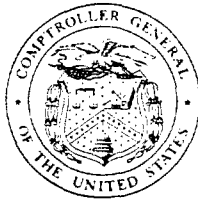


W. Westinghouse
Proc 2



DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**

WASHINGTON, D. C. 20548

9174

FILE: B-191537

DATE: February 15, 1979

MATTER OF: Westinghouse Air Brake Company

[Allegation that Low Bidder Does Not Satisfy Required Experience Clause]

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 does not possess sufficient staff or financial capability to perform contract in timely manner. These questions are matters of general responsibility which GAO will not review absent allegation of fraud.
2. Unsuccessful bidder contends that because grantee does not have *the* experience in *the* design, furnishing and installation of *the* exact type of circuitry to be used on contract, *the* grantee does not comply with a clause requiring experience with *a* complete signal systems of the same general type as called for under this Contract. *GAO finds no requirement* that experience include exact type of circuitry to be considered of same general type.
3. Where solicitation requires similar experience, GAO review is limited to whether evidence submitted reasonably shows that offeror possessed specified experience; quality and sufficiency of experience is left to subjective judgment of grantee, absent allegation of fraud.

Background

Westinghouse Air Brake Company (WABCO) has filed a complaint against the award of a contract by the Massachusetts Bay Transportation Authority (MBTA) to the joint venture of Regan Construction Company, Inc., Nager Electric

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Company, Inc., and Transcontrol Corporation (Trans-control) under Urban Mass Transportation Administration (UMTA) Capital Grant Project No. MA-23-9004. The contract is for reconstruction of the Dorchester Branch of the MBTA, including the design, furnishing and complete installation of a wayside and train control signal and communications system. UMTA's financial participation in the project is 80 percent under section 3 of the Urban Mass Transportation Act of 1964, 49 U.S.C. § 1602 (1970).

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

"5. PROPOSAL REQUIREMENTS AND CONDITIONS

* * * * *

"b. Competency of Bidders (Prequalification Requirement)

Further supplementing the provisions of Article 2.12 (competency of Bidders) of Division I, which shall apply to this Contract, the following shall be specifically applicable to this Contract:

- "(1) It is obvious that the work described in this Contract will involve the safety of life, person and property, the protection of which requires unusual engineering skill and experience. That portion of the work in the vicinity of South Station and Readville will also involve the safe and continuous operation of an operating railroad and the alteration of equipment under conditions of such railroad operation.
- "(2) To be considered skilled and experienced for automatic train control system work, the prospective bidder must show to the satisfaction of the Authority, that he has designed, manufactured and furnished

wayside signal and automatic train control equipment for complete signal systems of the same general type as called for under this contract, for the MBTA or any other similar high density commuter railroad or rapid transit system.

- "(3) The bidder shall also have commitments from his proposed subcontractors for the communications system work. The subcontractor shall have designed, manufactured and/or furnished communications equipment for complete systems of the same general type as called for under this Contract, for the MBTA or any other similar high density commuter railroad or rapid transit system.
- "(4) The bidder, as aforementioned, shall not perform any field installation work but shall also have commitments that such field installation work be performed by a qualified contractor regularly engaged in railroad or rapid transit signal system installation work and who is skilled and experienced in performing field installation work on high speed railroad passenger or freight lines of a nature and quantity similar to that required to be performed under this Contract, and who can meet all of the requirements for installation work in this contract. Such contractor representing the Contractor shall perform all of the field installation work with his own forces, except as otherwise approved by the Engineer, and shall not employ men or means in connection with this Contract at the site of the work which may cause strikes or similar troubles by workmen employed by other contractors or persons on any work.
- "(5) The above information is specifically required for prequalification for this Contract and must be submitted in duplicate to the Authority prior to the close

of business of the day as stated in the Notice to Contractors.

"c. Miscellaneous

- "(1) Upon demand of the Authority, each prospective bidder must be prepared to prove to the satisfaction of the Authority that in addition to required skill and experience, he has a sufficiently large and competent engineering staff to perform the portions of the work he proposed to do with his own forces, and that he has the necessary facilities and ample financial resources to do the work in a satisfactory manner and within the time specified; and that each of his subcontractors can meet similar conditions.
- "(2) Conditions for qualifications of bidders shall also be applicable to subcontractors and manufacturers as they apply.
- "(3) All services required in the design of the wayside and cab signal systems, as specified above, including circuits, case wiring diagrams, line location plans, etc. required for the Contract shall be furnished by the Contractor. The Contractor shall be responsible for the designs and drawings of concrete foundations, signal bridges, cantilever structures and other material and equipment installed as part of this Contract."

Transcontrol was the low bidder of three who responded to the solicitation. MBTA employed a consulting firm to examine all bidders for compliance with the above-quoted clauses. All three bidders were successfully prequalified. WABCO protested simultaneously to MBTA, UMTA and GAO arguing that Transcontrol could not

comply with the requirements of the clauses. MBTA denied the protest and awarded the contract to Transcontrol conditionally, pending UMTA's review of MBTA's findings concerning Transcontrol's compliance with clauses 5(b) and (c). UMTA reviewed MBTA's findings and determined that there was a rational basis for the determination that Transcontrol complied with the clauses. UMTA then concurred in the award.

WABCO's Allegations

In its complaint to us, WABCO argues that clauses 5(b)(1), (2) and (4), and 5(c)(1) and (3) contain definitive responsibility criteria that Transcontrol does not satisfy. According to WABCO, the evidence on which MBTA based its findings that Transcontrol was responsible, in which UMTA concurred, does not support such a conclusion.

