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K.H. Jones

DECISION



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

FILE: B-190706 **DATE:** July 21, 1978
MATTER OF: Tri-County Metropolitan Transportation
District of Oregon

DIGEST:

Although grantor agency believes grantee awarded contract to nonresponsive bidder, in violation of terms of grant, GAO would not object to funding of grant since it appears that problem resulted from ambiguous specifications which were imposed on grantee by grantor agency and since it appears grantee acted in good faith in awarding contract.

The Urban Mass Transportation Administration (UMTA), Department of Transportation requests a decision regarding the propriety of its funding, pursuant to a capital facilities grant under section 3 of the Urban Mass Transportation Act, 49 U.S.C. § 1602 (1970 and Supp. V 1975), for purchase of mobile radios by the Tri-County Metropolitan Transportation District of Oregon (Tri-Met), which provides mass transportation service in the Portland, Oregon metropolitan area.

The request arises out of a dispute between UMTA and Tri-Met as to whether UMTA-approved specifications in a solicitation issued by Tri-Met require mobile radio equipment to have "tone coded squelch" (TCS). Tri-Met, taking the position that TCS is not required, awarded a contract to Motorola Communications & Electronics, Inc. (Motorola), which, although the low bidder at \$262,879, did not offer the TCS feature. UMTA, after reviewing a complaint of the General Electric Company (G.E.), the next low bidder at \$269,225, determined that TCS was required, that the Motorola bid therefore was nonresponsive, and that it would be inappropriate for UMTA to "participate" in the procurement in light of the award to a nonresponsive bidder

since such an award would contravene the competitive bidding requirements of the grant agreement. In submitting the question, however, UMTA states that it would "welcome [our] view that * * * participation is justified under the circumstances."

For the reasons set forth below, we believe that UMTA is not precluded from participating in the procurement.

I. Background

On August 21, 1975, Tri-Met submitted to UMTA proposed specifications for its mobile radio communications system. These specifications were approved by UMTA subject to six changes. One of these changes related to the requirement for TCS in the system.

The Tri-Met specifications referred to TCS in connection with the base station transmitter, base station receiver, and mobile transmitters. UMTA, by letter of January 28, 1976, suggested that Tri-Met "delete all tone coded squelch requirements for the specifications because it is not needed in systems that have digital data." Tri-Met was also directed to revise its specifications "to conform to the suggested specifications contained in Attachment A." The portion of Attachment A relating to squelch in the receiver provided:

"Squelch Sensitivity (Carrier)	6 db quieting (.25 MV) or less at threshold
Squelch Tone Coded	6 db quieting (.25 MV)"

Tri-Met subsequently deleted the TCS requirement for the mobile transmitters and added the specifications from Attachment A to its "Minimum UHF Receiver Performance Specifications" for mobile receivers as section 6.18.3. It did not, however, delete base station transmitter and receiver TCS requirements from the specifications. Tri-Met states that it received telephonic approval from UMTA on February 16, 1976, to include TCS in the base station transmitter in

order to provide compatibility with existing Tri-Met equipment.

Early in March of 1976, the revised specifications were advertised and bid opening was set for April 21, 1976. After two protests by G.E. to UMTA concerning restrictive specifications (unrelated to squelch), a new bid opening date was set for July 16, 1976. Bids were opened on that date, and G.E. was the low bidder.

By letter dated July 14, 1976, UMTA received a protest from the Pacific-Communications Company, claiming that it had not received an invitation to bid and that the specifications were so restrictive that only Motorola could bid. As a result, UMTA directed Tri-Met to rebid the contract. The specifications were readvertised on August 25, 1976; bid opening was set for September 10.

At this point, both Motorola (on August 27) and G.E. (on September 7) requested that Tri-Met clarify the requirements concerning squelch in the base station and mobile radios. Tri-Met responded to the Motorola request in a letter of September 3, 1976, as follows:

"The requirements for tone squelch decoder [in the base station receiver] has been deleted according to UMTA's directions dated January 28, 1976.

* * * * *

"Minimum UHF Receiver Performance Specifications, Squelch, Tone Coder, page 32. The specifications remain as printed on page 32 - no change."

All prospective bidders, including G.E., received a copy of this response.

Tri-Met responded verbally to G.E.'s letter. G.E. claims to have been told that TCS was required in the base station transmitter and the mobile receivers; Motorola asserts that it was informed that TCS was required in the base station transmitter. Both Motorola and G.E. included TCS for the base station transmitter in their bids.

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Bids were opened on September 10, 1976. Motorola and G.E. were the only bidders, with bids of \$262,879 and \$269,225, respectively. Under UMTA regulations, UMTA concurrence in an award to the apparent low responsive and responsible bidder is not required. (UMTA External Operating Manual, Chapter 3, Section C, at p. 20). Accordingly, Tri-Met awarded the contract to Motorola on September 15, 1976.

On September 16, 1976, G.E. protested to UMTA that the Motorola bid did not encompass TCS equipment and therefore was not responsive. On October 1, 1976, UMTA requested Tri-Met to respond to the G.E. protest and Tri-Met complied on October 8, 1976. By letter dated October 12, 1976, Tri-Met was informed that UMTA found no grounds to delay the procurement and had no objection to awarding the contract to Motorola. In a telegram of October 18, 1976, however, UMTA advised Tri-Met that the approval had been withdrawn. Tri-Met was advised that "there are still unresolved issues that must be cleared up * * *." UMTA then determined, and informed Tri-Met by letter dated December 14, 1976, that since Motorola's equipment did not include TCS, the Motorola bid did not comply with section 6.18.3 of the specifications. UMTA directed Tri-Met to award the contract to G.E. Tri-Met declined to do so.

