



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: Charter Environmental, Inc.

File: B-297219

Date: December 5, 2005

Daniel J. Kelly, Esq., and Gary J. Campbell, Esq., Gadsby Hannah, for the protester.
Azine Farzami, Esq., Department of Agriculture, for the agency.
John L. Formica, Esq., and James A. Spangenberg, Esq., Office of the General
Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Contracting agency unreasonably determined that apparent low bidder on invitation for bids for the stabilization and removal of mine waste met the solicitation's definitive responsibility criterion requiring that the awardee have completed three similar projects, where the agency only considered the experience of what is apparently the low bidder's parent company, even though the record does not contain a commitment by the parent company to the low bidder's successful performance of the work.
 2. Bid cannot be rejected as nonresponsive on the basis that the bid did not include completed standard representations and certifications or the bidder had not yet registered in the Central Contractor Registration.
-

DECISION

Charter Environmental, Inc. protests the proposed award of a contract to ECI Northeast, LLC, under invitation for bids (IFB) No NEAT-05-190, issued by the Forest Service, Department of Agriculture, for restoration of the Ore Hill Mine Site in New Hampshire. Charter argues that ECI Northeast's bid should have been rejected as nonresponsive, and that ECI Northeast does not meet the IFB's definitive responsibility criteria and is thus ineligible for award.

We sustain the protest in part and deny it in part.

The IFB provides for the award of a fixed-price contract for the mine restoration services, which include, for example, the removal and stabilization of mine waste.

The solicitation (at 4), under the heading “RESPONSIBILITY CRITERIA,” provided in part as follows:

While this information does not need to be furnished with your bid, to be eligible for award bidders must meet the following affirmative responsibility criteria:

Contractor Experience

The Contractor shall have successfully completed at least 3 [solidification/stabilization] S/S projects requiring stabilization of lead with a phosphate based reagent. In addition the Contractor shall have successfully completed at least 3 S/S projects of comparable size and scope in accordance with local, state, and federal requirements using the proposed system or a similar system.

The agency received six bids, with ECI Northeast submitting the apparent low bid of \$2,232,309, and Charter submitting the second low bid of \$2,394,261. Agency Report (AR), Tab 7, Bid Abstract. After requesting and receiving certain information from ECI Northeast, the agency determined that ECI Northeast met the above “responsibility criteria” and selected that firm for award. This protest followed.

Charter argues that ECI Northeast does not have the experience required as set forth in the IFB’s responsibility criteria under “Contractor Experience,” and that the agency’s determination that ECI Northeast satisfied the experience requirements, based upon the agency’s consideration of projects completed by ECI Northeast’s parent company--Environmental Contractors of Illinois (ECI)--was improper.

Definitive responsibility criteria are specific and objective standards designed to measure a prospective contractor’s ability to perform the contract. Such criteria, which must be met as a precondition to award, limit the class of contractors to those meeting specified qualitative and quantitative qualifications necessary for adequate performance, e.g., unusual expertise or specialized facilities. MEI, Inc., B-277235.2, Nov. 12, 1997, 97-2 CPD ¶ 138 at 2. Here, there is no dispute that the “Corporate Experience” paragraph set forth above, which requires the prospective contractor to have completed at least three S/S projects of a certain type, size, and scope, is a definitive responsibility criterion.

Where a protester alleges that a definitive responsibility criterion has not been satisfied, we will review the record to ascertain whether evidence of compliance has been submitted from which the contracting officer reasonably could conclude that the criterion has been met; generally, a contracting agency has broad discretion in determining whether bidders meet definitive responsibility criteria. Although the relative quality of the evidence is a matter within the contracting officer’s judgment, the contracting officer may only find compliance with the definitive responsibility criterion based on adequate, objective evidence. MEI, Inc., supra, at 2.

As a general rule, the experience of a technically qualified subcontractor or third party—such as an affiliate or consultant—may be used to satisfy definitive responsibility criteria relating to experience for a prospective prime contractor. In considering whether the experience of a third party subcontractor or affiliate may be relied upon by a prime bidder to meet an experience criterion, we examine the record for evidence of a commitment by the third party to the bidder’s successful performance of the work. MEI, Inc., supra, at 3; Tutor-Saliba., Perini Corp., Buckley & Co., and O & G Indus., Inc., A Joint Venture, B-255756, Mar. 29, 1994, 94-1 CPD ¶ 223 at 5-6.

