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M. Boyle
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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: D-190969

DATE: August 4, 1978

MATTER OF: Gould, Inc., and Fuji Electric Co., LTD.

DIGEST:

1. Unsuccessful bidder for contract under Federal grant contends that grantee's affirmative determination of low bidder's responsibility is erroneous because low bidder has no experience in manufacture of generic type of AC switchgear as required by solicitation. Where solicitation requires "similar" experience, GAO has limited its review to whether evidence of specified experience was submitted and has declined to review affirmative responsibility determinations, absent alleged fraud, because such matters of subjective judgment are reserved to contracting agencies.
2. Unsuccessful bidder contends that low bidder does not have experience required by solicitation in manufacture of certain rectifiers for extra-heavy rapid transit substation service. GAO finds no solicitation requirement that prospective contractor demonstrate experience in manufacture of equipment (1) to be supplied under contract or (2) meet literal terms of NEMA RI-9 standard. Accordingly, GAO declines to review grantee's affirmative responsibility determination based on its subjective evaluation of evidence submitted by awardee.

The United States District Court for the District of Massachusetts has requested our opinion in connection with civil action No. 78-574-T, entitled Gould, Inc., and Fuji Electric Co., LTD. v. Massachusetts Bay Transportation Authority and Robert Kiley. Prior to filing that action, Gould, Inc., and Fuji Electric Co., LTD. (Gould), requested that our Office review the proposed award of a contract by the Massachusetts Bay Transportation Authority (MBTA) with the approval of the Urban Mass Transportation Administration,

Department of Transportation. Subsequently, award of the contract for furnishing and installation of rectifier and switchgear equipment was made to the joint venture of Nissho-Iwai American Corporation, U.S.A., and Hitachi, LTD. (Hitachi). The equipment was required for an UMTA-approved project which would be 80-percent federally funded under section 3 of the Urban Mass Transportation Act of 1964, as amended, 49 U.S.C. § 1602 (1970). After receipt of Gould's complaint, we requested reports from UMTA, MBTA, Gould, and Hitachi. The numerous, lengthy, and thorough reports and comments received in response form the basis for our views. In addition, an informal conference was held in our Office to clarify the issues. Our purpose here is to provide the Court with our views.

BACKGROUND

Gould's Basis of Complaint

The solicitation issued by MBTA contained the following special provisions relating to the qualifications of the contractor:

Experience

"Contractor shall have a demonstrated ability in the successful manufacture of silicon rectifier conversion equipment for extra-heavy rapid transit substation service [section 5.C]."

Manufacturers of Equipment Subcontracted

"Manufacturers of the subcontracted equipment shall have a demonstrated ability in the successful manufacture of the generic type of equipment they propose to furnish [section 5.G]."

In its low bid, Hitachi stated that it would be the prime contractor of the alternating current switchgear and the extra-heavy-duty rectifier

required by the specifications. Hitachi provided information at MBTA's request to satisfy the responsibility criteria in sections 5.C and 5.G of the solicitation.

With regard to Hitachi's experience in the manufacture of rectifiers, the relevant MBTA specifications and Hitachi's experience follow:

<u>MBTA Specifications</u>	<u>Victorian RR (1970)</u>	<u>Kinki RR (1974)</u>	<u>Tobu RR (1975)</u>	<u>Kinki RR (1976)</u>	<u>Tobu RR (1977)</u>
Volts dc: 590 Vdc	1500 Vdc	1500 Vdc	1500 Vdc	1500 Vdc	1500 Vdc
Amperes dc: 5085 Adc	1667	2667	2000	2667	4000
KW: 3000 KW	2550	4000	3000	4000	6000
Cooling System: Natural Air Convection of rectifier elements	Unspecified	Oil-Immersed	Oil-Immersed	Freon	Freon

Gould argues that equipment for "extra-heavy rapid transit substation service" is defined by provisions of the solicitation which require that all equipment furnished under the contract comply with the latest applicable standard of the National Electrical Manufacturers' Association (NEMA) RI-9 or the specifications when the latter standard is higher. Gould states that the solicitation's specifications for silicon rectifier conversion equipment are higher than the NEMA RI-9 standard; therefore, in order to be eligible for award, Hitachi must have previously produced equipment for transit substation service that is substantially similar to the specified equipment.

Gould contends that the information submitted to MBTA by Hitachi shows on its face that Hitachi has never manufactured a silicon rectifier "for extra-heavy rapid transit substation service" as required by the experience provisions of the solicitation. In Gould's view, the information filed with MBTA shows that Hitachi has never manufactured (1) cooling systems other than those utilizing forced air, oil immersion, or freon immersion and the specifications call for natural convection air-cooling, (2) a rectifier which could meet the overload standards and the short circuit requirement as set forth in the specifications, and (3) a rectifier for traction service with a current capacity (after deration) as large as that specified by MBTA.

