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DECISION



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

FILE: B-195153

DATE: November 1, 1979

MATTER OF: **Nidermeyer-Martin Co.**

DIGEST:

[Protest Alleging Competitive Bidding Not Achieved]

1. GAO will undertake reviews concerning propriety of contract awards by foreign governments under AID grants. Purpose of GAO review is to determine whether there has been compliance with applicable statutory requirements, agency regulations and terms of grant agreement and advise Federal grantor agency, which has authority for administering grant, accordingly.
2. GAO Bid Protest Procedures are not applicable to review of grant complaints; consequently, GAO will consider complaint notwithstanding possible failure to comply with timeliness standards of Bid Protest Procedures.
3. AID's concurrence in grantee's determination of minimum needs (exclusion of Douglas fir and requirement for only CCA and/or Penta preservatives at a 1.25 pounds (#) per cubic foot retention rate) was rationally founded.
4. Bidder who has offered required bid acceptance period but subsequently allows bid to expire may accept award on basis of bid submitted. If at same time bid bond expires, procuring activity is not precluded from considering and/or accepting bid.

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Nidermeyer-Martin Co. (Nidermeyer) has requested our review of what it terms "the arbitrary exclusion of one of [its] * * * principal products [(Douglas fir poles)] from consideration under the [Agency for International Development's (AID) Project No. 388-0021]." The purpose of AID's Project No. 388-0021 "is to provide electricity at reasonable cost for

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rural employment creation and community service facilities, and for rural households, especially for the poor." The three procurements in question are financed by a loan and grant agreement, dated December 15, 1977, between the Peoples Republic of Bangladesh (Bangladesh) and the United States of America, acting through AID.

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Pursuant to the project agreement, Bangladesh established a central organization, the Rural Electrification Board (Board), for the implementation of the rural electrification project. The Board "will take on the responsibilities of promoting, coordinating, financing and technically supervising a nationwide rural electric distribution network." One of its tasks was to make a determination concerning what type(s) of power pole should be used to carry out the project. It would be the Board's responsibility to draft tender documents that conformed to that decision. To assist the Board in its decision-making process the engineering and consulting firm, Commonwealth Associates, Inc. (Commonwealth), was engaged.

As a result of Commonwealth's investigation of the availability of suitable timber in Bangladesh for this project it was determined that, at least in the initial stages, importation of treated wood power poles was essential since the production capabilities of Bangladesh were questionable. Commonwealth advised the Board on the drafting of the technical specifications for wood power poles which included the type of preservative that should be utilized in treating the poles and the minimum preservative retention and penetration needed for protection in the climate and fungus exposure conditions of Bangladesh.

Eight species of trees were found to be acceptable for the procurement of the wood poles. The invitation provided that either pentachlorophenol (Penta) or chromated copper arsenate (CCA) may be used to preserve the wood poles. With respect to the preservative treatment, the invitation, under Technical Specifications, paragraph 2.5, provided:

"Poles supplied under this proposal shall be conditioned, treated, and tested in accordance with REA [U.S. - 46C00027 Rural Electrification Administration] Specification DT-5C except as modified below.

"These poles shall be treated so as to assure a heavy retention of preservative. The amount of retention shall be suitable for pole use in Bangladesh where severe exposure conditions are considered to exist.

"The heavy treatment must result in a retention of at least 1.25 pounds of the active ingredients of penta or CCA per cubic foot in the Assay Zone as specified in Table 10 of REA Specification DT-5C for the species listed therein or in an Assay Zone of from 0.5 in. to 1.0 in. for the Bangladesh species listed in Table G-1 attached hereto and these stipulations shall be considered as minimum treatment requirements.

"The penetration of preservative shall be as listed in the aforementioned Table 10 except that Bangladesh species must have a penetration of one hundred (100) percent of the sapwood."

It is Niedermeyer's position that:

"Properly treated Douglas Fir poles are universally recognized, among knowledgeable technical and scientific personnel as being at least the equal of any of the species of wood poles to which the subject procurement is limited, in addition to possessing definite advantages."

