

01334

Boyle  
Proc I

**DECISION**



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

FILE: B-185474

DATE: November 29, 1976

MATTER OF: Griffin Construction Company

**DIGEST:**

Where bidder for contract under grant fails to provide information called for by invitation as to amount of work to be performed by bidder and subcontractors, despite warnings in invitation that serious omissions might result in bid rejection; grantee's rejection of low bid as nonresponsive and concurrence by grantor agency had adequate support.

Griffin Construction Company (Griffin) has filed a complaint against the award of a contract by the city of Winter Haven, Florida, under a construction grant awarded by the Environmental Protection Agency (EPA) pursuant to title II of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1262, et seq., and implementing regulations at 40 C.F.R. part 35(E). The \$8 million grant funds approximately 75 percent of the construction of a wastewater treatment plant. The instant complaint involves only the contract for construction of a 30-inch force main, the approximate cost of which is \$1 million.

Winter Haven solicited bids for the 30-inch force main. Griffin submitted the lowest bid at \$1,051,538.25. Scott Cole Utilities, Inc., submitted the next lowest bid at \$1,102,356.25. The city's consulting engineers advised the city commission that Griffin's bid was nonresponsive for not furnishing information on (1) page E-14 of the invitation

B-185474

for bids which was required to prevent a "contract broker" from obtaining the award, and (2) page E-15 which was required to prevent "bid shopping" for subcontractors and to evaluate the contractor in light of proposed subcontractors. Since such omissions represented material deviations from the solicitation requirements requiring rejection of the Griffin bid, award to Scott Cole was recommended.

The relevant portions of the Invitation for bids and the Griffin bid are as follow:

"B-06 PREPARATION OF BID: (Page B-3 of instructions to bidders)

"a) Bids must be submitted in quintuplicate on the prescribed form furnished by the Engineer. All copies must be plainly marked by the Bidder, who will be responsible for its correctness. All blank spaces must be filled in as noted, in ink or typed, with the amounts extended and totaled. \* \* \*

" -1) Bids may be considered irregular and subject to rejection if they show serious omission, unauthorized alterations of form, unauthorized alternate bids, incomplete or unbalanced bids, or irregularities of any kind. No bid will be considered a regular bid without a list of the manufacturers of materials and/or equipment on which the bid is based, as required in attachments to the bid form.

"B-09 QUALIFICATIONS OF BIDDERS: (Page B-5 of instructions to Bidders)

"a) The Bidder shall submit with his Proposal the following:

"A statement of organizations and facilities showing Bidder's ability to properly complete the work to the satisfaction of the Owner within the time limits stated in the Proposal.

B-185474

"A list naming any subcontractors he proposes to employ. Subcontractors shall not be changed without the approval of the Owner and the Engineer.

"A list of projects similar both in scope and type of construction which he has successfully completed. Only those Bidders who show acceptable experience in work of this kind will be considered eligible.

"B-10 PERFORMANCE OF WORK BY CONTRACTOR: (Page B-5 of instructions to Bidders)

"a) The Contractor shall perform on the site and with his own organization, work equivalent to at least forty percent (40%) of the total amount of the work to be performed under this Contract. If, during the progress of the work hereunder, the Contractor requests a reduction of such percentage, and the Engineer determines that it would be to the client's advantage, the percentage of the work required to be performed by the Contractor's own organization may be reduced; provided prior written approval of such reduction is obtained by the Contractor from the Engineer.

"a-1) Each bidder must furnish with his bid a list of the items that he will perform with his own forces and the estimated total cost of these items. [Emphasis supplied.]

"B-11 CONSIDERATION OF BIDS AND AWARD OF CONTRACT:  
(Page B-5 of instructions to Bidders)

"a-1). The Contract will be awarded to the lowest responsible bidder complying with the conditions of the Advertisement, Instructions to Bidders, General and Special Conditions, Plans and Specifications, provided such bid is reasonable and provided it is to the interest of the Owner to accept it.

