

**March 4, 1994**

**P.S. Protest Nos. 94-01; 94-03**

**MORGANTI INCORPORATED**  
**GIORDANO CONSTRUCTION CO., INC.**

**Solicitation No. 425046-93-0015**

**DIGEST**

Protests against reasonableness of prequalification requirement for specific design/build experience and its application are dismissed and denied; challenges to requirement are untimely, and protesters have not supported their burden of demonstrating that the application of the requirement was incorrect.

**DECISION**

Morganti Incorporated (Morganti)<sup>1</sup> and Giordano Construction Co., Inc., (Giordano) protest their exclusion from the "short list" of prequalified firms to participate in the competition for the award of a contract for the design and construction of the New Haven, CT, Processing and Distribution Center.

The Philadelphia Major Facilities Office solicited the submission of prequalification statements for the project by the use of a prequalification package issued May 18, 1993. The package consisted of three parts: Part A was a two-page description of the prequalification procedure and the factors to be used in selecting the prequalified firms;<sup>2</sup>

<sup>1</sup> The Morganti protest was filed on a letterhead which identified the protester as The Morganti Group, Inc., the parent of Morganti Incorporated, which submitted the prequalification statement at issue here. The protest is appropriately that of the subsidiary, not the parent.

<sup>2</sup> According to the prequalification package:

Primary factors that will be considered are:

Part B was a one-page description of the project (a facility of approximately 338,000 gross square feet to be located on a 26-acre Postal Service site, with an estimated cost, including mechanization, between \$35 and \$40 million); and Part C was a fifteen-page prequalification statement which identified specific information which firms requesting prequalification were to supply.<sup>3</sup>

Twenty-two firms submitted prequalification statements which were reviewed by the evaluation committee. A December 2 "summary report" from the chairman of the evaluation committee described how the various factors set out in the prequalification package were assigned specific points and individual prequalification statements were assigned ratings multipliers from 0 to 3 for each factor based on how well the firm met the factor's

Previous design/build experience, having completed a minimum of two industrial type [(or Firm's Total Quality Management Program  
Financial stability  
Capacity (current workload in relation to company resources)

Other factors to be considered will include:

References and previous clients  
Project management capabilities  
Company organization  
Minority-owned Business participation and commitment

Prequalification package issued 5/18/93; text within brackets added by amendment A01, June 3, 1993.

<sup>3</sup> A Commerce Business Daily (CBD) synopsis published on June 2, 1993, described the various elements of the prequalification statement. According to the synopsis:

The prequalification statement must contain the following information: (1) previous design/build experience, having completed at least two industrial type [(or commercial type with conveying systems)] design/build projects with a minimum construction cost of thirty-five million dollars each. Statement as to the number of years of experience that entity, as presently organized, has in design/build contracts. (2) Complete list of active projects, stating the project location, contract type, original and estimated completion date, construction cost, name of owner with telephone number of owner's representative and name and telephone number of architect/engineer of record. (3) References for all comparable design/build projects completed within the last five years. To be considered comparable, a project must be an industrial type building with a minimum construction cost of thirty-five million dollars. Provide same information as outlined in item (2) above. (4) Complete list of USPS design/build, design and/or construction contracts that are ongoing or completed within the past five years. . . . Although previous USPS contract experience is not a requirement, failure to submit a complete list of all USPS contracts may be cause for rejection. (5) Description of the design/build organization, . . . (6) . . . [N]ame and qualifications of the mechanization architect-engineer and fabricator/installer area [sic] . . . (7) . . . [E]ntity's most recent financial statement . . . (8) Bonding Company Statement(s) . . . (9) Bank reference(s) . . . (10) Safety Program . . . (11) Quality Management/Control Program: Data, as outlined in the prequalification package, must accompany the prequalification statement. The prequalification statements will be reviewed by a prequalification evaluation committee appointed by the contracting officer. Only the most qualified entities will be placed on the prequalification list.

CBD Issue No. PSA-0858, June 3, 1993, bracketed text added by CBD Issue No. PSA0871, June 21, 1993.

requirements on a scale of "poor," "fair," "good," or "very good."<sup>4</sup> Six of the firms, with scores ranging from 5900 to 3750, were prequalified; the remaining sixteen firms, with scores ranging from 3200 to 300, were not prequalified. The summary report noted that all of the nonprequalified firms "failed to satisfy the minimum requirement of two completed \$35 million D/B industrial projects."

The firms were notified of the results of the prequalification process by letters dated December 14. The letters offered debriefings at the firms' requests; six debriefings were subsequently held.