With regard to AC switchgear, Gould contends that Hitachi's information shows that Hitachi is a fabricator, not a manufacturer as required by the solicitation.

MBTA's Determination

MBTA interprets section 5.C to require experience in the manufacture of rectifiers for extra-heavy rapid transit service, but not to require a bidder to actually have manufactured the equipment specified. With regard to switchgear, MBTA interprets the specifications to require a bidder to possess the ability to perform the required work and have general experience in the field.

MBTA states that (1) it conducted extensive prebid qualification procedures and detailed reviews of the submitted bids, (2) it requested Hitachi to submit information to establish its manufacturing experience, (3) Gould's objections were considered by MBTA's technical consultant in light of the information submitted by Hitachi, and (4) the consultant recommended award to the low bidder, Hitachi. Accordingly, MBTA determined that Hitachi was the low responsive and responsible bidder.

We note that MBTA's consultant interpreted section 5.C as requiring bidders to demonstrate experience in manufacturing units "equivalent" to extra-heavy traction service as defined by NEMA RI-9.

UMTA's Concurrence

At Gould's request, UMTA reviewed MBTA's determination and, after considering arguments from the parties, issued its opinion concurring with MBTA. UMTA believes that MBTA, by the terms of its bidding documents and UMTA requirements, is required to award to the lowest eligible responsible bidder and the question of whether Hitachi meets the experience requirements of sections 5.C and 5.G is a matter of responsibility. UMTA further believes that the MBTA specification contains definitive responsibility requirements which Hitachi has adequately satisfied. UMTA also believes that the experience provisions do not require experience in the production of the silicon rectifier and switchgear specified, but merely require that Hitachi (1) demonstrate successful manufacture of a silicon rectifier, (2) demonstrate that the rectifier was the extra-heavy type, and (3) demonstrate that the rectifier was for rapid transit substation service.

At issue, in UMTA's view, is only (2) above, whether Hitachi manufactured an "extra-heavy" type rectifier, as that term is understood by the industry and expressed in the NEMA RI-9 standard governing "extra-heavy traction." Information concerning equipment for the Keiban Electric Railway, submitted by Hitachi after the MBTA affirmative responsibility determination, indicated that an existing rectifier (rated at 3,000-KW, 600-volt) was reassigned a rating of 2,300-KW and compared to the requirements of the NEMA RI-9 standard. UMTA concluded that this rectifier was the "extra-heavy" type. Moreover, UMTA noted that MBTA and its consulting engineers reviewed Hitachi's submissions and in their collective technical judgment concluded that Hitachi satisfied the "extra-heavy" requirement.

With respect to the manufacture of switchgear, UMTA states that there is no requirement in the solicitation for a bidder to have manufactured switchgear rated at 750-MVA, but even if there were, Hitachi submitted information showing that it had successfully manufactured such equipment. Accordingly, UMTA found the MBTA determination to be rationally based.

UMTA reports that the MBTA project in question is funded by the Federal Government on the condition that contracts in excess of \$10,000 be awarded only after formal advertising and free, open, and unrestricted competitive bidding. UMTA also reports that its External Operating Manual, prescribing competitive bidding procedures for grantees, provides that (1) contracts for the items in question shall be awarded to the lowest responsive and responsible bidder, and (2) grantees are authorized to employ their own procurement standards and regulations, provided they adhere to general Federal standards of competitive bidding.

ANALYSIS

Affirmative Responsibility Determinations by Grantees

Our Office will not review a matter involving a grantee's determination that a low bidder is responsible unless fraud is alleged or it is alleged that a "definitive responsibility criterion" contained in the solicitation has not been applied. The Babcock & Wilcox Company, 57 Comp. Gen. 85 (1977), 77-2 CPD 368. When a solicitation used in a direct Federal procurement contains a restriction on competition such as a definitive responsibility criterion, we have determined that sound procurement practice requires that the procuring agency rigidly enforce it because (1) other potential bidders may have participated if they knew that the agency was not serious about the restrictive requirement, and (2) participating bidders may have bid differently if they knew that competition would be increased. Haughton Elevator Division, 55 Comp. Gen. 1051 (1976), 76-1 CPD 294. We believe that this Federal norm is equally applicable to grantee procurements as a basic principle of Federal procurement law to be

followed by grantees. See Illinois Equal Employment Opportunity Regulations for Public Contracts, 54 Comp. Gen. 6 (1974), 74-2 CPD 1; The Babcock & Wilcox Company, supra.