\* \* \* \* \*

"PERFORMANCE OF WORK BY CONTRACTOR [page E-14]

"The Bidder must be in a position to perform a substantial amount of the work with his own forces. Bids from so-called 'Brokerage Contractors' will not be considered.

"(List below the items that the Bidder will perform with his own forces, if awarded this Contract, and fill in blank below the estimated total cost of these items.)

[space provided]

"Estimated total cost of the items that Bidder states above that will be performed with his own forces, if awarded this Contract: \_\_\_\_\_

\_\_\_\_\_ Dollars (\$ \_\_\_\_\_).

[page E-15]

"The bidder proposes to employ the following subcontractors:

Description of  
Subcontractor's Work

[space provided]

"List description of material and name of manufacturer of all major items of materials and equipment to be furnished for this project:

[Griffin provided information here.]"

Griffin requested and was granted a public hearing before the city commission. Following presentations by Griffin, the city's consulting engineers, and Scott Cole, the city commission by unanimous vote decided to award the contract to Scott Cole on the basis that the Griffin bid was nonresponsive.

Griffin requested and was granted review of the city's decision by the EPA Regional Administrator for Region 4. The sole issue for consideration was whether Griffin's bid was properly rejected as nonresponsive. EPA regulations, made applicable to this procurement by the standard conditions of the grant, provide that, if the grantee proposes to award the contract to a bidder other than the low bidder, the grantee will bear the burden of proving that the determination concerning responsiveness of the low bid is in accordance with Federal law and regulations. 40 C.F.R. § 35.939(b) (1975). Therefore, Griffin contended that the city must prove: (1) that the omissions relate to responsiveness; and (2) if so, that the city gave adequate notice to bidders that such provisions related to responsiveness and that any failure to comply would result in bid rejection.

Griffin further contended that our Office in Lametti & Sons, Inc., 55 Comp. Gen. 413 (1975), 75-2 CPD 265, considered questions of responsiveness arising under EPA grants to be controlled by the Federal Procurement Regulations (FPR) and our decisions construing those regulations which provide known standards or basic determinations of the Federal norms applicable to grant procurements. In summary, Griffin argued that: (1) the requirement to list subcontractors, in not specifically warning bidders that omission of information would result in non-responsiveness, seems to be directed at contractor responsibility (39 Comp. Gen. 247 (1959)); (2) the performance of work by contractor requirement is clearly a matter of responsibility (41 Comp. Gen. 106 (1961) and 53 Comp. Gen. 27 (1973)); and (3) substantially similar language used by the city's consulting engineers in a previous procurement under an EPA grant was construed by them to relate to responsibility.

Scott Cole contended that the omissions rendered the bid nonresponsive under Florida law and our decisions. Scott Cole stated that, while there are no reported Florida appellate level cases which consider subcontractor listing requirements, two Florida Supreme Court cases (Culpepper v. Moore, 40 So. 2d 366 (Fla. 1949)

B-185474

and City of Pensacola v. Kirby, 47 So. 2d 533 (Fla. 1959)) permit a municipality certain discretion in determining the bidder to whom the contract should be awarded as long as the decision is rational and not arbitrary. Scott Cole argued: (1) that the city reasonably relied on the advice of its consulting engineers, who drafted the bid requirements, concerning the responsiveness of Griffin's bid; (2) that the FPR's are inapplicable to the bid processing of the city; and (3) that our decisions are not outcome-determinative in cases of contracts awarded by a city. Alternatively, Scott Cole argued that our decisions have consistently held that failure to list subcontractors renders a bid nonresponsive. 43 Comp. Gen. 206 (1963); 50 id. 839 (1971); Edgemont Construction Company, B-181218, August 29, 1974, 74-2 CPD 129; Piland Construction Company, Inc., B-183077, April 25, 1975, 75-1 CPD 262.

