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DECISION



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

FILE: B-187423

DATE: November 21, 1977

MATTER OF: Complete Irrigation, Inc.

DIGEST:

1. Grantee's actions--in (1) procuring irrigation system by competitive negotiation rather than formal advertising, (2) calling for offerors to exert design effort, rather than specifying one set method of irrigation as basis for competition, and (3) not conducting discussions with offeror whose proposal had in effect been excluded from competitive range--are not objectionable under Economic Development Administration grant regulations or fundamental principles of Federal negotiated procurement.
2. Grantee's failure to issue adequate written solicitation was departure from Economic Development Administration grant regulations and fundamental principles of Federal negotiated procurement. Solicitation should have given at least general description of contemplated irrigation project, informed offerors of various requirements which would be imposed on contractor, provided for common cutoff date for proposal submission, and given indication of relative importance of price versus technical factors.

This is our decision on a request by Complete Irrigation, Inc. (CII), that we review the award of a contract by the Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, Lama Deer, Montana, a recipient of Federal grant funds from the Economic Development Administration (EDA), Department of Commerce. Our review is undertaken pursuant to 40 Fed. Reg. 42406 (1975), where we stated that we would consider complaints concerning contracts awarded under Federal grants.

EDA's grant in the amount of \$350,000 was for a sprinkler irrigation project, including design work and the furnishing of irrigation equipment. In conducting the procurement for this work, the grantee was assisted by Brigham Young University personnel including a technical assistant associated with the University. The record indicates that the technical assistant solicited bids or proposals from prospective offerors. CII and four other concerns submitted offers. These were evaluated in terms of their system designs, total costs and the offerors'

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reputability. Two offers were then selected as the most desirable. CII's offer was not included. After further consideration, the Brigham Young University personnel recommended one of the two offers to the grantee, and an award was made in July 1976.

While CII raises several objections, we believe its complaint involves three basic points: first, the fact that there was no advertising for competitive bids; second, that although CII submitted an offer and allegedly was told its proposed system was best, it was never offered an opportunity for a "conference" to discuss its proposal with the irrigation manager; and third, that the grantee never established a "set method" of irrigation as the basis for competition among the offerors.

Paragraph 38 of EDA's Standard Terms and Conditions attached to the grant provided that the grantee agreed to comply with EDA regulations, 13 C.F.R. § 301 et seq. (1976). In this regard, 13 C.F.R. § 305.95 set forth procurement standards for the grantee which provided in pertinent part:

"Recipients may use their own procurement procedure regulations which reflect applicable State and local law, rules, and regulations, provided that procurements made with Federal grant funds adhere to the following standards:

* * * * *

"(b) All procurement procedures shall provide for maximum open and free competition to avoid organizational conflicts of interest or noncompetitive practices; and

"(c) Procurement procedures shall meet the following minimum requirements:

"(1) Avoidance of unnecessary or duplicatory items is required.

"(2) Clear and accurate description requirements are necessary ('Brand Name-or-Equal' may be used).

"(3) Utilization of small business and minority owned business sources of supplies and services is required.

"(4) Procurement contracts shall be appropriate for the particular procurement and the project. The 'cost-plus-a-percentage-of-cost' contract shall not be used.

"(5) Formal advertising shall be required unless negotiation, as permitted in subparagraph (6) of this paragraph, is necessary. Procurements of \$2,500 or less need not be so advertised. Awards shall be made to the responsible bidder whose bid is responsive to the invitation, price, and other factors considered. Any and all bids may be rejected when it is in the grantee's interest and such action is in accord with applicable law.

"(6) Competition shall be obtained to the maximum extent possible. However, procurements may be negotiated under the following circumstances and if EDA gives prior approval. When:

"(i) There is a sole source procurement;

"(ii) The procurement is less than \$2,500;

"(iii) The contract is for personal or professional services or the service is to be rendered by an educational institution;

"(iv) No acceptable bids have been received after formal advertising; or

"(v) Federal law authorizes negotiated procurement."

Since there is no indication that the grantee followed procurement procedure reflecting applicable State or local law, rules or regulations, our review is undertaken in terms of the grantee's compliance with the EDA regulations and fundamental principles or norms of Federal procurement. Copeland Systems, Inc., 55 Comp. Gen. 390 (1975), 75-2 CPD 237.

