

Protest of)
) Date: June 21, 1988
 RESTORE SPECIALTIES)
)
 Solicitation No. 269986-88-A-0011) P.S. Protest No. 88-13

DECISION

Restore Specialties, Inc. (Restore), timely protests the contracting officer's decision to award a contract under Invitation for Bids (IFB) No. 269986-88-A00011 to K. J. Johnson Construction, Inc. (K. J. Johnson), on the ground that K. J. Johnson fails to satisfy an experience requirement contained in the solicitation.

Background

IFB No. 269986-88-A-0011, issued November 17, 1987, by the Bloomington Facilities Service Office (FSO), Central Region, sought bids for parking ramp repairs at the Minneapolis, Minnesota, Main Post Office. The instant Protest involves the three provisions of the solicitation that follow.

Paragraph 1.09 A. in Section 01100 - Miscellaneous Requirements:

The Contractor shall perform on the site with his own organization, work equivalent to at least (10%) of the total amount of work to be performed under the contract.

Paragraph C. ("Qualifications") under "Concrete Restoration" on page 19 of the contract drawings:

Restoration Contractor: The concrete restoration work shall be done by an experienced concrete restoration contractor. The contractor shall have had at least 3 years satisfactory experience in concrete restoration on projects of a similar size and type.

Paragraph D. (Submittals") under "Concrete Restoration" on page 19 of the contract drawings:

Restoration Contractor: Submit certified copies of the history and experience of the restoration contractor to the Engineer. The history shall list the projects, locations, type of work, size, completion date and name and address of the owner on which the restoration contractor has worked.

K. J. Johnson's bid of \$329,415 was the lowest of thirteen bids received. Restore, the second low bidder at \$346,977, objected by letter of December 22, to a possible contract award to K. J. Johnson; it claimed that K. J. Johnson was incapable of satisfying the "Qualifications" provision quoted above. Because the bids were being evaluated, the contracting officer found the protest to be premature; he denied the protest as obviously without merit by letter dated December 30.

A conversation was held January 21 with the low bidder to determine whether it was capable of satisfying the experience requirement of the solicitation. K. J. Johnson informed the contracting officer that the requirement would be met by subcontracting the concrete restoration work to Paragon Constructors, Inc. (Paragon). This represented a substitution of Paragon for Dave Parks Construction Company (Dave Parks), the subcontractor initially identified by K. J. Johnson. Paragon was one of several firms that appeared on a list of recommended concrete restorers that had been supplied by the project architect. The contracting officer knew of the FSO's favorable experience with Paragon. However, the contracting officer was also aware that the firm was included in the General Services Administration list of suspended, debarred and ineligible contractors (GSA List).

Mr. Robert B. Parks, paragon's owner, had been under indictment for allegedly defrauding the Small Business Administration. The contracting officer was aware of this fact and also of Mr. Parks' subsequent acquittal. He contacted the Department of the ARmy, which had initiated the suspension, and made inquiries into Paragon's status. He wa told that once the Department of the Army received written confirmation of the acquittal from the GSA List. Contract award was made to K. J. Johnson, January 26, 1988, and the contracting officer then notified Restore of the award.

On January 29, Restore filed a second protest with the contracting officer, repeating and expanding upon its earlier claim by arguing that K. J. Johnson was prohibited from fulfilling the experience requirement through subcontracting. The contracting officer denied the protest as obviously without merit on February 5. He stated the experience requirement applies to the "Restoration Contractor: who may be the prime contractor or a subcontractor. The contracting officer concluded that compliance with the experience requirement is a matte of contract administration, and that although K. J. Johnson may

not possess the experience, it is not grounds for rejecting the bid, since the restoration contractor is required to submit certified copies of its experience.^{1/}

In Restore's protest to this office, dated February 22, it repeats its earlier arguments and also raises new issues. Restore questions the contracting officer's use of the references submitted by Paragon. It also claims that the contracting officer's check of paragon's concrete restoration experience was inadequate. Restore provides information concerning the subcontractor's allegedly unsatisfactory performance on several restoration projects. The protester also notes that the concrete restoration work represented "virtually" the entire parking ramp project. As a result, Restore contends that the awardee is incapable of complying with the solicitation's paragraph 1.09 A., quoted above.

In his report to this office, the contracting officer disputes Restore's claim that K. J. Johnson is not a responsible contractor. He concedes, however, there were doubts as to whether the subcontractor initially identified by K. J. Johnson, Dave Parks Construction Company (Dave Parks), could meet the experience requirement for the concrete restoration work. The contracting officer requested references for Dave Parks and was informed of K. J. Johnson's decision to replace Dave Parks with Paragon as the restoration contractor.

