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P.L. II

DECISION

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

FILE: B-187984 DATE: September 2, 1977

MATTER OF: Westinghouse Electric Corporation

DIGEST:

Although award should not have been made to firm that did not meet "definitive responsibility criteria" award will not be disturbed in view of stage of completion of contract.

This protest raises the question of whether the General Services Administration (GSA) properly awarded an elevator installation contract under Project No. NMS 75108 to Dover Elevator Company (Dover).

On August 27, 1976, GSA invited bids for installing elevators in the Federal building, Jackson, Mississippi. The following bids were opened on September 28, 1976:

		Total of Base Bid and Alt. A & B
1.	Dover Elevator Co.	$ 951,033
2.	Reliance Elevator Co.	1,136,055
3.	Montgomery Elevator Co.	1,153,056
4.	U.S. Elevator	1,177,605
5.	Westinghouse Electric Co.	1,261,956
6.	Otis Elevator Co.	1,341,012

Award was made to Dover on December 7, 1976, for the base bid work and Alternates A and B, in the total amount of $951,033, whereupon Westinghouse Electric Company (Westinghouse) protested on the ground that Dover did not meet the solicitation's "definitive responsibility criteria."

The invitation's Special Conditions stated that award would be only to a firm meeting certain competency requirements set out at paragraph 16, to wit:

> "16.2 * * * the bidder shall have installed on at least two prior projects, elevators which are comparable to those required for this project and which have performed satisfactorily under conditions of normal use for a period of not less than one year.
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> "16.6 To be considered comparable prior installations shall have not less than the same number of elevators operating at the same, or greater capacity at the specified speed together in one group as the largest number in any group specified for this project."

These requirements, referred to as "definitive responsibility criteria" (see, Haughton Elevator Division, Reliance Electric Company, 55 Comp. Gen. 1051, 76-1 CPD 294), when read in conjunction with the specifications, required the contract awardee to have installed on at least two prior projects, a group of eight elevators having a capacity of 4000 pounds and operating at a speed of 700 feet per minute.

GSA argues that Dover meets the responsibility criteria, because its "prior installations were not only equivalent to, but in certain instances were in excess of comparability parameters (i.e. capacity 4000 pounds, speed - 700 F.P.M., group size-8 car) specified in the IFB." GSA cites Haughton, supra, for the proposition that "equivalency" of experience is sufficient to meet definitive responsibility criteria. There we stated that:

> "[W]e believe that meeting such definitive criteria of responsibility, either precisely or through equivalent experience, etc. is actually a prerequisite to an affirmative determination of responsibility.
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> * * * * *

"Therefore, we believe that definitive criteria of responsibility, which the agency has determined necessary by placing them in the solicitation, should be read as outlining a minimum standard of experience or expertise which is a prerequisite to an affirmative determination of responsibility. We recognize that there may be situations where a bidder may not have met the specific letter of such criteria but has clearly exhibited a level of achievement either equivalent to or in excess of the minimum level specified and may thus properly be deemed responsibile." Haughton at 1056.

In that case we went on to say that the agency had not found that the contractor had five years of experience with either the specified model of elevator or one of "equal or greater complexity." Thus, we assumed that it was possible to equate elevators in terms of their "complexity" for purposes of determining whether a firm had demonstrated sufficient expertise to meet the Government's minimum requirements of responsibility. Had we required "literal" compliance with the terms of the specification, i.e., that the personnel have five years experience in "repairing and servicing the specified equipment," Haughton at 1052, there would have been no need to consider experience with equipment of "equivalent" complexity. See, Master Airmatic Systems Division, B-187586, January 21, 1977, 77-1 CPD 42.

In the instant case, the specifications listed three variables with respect to required past performance in addition to the two installations and one year of operation requirements: (1) eight elevators working together; (2) carrying 4000 pounds; (3) at 700 feet per minute. Dover shows: two installations meeting criteria (1) and (3) but carrying only 3500 pounds; three installations meeting criteria (2 and 3) containing 2, 4, and 7 cars in a group (in operation for less than one year); 75 installations meeting criterion number (2); and 58 installations meeting criterion (3).

We cannot agree with GSA that Dover's showing that it has met the performance criteria in many separate instances is equal to a showing that it has met the responsibility requirements in the two specific instances mandated by the IFB.

In Haughton the equivalency test was necessary in order to allow firms to show experience on "performance" rather than "design" or "brand-name" specifications. Here, however, we are dealing with "performance" criteria wherein equivalency should be demonstrable, if at all, by showing two prior installations meeting the specified operational and performance requirements.

