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DECISION

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

[Request for Reconsideration]

FILE: B-194151 DATE: October 14, 1980

MATTER OF: The Harris Corporation--Reconsideration

DIGEST:

Prior decision is affirmed upon reconsideration as earlier decision did not find grantee could not waive minor irregularities, as alleged by requester, thereby restricting competition. Items offered which were functionally equivalent to design specification were accepted by grantee except in two areas. We did not decide merits since such decision would be on purely technical dispute as to equivalency of two items and only possible recommendation was propriety of funding Federal portion of program.

The Harris Corporation (Harris) has requested reconsideration of our decision of July 16, 1980, in the matter of The Harris Corporation--Reconsideration, B-194151, July 16, 1980, 80-2 CPD 31.

The July 16 decision was a reconsideration of our decision (The Harris Corporation, B-194151, April 22, 1980, 80-1 CPD 282) on Harris' request for review of the award of a contract to the RCA Corporation for television broadcast equipment by the Milwaukee Area Technical College (MATC). The contract was funded, in part, by a Federal grant.

Our initial decision of April 22, 1980, found that since MATC had, in the solicitation, specifically reserved the right to waive any discrepancies or irregularities in the equipment offered, it appeared MATC had overstated its minimum needs in the specifications and that particular features of the RCA equipment were not essential. Because we concluded

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that MATC did not obtain maximum open and free competition, we recommended that the grant administrator, National Telecommunciations and Information Administration (NTIA), Department of Commerce, determine whether to withhold the Federal grant funds or whether extenuating circumstances may make it appropriate to fund the grant notwithstanding the degree of competition.

Upon a request for reconsideration by MATC, our July 16 decision stated:

> "We note that Wisconsin's VTAE (Vocational, Technical, and Adult Education) Procurement Policy was applicable to this procurement. VTAE provides that minor irregularities in bids may be waived but that irregularities which could substantially change the bids made by other vendors may not be waived. The VTAE example is a specification calling for swivel chairs and a bid offering non-swivel chairs. According to VTAE, this irregularity could not be waived since bids could change substantially if other vendors were allowed to rebid on the non-swivel chairs.
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> "Although it remains our position that the above-quoted clause, standing alone, is objectionable for the reasons stated in our prior decision, we are persuaded that MATC could not waive other than minor irregularities under the clause because of the applicable local law on the matter. Upon reconsideration, therefore, we conclude that the clause did not prevent open and free competition for this procurement."

We found it unnecessary to resolve the merits of Harris' original complaint--whether the specifications were restrictive--because our original recommendation only affected the administration of the grant by NTIA

(i.e., grant funding) and the contract had been substantially performed. We withdrew the prior recommendation that NTIA consider withholding of the grant funds.

Harris contends that our July 16 decision ignores other clauses in the solicitation that invited offerors to take exception to the specifications. Harris cites paragraph 9 of the Standard Conditions of Bid and section IV.A.4 of the Specifications which read as follows:

Paragraph 9

"Any deviation from Standard Condition of Bid or Specifications or exceptions taken shall be described fully and appended to the bid form on the bidder's letterhead over the signature of the persons signing the bid form. In the absence of any statement of deviation or exception, the bid shall be accepted as in strict compliance with all terms, conditions, and specifications, and the bidder shall be liable therefor."

Section IV.A.4

"The equipment bid must be new and of current manufacture, and must conform to the requirements of the pertinent specifications. A point by point reply, indicating compliance or deviation from the specifications shall be included as a part of the bid. If the equipment bid does not meet the requirements of the specifications, the bidder must take exception to the specification(s) and provide details and explanation of the extent to which the equipment bid deviates from the specification."

Further, Harris argues that it was given assurances by MATC, which is disputed by MATC, prior to the submission of bids that equipment offering performance characteristics similar to the specified equipment

would be considered even if it did not meet the detailed specifications. Finally, Harris states that because of the above contentions, our Office must decide the merits of Harris' request for review (i.e., restrictive nature of the specifications), notwithstanding the advanced stage of performance.

We think Harris has misconstrued our July 16 decision. In that decision we did not conclude that MTAC could only waive minor irregularities. As Harris pointed out in its request for reconsideration, the report from NTIA, on the original request for review, made clear that functionally equivalent items could not be rejected merely because of noncompliance with design specifications. We agree that the invitation permitted such bids. The purpose of the clauses cited by Harris was to obtain an item which was functionally equivalent and to place the burden on the bidder to demonstrate equivalency of the offered item. Our initial decision found the clause regarding waiver of irregularities to be too broad but upon reconsideration, when the clause was read in conjunction with the VTAE policy, we found it to be acceptable. Under the VTAE policy, those deviations which could substantially change the bids (i.e., swivel versus nonswivel chairs) could not be waived.

In fact, MTAC did accept the proposed Harris equipment where it was functionally equivalent. The consulting engineers who reviewed the bids for MATC found that the Harris equipment did not meet the exact specifications in numerous areas, but concluded that the intent of the specifications had been met. However, in two areas, the type of antenna proposed (batwing versus the required traveling wave antenna) and the transmission line equipment (lack of wristband expansion joint), the consulting engineers did not find the equipment offered by Harris to be functionally equivalent.

Harris contends that since the specifications were based on RCA equipment, only RCA equipment could comply because there was no listing of salient characteristics. However, we do not agree with the contention since the IFB made clear that design specifications were waivable if the item retained functional equivalency.

Finally, Harris' complains about our failure to rule on the merits of its complaint. Initially, when we concluded that the invitation was defective, we recommended that MATC should consider withholding its funding of the project even though the contract had been substantially performed. However, upon reconsideration, we did not find the invitation to be defective. As a result, the remaining question was the propriety of the technical evaluation of MATC's consulting engineers regarding equivalency of the offered equipment. Our concern in connection with the instant request for review relates to the propriety of expending Federal grant funds. Where, as here, there was no allegation of bad faith and the grantee had agreed with the views of the engineers, we do not consider that Federal grant funds should be withheld on the grounds of differences in the bona fide technical judgments made.

While Harris has cited several cases where performance was completed in a contract under a grant and we still ruled on the merits, those cases either involved specifications which were restrictive as written in the invitation or other matters of general concern to the administration of the agency's grant program.

Accordingly, our decision of July 16, 1980, is affirmed.

Milton J. Socolar

For the Comptroller General
of the United States