Morganti was debriefed on December 23; its January 3 protest was received January 5. The protest objects to the evaluation committee's failure to accept as qualifying the two design/build projects which Morganti listed to meet the prequalification statement's requirements. Morganti contends that those projects, the Essex County (Massachusetts) House of Corrections Program and the Massachusetts Correctional Institution Program, should be considered to be "of . . . [the] industrial building type by virtue of the . . . nature of the ancillary support building that comprise the overall scope of the projects." Further, Morganti contends that these projects were considered with respect to an earlier postal design/build project for Columbia, South Carolina. According to Morganti, that prequalification package contained a statement describing comparable projects as "industrial building[s] having] a minimum construction cost of \$45 million."

Morganti also notes its successful inclusion on the prequalified lists for a number of previous postal projects, and its selection to implement the Westchester, NY, project, its recent completion of the renovation of the " Postal Square project in Washington, DC, its ranking as the seventh largest design/build contractor in the Northeast and the 73rd largest general contractor in the country, and the location of its corporate headquarters in Danbury, CT, near the New Haven site.

Giordano was debriefed on January 10; its January 21 protest was received January 25. It

<sup>4</sup> The complete scoring matrix looked like this:

	Points Assigned	Multiplier	Maximum Points
<b>Primary Factors</b>			
Previous Design Build Experience	800	0 to 3	2400
Firm's TQM Program	600	0 to 3	1800
Financial Stability	400	0 to 3	1200
Capacity	200	0 to 3	600
<b>Other Factors</b>			
References/Previous Clients	200	0 to 3	600
Project Management Capabilities	150	0 to 3	450
Company Organization	100	0 to 3	300
MBE Participation	50	0 to 3	150
Maximum Total Point Score = 7500			

takes exception to the "arbitrary" experience requirement for two \$35 million industrial type design/build projects. It contends that that dollar amount is "not consistent with the basic cost of the construction . . . of a building of the size suggest[ed] in the announcement." Giordano notes that it has built projects of that size but not of that dollar amount, and notes that it has the capability to be bonded in the amount of the New Haven project.

Further, Giordano complains that it was afforded no credit for its quality control program under the evaluation factor for total quality management (TQM). Citing a definition of "manage" as "to exert control over," the protester contends that it should have received credit for its submission in that regard.

Finally, Giordano, which has its headquarters in Branford, CT, complains that the six prequalified firms are from states other than Connecticut, the site of the project, and all have done previous work for the Postal Service. It states that this is inconsistent with a statement attributed to the Postmaster General by the Associated General Contractors of Connecticut that "the department will work to promote local participation and economic stimulus."

The contracting officer's statement on the Morganti protest notes that the prequalification process is authorized by Procurement Manual (PM) 3.1.6. c., which defines prequalified contractors as "firms or institutions that have previously demonstrated their ability to perform consistently to high standards of quality and reliability" (PM 3.1.6 c.1.), and explains that "[t]he consideration of proposals only from prequalified contractors ensures that selection for award can be made primarily on the basis of price proposals without undue performance risk." PM 2.1.6. c.2. The contracting officer explains that production and distribution facilities like the one for New Haven "are essentially complex 'mail factories'" consisting of large workroom areas containing a material handling (mechanization) system in support of Postal Service furnished automated mail processing equipment and that the Postal Service has determined that contractors with design/build experience in projects comparable "in complexity and magnitude" to such factories are considered to be more qualified than those with differing experience and expertise. Accordingly, for the New Haven project the Postal Service sought previous experience with industrial-type (or commercial-type with conveyors) facilities. The contracting officer notes that the building classification standards of the Building Officials and Code Administrators (BOCA) National Building Code (the building code applicable in Connecticut) were used to determine whether projects identified in the prequalification statements were industrial-type or not. The BOCA code lists industrial-type facilities under "Use Group F - Factory and Industrial Use," while penal and correctional facilities are listed under "Use Group I - Institutional Uses."<sup>5</sup> According to the contracting officer, the American Institute of Real Estate Appraisers makes a similar distinction.

The contracting officer notes that Morganti's submission identified its offered design/ build projects as correctional in nature, and that neither its submission nor its protest explain satisfactorily why the nature of the ancillary support buildings should require reclassification

<sup>5</sup> The contracting officer notes that the BOCA code places post offices in "Use Group B - Business Uses," but notes that that category is appropriate for local postal customer service facilities, not processing and distribution facilities.

as industrial. The contracting officer contends that the identified facilities would have been built to the BOCA code requirements for institutional buildings, which differ from those for industrial buildings. The contracting officer also notes that all three of the completed design/build projects set out in Morganti's prequalification statement were correctional facilities, and that only one of the three had a cost in excess of the required \$35 million.<sup>6</sup>

The contracting officer notes that the requirements to be met with respect to the Columbia, SC, project to which the protester referred were contained in that project's CBD notice, but that while the prequalification package required previous design/build experience, it did not require experience with projects of a specific type or of a specific dollar amount. The contracting officer notes that "the evaluation of submittals [for Columbia, SC] was conducted according to the requirements in the Prequalification Packages, not the CBD notice." The contracting officer acknowledges Morganti's previous selection for various Postal Service design/build and construction projects with requirements different from those at issue here, but disputes the protester's apparent understanding that inclusion there entitles it to inclusion here.

