

DOCUMENT RESUME

03025 - [A2153262]

[Procurement for Housing Project Construction Not Reviewable by GAO]. B-187609. July 28, 1977. 3 pp.

Decision re: A. G. I., Inc.; by Paul G. Dembling, General Counsel.

Issue Area: Federal Procurement of Goods and Services (1900); Domestic Housing and Community Development (2100).

Contact: Office of the General Counsel: Procurement Law II.

Budget Function: General Government: Other General Government (806).

Organization Concerned: Department of Housing and Urban Development; Erie, Pennsylvania Housing Authority.

Authority: Housing and Community Development Act of 1974, sec. 3 (42 U.S.C. 1437f (Supp. V)). Housing and Urban Development Act of 1968, as amended, sec. 3 (12 U.S.C. 1701u). 4 C.F.R. 20.1(a)(1). 24 C.F.R. 135. 24 C.F.R. 880.114. B-184932 (1975). B-180482 (1974). 40 Fed. Reg. 42406. S. Rept. 93-693. 35 Pa. Stat. Ann., sec. 1541-1558.

A protest was made to an alleged improper prequalification of bidders for construction of a public housing project for the elderly by the Erie, Pennsylvania, Housing Authority. The Erie, Pennsylvania, Housing Authority is neither a Federal agency nor a Federal grantee, so its procurement was not reviewable by GAO, even though the Department of Housing and Urban Development will provide rent subsidies for eligible tenants. (Author/DJM)

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DECISION



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

FILE: B-187609

DATE: July 28, 1977

MATTER OF: A.G.I. Inc.

DIGEST:

Erie, Pennsylvania, Housing Authority is neither a Federal agency nor a Federal grantee, so its procurement for construction of housing project for the elderly is not reviewable by GAO, even though HUD will provide rent subsidies for eligible tenants.

A.G.I. Inc. (AGI) has protested what it believes was an improper prequalification of bidders for construction of a 33-unit public housing project for the elderly by the Erie, Pennsylvania, Housing Authority (EHA).

Construction of the \$900,000 project was financed by sale of an existing, non-Federally assisted project owned by EHA. The Department of Housing and Urban Development (HUD) has agreed to provide rent subsidies for eligible tenants of the new project over a 40-year period. Because of this Federal involvement, AGI argues that EHA should be required to comply with the Federal Procurement Regulations.

On September 17, 1976, AGI responded to a legal notice by EHA which had appeared in the Erie Morning News and the Erie Daily Times at weekly intervals for three weeks beginning September 7, 1976. Architects for the project, designated by EHA to distribute plans, specifications, and bid forms, initially refused to provide these to AGI because, although AGI had enclosed a required \$50 deposit, it also had requested a list of planholders. This led the architects to believe that AGI might be a material supply company, rather than a contractor and prospective bidder. AGI was informed that before bid documents could be supplied, "we must know your qualifications." AGI responded by sending a brochure and work history from Pittsburgh on September 23, 1976; these arrived in Erie on September 25, 1976. After determining AGI's status from these materials, the architects forwarded the requested documents by first class mail on September 27, 1976. AGI alleges that it did not receive the documents until October 4, 1976, preventing it from submitting a bid by the October 5, 1976, opening date.

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AGI believes these actions constituted prequalification of bidders, unduly restricting competition. The newspaper announcements did not state that bid documents were reserved for contractors, AGI argues, and so long as it had paid the required \$50, it was entitled to the documents without further qualification.

The architects not only defend their right to restrict distribution of bid documents but also contend that AGI was not prevented from bidding on this account, since bid documents were available in the Erie and Pittsburgh offices of F.W. Dodge, a reporting service, on microfilm through the Dodge service, and at the Pittsburgh Builders' Exchange.

In its report, HUD argues that a protest concerning contracting by EHA is not for resolution by our Office. We agree. Our bid protest procedures apply to protests concerning contracts of procurement or sale "by or for an agency of the Federal Government" whose accounts are subject to settlement by the General Accounting Office. 4 C.F.R. 20.1(a)(1) (1977). The EHA is a public body created by and operating under Pennsylvania statutes, 35 Pa. Stat. Ann. § § 1541 - 1568 (1964; Supp. 1977); its legal status is that of an agency of the Commonwealth of Pennsylvania. Id. § 1550. Although EHA is empowered to act as an agency of the Federal Government, Id. § 1550(g), the Federal Government in this case is neither funding construction nor a party to the construction contracts. We therefore find that in this procurement, EHA is not acting as an agency of the Federal Government.

Nor do we believe that this procurement is reviewable under our Public Notice, 40 Fed. Reg. 42406 (1975), which states that our Office will review procurements by recipients of grants if significant Federal funds are involved. In this case HUD, under authority of the United States Housing Act of 1937, as amended by the Housing and Community Development Act of 1974, § 8, 42 U.S.C. 1437f (Supp. V 1975), agreed in October 1976, to enter into a housing assistance contract with EHA upon completion of construction of the project. HUD will contribute \$95,317 a year, supplementing rent payments by tenants of \$22,711 a year.

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The legislative history of the Act indicates that Congress intended housing assistance payments to be considered as a subsidy, used to assure the low income character of public housing projects, and that the program should resemble as closely as possible the direct cash assistance approach advocated by HUD. S. Rep. No. 93-693, 93d Cong. 2d Sess., reprinted in [1974] U.S. Code Cong. & Admin. News 4273. A separate section of the Housing and Community Development Act of 1974, codified at 42 U.S.C. 5301 - 5317 (Supp. V 1975), consolidated existing grant programs and established the Community Development Block Grant program, further indicating that Congress intended to distinguish housing assistance payments from grants. For the foregoing reasons, we do not believe the protested procurement is one by a Federal grantee. See generally Chambers Builders Corporation, B-184932, October 8, 1975, 75-2 CPD 213; Technical Enterprises Incorporated, B-130482, July 26, 1974, 74-2 CPD 60.

Finally, a number of Federal statutes and regulations specifically apply to this project. For example, the Housing and Urban Development Act of 1968, as amended, § 5, 12 U.S.C. 1701u (1970), requires training and employment of project area residents and contractors. See 24 C.F.R. 135 (1976); see also 24 C.F.R. 880.114, listing other Federal requirements for the Section 8 Housing Assistance Payments program. However, compliance with the Federal Procurement Regulations is where required.

Accordingly, we must decline to consider the protest.


Paul G. Dembling
General Counsel