In the opinion of the administrative law judge representing the EPA Regional Administrator, the Lametti decision does not stand for the proposition advanced by Griffin and the decisions of our Office presented by Griffin are not relevant to the matter. Instead, the two Florida Supreme Court cases, holding that a public agency in rejecting a low bid as being nonresponsive is exercising proper discretion unless arbitrary or irrational, and other decisions of our Office supported the action taken by the city.

By letter dated December 1, 1975, Griffin filed its complaint as to the adverse EPA ruling and requested a clarification of Lametti, stating that, under the EPA ruling, the responsiveness of a contractor's bid would be subject to different interpretations in accordance with the State law of each grantee. We requested a report on the matter by letter of December 12, 1975.

By letter dated June 17, 1976, EPA provided a report on Griffin's complaint. EPA concluded that the requirements to list subcontractors and to identify that portion of the work to be performed by the contractor were adequately defined in the solicitation and that there was a rational basis for the city rejecting Griffin's bid. EPA refers to our decision in Copeland Systems, Inc., 55 Comp. Gen. 390 (1975), 75-2 CPD 237, as governing in that the EPA Regional Administrator determined that there was a rational basis for the city's action.

B-135474

To resolve this matter, we do not find it necessary to specifically address the choice of law question raised by Griffin since we believe that the conclusion reached below would be compatible with either Federal or State law. See Air Products and Chemicals, Inc., B-183235, November 6, 1975, 75-2 CPD 281.

The concept of responsiveness is basic to a system of competitive bidding. So that all bidders are treated equally, their bids must conform to all material elements relating to price, quality, quantity, or delivery of the items offered. Instructions to bidders must clearly identify the information to be provided by the bidder and the consequences resulting from the failure to provide the information. See Illinois Equal Employment Opportunity Regulations for Public Contracts, 54 Comp. Gen. 6 (1974), 74-2 CPD 1; Thomas Construction Company, Inc., 55 Comp. Gen. 139 (1975), 75-2 CPD 101.

In the instant case, the invitation provided that all blank spaces must be filled in as noted but did not provide that a bid would be rejected if all blank spaces were not completed. The invitation also provided that bids might be considered irregular and subject to rejection if they showed "serious" omission. The only specific reference to an irregular bid was one without a list of the manufacturers of materials and/or equipment. Griffin provided the name of the firm which was to manufacture the material required for the force main. Although the invitation did not specifically provide that an omission other than the manufacturers listing requirement would be considered a "serious" omission resulting in bid rejection, it seems clear that any omission, which resulted in nonconformance with any of the material elements relating to price, quality, quantity, or delivery, would also have been considered "serious" and would have resulted in bid rejection.

The invitation further provided that each bidder was to list the items of work to be performed with its own forces and to submit a list of proposed subcontractors along with a description of the work to be performed by the subcontractors. Griffin did not provide any information in these regards. By failing to do so, Griffin not only ignored the clear warnings in the invitation regarding the completion of all blank spaces and the possibility of bid rejection for serious omissions but the firm created a patent ambiguity as to the division of the work. In view of the warnings in the invitation, we find adequate support for the city's action and EPA's concurrence therein.

B-185474

As mentioned above, before the administrative law judge, Griffin argued that virtually identical provisions of another contract awarded by a separate grantee under another EPA grant, drafted by the same consulting engineering firm, were interpreted as not relating to responsiveness. The contention of inconsistent interpretation of substantially similar provisions in relatively contemporaneous solicitations was not addressed in the opinion of the administrative law judge or the EPA's report to our Office. Although other briefs were submitted to EPA, that point was not contested. Based on the record presently before us, we have no basis for concluding that the city in including and interpreting certain provisions of the instant solicitation would be bound by the intent or interpretations of other similar provisions in solicitations of other grantees. In any event, we found adequate support for the actions of the city and EPA.

  
Deputy Comptroller General  
of the United States