



# Decision

**Matter of:** Tutor-Saliba Corp., Perini Corp., Buckley & Co., Inc., and O & G Industries, Inc., A Joint Venture

**File:** B-255756

**Date:** March 29, 1994

E. Manning Seltzer, Esq., and Mark E. Davis, Esq., Seltzer and Rosen, P.C., for the protester.  
A. Wayne Lalle, Jr., Esq., and Matthew E. Marquis, Esq., Graham & James, for CBPO of America, an interested party.  
Stephen E. Temmel, Esq., Department of the Army, for the agency.  
Behn Miller, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

## DIGEST

1. Protest that awardee fails to comply with solicitation's prime contractor definitive responsibility criterion is denied where: (1) prime contractor experience specification did not expressly prohibit bidders from relying on third party subcontractors or affiliates to meet the requirement; (2) awardee's affiliate holds the requisite prime contractor experience; and (3) the awardee has submitted evidence--in the form of a letter of commitment from the affiliate as well as a performance guaranty executed by the affiliate--which demonstrates that the affiliate will perform as promised by the awardee.

2. Protest that awardee is nonresponsible based upon affiliate's alleged involvement in Brazilian government scandals is denied where contracting officer reviewed protester's submitted evidence of alleged nonresponsibility and reasonably concluded that the submissions amounted only to unsubstantiated speculation and innuendo--particularly since Brazilian government--after conducting an investigation into the alleged wrongdoings--concluded that affiliate was not guilty of any improprieties.

## DECISION

The Joint Venture of Tutor-Saliba Corp., Perini Corp., Buckley & Co., Inc., and O & G Industries, Inc. (hereinafter Joint Venture), protests the award of a contract to CBPO of America, Inc. (CBPOAmerica), under invitation for bids (IFB)

No. DACW09-93-B-0010, issued by the Los Angeles District of the United States Army Corps of Engineers, for the construction of the Seven Oaks Dam and appurtenances at San Bernardino County, California. The Joint Venture contends that the agency improperly waived a definitive responsibility criterion for the awardee and that CBPOAmerica is a nonresponsible contractor.

We deny the protest.

#### BACKGROUND

This requirement is part of the Santa Ana River Flood Control Project. The solicitation was issued on March 1, 1993, and requires: (1) construction of a 550-foot high embankment dam, a 50-foot high coffer dam, 3 miles of permanent access roads and two access bridges; (2) excavation of a spillway approximately 550 feet wide and 1,400 feet long; (3) completion of the outlet works and intake tower; (4) installation of gates in the outlet tunnel; and (5) landscaping and hydroseeding of the project area.

The IFB provided that contract award would be made to the lowest priced, responsible, responsive bidder. Of relevance to this protest, the solicitation included the following experience requirement:

"PREAWARD SURVEY: The Corps of Engineers will conduct an intensive preaward survey prior to award of the contract. The contract will not be awarded to the low bidder unless they can demonstrate that they have been the prime [c]ontractor responsible for the management of the construction of a zoned embankment dam at least 150 feet high which required the installation of a grout curtain."

At the July 7 bid opening date, eight bids were received. CBPOAmerica submitted the low bid with a price of \$167,777,000; the Joint Venture was the second-low bidder with a bid price of \$196,877,000. The government estimate was \$203,771,540.

On July 19, the Joint Venture filed a pre-award protest with the agency challenging any prospective award to CBPOAmerica. The Joint Venture argued that CBPOAmerica's bid had to be rejected since the firm did not meet the solicitation's prime contractor experience requirement. In this regard, the record shows that CBPOAmerica has only been in existence since 1990, and that the firm has never managed the construction of a dam/grout curtain project.