The contracting officer's statement on the Giordano protest relies on the explanation for the design/build experience requirement set out in response to the Morganti protest, contending that it is neither arbitrary nor capricious. The contracting officer disputes the protester's contention that the cost estimate for the New Haven project is too high, noting that it includes fixed mechanization and other requirements unique to postal construction. The contracting officer notes that the \$35 million requirement was set out in the solicitation, making this protest against it now untimely. Further, the contracting officer notes that Giordano's prequalification statement lists no projects over \$12 million and no design/build projects over \$5 million, and asserts that bonding capacity is not a substitute for experience.

With respect to the issue of total quality management, the contracting officer notes that TQM is a "management philosophy that is process oriented, that is, its goal is to prevent errors, mistakes, and rework, rather than correcting mistakes or inspecting for 'quality' at the end of the process." Giordano's program focussed on quality control (the identification and correction of defective work) and accordingly was afforded no credit for this factor. The contracting officer recognizes, however, that the prequalification package may have been ambiguous in this respect because of its use of the term "Quality Management/Quality Control" in some sections, but notes that Giordano was not prejudiced by the ambiguity because it would not have qualified for inclusion on the short list even if it were given full points for its quality control submission.

Responding to Giordano's closing points, the contracting officer states that while it was "perhaps regrettable" that no Connecticut firms were prequalified, it would have been

<sup>6</sup> The projects were listed at \$53.7 million (elsewhere \$47.7 million), \$31.45 million, and \$28 million. The contracting officer notes that while the forms set out in Part C of the prequalification package requested the identification of the several projects' "construction cost," Morganti used a different form which replaced that term with "contract amount," a term which the contracting officer suggests may be higher than construction cost in the design/build context, because it may include design and other fees. Since even Morganti's figures do not meet the minimum requirement for two \$35 million projects, we need not consider whether those figures should be adjusted in some fashion.

inappropriate to consider geographic location in the selection process, since it was not an evaluation factor, citing *Dawson Construction Company, Inc.*, P.S. Protest No. 91-47, September 25, 1991. He notes that design/build firms typically subcontract large portions of their work, and that the subcontractors are often local firms.

A number of interested parties have submitted comments on the protest. Several companies which, like Morganti and Giordano, were not prequalified, support the protesters' challenges either to the reasonableness of the prequalification package requirements or the way in which they were measured. Some of these firms also challenge the application of the requirements to themselves.<sup>7</sup> Two commenters, however, appear to support the reasonableness of the requirements and their application.

## DISCUSSION

Initially, we discuss the timeliness of these protests.<sup>8</sup> As stated, the protesters were advised of their exclusion from the short list by letters dated December 14. Their protests followed their debriefings, and were received on January 3 and 25, respectively.

Under PM 4.5.4, protests other than those based on alleged deficiencies in a solicitation "must be received not later than ten working days after the information on which they are based is known or should have been known, whichever is earlier." PM 4.5.4 d. In *Franklin E. Skepton*, P.S. Protest No. 88-59, October 3, 1988, the protester challenged his exclusion from a prequalification short list; we measured the timeliness of that protest from the date of notification of exclusion. The decision in that case provides no information about the extent to which the notification provided details concerning the basis for the exclusion. Under the rule established by *Skepton*, Morganti's protest would be timely, but Giordano's would not.

A subsequent decision, *Travelco, Inc.*, P.S. Protest No. 91-10, March 21, 1991, discussed timeliness in the context of the exclusion of offerors from the competitive range in the course of a negotiated procurement. In such procurements, offerors excluded from the competitive range commonly are not provided with detailed reasons for the exclusion; such explanations are available only at a subsequent debriefing, which by regulation may not occur until after contract award. *Travelco* concluded that where an excluded offeror promptly requests a debriefing and learns only at the debriefing of the reasons for the exclusion which give rise to its protest, the protest will be considered timely measured from the date of the debriefing.

The circumstances here are sufficiently similar to those in *Travelco* to warrant the

<sup>7</sup> To the extent that these challenges constitute separate protests, they are untimely for reasons consistent with the discussion of timeliness which follows. Some of the complaints follow debriefings which were not promptly requested, while another was filed more than ten working days after a timely debriefing.

