



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Townsco Contracting Company, Inc.--
Reconsideration

File: B-240289.2

Date: March 15, 1991

LeRoy Powers, Esq., for the protester.
Clyde A. Muchmore, Esq., Harvey D. Ellis, Esq., and Timila S. Rother, Esq., Crowe and Dunlevy, for Jim Cooley Construction, Inc., an interested party.
Aldo A. Benejam, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Awardee's mere assertion, in request for reconsideration of decision sustaining protest challenging award, that it completed one airfield paving project is not sufficient to establish that awardee satisfied definitive responsibility criterion in solicitation requiring that bidders have been "regularly engaged in airfield pavement work for the three years immediately preceding" their bid, especially where most of the only airfield project awardee completed was performed by a subcontractor in less than 1 year.

DECISION

Jim Cooley Construction, Inc. requests reconsideration of our decision in Townsco Contracting Co., Inc., B-240289, Oct. 18, 1990, 90-2 CPD ¶ 313, in which we sustained Townsco's protest against any award to Cooley 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.^{1/} We sustained the protest on the basis that the contracting officer had no objective evidence upon which he could reasonably find that Cooley, the low bidder, met the definitive responsibility criterion concerning

^{1/} Northrop, a government prime contractor, manages, operates and maintains Vance AFB on behalf of the Department of the Air Force. We therefore limited our review to determining whether the procurement conformed 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.

050855/ 143403

bidders' experience established in the IFB. Cooley now contends that our decision contains factual errors pertaining to Cooley's experience as an airfield paving contractor, a clarification of which allegedly shows that Cooley meets the definitive responsibility criterion established in the IFB. Cooley also argues that even if it does not literally meet the IFB's requirements, Cooley's experience substantially complies with and is essentially comparable to that required in the IFB.

We affirm our decision.

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. By letter dated June 22, the contracting officer denied Townsco's agency-level protest, stating that based on information provided by Cooley and its proposed subcontractors, Cooley "meets or exceeds" the requirements set forth in the IFB. Townsco then protested to our Office.

The IFB contained the following provision at issue:

"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" (Emphasis added.)

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 of the three completed in 1989 and described as "Army Aviation Support Facility, Tulsa," involved airfield pavement work. Although Cooley submitted no information concerning any proposed subcontractors with its bid, Cooley subsequently submitted information concerning subcontractors, equipment, and personnel it proposed to perform the work under the IFB.^{2/}

As its subcontractors, Cooley proposed Morton Paving, Duit Construction, Southwest Paving, and Connelly Paving. A review

^{2/} 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.

of the supplemental information Cooley submitted conducted by Northrop's Project Engineer (PE) 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; that Morton was primarily a city street and highway paving contractor; and that Morton had completed only two contracts involving airfield pavement-type work, including the Tulsa project.

The PE's review of the supplemental information further revealed that Connelly Paving had completed only one airfield pavement-type work and that the firm was not primarily an airfield paving contractor. The PE also found that Southwest Paving had completed one airfield paving project in 1990. Cooley submitted no information on Duit Construction. Based on his review of the information provided by Cooley, on June 13, the PE concluded that Cooley failed to satisfy the IFB's airfield paving experience requirement.

Notwithstanding the PE's finding, and despite an earlier negative pre-award survey on Cooley that had resulted in a recommendation that award not be made to that firm,^{3/} the contracting officer determined on June 15 that Cooley was qualified to perform the contract. Except for the contracting officer's conclusory determination,^{4/} there is no evidence in the record explaining his rationale.

In its protest to our Office, Townsco alleged that Cooley did not satisfy the experience requirement in the IFB. In analyzing the IFB provision at issue, we found that by requiring that bidders be "regularly engaged in airfield pavement work" for the past 3 years, the IFB provided specific quantitative qualifications, thereby establishing a definitive

^{3/} Contrary to Cooley's assertion on reconsideration that Northrop officials never found Cooley nonresponsible, in a letter to Cooley dated May 24, based on the negative pre-award survey, Boyd A. Hemphill, Jr., Northrop's Superintendent, Procurement Branch, Vance AFB, 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."

^{4/} 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."

responsibility criterion.^{5/} Townsko Contracting Co., Inc., B-240289, supra, at 3. While Cooley correctly argues on reconsideration that in determining whether Cooley satisfies the IFB's experience requirement, the relative quality of the evidence is a matter for the judgment of the contracting officer, we have insisted upon the presence of objective evidence from which the contracting officer could find compliance with the definitive responsibility criteria, and have sustained protests against affirmative determinations of responsibility where such evidence is lacking. See, e.g., Topley Realty Co., Inc., 65 Comp. Gen. 510 (1986), 86-1 CPD ¶ 398, and cases cited therein.

We found, based on our review of the record, that the contracting officer lacked sufficient 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. In so doing, we specifically rejected the contracting officer's interpretation that Cooley's completion of only one project involving airfield pavement satisfied the IFB requirement. Townsko Contracting Co., Inc., B-240289, supra, at 4.

Cooley disagrees with our interpretation of the IFB provision, arguing that the term "regularly engaged" was not defined in the IFB; that the IFB did not specifically require that a contractor be "continuously engaged" in airfield paving work over the last 3 years to be eligible for award; and that if Northrop intended such "concentrated" experience, the IFB would have specifically required that bidders be "continuously engaged," a more stringent standard according to Cooley, rather than the "regularly engaged" language Northrop used in the IFB.