On July 29, the agency began an intensive preaward survey evaluation of CBPOAmerica which proceeded for several months. During this time, CBPOAmerica submitted a letter of commitment and a performance guaranty from a corporate affiliate--Construtora Norberto Odebrecht (CNO)--a Brazilian corporation that has managed and constructed, as the prime contractor, two dam projects similar to the one required here.<sup>1</sup>

Upon learning that CBPOAmerica intended to rely on its affiliate to meet the prime contractor experience requirement, the Joint Venture submitted three supplemental agency-level protests. First, the Joint Venture contended that the language of the prime contractor experience specification precluded a bidder's use of a third contracting party or affiliate to meet this requirement. Next, the Joint Venture argued that because CBPOAmerica did not identify or otherwise reference CNO as a contracting party in its bid documents, the awardee's bid was nonresponsive. Finally, the Joint Venture submitted approximately 40 newspaper and magazine articles purporting to demonstrate the nonresponsibility of CBPOAmerica by emphasizing the alleged lack of integrity of its affiliates--including CNO. The Joint Venture also submitted a copy of a recent legal decision wherein a federal judge of Brazil nullified an affiliate's bid for a Brazilian railway construction project and referred the entire procurement to the Brazilian Attorney General for further investigation.

To refute the Joint Venture's allegations that CNO lacked business integrity and was otherwise corrupt, the General Counsel for CNO--who is also the Secretary of CBPOAmerica--executed a lengthy affidavit addressing in detail each of the Joint Venture's nonresponsibility allegations.

After completing the preaward survey process, the contracting officer--with the full concurrence of the other agency technical and procurement officials--determined that notwithstanding the Joint Venture's arguments, the prime contractor experience of CNO could be imputed to CBPOAmerica for purposes of compliance with the solicitation's definitive responsibility criterion. After reading the articles, and reviewing CNO's response, the contracting

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<sup>1</sup>CBPOAmerica and CNO are affiliated as follows. Odebrecht Group, S.A., is a Brazilian holding company which controls the shares of 53 subsidiaries. Two of these subsidiaries which are involved primarily in heavy construction are CNO and CBPO of Brazil (CBPOBrazil), which are Brazilian corporations. CBPOAmerica is a wholly owned subsidiary of CBPOBrazil. The Chief Operating Officer/Executive Vice President of CNO is also President of CBPOAmerica.

officer also determined that CBPOAmerica was a responsible contractor, and that the unsubstantiated allegations of improper business ethics and integrity violations against CNO were an insufficient basis from which to determine either CNO or CBPOAmerica nonresponsible.

Consequently, by decision dated October 29, the Army denied the Joint Venture's agency-level protests and awarded the contract to CBPOAmerica.<sup>2</sup> On November 12, the Joint Venture filed this protest with our Office, which reiterates its agency-level protest grounds.

#### PROTESTER'S CONTENTIONS

The Joint Venture first contends that the agency improperly waived the experience requirement for the awardee. The protester argues that the solicitation expressly prohibited bidders from relying on affiliates or other third parties to satisfy the experience requirement. The Joint Venture also argues that CBPOAmerica's reliance on CNO's prime contractor experience to comply with the requirement here renders CNO's bid nonresponsive since CNO is not referenced as a contracting entity in CBPOAmerica's bid. Finally, the Joint Venture alleges that CNO is nonresponsible and that CBPOAmerica's reliance on CNO renders CBPOAmerica a nonresponsible contractor.

#### DISCUSSION

##### Waiver of Definitive Responsibility Criterion

Definitive responsibility criteria are specific and objective standards established by an agency as a precondition to award that are designed to measure a prospective contractor's ability to perform the contract; the criteria limit the class of contractors to those meeting specified qualitative and quantitative qualifications necessary for adequate performance, e.g., unusual expertise or specialized facilities. Topley Realty Co., Inc., 65 Comp. Gen. 510 (1986), 86-1 CPD ¶ 398. Here, there is no dispute by any of the parties that the clause at issue in this protest constitutes a definitive responsibility criterion since it establishes a specific and objective standard.