Tri-Met's basic position is that section 6.18.3 provided performance requirements, rather than equipment requirements, and that therefore the receiver was only to be capable of meeting the requirement for TCS if equipped with that type of squelch. Tri-Met further contends that the receiver specification, 6.18.1, contained the equipment specification for the receiver squelch circuit and required only that "the squelch circuit shall be of the noise compensated adjustable sensitivity type."

Tri-Met's position is supported by consultants hired by Tri-Met to evaluate the specifications in dispute. According to these consultants, section 6.18.1 calls for a type of squelch known as noise or carrier operated squelch, which is distinct from tone coded squelch, performing the same function but in a different manner. Moreover, these consultants advise that section 6.18.3 is properly interpreted as follows:

"This section provides a measurement standard for testing the receiver electrical performance. If the receiver has a carrier squelch, the first sensitivity number is used. If the receiver is TCS equipped, the second sensitivity number is used."

Consultants asked by UMTA to review the specifications reached a different conclusion. They advised that section 6.18.3 was not a measurement standard, but rather the minimum acceptable receiver specification for the mobile unit. They concluded that TCS was required by the Tri-Met bid package.

II. Discussion

UMTA, as a Federal grantor agency, while not a party to the contract awarded by Tri-Met, is responsible for administering its grants so as to reasonably insure compliance with the grant terms and conditions. Thomas Construction Company, Inc., et al., 55 Comp. Gen. 139 (1975), 75-2 CPD 101. The grant required the mobile radio system contract to be awarded to the lowest responsible bidder submitting a responsive bid. Accordingly, UMTA's insistence that Tri-Met not make award to a nonresponsive bidder is consistent with the exercise of UMTA's responsibility under the grant. UMTA's view that the Motorola bid was nonresponsive is based on UMTA's reading of the specifications. We are inclined, however, to disagree with that reading.

It is clear that Tri-Met's original specifications did not contain a TCS requirement for the mobile receivers. Those specifications imposed TCS requirements only in connection with the mobile transmitter and the base station transmitter and receiver. UMTA viewed the requirements as unnecessary and suggested that they be deleted because there was no need for TCS. At the same time, UMTA suggested the use of the specifications which Tri-Met set out in its revised specifications as section 6.18.3. UMTA places its reliance primarily upon the reference to TCS in that section. Nowhere, however, does UMTA explain why it would view TCS as unnecessary and cause the deletion of the original references to TCS while also imposing a TCS requirement through the addition of another

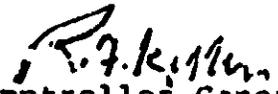
specification provision. We think that under these circumstances the only logical interpretation of section 6.18.3 is that understood and advanced by Tri-Met--that the reference to TCS was a performance requirement having application only in the event TCS equipment was to be furnished. Our view in this respect is reinforced by section 6.18.1 of the specifications, which states that the mobile receiver squelch circuit shall be of the "noise compensated adjustable sensitivity type." This section, which appears to be the specification provision setting forth Tri-Met's requirement for squelch in the mobile receivers, does not require TCS.

Moreover, we note that the conclusion of UMTA's consultants is based not only on their interpretation of section 6.18.3, but also on their understanding that specification sections requiring the TCS feature for the base station transmitter and receiver were not deleted by specification amendment. The TCS requirement in the transmitter section, however, was deliberately retained in the revised specifications to provide compatibility with existing Tri-Met equipment, and has no bearing on what was required for the mobile receivers. The TCS requirement for the base station receiver, although never formally deleted from the specifications as would have been appropriate, was regarded by Tri-Met as "deleted according to UMTA's directions" and both Motorola and G.E. were so informed in writing prior to bid submission. Thus, insofar as Tri-Met and the two competing firms were concerned, there was no TCS requirement for the base station receiver, despite the absence of a formal amendment. Cf. 49 Comp. Gen. 156, 162 (1969); 51 id. 85 (1971); Idaho Forest Industries, Inc., B-189676, December 27, 1977, 77-2 CPD 504.

Nonetheless, we recognize that there is substantial disagreement as to the meaning of section 6.18.3 among the technical consultants, between the agency issuing the specifications and the agency which suggested their use, and between the two bidders. Under such circumstances, it appears that overall the specifications are subject to more than one reasonable interpretation and therefore are ambiguous. 48 Comp. Gen. 757, 760 (1969).

We have held that it is improper to reject a bid as nonresponsive for failure to comply with a specification which is ambiguous or indefinite. Thomas Construction Company, Inc., et al., supra; Essex Electro Engineers, Inc., et al., 54 Comp. Gen. 1068 (1975), 75-1 CFD 372. Rather, the appropriate course is for the contracting agency to cancel the solicitation, revise the specifications, and recompetitively needs so that all prospective bidders can compete equally on the basis of a definitive statement of agency needs. Thomas Construction Company, Inc., et al., supra; Essex Electro Engineers, Inc., et al., supra.

Here, this course of action was not followed. However, we note that award was made by Tri-Met prior to any dispute arising regarding the meaning of the specifications, that UMTA initially concurred with the award to Motorola, and that at this point it is not practical to consider upsetting the award. It is also apparent from the record that Tri-Met acted in good faith in making the award and in believing the Motorola bid was responsive to the specifications and to its needs, and that Tri-Met finds itself in this situation primarily as a result of its efforts to comply with UMTA's directions to delete certain specification provisions regarding TCS and to utilize certain others which included the troublesome TCS reference. Under these circumstances, we do not believe Tri-Met should be penalized by the loss of grant funding, and this Office would not object to UMTA's providing such funding.


Deputy Comptroller General
of the United States