Cooley further argues that interpreting the IFB as requiring "numerosity" of projects would improperly disqualify an otherwise eligible contractor who completed only one large project spanning 3 years. Instead, Cooley contends that the quality and extent of previous airfield paving experience, as well as the amount of time required to complete a project, should be considered in determining whether a bidder is eligible for award under the IFB. Cooley concludes that if

^{5/} 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).

its experience in airfield pavement work were added to that of its proposed subcontractors, Cooley would meet any "numerosity" requirement implied in the IFB.

We are not persuaded by Cooley's arguments. While the term "regularly engaged" was not specifically defined in the IFB, giving the phrase its plain and ordinary meaning, we found that the IFB contemplated that bidders must show a continuing course of performing airfield paving work to be eligible for award. Black's Law Dictionary (6th ed. 1990) defines the term "regularly" as "at fixed and certain intervals, regular in point of time"; "regular" as "steady or uniform in course, practice, or occurrence"; and "engage" as "to employ or involve one's self." When the term "regularly engaged" is read within the context of the provision at issue, the IFB clearly contemplates that, to be eligible for award, bidders must have been employed or involved in airfield pavement work for a minimum of 3 years immediately preceding the date of their bids. Cooley's suggestion that since the term "regularly engaged" was not explicitly defined in the solicitation, the IFB did not require that bidders show a continuing course of performing airfield pavement work, is simply illogical, inconsistent with the plain meaning of the terms, and an unreasonable interpretation of the IFB's experience requirement.

Cooley incorrectly interprets our decision as requiring "numerosity" of projects in order to meet the IFB's experience requirement. While we pointed out in our decision that Morton's completion of only "two" projects involving "airfield pavement-type work," or Connelly's completion of only "one" such project, did not satisfy the IFB's requirement, we concluded that Cooley should have been found nonresponsible because its experience, even when considering that of its proposed subcontractors, lacked the continuing course of performing airfield paving work over the preceding 3 years contemplated by the IFB. It is thus unreasonable for Cooley to argue that our interpretation of the IFB provision fails to consider the amount of time required to complete a project, or that an otherwise eligible contractor would be disqualified merely because it was "regularly engaged" in only one airfield paving project that required 3 years to complete.

Even if, as Cooley argues, the Tulsa project required three times as much paving as required under the IFB, and that Cooley supervised the project's completion, our conclusion here would not change since Cooley provided no evidence that it meets the definitive responsibility criterion established in the IFB. In fact, Cooley admits that most of the Tulsa project, the only arguably qualifying project in which Cooley was engaged during the preceding 3 years, was performed by a subcontractor, and was completed in less than 1 year.

Cooley relies on the principle enunciated in our decisions in Union Transformer Servs., Inc., 68 Comp. Gen. 74 (1988), 88-2 CPD ¶ 471, and EG&G Washington Analytical Servs. Ctr., Inc., B-233141, Feb. 21, 1989, 89-1 CPD ¶ 176 (when responsibility-type factors such as experience are included as technical evaluation factors in a request for proposals, they do not constitute definitive responsibility criteria), to argue that the experience requirement at issue here is not a definitive responsibility criterion, but merely a technical evaluation factor. Cooley apparently fails to recognize that in this case, the experience requirement was included as a definitive responsibility criterion in a sealed bid solicitation, noncompliance with which renders a bidder ineligible for award. Prime Mortgage Corp., B-238680.2, July 18, 1990, 69 Comp. Gen. ___, 90-2 CPD ¶ 48. By contrast, the experience requirements in the cases relied on by Cooley were properly included as a factor to be evaluated in the context of negotiated procurements; whether a particular experience factor is rated high or low, while potentially affecting the relative standing of the offers, would not automatically render an offeror ineligible for award.

Cooley also cites our decisions in Western Roofing Serv., B-232666.3, Apr. 11, 1989, 89-1 CPD ¶ 368, and Tama Kensetsu Co., Ltd., and Nippon Hodo, B-233118, Feb. 8, 1989, 89-1 CPD ¶ 128, to further argue that even if it does not literally meet the IFB's requirements, Cooley's experience, together with that of its proposed subcontractors, substantially complies with and is comparable to that required in the IFB.

In the cases relied on by Cooley, unlike this case, we found that the awardee submitted adequate objective evidence from which the contracting officer could reasonably conclude that the awardee in Tama Kensetsu Co., Ltd., and Nippon Hodo, and the awardee's subcontractor in Western Roofing Serv., met the definitive responsibility criteria established in the solicitations. We specifically found in Tama Kensetsu Co., Ltd., and Nippon Hodo, that while the awardee and its subcontractor did not meet the literal requirement of the experience requirement,^{6/} they exhibited a level of

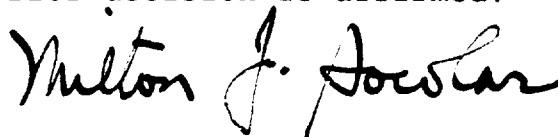
^{6/} The solicitation sought offers for asbestos removal and stated in pertinent part:

"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"

achievement equivalent to the definitive responsibility criterion and thus met it. Cooley, however, failed to do so in this case.

Since Cooley listed only one recent project involving airfield paving (the Tulsa project)--and in fact, the record shows that much of the paving work on that project was performed by a subcontractor--and its proposed subcontractors lacked the required experience, the contracting officer lacked objective evidence upon which he could reasonably find that Cooley met the definitive responsibility criterion established in the IFB.

Our prior decision is affirmed.


Acting Comptroller General
of the United States

6/ (...continued)

Significantly, we found that since the first part of the provision stated that "[t]he purpose of this Qualification Statement is to assure . . . that the offeror is qualified . . . " such assurance could be obtained without literal compliance.