As a general rule, the experience of a technically qualified subcontractor or third party--such as an affiliate or consultant--may be used to satisfy definitive responsibility criteria relating to experience for a prospective prime

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<sup>2</sup>Award has been withheld pending our decision on this protest.

contractor. Gelco Servs., Inc., B-253376, Sept. 14, 1993, 93-2 CPD ¶ 163, recon. denied, B-253376.2, Oct. 27, 1993, 93-2 CPD ¶ 261; Tama Kensetsu Co., Ltd., and Nippon Hodo, B-233118, Feb. 8, 1989, 89-1 CPD ¶ 128. However, where a solicitation contains a criterion which by its express language prohibits satisfying a particular experience requirement through the experience of a prospective subcontractor, such a provision limits a prime contractor from relying on a subcontractor to comply with the experience criterion. See Allen-Sherman-Hoff Co., B-231552, Aug. 4, 1988, 88-2 CPD ¶ 116.

To be reasonable, an interpretation of solicitation language must be consistent with the solicitation when read as a whole. See Lithos Restoration, Ltd., 71 Comp. Gen. 367 (1992), 92-1 CPD ¶ 379. In this case, although the nature of the experience required is that of a prime contractor responsible for managing the construction of a zoned embankment dam, we find no limitation in the IFB against relying on an affiliate or other third party to comply with this requirement. Since the clause here did not provide that bidders could not use the experience of affiliates or subcontractors to comply with the prime contractor experience requirement, the contracting officer could reasonably consider the experience of CBPOAmerica's affiliate to determine if the firm meets this requirement. We turn now to the question of whether the contracting officer reasonably determined, based on the evidence submitted by CBPOAmerica, that the firm had the required experience.

As a preliminary matter, the protester contends that CBPOAmerica cannot rely on CNO to meet the experience requirement since the affiliate was not referenced in CBPOAmerica's bid documents. The Joint Venture maintains that permitting CBPOAmerica to present evidence of its reliance on its affiliate for purposes of meeting the prime contractor experience clause after bid opening changes the legal relationship between CBPOAmerica and the agency, and consequently renders CBPOAmerica's bid nonresponsive.

Since definitive responsibility criteria involve matters of responsibility, evidence of compliance with such provisions may be provided any time up to actual award. Gelco Servs., Inc., supra. Here, the addition of CNO as a subcontracting entity after bid opening did not change CBPOAmerica's obligations as the sole prime bidder; consequently, the failure to reference the affiliate in the bid documents, as a matter of responsibility, does not render the awardee's bid nonresponsive. See Hardie-Tynes Mfg. Co., 69 Comp. Gen. 359 (1990), 90-1 CPD ¶ 347, aff'd, B-237938.2, June 25, 1990, 90-1 CPD ¶ 587.

Where, as here, a protester alleges that a definitive responsibility criterion has not been satisfied, we will review the record to ascertain whether evidence of compliance has been submitted from which the contracting official reasonably could conclude that the criterion has been met; generally, a contracting agency has broad discretion in determining whether bidders meet definitive responsibility criteria since the agency must bear the burden of any difficulties experienced in obtaining the required performance. Prime Mortgage Corp., 69 Comp. Gen. 618 (1990), 90-2 CPD ¶ 48; Gelco Servs., Inc., *supra*. The relative quality of the evidence is a matter within the contracting official's judgment; however, the official may only find compliance with the definitive responsibility criterion based on adequate, objective evidence. T. Warehouse Corp., B-248951, Oct. 9, 1992, 92-2 CPD ¶ 235. In considering whether the experience of a third party subcontractor or affiliate may be relied upon by a prime bidder to meet an experience criterion, we examine the record for evidence of a commitment by the third party to the bidder's successful performance of the work. See Townsco Contracting Co., Inc., B-240289, Oct. 18, 1990, 90-2 CPD ¶ 313, *aff'd*, B-240289.2, Mar. 15, 1991, 91-1 CPD ¶ 290; Barnes & Reinecke, Inc., and FMC Corp., B-236622; B-236622.2, Dec. 20, 1989, 89-2 CPD ¶ 572. While identifying or otherwise referencing the third party entity in the bid documents is considered to be reliable (indeed, preferable) evidence of compliance with an experience criterion, *see* Hardie-Tynes Mfg. Co., *supra*; Gelco Servs., Inc., *supra*, as noted above, because it constitutes a matter of responsibility, identification of the third party or evidence of a firm commitment between the third party and the prime bidder need not be present in the bid and may be submitted after bid opening. See Allen-Sherman-Hoff Co., *supra*.