GSA argues that even if Dover does not meet the responsibility criteria, no useful purpose would have been served by canceling and resoliciting the procurement. In that regard, GSA cites again to Haughton which states that, although an IFB containing unduly restrictive definitive responsibility criteria ordinarily should be canceled, if, for example, no potential bidders were precluded from participating, then cancellation and resolicitation would not be necessary. GSA then argues that no potential bidders were precluded from bidding and those who bid were not prejudiced because no bidder has shown that it would have bid lower if it knew the criteria would be disregarded.

While it is true that no bidder has demonstrated prejudice, Haughton does not place such a burden on bidders who bid relying on a narrow "scope of competition". In fact, Haughton added a new test for prejudice that protected bidders and not just potential bidders or offerors. Illustrative of the new test is following language from Haughton:

> "* * * [W]e do not feel that definitive criteria of responsibility specifically and purposely placed in the solicitation by an agency can be waived as the contracting officer sees fit. [Citation omitted]. In fact to do so would be misleading and prejudicial to other bidders which have a right to rely on the wording of the solicitation and thus to reasonably anticipate the scope of competition for award. [Citation omitted] * * * [P]articipants with the specified experience may have been prejudiced in that had they realized that the competition would include firms with less experience and thus perhaps lower overhead, etc., those firms may have refrained from bidding or bid lower in an attempt to secure award." (Emphasis supplied) Haughton at 1055-56.

In addition, we stated that:

> "Where, as here, the IFB contained such an unnecessary requirement, the criteria must be construed as being unduly restrictive of competition and the IFB should have been canceled before award since we believe that both bidders who participated in the procurement, and those which did not, may have been prejudiced by the inclusion of restrictions that were unnecessary and which the agency apparently did not intend to rigidly enforce. [Citation omitted]. Had Haughton [a participant] known that the 5-year experience criterion was not a requirement to be enforced, it may have bid lower in view of the anticipated competition, * * *.
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> "* * * [I]n determining if * * * a cogent and compelling reason exists to justify cancellation two factors must be examined: (1) [the best interests of the Government] and (2) whether bidders would be treated in an unfair and unequal manner if * * * an award were made.
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> "* * * the IFB was * * * misleading * * * to the prejudice of others in that it indicated that consideration would be limited to bidders having a minimum of approximately 5 years' experience when in fact no such level of experience was needed. Accordingly, a cogent and compelling reason did exist, and the IFB should have been canceled." (Emphasis supplied) Haughton at p. 1058.

Particularly important in the Haughton case was the fact that the protester was not required to demonstrate prejudice as a bidder. Nor have any of the cases relying on Haughton indicated that more than a presumption of prejudice is sufficient to sustain a protest, e.g., Harry Kahn Associates, Inc., B-185046, July 19, 1976, 76-2 CPD 51; and Airways Rent - A - Car, September 10, 1976, 76-2 CPD 232.

Following the rule in Haughton that bidders are prejudiced where they reasonably can presume that the competition is limited to only a few possible bidders (Dover argues that the definitive

responsibility criteria could only be met by one or two firms), it is clear that Westinghouse, being in that limited, protected class, was prejudiced in that it could price its bid relying on what it reasonably perceived as a narrow scope of competition for award. Haughton, supra, at 1055. Accordingly, Westinghouse's protest is sustained.

In determining what action should be taken with regard to an improperly awarded contract, the foremost consideration is the best interest of the Government. Honeywell Information Systems, Inc., B-186313, April 13, 1977, 77-1 CPD 256. Here it is reported that an award was made to Dover on December 7, 1976. By letter of August 19, 1977, GSA has further advised us that if Dover's contract were terminated at this time and upon resolicitation Dover were not the successful bidder, over 7 months of engineering design and fabrication work would be lost because work in process could not be transferred to another contractor. Moreover at least 2 months would be required for resolicitation and award and a new contractor would probably require 7 months of work in order to be where Dover is today. GSA states that because this is a phased construction project, "extensive delay claims of a far greater magnitude than Dover's termination costs would be anticipated from the other contractors whose work interfaces with the elevator work or is dependent thereon." Under these circumstances, we agree with GSA that termination of Dover's contract would not be in the Government's interest. Therefore, we do not believe that the award should be disturbed.

R.F. Keller

Deputy Comptroller General
of the United States