

DOCUMENT RESUME

03256 - [A2173297]

[Alleged Failure of Bid to Comply with the Specifications].
B-188488. August 3, 1977. 6 pp.

Decision re: Johnson Controls, Inc.; by Robert P. Keller, Deputy
Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).
Contact: Office of the General Counsel: Procurement Law II.
Budget Function: General Government: Other General Government
(806).

Organization Concerned: Grunau Co., Inc.; Medical College of
Wisconsin; Powers Regulator Co.

Authority: Comprehensive Health Manpower Training Act of 1971
(P.L. 92-157). 4 C.F.R. 20.2. 42 C.F.R. 57.107(b)(2). 55
Comp. Gen. 390. 55 Comp. Gen. 262. 55 Comp. Gen. 139. 54
Comp. Gen. 6. 39 Comp. Gen. 570. 54 Comp. Gen. 1068. 49
Comp. Gen. 713. 43 Comp. Gen. 23. 40 Fed. Reg. 42406.
B-184810 (1975). B-186198 (1977). B-187617 (1977). B-180642
(1974).

The protester objected to the award of a subcontract
for a Federal grantee, alleging that the awardee's bid was
nonresponsive. GAO will consider a complaint concerning the
award of a subcontract pursuant to a Federal grant where the
award is made by or for the grantee, but such complaints do not
have to comply with the timeliness requirement of the Bid
Protest Procedures. The contested bid constituted a definite and
unqualified offer to meet the terms of the solicitation and was
fully responsive. Although the specifications of the
solicitation were ambiguous, award may be made under the
solicitation since the needs of the procuring activity will be
met and substantial prejudice will not result to other bidders.
(Author/SC)

ZUCKERMAN
P.L. II

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DECISION



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

FILE: B-188488

DATE: August 3, 1977

MATTER OF: Johnson Controls, Inc.

DIGEST:

1. GAO will consider complaint concerning award of subcontract pursuant to Federal grant where award is made by or for grantee.
2. GAO Bid Protest Procedures are not applicable to the review of grant complaints; consequently, GAO will consider such complaints notwithstanding that they do not comply with timeliness standards of Bid Protest Procedures.
3. Bid which takes no exception to specifications or other solicitation documents constituted a definite and unqualified offer to meet terms of solicitation and is fully responsive, notwithstanding information received after bid opening suggesting that bidder does not intend to meet specification requirement. Responsiveness of bid is determined on basis of bid as submitted and not on basis of information submitted after bid opening.
4. Although cancellation of solicitation is generally appropriate when it is discovered, after bid opening, that specifications were defective in that they were susceptible to more than one reasonable interpretation, award under such specifications may be made where needs of procuring activity will be satisfied and prejudice will not result to other bidders. Since record suggests that substantial prejudice did not result, it cannot be concluded that Federal competitive bidding requirements were not met.

Johnson Controls, Inc. (Johnson) has requested review of the issuance of a purchase order by the Grunau Company, Inc. (Grunau) on behalf of the Medical College of Wisconsin (grantee) to Powers Regulator Company (Powers) for the building automation system of the college's new basic science building. The project was funded

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in part by a Department of Health, Education, and Welfare (HEW) grant under the Comprehensive Health Manpower Training Act of 1971, Public Law 92-157. Johnson's complaint is that the Powers bid "was not responsive and failed to comply with the specifications [and] should have been rejected."

Bids for the work in question were solicited by "public advertising" with 3 bids received on March 31, 1976 as follows:

Minneapolis Honeywell	\$673,910
Johnson Controls	\$599,733
Powers Regulator	\$533,612

After bids were received, Johnson raised questions as to the responsiveness of the Powers' bid, "particularly the failure of Powers to have the requisite Underwriters Laboratories (UL) approvals." The record does not show that any descriptive literature or other technical documentation accompanied or was incorporated into the Powers bid. The contract was awarded to Grunau, the mechanical contractor on the project, with Powers as the "assigned" or directed subcontractor on May 28, 1976, and HEW concurred in that award.

A threshold question--whether a complaint directed to the award of a subcontract precludes our review--was considered in Copeland Systems, Inc., 55 Comp. Gen. 390 (1975), 75-2 CPD 237, wherein we concluded that we would consider requests for review of subcontracts awarded "by or for" grantees. Inasmuch as Powers was the directed subcontract source as a result of the grantee's solicitation of competition for the building control portion of the contract, we consider the award to Powers to have been made "for" the grantee and thus subject to our review.

Powers has raised the issue of the timeliness of the Johnson request for review, pointing out that the Johnson complaint was filed several months after award had been made by the grantee and approved by HEW. Powers characterizes the Johnson complaint as a "protest" and requests that it be dismissed summarily for failure to comply with GAO Bid Protest Procedures, 4 C.F.R. § 20.2 (1976). Those procedures, however, are not applicable to the review of grant complaints which are considered pursuant to a Public Notice published at 40 Fed. Reg. 42406, September 12, 1975. Consequently, we will consider the matter.

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The purpose of GAO reviews of grant complaints is to foster compliance with grant terms, agency regulations and applicable statutes. 40 Fed. Reg. 42406, supra. It is the responsibility of the grantor agency (HEW) to determine whether there has been compliance with those requirements. O.C. Holmes Corporation, 55 Comp. Gen. 262 (1975), 75-2 CPD 174. GAO's role in these cases is to advise the agency whether requirements have been met. Thomas Construction Company, Incorporated, et al., 55 Comp. Gen. 139 (1975), 75-2 CPD 101.