Here, we conclude that there was sufficient objective evidence for the agency to conclude that CBPOAmerica met the prime contractor experience requirement through its CNO affiliate. In addition to meeting with agency procurement officials during the preaward survey, CNO submitted a July 28 letter of commitment to the agency which, in relevant part, pledged to "provide the necessary technical human resources (qualified and experienced personnel), equipment, and financial support to the works of Seven Oaks project to be carried out by [CBPOAmerica]."<sup>3</sup> More significantly, CNO--and two other CBPOAmerica Affiliates--executed and provided an August 3 "Performance Guaranty"

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<sup>3</sup>Another affiliate--CBPOBrazil--also pledged similar support in a commitment letter dated August 4.

wherein the three affiliates obligated themselves, as "Guarantors," to:

". . . jointly and severally, hereby unconditionally and absolutely guarantee to the Army Corps of Engineers that [CBPOAmerica] or, in the event of [CBPOAmerica's] default under the [contract], the Guarantors shall fully construct, substantially complete and equip the Project all in accordance with the terms, covenants and conditions set forth in the [CBPOAmerica contract.]"

Under these circumstances, we conclude that the contracting officer reasonably determined that CBPOAmerica unequivocally met the prime contractor experience through its CNO affiliate. See Gelco Servs., Inc., supra.

#### Alleged Nonresponsibility of CNO

With respect to responsibility determinations, Federal Acquisition Regulation (FAR) § 9.104-3(d) requires the contracting officer to consider an affiliate's or subcontractor's past performance and integrity when they may adversely affect the prime contractor's responsibility. In its protest, the Joint Venture argues that the alleged involvement of CNO in various political and procurement scandals in Brazil renders both CNO and CBPOAmerica nonresponsible. In this regard, the Joint Venture contends that the contracting officer ignored the protester's submitted evidence of CNO's alleged lack of business ethics and integrity in bad faith.

The determination of a prospective contractor's responsibility rests principally within the broad discretion of the contracting officer, who, in making that determination, must of necessity rely on his or her business judgment. See Garten-und Landschaftsbau GmbH Frank Mohr, B-237276; B-237277, Feb. 13, 1990, 90-1 CPD ¶ 186. Where, as here, a protester asserts that procurement officials have made an affirmative determination of responsibility in bad faith, the protester must submit evidence that the contracting officer had an intent to harm the protester, since contracting officials are presumed to act in good faith. Native Resource Dev., Inc., B-246597.2; B-246597.3, July 13, 1992, 92-2 CPD ¶ 15.

We find no showing of bad faith here. First, with respect to the plethora of magazine and newspaper articles submitted by the protester to reach its conclusion that CNO is corrupt and involved in illegal bribery and procurement schemes, we agree with the agency--who, along with the contracting officer, has performed an exhaustive review of these

documents--that these submissions fail to provide any substantive evidence of nonresponsibility. While these articles purport to characterize CNO as the perpetrator of various scandals pertaining to the Brazilian government and associated federal procurements, they are not proof that CNO has engaged in wrongdoing. Such allegations of possible impropriety, unaccompanied by supporting evidence, amount to speculation, and do not provide a basis for questioning either CNO's or CBPOAmerica's integrity, particularly in light of the sworn affidavit of explanation submitted by CNO. See Sierra Tech. and Resources, Inc., B-243777.3, May 19, 1992, 92-1 CPD ¶ 450; E. H. Pechan & Assocs., Inc., B-244583, Oct. 30, 1991, 91-2 CPD ¶ 404. We also think it significant that after conducting its own investigation of the alleged scandals involving CNO, Brazil's Attorney General and other government officials concluded that CNO was not involved in any impropriety.

Since the contracting officer clearly considered the Joint Venture's nonresponsibility arguments, and since we find that there is no reliable basis on the face of these documents for concluding that CNO has engaged in improper business practices or is otherwise nonresponsible, we deny this protest ground.

The protest is denied.

*Robert P. Murphy*  
Robert P. Murphy /  
Acting General Counsel