Niedermeyer believes that had it been permitted to submit a bid offering Douglas fir poles, a savings of \$1 million dollars could have been realized. Essentially, Niedermeyer is arguing that the specifications for this project are restrictive, in

that the Board overstates its minimum needs. Specifically, Niedermeyer contends that a specification requiring 1.25 # retention per cubic foot of wood is "100% over any normal requirement" and "increases the cost of the pole by approximately 50%." In this connection, Niedermeyer states:

"* * * even on piling that is used in the ocean, such as San Diego, San Francisco, New Orleans, Hawaii, Vietnam, Korea, and purchased by the Army, Navy, port authorities and the engineering firms which design docks, the retention is [1.00] * * * # per cubic foot of wood with creosote."

Niedermeyer, while pointing out that creosote was not an acceptable preservative for this procurement, questions the decision to not allow the preservative. In support of this Niedermeyer states:

"* * * I cannot understand why, in 1975, creosote was very acceptable in Korea and Vietnam, and 8#, 10#, 12# [(its equivalent .60#)], 15# retention was also acceptable, and now three years later they [REA] change their minds and say creosote should not be used, that only Penta and CCA are acceptable -- and they doubled the retention requirements."

Niedermeyer posits that, if the retention rate was the .60 # standard required by the United States Government for severe climatic conditions and the use of creosote was permitted, more than two treating plants in the United States would have bid and competitive bidding, which was not achieved, would have been realized.

Finally, by telegram dated September 24, 1979, Niedermeyer advises that it has been informed that the apparent low bidder, Koppers Company, Inc. - 0260323 (Koppers), "extended validity of their bid and bid bond two days after [the] date required under [the] bid documents." Niedermeyer believes this renders the bid nonresponsive, requiring its rejection.

AID's position is threefold. First, AID questions whether GAO has jurisdiction to consider this protest since it arises pursuant to a procurement funded by an AID grant to a foreign country. In addition, AID argues that even if GAO has jurisdiction, the complaint is untimely. AID's final contention is that "the exclusion of Douglas Fir from the subject tender by the [Board] * * * of Bangladesh was not 'arbitrary and capricious,' but a reasonable and necessary action that will withstand GAO scrutiny."

An award has recently been made to Koppers.

Jurisdiction

AID believes that GAO should not assert jurisdiction over contracts awarded under AID grants by foreign governments and thus be consistent with our position concerning contracts awarded under loans to foreign governments. AID argues that GAO would be inserting itself in the area of foreign policy since such considerations are as inherent in AID grants as they are in AID loans. AID appears to be arguing that its review role is paramount here because one of its functions is assisting in the determinations concerning conditions of grants which includes establishing the terms necessary for the foreign government's compliance.

In addition, AID points out that the GAO Public Notice entitled "Review of Complaints Concerning Contracts Under Federal Grants," 40 Fed. Reg. 42406 (1975), where we decided to undertake reviews of contract awards of Federal grantees, does not appear to have contemplated grants to foreign governments. Consequently, AID concludes that a foreign government should not be considered a "Federal grantee" within the meaning of the term as used in our prior decisions. Finally, AID expresses concern that since many AID projects, including the instant one, are funded by combinations of grant and loan funds, GAO could be faced with asserting jurisdiction over only a portion of the procurement, resulting in what AID believes would be an untenable position. However, we have been advised by AID that, in the instant situation, only grant funds are involved in the procurement of the wood poles.

AID's request for consistent treatment of AID grants and loans must be denied. It is our policy to decline jurisdiction concerning protests of contract awards where the funds involved are obtained through a loan from the United States Government because those awards involve neither a procurement by or for an agency of the United States nor a procurement by a grantee of the United States. International Research Associates, Inc., B-192376, August 10, 1978, 78-2 CPD 113. The rationale is that the funds involved are exclusively those of the foreign government since the loan is an obligation of the foreign government to be repaid with interest. See Allis-Chalmers Corporation, B-188514, April 5, 1977, 77-1 CPD 235. The situation where the funds involved are obtained through a grant is different since the funds are United States funds and the foreign government has no repayment obligation. However, it is clear that the foreign government has obligations to comply with the terms and conditions of the grant agreement, agency regulations and any applicable statutory authorities.

