracting officer" means Northrop's Director of Supply, Transportation and Procurement at Vance AFB.

airfield pavement work during the last 3 years does not satisfy this requirement and that Cooley therefore is ineligible for award.

The agency responds that the provision does not contain mandatory language such as "must possess five years of verifiable experience," or "shall have maintained,"^{2/} and therefore, the provision cannot be considered to establish a definitive responsibility criterion. Rather, the agency contends that the provision at issue here is analogous to the requirement in Telex Comms., Inc., B-236981, Jan. 29, 1990, 90-1 CPD ¶ 120, where we found that an IFB provision restricting the procurement to "previous proven producers" was an undefined requirement that lacked the specificity and objectivity characteristic of definitive responsibility criteria.

Definitive responsibility criteria are specific and objective standards established by an agency for use in a particular procurement for the measurement of a bidder's ability to perform the contract. See Federal Acquisition Regulation (FAR) § 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, supra. We think that the IFB provision at issue here, requiring that bidders be regularly engaged in airfield pavement work for the past 3 years, provides specific quantitative qualifications, thereby establishing a definitive responsibility criterion.

Contrary to the agency's position, a solicitation requirement that bidders have a specified number of years of experience in a particular area constitutes a definitive responsibility criterion. Calculus, Inc., B-228377.2, Dec. 7, 1987, 87-2 CPD ¶ 558 (requirement that the contractor "should have been regularly engaged in the installation, maintenance and repairing of equipment . . . for a minimum of two years," is a definitive responsibility criterion); Urban Masonry Corp., B-213196, Jan. 3, 1984, 84-1 CPD ¶ 48 (requirement that contractor "be regularly engaged for a minimum of 5 years" constituted a definitive responsibility criterion). Notwithstanding the absence of mandatory terms such as "shall" or "must," the provision requires that bidders certify that they have been "regularly engaged in airfield pavement work" for the past 3 years, and requires that bidders submit a list of contracts involving airfield pavement work successfully

^{2/} See, e.g., Topley Realty Co., Inc., 65 Comp. Gen. 510 (1986), 86-1 CPD ¶ 398; D.J. Enters., Inc., B-233410, Jan. 23, 1989, 89-1 CPD ¶ 59.

completed within the past 3 years. It is logically inconsistent to conclude that while the only information as to bidders' experience that the contracting officer will accept concerns contracts involving airfield pavement work completed within the last 3 years, this experience is not required for award. See Antenna Prods. Corp., B-227116.2, Mar. 23, 1988, 88-1 CPD ¶ 297.

Generally, a contracting agency has broad discretion in making responsibility determinations, including whether bidders meet definitive responsibility criteria, since the agency must bear the brunt of any difficulties experienced in obtaining the required performance. BMV, Div. of Harsco Corp., B-233081; B-233081.2, Jan. 24, 1989, 89-1 CPD ¶ 67. Nevertheless, evidence that a bidder meets the definitive responsibility criteria must be obtained by the agency so that compliance with the requirement, which is a prerequisite to award, can be determined. Prime Mortgage Corp., B-238680.2, July 18, 1990, 69 Comp. Gen. ____, 90-2 CPD ¶ 48. Although the relative quality of the evidence regarding responsibility is a matter for the judgment of the agency, the contracting officer may find compliance with the definitive responsibility criteria based upon objective evidence only. Vulcan Eng'g Co., B-214595, Oct. 12, 1984, 84-2 CPD ¶ 403. We have sustained protests against affirmative determinations of responsibility where such objective evidence is lacking. Id.; Ampex Corp., B-212356, Nov. 15, 1983, 83-2 CPD ¶ 565; Power Sys., B-210032, Aug. 23, 1983, 83-2 CPD ¶ 232. Our review of the record here reveals that the contracting officer lacked objective evidence from which he could reasonably determine that Cooley had been regularly engaged in airfield pavement work for the 3 years immediately preceding the date of its bid.

The record shows that in a letter to Cooley dated May 24, based upon a pre-award survey of Cooley that resulted in a recommendation that award not be made to that firm, Boyd A. Hemphill, Jr., Northrop's Superintendent, Procurement Branch, Vance AFB, determined that Cooley did not meet the IFB requirements and was therefore ineligible for award. Mr. Hemphill specifically determined that: (1) "Cooley has not been regularly engaged in airfield pavement work for the three years immediately preceding the date of the offer"; and (2) "Cooley has not completed contracts for airfield pavement work within the past three years." The letter also stated that the references Cooley provided did not "validate previous and continuing airfield construction experience." Mr. Hemphill then waived the pre-award survey on Townsco based on its past performance at Vance AFB, and recommended award to that firm.

Subsequently, by letters dated June 1 and June 11, Cooley submitted information concerning subcontractors, equipment, and personnel it proposed to perform the work under the IFB. Cooley also expanded on the original list of projects submitted with its bid, adding nine projects it completed from 1987 to 1990; however, none of the nine involved airfield pavement work. As its subcontractors, Cooley proposed Morton Paving, Duit Construction, Southwest Paving, and Connelly Paving. According to Cooley's June 11 submission, each of the subcontractors it proposed is experienced in airfield paving and was prepared to work with Cooley on the project.

The agency argues that even assuming that Cooley subcontracts the actual airfield paving portion of the project, the contracting officer received sufficient information regarding the proposed subcontractors and their performance history from which he could reasonably determine that Cooley met the definitive responsibility criterion. We disagree.