WABCO also alleged, in its letter of complaint, that Transcontrol's bid was nonresponsive because it offered a demodulator that WABCO contends will not meet the solicitation requirements. In its comments on UMTA's report on the complaint which indicated that MBTA had the right to reject and require other equipment, WABCO amended its allegation to argue that offering the allegedly nonconforming demodulator indicated that Transcontrol did not understand the requirement. This, WABCO argues, supports the contention that Transcontrol is not responsible.

GAO Review of Affirmative Responsibility Determinations

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.

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 might have participated if they knew that the agency was not serious about the restrictive requirement and (2) participating bidders might 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.

WABCO has alleged that sections 5(b) and (c) of the solicitation contain definitive responsibility criteria we should review.

"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." In Gould, Inc., and Fuji Electric Co., LTD., B-190969, August 4, 1978, 78-2 CPD 86, we found that the following clauses established definitive responsibility criteria:

"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 this case, it is our opinion that of the clauses cited by WABCO, only clauses 5(b)(2) and 5(b)(4) contain definitive responsibility criteria that we will review. Clause 5(b)(1) is a general statement of the nature of the required work and bidder capabilities ("unusual engineering skill and experience") which serves as a prelude to the detailed description that follows. Clause 5(c)(1) involves general responsibility criteria, such as financial capability and general size and competence of work force, which we do not review. Clause 5(c)(3) sets forth the portions of the work that the contractor is required to perform.

Scope of Review

In Yardney Electric Corporation, 54 Comp. Gen. 509 (1974), 74-2 CPD 376, the solicitation required bidders to show that they had "experience in designing and producing items of a quality, complexity and purpose comparable to the items called for by this Solicitation." 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 two years using CRT and software routines functionally similar to those outlined in these specifications." In Gould,

supra, the solicitation required experience in the manufacture of the "generic type" of equipment to be furnished and in the manufacture of "silicon rectifier conversion equipment for extra-heavy rapid transit substation service." In each of the above decisions, we essentially limited the scope of our review to ascertaining whether evidence had been submitted from which the contracting officer could reasonably determine that the offeror possessed the specified experience. The relative quality and sufficiency of that experience is, however, a matter of judgment reserved to the contracting officer in determining the offeror's responsibility, which we will not review absent an allegation of fraud.

WABCO argues that our review in this case should concern itself with the quality of the experience on which MBTA based its decision. According to WABCO, the Gould decision never reached that question. WABCO contends that the restrictive clause in Gould was more general than the one here and that when the standard is specific we should review the quality of the experience.

WABCO has apparently misinterpreted the Gould decision. That decision does hold that in reviewing definitive responsibility criteria we will not review the quality or sufficiency of an offeror's experience, but will limit our review to ascertaining whether the evidence submitted reasonably shows that the offeror possessed some experience as specified in the solicitation. The question that we did not reach in Gould was whether evidence was submitted showing that the awardee had experience in manufacturing equipment in compliance with the standards of the National Electrical Manufacturers' Association (NEMA) RI-9, because we determined that the clause in question did not require that the NEMA standard be met.

Transcontrol's Compliance with Clauses
5(b)(2) and 5(b)(4)

In response to the inquiry by MBTA's consultant regarding Transcontrol's previous experience relative to

clause 5(b)(2), Transcontrol provided a list of projects it considered to be "of the same general type as required by this contract." WABCO alleges that none of the listed projects involved the use of the threefold application of phase-selective circuitry required to be used in the present contract, and that Transcontrol's experience, therefore, does not comply with the requirements of clause 5(b)(2).

According to WABCO, since the contract requires threefold application of phase-selective circuitry and that circuitry is the heart of the project, only experience in projects using that exact circuitry will satisfy the requirements of clause 5(b)(2). MBTA and UMTA interpret the phrase "of the same general type" as permitting experience in projects using similar circuitry and that are otherwise similar. MBTA's consulting engineers prepared an analysis stating that the specific track circuitry alone does not define the overall type of system.

It is our opinion that clause 5(b)(2) does not require experience in projects using the exact circuitry required in this contract. If MBTA had intended to restrict bidding in that manner, it could have stated that explicitly. The term "general" is defined as:

"4. not limited to a detail of application; not specific or special. 5. indefinite or vague." American College Dictionary, Random House (1970).

We agree with MBTA's interpretation of the clause-- that experience in the design, manufacture, and installation of signal systems that are similar to the one being contracted for is adequate to demonstrate compliance with the clause.

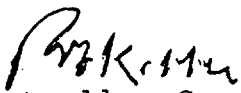
Transcontrol provided MBTA with a list of projects to show compliance with the clause. MBTA's consultants examined the evidence and determined that these projects were sufficiently similar to the present project to satisfy the experience requirement. Several of the projects even involved the use of phase-selective circuitry, although for one function rather than three. In addition to arguing that because the listed projects do not involve threefold application of phase-selective circuitry they are

not of the same general type, WABCO also attacks the quality and sufficiency of the experience. However, as we stated in Yardney, absent allegations of fraud, that matter is reserved to the subjective judgment of the contracting agency.

WABCO argues that clause 5(b)(4) "imposes the further obligation [beyond that imposed by 5(b)(2)] on the low bidder to demonstrate that it has done field installation work on high speed railroad lines of the type called for under this contract." WABCO contends also that Transcontrol cannot meet this requirement.

However, Nager Electric Company, Inc. (Nager), will perform the field installation, and evidence was submitted relating to its experience in the area. MBTA's consultants contacted the New York City Transit Authority (NYCTA) concerning Nager's installation work on several contracts. According to the consultants, Nager performed satisfactorily in the installation of signal systems similar to those required here. WABCO disputes this, arguing that the work was not really analogous to the work required under the MBTA contract. In our view, WABCO is basically attacking the quality and sufficiency of the experience, which must be left largely to the sound discretion and subjective judgment of the grantee.

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


Deputy Comptroller General
of the United States