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L.G. Crowley

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DECISION



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

FILE: B-191112

DATE: February 22, 1978

MATTER OF: Schiavone Construction Co., Inc.

DIGEST:

GAO will not review grantee's determination and subsequent approval by grantor agency concerning correction of bid when material issues involved are before court of competent jurisdiction, unless court expresses interest in receiving GAO's views, which is not case here.

Schiavone Construction Company, Inc. (Schiavone) requests review of a contract awarded by the New York City Department of Environmental Protection, a recipient of a construction grant from the United States Environmental Protection Agency, Region II (EPA) under Title II of the Federal Water Pollution Control Act Amendments of 1972, Pub. Law 92-500, 33 U.S.C. 1281, et seq. (Supp. V 1975) for the construction of an intercepting sewer as part of a water pollution control project serving the Red Hook Section of Brooklyn in New York City.

Under the EPA grant, the grantee advertised for bids on Contract 1A which covered all of the work under the grant. Three bids were received and opened on September 15, 1977. At the public bid opening the "Total Aggregate Bid" for the apparent two low bidders was read aloud as follows:

Schiavone	\$61,891,521
Grow Tunneling Corporation, etc., a joint venture (Grow)	\$61,962,009

It thus appeared that Schiavone was low by \$70,488.

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After bid opening, but on the bid opening day, the grantee reviewed the bids and found that in Grow's bid the Total Aggregate Bid amount did not equal the sum of the 77 sub-bid item prices. The grantee notified Grow by telephone that it had found a discrepancy in Grow's bid and advised Grow to check its arithmetic. By telegram dated the same day, September 15, Grow stated that a check of its sub-bid item prices revealed an error in the Total Aggregate Bid, the correct total being \$61,862,009. This amount was \$100,000 less than that read at the bid opening as the Grow bid and \$29,512 less than the Schiavone bid.

The grantee corrected Grow's Total Aggregate Bid and proposed to award the contract to Grow. Schiavone was notified on September 16, 1977 that the grantee's audit showed Grow as the apparent low bidder. On September 21, 1977, Schiavone protested the grantee's action pursuant to 40 C.F.R. 35.939 (1977). On November 1, 1977, the grantee issued its determination denying Schiavone's protest. On November 7, 1977, Schiavone filed its protest appeal with EPA pursuant to 40 C.F.R. 35.939(e). On January 12, 1978, the Regional Administrator approved the proposed award to Grow in the amount of \$61,862,009. The contract has been awarded to Grow.

During the pendency of the protest before the grantee, Schiavone instituted an action in the United States District Court for the Southern District of New York to compel the grantee to grant Schiavone the administrative grievance procedure to which it was entitled under the EPA regulations. On September 30, 1977, the parties consented to an informal stay until October 3, 1977, on which date the court entered a 10-day temporary restraining order. On October 13, 1977, the grantee agreed to comply with the EPA regulations without prejudice to its assertion that it was not required to do so. After the decision by the EPA Regional Administrator, Schiavone, on January 16, 1978, applied to the district court for a temporary restraining order and a preliminary injunction en-

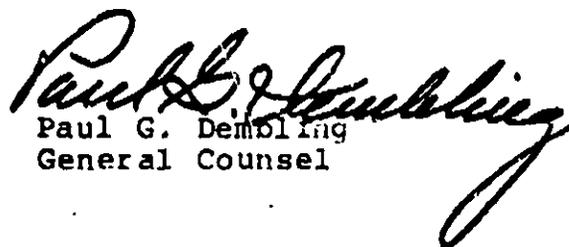
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joining the grantee from awarding the contract to Grow and enjoining EPA from allocating or disbursing any funds to the grantee in connection with this project. The application was denied. On January 20, 1978, EPA and Grow moved for summary judgment which was granted in an opinion entered the same day. On January 27, 1978, Schiavone appealed to the United States Court of Appeals for the Second Circuit, Docket No. 78-6012.

Schiavone, through its counsel, requested this Office to review the matter by letter dated January 16, 1978.

Under the circumstances, we must decline to consider this complaint. It is the policy of our Office not to review matters where the material issues involved have been or are before a court of competent jurisdiction unless the court expresses an interest in receiving our views, which is not the case here. Sovereign Construction Company, Ltd.; City of Philadelphia, B-185874, March 8, 1977, 77-1 CPD 168.

Accordingly, since there has already been a judicial ruling on the merits of the complaint, we will take no action on the matter.


Paul G. Dembling
General Counsel