Northrop's Project Engineer (PE) reviewed the additional information Cooley submitted, and in a memorandum dated June 13, documented interviews with Blaine Morton, of Morton Paving, with J.A. Connelly, of Connelly Paving, and with individuals familiar with their work. The PE's interview with Mr. Morton revealed that Morton Paving was the paving subcontractor on the project Cooley described as "Army Aviation Facility, Tulsa" in the original list of projects submitted with its bid. The interview also revealed that Morton is primarily a city street and highway paving contractor and that, including the Army Aviation Facility project, it had completed only two contracts involving airfield pavement-type work.

The PE's interview with J.A. Connelly, of Connelly Paving, and with another contractor familiar with Connelly's work, revealed that while Connelly had completed one project involving airfield pavement-type work, it was not primarily an airfield paving contractor. Other than proposing it as a subcontractor, Cooley did not submit, and the record does not contain, any information concerning Duit Construction. Based on his review of the information Cooley submitted, the PE concluded that only Southwest Paving had actual airfield paving experience, consisting of one project in 1990. On June 13, the PE concluded that Cooley still failed to satisfy the IFB requirements.

Despite the negative pre-award survey on Cooley, Mr. Hemphill's May 24 conclusion that Cooley did not meet the experience requirement, and the PE's June 13 finding, the contracting officer determined on June 15 that Cooley was qualified to perform the contract. Other than the contracting

officer's conclusory determination,^{3/} the record is devoid of any evidence explaining his rationale. Nevertheless, the agency now contends that the contracting officer's decision was reasonable because while Cooley may not have the experience in airfield paving work required by the IFB, its proposed subcontractors have the requisite experience.

Townscoc concedes that the contracting officer's responsibility determination of Cooley may be properly based on Southwest Paving's experience in airfield paving work, but only if that firm were to actually perform the work as a subcontractor. The protester alleges, however, that Southwest has indicated that it will not be performing any work on the project.

The record shows that on July 12, 1990, apparently upon learning that Cooley had proposed it as subcontractor, a representative of Southwest telephoned the contract specialist and informed her that Southwest had not provided Cooley with a quote; that Southwest had reached no agreement with Cooley to perform any work on the project; and that the project was too "broken up" due to phasing to be profitable. According to the contract specialist's record of the conversation, Southwest made it clear that there was only a remote possibility that it would ever perform any work on the project. Moreover, in a letter to Cooley dated August 27, Southwest stated that while it would be pleased to work with Cooley anytime it is "feasible and mutually beneficial," Southwest could not hold crew or equipment in reserve for the project. Since the record shows that Southwest was not prepared to work on the project, we find that it was not reasonable for the contracting officer to conclude that Cooley could rely on Southwest's experience to satisfy the experience requirement in the IFB.

The agency argues that in addition to Southwest, either Morton or Connelly have sufficient experience to satisfy the IFB requirement. As noted above, the PE concluded that Morton had completed two airfield pavement-type contracts and that Connelly had completed one such contract. The PE found that this experience was not sufficient to satisfy the requirement that the contractor be "regularly engaged in airfield pavement work"; his finding was later reversed by the contracting officer. The agency attributes the conflicting findings to a different interpretation of the

^{3/} The contracting officer's determination provides in its entirety: "I have reviewed information from Cooley Construction and [the PE's] notes. My determination is that Cooley Construction is qualified to do the slabs and widen taxiway No. 7."

"regularly engaged in airfield pavement work" requirement. According to the agency, the PE interprets the provision as requiring that a bidder's primary business involve airfield pavement work, while the contracting officer interprets the provision to mean that completion of only one project involving airfield pavement work satisfies the requirement.

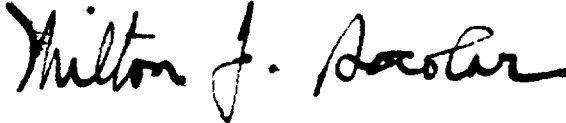
We find the contracting officer's interpretation to be unreasonable. Since the IFB explicitly calls for bidders to be "regularly engaged" in airfield paving work, we think that it clearly contemplates a continuing course of performing that type of work, not just an occasional project by a firm whose regular business is principally in another area. Accordingly, we do not think that Morton's completion of only two projects involving "airfield pavement-type work," or Connelly's completion of only one such project, satisfies the requirement.

Since Cooley listed only one recent project involving airfield paving which it had performed itself--and in fact, the record shows that the paving work on that project was performed by Morton as a subcontractor--and its proposed subcontractors lack the required experience and, in the case of Southwest, have clearly indicated an unwillingness to work on the project, we find that the contracting officer lacked objective evidence upon which he could reasonably find that Cooley met the definitive responsibility criteria in the IFB. Under these circumstances, Cooley should have been found nonresponsible. Accordingly, we sustain the protest and recommend that award be made to Townsco as the second-low bidder, if that firm is otherwise eligible.4/

4/ While Cooley self-certified that it is a small business concern, Northrop is not required to refer the nonresponsibility determination to the Small Business Administration under certificate of competency procedures, unless the contract between Northrop and the agency or the applicable regulations so require. Miklin Corp.--Recon., B-236746.3, June 8, 1990, 69 Comp. Gen. ____, 90-1 CPD ¶ 540. We are not aware of any such requirement in the FAR or the Department of Defense FAR Supplement, and we understand that Northrop's contract contains none.

We also find that Townsco is entitled to recover its costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1990); Westinghouse Electric Corp., B-227091, Aug. 10, 1987, 87-2 CPD ¶ 145. Townsco should submit its claim for costs directly to the agency. 4 C.F.R. § 21.6(e).

The protest is sustained.

A handwritten signature in black ink, reading "Milton J. Acosta". The signature is written in a cursive style with a large initial "M".

Acting Comptroller General
of the United States