Since the FSO had had experience with Paragon as a contractor and found its work to be excellent, the contracting officer determined that K. J. Johnson was responsible on the basis of the subcontractor's experience. The contracting office identifies the information about Paragon, noted above, as factors influencing his affirmative determination of K. J. Johnson's responsibility.

Restore submitted supplemental comments in rebuttal to the report. The comments focus on assertions that the contracting officer failed to act upon information that Dave Parks was a debarred contractor and also was not registered with Minnesota's Secretary of State.^{1/} Restore further asserts that Paragon is a debarred contractor and

^{1/}K.J. Johnson' counsel, in a letter dated February 16, claimed that Restore had proffered unsubstantiated allegations regarding K. J. Johnson's experience; that K.J. Johnson and its subcontractor, Paragon, complied with requests made by the contracting officer regarding their experience and that Paragon possessed the experience for concrete restoration. He argued that contracting officers are accorded broad discretion in making responsibility determinations and Boards of Contract Appeals give deference to them in the absence of allegations of fraud or bad faith. Counsel further asserted that K. J. Johnson was required to perform only 10% of the work, and, as a result, the Postal Service "expected" the prime contractor to subcontract the remainder. He urged the protest be denied.

^{2/}It serves no useful purpose to speculate about the adequacy of the inquiry about Dave Parks as a subcontractor. Given the substitution of Paragon, Restore was clearly not prejudiced by the contracting officer's line of inquiry. To the extent the protest is based on the responsibility of Dave Parks , it is

thus not eligible to perform the concrete restoration.^{1/} The protester also claims that the restoration contractor failed submit certified copies of its history and experience to the engineer, as required by the third-quoted provision above. Restore contends that because the restoration contractor failed to submit the documents, K. J. Johnson "has not been properly qualified for an award of the contract."

Discussion

Several elements of Restore's protest can be dealt with in summary fashion. Two grounds of the protest, K. J. Johnson's alleged failure to submit certification of its history experience to the engineer and its alleged inability to meet the requirement that it perform at least 10% of the on-site work with its own organization, are matters of contract administration. Were submission of certifications of history and experience required prior to contract award, such submissions would be made to the contracting officer, not to the engineer for the project. Similarly, whether K. J. Johnson complies with the requirement that it perform at least 10% of the on-site work with its own forces is a matter with which the contracting officer will have to concern himself in administering the contract. See John Crowe & Associates, INC., Comp. Gen. Dec. B-227846, August 21, 1987, 87-2 CPD & 194. Contract administration is the function and responsibility of the contracting officer, and is not for consideration under the bid protest procedure of Postal Contracting Manual (PCM) 2-407.8. See York International Corporation, P.S. Protests No. 87-111, November 23, 1987.^{2/}

Insofar as Restore's protest is grounded in these provisions, it is dismissed.

The remaining grounds of Restore's protest relate to the responsibility of K. J. Johnson, and that of Paragon. Implicit in Restore's argument that the successful bidder must meet the experience requirement is its conclusion that the experience requirement represents a definitive responsibility criterion. We conclude, however, that the qualification provision is not a definitive responsibility criterion; rather, it represents a performance requirement under the contract.

In distinguishing between performance requirements and definitive responsibility criteria, the Comptroller General has looked to the wording of the requirement in question, its placement in the solicitation and the time at which compliance with the requirement must be demonstrated. See e.g., Motorola Communications and Electronics, INC., Comp. Gen. Dec. B-225613, January 27, 1987, 87-1 CPD & 91

denied.

^{3/}The record before us indicates that Paragon and its owner were listed as suspended and not debarred as alleged by Restore.

^{4/}We note that the provision allows for the modification of the 10% performance requirement with the contracting officer's approval.