We believe that our policy of reviewing contracts awarded under Federal grants does include grants to foreign governments. Our Public Notice provides, in pertinent part:

"* * * consistent with the statutory obligation of the General Accounting Office to investigate the receipt, disbursements, and application of public funds, we will undertake reviews concerning the propriety of contract awards made by grantees in furtherance of grant purposes upon request of prospective contractors."

Although our Notice did not specifically mention foreign governments while mentioning State and local governments, it is clear that the Notice did not preclude our review involving grants to foreign governments. Our concern is the source of the funds used (United States Government) rather than the specific circumstances of the recipient. In such cases, our role, as set forth in the Notice and our decisions, is to determine whether there has been compliance with

applicable statutory requirements, agency regulations and the terms of the grant agreement and to advise the Federal grantor agency, which has the authority for administering the grant, accordingly. See Thomas Construction Company, Incorporated, et al., 55 Comp. Gen. 139 (1975), 75-2 CPD 101; Copeland Systems, Inc., 55 id. 391 (1975), 75-2 CPD 237; Sola Basic Industries, B-185505, April 7, 1976, 76-1 CPD 232; and B-168759, April 15, 1970; also, see International Commodities Export Company, B-186822, August 23, 1977, 77-2 CPD 141, where we did not review the propriety of a contract award by a foreign government grantee under an AID grant only because, unlike here, AID did not retain certain rights of approval and there was no requirement affecting the procurement procedures to be used by the foreign government.

AID points out that although the foreign government grantee will be conducting the AID-financed procurement using the former's own contracting laws and regulations, adequate oversight is provided for by AID, the host country and Congress. However, this is not a bar to our review. The foreign government grantee receiving Federal funds takes these funds subject to any statutory or regulatory restrictions which may be imposed by the Federal Government and the specific terms of the grant agreement. We believe our review is appropriate to ascertain whether there has been compliance with the various terms and conditions and advise the Federal grantor accordingly.

Further, because of the above, it is clear that we are not inserting ourselves into the area of foreign policy here. We note that we have previously reviewed complaints concerning awards of contracts under AID grants (e.g., Sola Basic Industries Inc., *supra*), and loans to foreign governments (e.g., B-168809, March 17, 1970; B-165600, September 12, 1969), and neither type of situation resulted in embarrassment, as forecasted by AID, for the United States Government or the foreign government.

In this case, AID has reserved the right to review and approve the terms of the solicitation and the award selection. Further, the grant (project) agreement does

contain instructions to the grantee concerning procurement procedures to be used by the grantee. For instance, the agreement provides in Annex 2, paragraph C.4:

"Any goods and services financed, in whole or in part, under the Loan and/or Grant will be procured on a fair and, to the maximum extent practicable, on a competitive basis."
(Our emphasis added.)

We note that AID regulations set forth at 22 C.F.R. Chapter II (1979), which were promulgated pursuant to the Foreign Assistance Act of 1961, Pub. L. 87-195, 75 Stat. 424 (1961) § 621, provide that "specifications shall be stated * * * in a nonrestrictive manner and in sufficient detail to permit maximum response from prospective suppliers." See 22 C.F.R. § 201.22(a)(1) (1979).

Where competitive bidding is required as a condition for receipt of a grant, we have held that certain basic principles of Federal procurement law must be followed by the grantee in solicitations issued pursuant to the grant. This requires only rationality rather than compliance with technical intricacy in grantee decisions. See Copeland Systems, Inc., supra.

With respect to AID's final contention, concerning our role where there is a combination of grant and loan funds, which is not the situation here, it will be our policy initially to make a determination regarding the significance of the Federal grant funds in the project as a whole. If the amount is found to be significant, we will consider the complaint. See GAO Public Notice, supra.

Under these circumstances, we find that our review of the instant procurement or others like it to be appropriate, given the magnitude of this activity.

Timeliness

AID has raised the issue of the timeliness of Niedermeyer's request for review. AID characterizes the Niedermeyer complaint as a "protest" and requests

that it be dismissed as untimely pursuant to GAO Bid Protest Procedures, 4 C.F.R. 20.2(a) (1979). However, the timeliness requirements of the Procedures are not applicable to the review of grant complaints considered pursuant to our Public Notice. Consequently, we will consider the matter.