Applicable HEW regulations are set forth in 42 C.F.R. § 57.107(b)(2) (1976) and provide in pertinent part that:

"* * * contracts will be awarded on the basis of competitive bidding obtained by public advertising with award of the contract to the lowest responsive and responsible bidder. * * *"

In its report to this Office on the complaint, HEW has taken the position that the bidding and the award to Powers was in full compliance with HEW regulations, i.e., that Powers was the low responsive, responsible bidder under an advertised solicitation as required by 42 C.F.R. § 57.107(b)(2), supra.

Where open and competitive bidding is required as a condition to receipt of a Federal grant, certain basic principles of Federal procurement law must be followed which go to the essence of the competitive bidding system. Illinois Equal Employment Opportunity Regulations for Public Contracts, 54 Comp. Gen. 6 (1974), 74-2 CPD 1. One of these principles is that a bid, to be accepted, must be responsive. In order to be responsive, a bid must be submitted in exact accord with the essential terms of the invitation, i.e. it must constitute a definite and unqualified offer to meet the terms of the contract, which among other things could affect price, quality, quantity or delivery. P. Shnitzer, Government Contract Bidding 237 (1976); Thomas Construction Company, Inc., B-184810, October 21, 1975, 75-2 CPD 248.

The record is replete with allegations as to the responsiveness of the Powers bid in a number of respects, the grantee's waiver of certain technical requirements after bid opening and award, and conflicting specification interpretations. However,

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an examination of the Powers bid shows that Powers took no exception to the specification but bid "in strict accordance with the contract Documents dated February 16, 1976 including all addenda * * *." Powers thus obligated itself in its bid to perform as required by the specifications, and its bid was fully responsive. All of the asserted activity and information obtained after bid opening does not affect the responsiveness of the Powers bid. It is a firmly established principle of formal advertising that the responsiveness of a bid is determined on the basis of the bid as submitted and not on the basis of information submitted by a bidder [or any other party] after bid opening. Abbott Power Corporation, B-186198, January 7, 1977, 77-1 CPD 13.

We think the gravamen of Johnson's complaint, although not explicitly expressed, is related to another basic principle of competitive procurement, that specifications be sufficiently definite so as to permit competition on a common basis. See 39 Comp. Gen. 570 (1960); Thomas Construction Company, Incorporated, et al., supra; Union Carbide Corporation, B-187617, April 7, 1977, 56 Comp. Gen. _____, 77-1 CPD 243. In this regard, the record shows that Johnson's bid was based on furnishing a system which is completely UL approved, while Powers planned to furnish a system that, at the time of bid opening, was UL approved only in part. Johnson reads the specifications as requiring complete UL approval; Powers and the grantee state that the "intent" of the specifications was to require UL approval only for the life support elements of the system.

The specification provision in question states:

"5. Approvals:

(a) Automatic Control Systems must have U.L. * * * approval for Fire Alarm Detection and Signaling.

(b) All RDCMPs [remote data collection multiplexing panels] and Console shall be supplied with U.L. labels affixed showing this approval."

The grantee claims only that it was the intent of this provision to require UL approval only for the life support system; the grantee stops short of stating that the provision, by its terms, required no more. We also note that the record shows the grantee's consulting engineers, as well as Grunau, agree with Johnson's interpretation. The record further shows that the grantee, through counsel, advised Powers as follows on December 13, 1976:

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"* * * the College waives as a technical deviation from specifications your failure to have all the components of your system U.L. approved. The College is of the opinion that this is a technical matter since your system, in all other respects, is U.L. Approved—especially as to the life-support components. This was the intent of the specifications. For such a waiver, the College will receive a credit from you."

It thus appears that the specification provision was reasonably susceptible to more than one interpretation, and that the grantee itself read the provision as technically requiring complete UL approval.

Generally, when it is learned after bid opening that a specification was defective and therefore subject to more than one interpretation, so that bidders did not compete on an equal basis, the proper course of action is to reject all bids and resolicit on the basis of a revised specification. Learning Resources Manufacturing Co., B-180642, June 6, 1974, 74-1 CPD 308; see also Essex Electro Engineers, Inc., 54 Comp. Gen. 1068 (1975), 75-1 CPD 372; 49 Comp. Gen. 713 (1970). However, we have permitted award under such a defective specification when it appeared that the agency would be getting what it wanted under the contract and that competition was not adversely affected, that is, no bidder was prejudiced. 43 Comp. Gen. 23 (1963); Thomas Construction Company, Inc., supra, and cases cited therein.

In this case, it is clear that under the award the grantee will be getting what it intended to obtain under the specifications. We also find it doubtful that Johnson was significantly prejudiced. While Johnson states that it "could have bid the contract in the same fashion as Powers and have provided a significantly lower bid," Powers states its bid "included all costs of procuring any necessary UL listing" and that apparently despite the waiver, it "fully intends to have all of the components that are to be installed under this contract, both life support and nonlife support, UL listed by the time of the completion of the contract," which is, of course, no more than the solicitation required even under Johnson's interpretation of the specification. We also note that the waiver was accompanied by a price reduction of \$15,000, while the Johnson bid was some \$66,000 higher than the Powers

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bid, which suggests that the extent of any possible prejudice to Johnson was insufficient to permit the conclusion that there was an adverse effect on competition here.

Accordingly, under the circumstances we are unable to find that Federal requirement for competitive bidding was not met in this case.

R. K. Kelly
Deputy Comptroller General,
of the United States