<sup>8</sup> Although no party has addressed the issue of the overall timeliness of these protests, we do *sua sponte* because it affects the jurisdiction of our office to adjudicate the protesters' assertions. *Coopers & Lybrand*, P.S. Protest No. 89-91, March 21, 1990.

application of a similar rule. The notices that the various firms had not been prequalified provided no information on the bases for the decisions, and that information was available only at a debriefing. Where a debriefing is promptly requested and held, we will measure the timeliness of the protest from the date of the debriefing.<sup>9</sup> We conclude that Giordano's protest is timely as so measured.

Accordingly, we turn to the merits of the two protests.

This office plays a limited role in reviewing the technical evaluation of prequalification or similar information submitted by a potential offeror. The technical determinations of a contracting officer will not be overturned unless they are arbitrary, capricious, or otherwise unsupported by substantial evidence. The protester bears the burden of overcoming the "presumption of correctness" which accompanies the statements of contracting officers. Accordingly, we must determine if [the protesters have] met this burden and shown that the contracting officer's decision was arbitrary or not supported by substantial evidence.

*Daniel J. Keating Construction Company, P.S. Protest No. 89-92, March 1, 1990 (citations omitted).*

Here, Morganti has the burden of establishing that its projects were not properly considered. It has failed to do so. The solicitation requested evidence of previous experience with at least two industrial-type design/build projects of a specified minimum size; Morganti demonstrated design/build experience with respect to correctional, not industrial, facilities, only one of which met the size standard. Its contention that those projects were considered with respect to an earlier postal project have been adequately rebutted by the contracting officer, who has demonstrated that the prequalification requirements stated for the earlier project were different from the requirements stated for this one.<sup>10</sup> Accordingly, neither Morganti's previous qualification for other postal projects nor its status as a large firm with substantial design/build and construction experience are appropriate substitutes for the experience with specific projects requested here.

<sup>9</sup> Because there is no regulatory requirement limiting when the debriefing may occur, the firm requesting the debriefing must promptly request the debriefing and must assure that it is timely held. *Coopers & Lybrand, supra*.

<sup>10</sup> As the contracting officer notes, while the CBD notice for the Columbia project requested the identification of comparable design/build projects and indicated that comparable projects had to be industrial projects, the prequalification package was not so limited. Paragraph 1.09 of Part C of that package, in which completed comparable projects were to be listed, instructed submitting firms to indicate the general category of the submitted projects under a listing for "project type," and offered the following examples: "Office, hospital, manufacturing, process plant, sewerage, educational, etc."

We note that the disparity between the evaluation criteria stated in the CBD synopsis and those used by the evaluators may have been more serious than the contracting officer appears to believe. In an appropriate case, such disparities may require re-evaluation of the prequalification statements. *Kleinknecht Mechanization Group, P.S. Protest No. 92-24, October 2, 1992.*

Giordano's contention that the experience requirement is unreasonable is challenging a term of the prequalification package. Such a protest may be considered only if it is received prior to the time set for the receipt of the prequalification statements. PM 4.5.4 b. provides that "[p]rotests based upon alleged deficiencies in a solicitation that are apparent before the date set for the receipt of proposals must be received by the date and time set for the receipt of proposals" and prequalification packages are solicitations for the purposes of this section. *J. W. Bateson Company, Inc.*, P.S. Protest No. 88-44, November 1, 1988. To the extent that its protest may be understood to suggest, like Morganti, that the requirement was not appropriately applied to it, Giordano has not met its burden of demonstrating the unreasonableness of the contracting officer's determination.

With respect to the failure to afford credit for its quality control program, we concur with the contracting officer's concession that that failure was inconsistent with the prequalification package. Section 3.08 of Part C of that package clearly contemplated the submission of information about either quality management or quality control programs.<sup>11</sup> Giordano's proposal provided information of the sort requested about its program for quality control, and it should have received an appropriate credit for this item. However, the omission in this regard is not significant, since Giordano did not meet the prequalification package's experience requirement.

Giordano's complaint about the lack of local firms among those prequalified and the perceived inconsistency of that lack with its understanding of the Postal Service intent does not afford a basis for relief. As the contracting officer notes, it would have been inappropriate to take the firms' location into account in the evaluation since there was no stated evaluation factor for location. Of course, any protest against such an omission could be timely raised only before prequalification statements were due.

<sup>11</sup> The relevant paragraphs provided as follows:

Attach a statement outlining the company's Quality Management and/or Quality Control program. This statement, in addition to describing in detail the process by which the company ensures that the project is completed in accordance with the contract specifications, should include a listing of any company training programs being employed that are intended to improve construction quality performance.

Provide a resume of the individual(s) responsible to monitor, update and enforce the company's Quality Management and/or Quality Control Program.

The protests are dismissed in part and denied in part.

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