Here, the agency contacted ECI Northeast and requested that it provide information establishing that ECI Northeast had completed three S/S projects as required by the IFB. AR, Tab 2, Agency E-mail to ECI Northeast. ECI Northeast responded by providing information regarding three projects completed by ECI, which the contracting officer “accept[ed] . . . as valid,” based upon his understanding that “ECI Northeast [is] a branch office of ECI.” AR, Tab 2, ECI Project Summaries; Contracting Officer’s Statement at 4. The contracting officer explains here that when first reviewing ECI Northeast’s bid, he “could not retrieve a CCR [central contractor registration] registration for ECI Northeast,” so he “called the phone number on the bid and was informed that ECI Northeast is just a branch of [ECI].” Contracting Officer’s Statement at 2. The agency, while recognizing that ECI is the “parent company” of ECI Northeast, also points out that the bid, which was submitted by ECI Northeast, provided the name and address of ECI in block 16, remittance address, of Standard Form 1442, the IFB cover sheet. AR at 9, 13.

The information received by the agency does not, in our view, provide sufficient evidence of ECI’s pre-award commitment to ECI Northeast’s successful performance of the contract. Specifically, we do not understand, and the agency has not explained, why the mention by an ECI Northeast employee that ECI Northeast is a “branch office” of ECI establishes such a commitment. As indicated by the agency, ECI and ECI Northeast appear to be separate corporate entities, with ECI being the parent company. Nor has the agency explained why the fact that ECI’s address appears in the remittance box of the IFB cover sheet establishes such a commitment. There is simply no information in the record providing a commitment on ECI’s part to ECI Northeast’s successful performance of the contract, and thus, no way to establish that ECI Northeast, and by extension, the agency, would reap the benefit of ECI’s experience. Accordingly, under the circumstances here, the agency could not properly consider the experience of ECI in determining whether ECI Northeast met the solicitation’s definitive responsibility criteria, and we sustain this aspect of Charter’s protest.

Charter also argues that ECI Northeast’s bid should have been rejected as nonresponsive by the agency because ECI Northeast’s bid did not include a completed Section K, “Representations, Certifications, and other Statements of Bidders” with its bid, and because ECI Northeast has not registered in CCR as

required by the IFB. IFB at 117. These protest contentions do not provide a basis to reject ECI Northeast's bid.

The failure to include with a bid completed standard representations and certifications does not render the bid nonresponsive because it does not affect the bidder's material obligations. Such a failure therefore may be waived as a minor bidding irregularity and the information may be furnished after bid opening. Jettison Contractors, Inc., B-242792, June 5, 1991, 91-1 CPD ¶ 532 at 2. Similarly, and as conceded by the protester, the solicitation did not require that bidders be registered in the CCR prior to bid opening, but rather, required such registration prior to award. IFB at 117; Federal Acquisition Regulation § 52.204-7(b)(1) (requiring that a prospective awardee shall be registered in the CCR database prior to award); see Graves Constr., Inc., B-294032, June 29, 2004, 2004 CPD ¶ 135 at 3 (protester not prejudiced by the agency's failure to verify whether the awardee had registered in the CCR prior to award). Moreover, the agency advises that during the course of this protest ECI Northeast has registered on the CCR. As such, and contrary to the protester's view, the agency properly considered ECI Northeast's bid responsive.

The protest is sustained in part and denied in part. We recommend that the agency reconsider ECI Northeast's responsibility by ascertaining, through further communication with ECI Northeast if needed, whether ECI is committed to ECI Northeast's successful performance of the contract.¹ In the absence of reasonable objective evidence establishing such a commitment or other objective evidence that

¹ The solicitation, under the heading "RESPONSIBILITY CRITERIA," also provided as follows:

Key Personnel

Key personnel shall have a minimum of 3 years of S/S field experience.
Key personnel shall include system foreman, quality control personnel, and supervisory engineering and technical staff involved with the proposed system of a similar system.

The key personnel experience requirements here possess all of the characteristics of definitive responsibility criteria--they concern the capability of the bidder, not a specific product, and they are objective standards established by the agency as a precondition to award. See Vador Ventures, Inc., B-296394; B-296394.2, Aug. 5, 2005, 2005 CPD ¶ 155 at 4. However, nothing in the record suggests that the agency performed any review of information from ECI Northeast with regard to the key personnel responsibility requirements. As such, we suggest that in addition to implementing our recommendation as set forth above, the agency also request and review information from ECI Northeast regarding its key personnel. The agency should also obtain from ECI Northeast completed standard representations and certifications.

ECI Northeast meets the IFB's definitive responsibility requirements, ECI Northeast should be found nonresponsible and award made to the next low responsive and responsible bidder. We also recommend that Charter be reimbursed the reasonable costs of filing and pursuing the protest. 4 C.F.R. § 21.8(d)(1) (2005). Charter should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the agency within 60 days of receiving this decision.

Anthony H. Gamboa
General Counsel