(requirement "contractor," rather than bidder, is to meet before "start date," rather than prior to award, is not precondition to award); Hettich GmbH and Co. KG, Comp. Gen. Dec. B-224267, October 24, 1986, 86-2 CPD & 457 (certification requirement deemed a performance requirement where protester identified no RFP provision establishing requirement as prerequisite to award); Markhurd Aerial Surveys, Inc., Comp. Gen. Dec. B-210108, January 17, 1983, 83-1 CPD & 51 (compliance with prospectively worded ("shall") experience requirement deemed a matter of contract administration). Compare Auto Discount Rent-N-Drive Systems, INC. et al., Comp. Gen. Dec. B-197236, B-197236.2, B-197236.3, July 28, 1980, 80-2 CPD & 73 (demonstration required in order to be "considered for award" deemed a definitive responsibility criterion); George Hyman Construction Company of Georgia; Westinghouse Elevator Company, Comp. Gen. Dec. B-186279, November 11, 1976, 76-2 CPD & 401 (experience required of bidder of proposed subcontractor was definitive responsibility criterion where failure to meet requirement "may be grounds for rejection" of bid).

In the instant solicitation, the mandated experience is required not of the "bidder," but of the "restoration contractor." This term not only distinguishes the object of the requirement from the pre-award "bidder," but also from the "contractor" to which reference is made throughout the specifications.¹⁴ The experience requirement's placement within the solicitation also supports the conclusion that it is a performance requirement; it does not appear in the sections instructing bidders or explaining the process of contract award, but rather among the notes on the contract drawings. In addition, the requirement is adjacent to a provision (the third quoted above) requiring submission of certifications of experience to the project engineer, not to the contracting officer. Thus, we conclude that the experience requirement on which the protester relies is a performance requirement, and not a definitive criterion of responsibility.¹⁴

^{5/}As defined in general provision 1, the contractor is the person or persons, partnership or corporation named as Contractor in the contract. That naming occurs in block 3 of Form 7390.

^{6/}Even if the experience requirement were a definitive responsibility criterion, Restore's suggestion that the requirement could not be met by a subcontractor would not be will taken. Where the Comptroller General has considered similar issues, the wording of the experience requirement has been critical. Compare 39 comp. Gen. 173 (1959) (under solicitation requiring that bidders meet experience requirements "either with their own organizations or through the Subcontractor they will use on this project," only bidder's experience as prime contractor with proposed subcontractor--rather than proposed subcontractor's experience--could be used to meet requirement) with George Hyman Construction Company of Georgia; Westinghouse Elevator Company, supra (definitive criterion could, by its terms, be met by bidder or proposed subcontractor).

In the instant solicitation, there is no prohibition of subcontracting, and the experience requirement is applicable to neither the "bidder" nor the "prime contractor," but rather to the "restoration contractor." The protester points to no other portion of the solicitation that would lead us to adopt a more restrictive interpretation of the requirement.

Our conclusion that the experience provision is a performance requirement under the contract removes Restore's protest from the exception to our general standard for review of contracting officers' affirmative determinations or responsibility.

[I]n the absence of allegation of fraud or bad faith on the part of the contracting officer, or of claims that definitive responsibility criteria set forth in the solicitation were not applied, we will not review a protest against an affirmative determination of responsibility. Pitney-Bowes, Inc., P.S. protest No. 87-95, November 20, 1987; E. Trailer Maintenance, Ltd., P.S. Protest No. 84-33, April 17, 1984; EDI Corporation, P.S. Protest No 83-51, January 26, 1984. The contracting officer made an affirmative determination of K. J. Johnson's responsibility, including its ability to obtain the services of an experienced restoration contractor. See Adak Communication Systems, Inc., Comp. Gen. Dec. B-226952, June 1, 1987, 87-1 CPD & 556. Restore does not allege, much less demonstrate, the presence of bad faith or fraud in the contracting officer's affirmative determination.

There is no merit in Restore's arguments that the contracting officer should have discovered evidence of Paragon's allegedly unsatisfactory performance on several projects, and that the proposed subcontractor's presence on the GSA List precluded award of the contract to K. J. Johnson. The contracting officer of the contract to K. J. Johnson. The contracting officer complied with PCM 1-905.3, which details the sources among which he shall seek information on a contractor's responsibility. He made inquiries within the FSO and was informed that Paragon performed excellent work on prior Postal Service contracts.

As to Restore's arguments based upon Paragon's alleged debarred status, the record indicates that Paragon was suspended, rather than debarred, by the Department of the Army. PCM 1-603(3) subcontracting with a firm listed as debarred, suspended or ineligible, "in any instance in which consent is required of the Postal Service before the contract is made." Under the terms of the instant solicitation, however, the Postal Service's consent to subcontracts was not required. Thus, Paragon's presence on the GSA List could not have been a bar to the award of the contract to K. J. Johnson.

The protest is dismissed in part and denied in part.

William J. Jones
Associate General Counsel
Office of Contracts and Property Law

[checked against original JLS 2/23/93]