Merits

Niedermeyer, as set forth above, is questioning the exclusion of Douglas fir and the type of preservative and retention specified in the solicitation, that is, the Board's determination of its minimum needs.

The Board and AID both adopted Commonwealth's view--exclusion of Douglas fir from the solicitation and requiring only CCA and/or Penta for preserving the wood poles. Commonwealth's view was essentially summarized in its March 22, 1979, letter as follows:

"Bangladesh is a low, humid hot tropical climate, subject to floods during the monsoons. It is a high soft rot area. The treatment specifications were written for this condition. * * *

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"When CCA treatment is to be specified in severe hazard locations such as marine exposures, the AWWA recommendations are for retentions as high as 2.5 pcf CCA.

"CCA and pentachlorophenol were specified for Bangladesh, because both are dissolved active preservatives in a carrier. By increasing the concentration of the preservative, the toxicity or the preservative capability can be increased without increasing the gross volume of the solution. To increase the preservative level of a creosote treatment, the gross volume of creosote must be increased. This increases the gross weight of the pole and the possibility of bleeding which could increase the shipping and handling costs and cause problems with shipping companies.

"Regarding the exclusion of Douglas Fir poles, it should be noted that in wood preservation, the level of treatment is dependent on the pore space in the sapwood. In general, only the sapwood can be treated. In heavy, dense woods, such as Douglas Fir, the sapwood is thin (max. 1-1/2"). Therefore, in Douglas Fir there is a limited space available in the wood to receive and hold the preservative. If rot should develop, in the heart wood of a Douglas Fir pole, as it has in a few cases in southeastern U.S.A., only a thin 1" to 1-1/2" treated shell may remain to support the line. Poles with thicker treated sapwood (approximately 3"), retain sufficient strength to support the line.

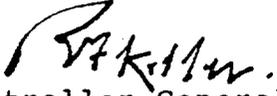
"A southeastern U.S.A. utility which specified more than the AWWA recommended 0.6 pcf, has reported that of 80 Douglas Fir poles, they installed on one line, 80% had serious internal decay in seven years. Twenty-seven and one half percent of these eighty poles were classified as failures and were replaced. They are continuing to check for additional decayed poles."

As indicated above, the purpose of our review is to determine whether the grantee has complied with the applicable statutes, regulations and grant terms which require nonrestrictive procurements assuring maximum competition in the statement of its minimum needs. In this connection, our standard of review is that we will not dispute a procuring activity's minimum needs determination unless it is clearly shown to be unreasonable. See The Babcock & Wilcox Company, 57 Comp. Gen. 85 (1977), 77-2 CPD 368. We acknowledge that the record contains information concerning how the Board could make use of the Douglas fir. However, the record also includes documentation showing that the solicitation's specifications (species of trees, type of preservative and retention rate) reasonably

excluded the Douglas fir and represent the Board's minimum needs. Although Niedermeyer may disagree with such determination, we do not consider that Niedermeyer has shown them to be unreasonable. Therefore, we find that the AID concurrence with the Board's decision to exclude Douglas fir and require only CCA and/or Penta at the 1.25 # per cubic foot retention rate does not contravene the requirements of the AID grant agreement and regulations applicable thereto.

Consequently, Niedermeyer's contention, that competitive bidding was not achieved, is without merit. We observe here that, other than Niedermeyer, six firms responded to two of the procurements and three firms responded to the third. (Niedermeyer apparently bid on another species.)

With respect to Niedermeyer's final contention that Kopper's failure to extend its bid and bid bond as required under bid documents makes the bid nonresponsive, we disagree. We have held that a bidder who has offered the required bid acceptance period but subsequently allows his bid to expire may at his option accept an award on the basis of the bid submitted. See Government Contractors, Inc., B-193548, February 26, 1979, 79-1 CPD 133. In regard to the expiration of the bid bond, it is our position that if the bid bond period expires due to the extension of the bid acceptance period, such does not preclude the procuring activity from considering and/or accepting the bid. See Engle Acoustics & Tile, Inc., B-190467, January 27, 1978, 78-1 CPD 72.


Acting Comptroller General
of the United States