Definitive Responsibility Criteria

"Definitive responsibility criteria" involve specific and objective factors. For example, in the Haughton Elevator Division decision, the solicitation contained a requirement that the successful "bidder shall have had approximately 5 years successful experience in repairing and servicing the specified equipment." Another example of specific and objective factors was involved in F-Systems, Inc., B-190693, March 28, 1978, 78-1 CPD 236, where the solicitation provided as follows:

* * * Bidders must meet these standards to be considered for award.

"Before a bidder will be awarded a contract, he must show, at least by the time of the pre-award survey,

"1. That the bidder has successfully produced the AN/PRC-77 or, within the last (5) years, equipment of the same general complexity as the Radio Set AN/PRC-77. * * * Equipment other than a PRC-77 will be considered of the same general complexity as a PRC-77 if it:

"a. is an HF, UHF or VHF Radio;
and,

"b. has plug-in modular design using at least 10 modules of which at least four require individual electrical peaking or alignment as part of the manufacturing process; and,

"c. uses printed circuit boards in the radio, at least fifteen of which contain some discrete components, such as transistors, diodes, capacitors resistors; and,

"d. employs phase-lock loop method of frequency synthesis; and,

"e. was produced to meet military or similar standards for electrical, mechanical and environmental requirements."

In the instant solicitation, we believe that section 5.C--requiring experience in the manufacture of silicon rectifier conversion equipment for extra-heavy rapid transit substation service--and section 5.G--requiring experience in manufacture of the generic type of equipment to be furnished--establish definitive responsibility criteria, which are subject to review by our Office.

Scope of Review

In Mosler Airmatic Systems Division, B-187586, January 21, 1977, 77-1 CPD 42, the solicitation required the successful offeror to provide "proof of successful installations similar in nature." Similarly, in Continental Service Company, B-187700, January 25, 1977, 77-1 CPD 53, the solicitation required bidders to furnish evidence of having performed firefighting services "of the type required for a period of at least three years" and of experience in providing plant security services. And, recently, in Johnson Controls, Inc., B-191262, April 27, 1978, 78-1 CPD 442, the solicitation required that each bidder have "a successful working system in operation for at least 2 years using CRT and software routines functionally similar to those outlined in these specifications." In each of the above decisions, we essentially limited the scope of our review to ascertaining whether evidence of the specified experience had been submitted because,


absent allegations of fraud, the sufficiency or relative quality of that evidence is, in our view, a matter reserved to the subjective judgment of the contracting agency.

We believe that this is the scope of review which should be applied with regard to section 5.G--requiring experience in the manufacture of the "generic type" of equipment to be furnished. Since the awardee submitted substantial evidence regarding its experience in manufacturing the generic type of alternating current switchgear specified, we will not further review the MBTA's subjective determination that the evidence of the required experience was satisfactory.

With regard to the experience requirement of section 5.C--requiring experience in the manufacture of silicon rectifier conversion equipment for extra-heavy rapid transit substation service--after reviewing the solicitation and considering all the arguments, we do not find any express intent in section 5.C that the contractor must have previously manufactured (1) the equipment to be provided under the contract, or (2) equipment which would meet the literal requirements of NEMA RI-9 establishing standards for forced-air-cooled and water-cooled silicon rectifier units for transportation power supplies. While all the parties agree that the term "extra-heavy" as used in section 5.C derives meaning and specificity from the "extra-heavy traction" portion of NEMA RI-9, we cannot find any express or implied intent that a bidder would be ineligible for award if it had not previously manufactured equipment with minimum operating characteristics identical to those outlined in NEMA RI-9. The solicitation's only direct or express reference to NEMA RI-9 is for the purpose of establishing minimum standards for the equipment to be provided by the awardee under the terms of the contract where the specifications do not establish higher standards. See solicitation, page I-1. Since we find no requirement for compliance with NEMA RI-9 in section 5.C, the awardee was only required to show prior experience in manufacturing the designated rectifiers for extra-heavy service. Information was

submitted by the awardee which satisfied the grantee and its consulting engineers that the awardee's experience in manufacturing the designated rectifiers for extra-heavy service would make it capable of performing in accordance with contractual requirements. In our view, that determination must be left largely to the sound discretion and subjective judgment of the grantee. Yardney Electric Corporation, 54 Comp. Gen. 509 (1974), 74-2 CPD 376; Johnson Controls, Inc., supra. Therefore, while we note that the grantee and grantor strongly contend that the awardee has experience manufacturing equipment in compliance with NEMA RI-9, it is not necessary to reach that question to conclude that there was a rational basis for the responsibility determination.

Accordingly, our Office would not question or object to MBTA's award.


Deputy Comptroller General
of the United States