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The EDA regulations allow procurement by negotiation in lieu of formal advertising (competitive bidding) in circumstances where Federal law authorizes negotiated procurement. The present procurement appears to have contemplated offerors taking their own individual approaches to designing and furnishing an irrigation system suited to the particular characteristics of the land involved. We think this type of purchase is one for which negotiated procurement could be authorized under Federal law. In this regard, Federal Procurement Regulations (FPR) § 1-3.210(a)(13) (1964 ed. circ. 1) authorizes negotiation when it is impossible to draft for an invitation for bids adequate specifications or any other adequately detailed description of the required property or services. Accordingly, we do not believe the grantee's use of negotiated procurement in lieu of formal advertising can be considered objectionable under EDA's regulations.

As for the complaint that CII never had a conference to discuss its offer, it is well established under Federal procurement principles that written or oral discussions are required with those responsible offerors whose proposals are within a competitive range, price and other factors considered. See FPR § 1-3.805-1(a) (1964 ed. amend 153). We believe the grantee in the present case in effect determined that only two of the five offers were within the competitive range. Under Federal law, contracting agencies are accorded a reasonable range of judgment and discretion in determining the competitive range; moreover, where an offeror's initial proposal is properly excluded from the competitive range, there is no obligation to conduct discussions with that offeror. See Comten-Comress, B-183379, June 30, 1975, 75-1 CPD 400, and decisions cited therein. In the circumstances, we cannot say there was any impropriety involved in the grantee's not conducting discussions with CII concerning its proposal.

Also, the fact that the grantee did not establish one set method of irrigation as the basis for competition is not in itself objectionable. Under Federal principles of negotiated procurement, agencies sometimes choose to describe their requirements in relatively general terms and request offerors to exercise their inventiveness and ingenuity in developing their own individual approaches to satisfying the agencies' needs. See, for example, Magnetic Corporation of America, B-187887, June 10, 1977, 77-1 CPD 419.

However, in this connection there was a serious impropriety in the procurement which involved both a failure to follow EDA regulations and a conflict with fundamental principles of Federal negotiated

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procurement. While the grantee was not required to establish one set method of irrigation as the basis for competition, we believe the EDA regulations did require that a written solicitation be issued to prospective offerors.

As far as the record shows, no comprehensive written solicitation was ever issued. While the record is not entirely clear on this point, it appears that the Brigham Young University technical assistant sent a list of irrigation machinery to several concerns. With the exception of this, the remainder of the procurement was apparently carried out informally. Several prospective offerors were contacted by telephone and invited to inspect the site so that they could independently design irrigation systems which would be suited to the site conditions. After the site visits, offerors submitted their proposals. There was no specific closing date for receipt of proposals.

While we see nothing objectionable in allowing offerors to visit the site, the informal procedures described above were not an adequate substitute for a written solicitation. 13 C.F.R. § 305.95(b), supra, required "maximum open and free competition," and 13 C.F.R. § 305.95(c)(2) called for "clear and accurate description requirements." While, as already noted, the grantee was not obligated to prescribe a "set method" of irrigation, it should at a minimum have issued a written solicitation giving at least a general description of what was involved in the contemplated project. A written solicitation was also necessary to convey to offerors various requirements which would be imposed on them, if awarded the contract, by virtue of the grant's standard terms and conditions--for example, requirements for certain recordkeeping and access by the Federal Government to the contractor's records. Also, a written solicitation should have provided a common cutoff date for the submission of proposals. Finally, one of the fundamental norms of Federal negotiated procurement is that a solicitation give some reasonably clear indication of the relative importance which the purchaser attaches to price versus technical factors in making an award determination--i.e., whether the procurement is intended to achieve a minimum technical standard at lowest cost, or whether cost is secondary to technical quality.

Due to the lack of an adequate written solicitation in the present case, in our view the procurement procedures were not proper under EDA regulations and fundamental principles of Federal negotiated procurement. While recommending corrective action with respect to the award would not be practicable at this late stage in the procurement,

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by letter of today to the Secretary of Commerce we are suggesting that our conclusion in this regard be brought to the attention of cognizant EDA grant personnel with a view towards attempting to prevent a recurrence of this situation in future procurements under EDA grants.


Deputy Comptroller General
of the United States



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

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November 21, 1977

The Honorable Juanita Kreps
The Secretary of Commerce

Dear Madame Secretary:

Enclosed is a copy of our decision of today in the matter of Complete Irrigation, Inc., in which we review a complaint concerning the award of a contract under a grant by the Economic Development Administration (EDA).

For the reasons indicated in the decision, we believe the procurement procedures followed by the grantee were not proper, due to the lack of an adequate written solicitation. We suggest that this information be brought to the attention of cognizant EDA personnel with a view towards attempting to prevent a recurrence of this situation in future procurements under EDA grants.

Sincerely yours,

Deputy

[Signature]
Comptroller General
of the United States

Enclosure