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Mr. Col

DECISION



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

[Protest Alleging Solicitation Specification Unduly Restricts Competition]

FILE: B-192361

DATE: March 4, 1981

MATTER OF: Carolina Concrete Pipe Company

DIGEST:

1. GAO will consider complaint that specification in solicitation issued by Environmental Protection Agency grantee unduly restricted competition in view of fundamental requirement for full and free competition.
2. Time limits for filing protests set out in GAO's Bid Protest Procedures do not apply to grant complaints.
3. Environmental Protection Agency Regional Administrator, in response to complaint by concrete pipe supplier, found that grantee's consulting engineer's technical opinion, based on experience and analysis, that only clay sewer pipe will meet needs in connection with construction of waste treatment facility, adequately supported solicitation restriction to clay pipe. Subsequent complaint to GAO which essentially disputes grantee's judgment is denied, since complainant has not shown that Regional Administrator's finding was unreasonable.

Carolina Concrete Pipe Company (Carolina) complains that the specification for sewer pipe in a solicitation issued by the Chester Sewer District, Chester, South Carolina, to construct a waste treatment facility and accompanying sewer line unduly restricted competition. The project is to be funded by a 75-percent grant from the Environmental Protection Agency (EPA) under Title II of the Clean Water Act, 33 U.S.C. § 1281 et seq. (1976).

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The grantee specified the use of only vitrified clay pipe, whereas Carolina manufactures concrete pipe. Carolina filed a protest with the grantee before bids were to be opened, in accordance with EPA's procedures at 40 C.F.R. § 35.939 (1979). In denying Carolina's protest, the grantee defended its refusal to permit the use of concrete pipe in large part on the grounds that the concrete pipe in its existing system, which was installed in the 1950's, has been severely eroded by sulfuric acid, which is formed when hydrogen sulfide gas in the pipe reacts with water vapors. Carolina's position was that there had been no analysis to determine whether there would be similar difficulty with the new system and that concrete compositions presently available have resolved the hydrogen sulfide problem to a large extent.

Carolina appealed the grantee's finding to the EPA Regional Administrator. The appeal was dismissed because in the Regional Administrator's view the grantee had adequately substantiated the selection of the vitrified clay pipe. The Regional Administrator also noted that it appeared that there would be adequate competition among vitrified clay pipe suppliers. The dismissal was affirmed by the Regional Administrator in response to Carolina's request for reconsideration.

We believe that the Regional Administrator's decisions were reasonable.

THRESHOLD MATTERS

Before discussing the merits of the complaint, we will deal with a number of threshold matters that have been raised by either EPA or Pomona Pipe Products Company (Pomona), which we understand supplies clay pipe:

- (1) The General Accounting Office's review role;
- (2) Whether the complaint is moot;
- (3) The timeliness of the complaint; and
- (4) Carolina's "standing."

(1) General Accounting Office Review Role

EPA suggests that it is inappropriate for our Office to review Carolina's complaint on the basis that "any determination of the need for increased competition must appropriately be left to EPA under its statutory and regulatory authorities and standards.* * * GAO [should] not entertain protests which involve issues fundamental to the nature of competition in procurements under EPA construction grants."

EPA has often suggested for various reasons that our review of complaints arising from its grant awards is inadvisable and inappropriate. See, e.g., Copeland Systems, Inc., 55 Comp. Gen. 390 (1975), 75-2 CPD 237. However, we stated in Edward L. Nezelek, Inc., B-192478, June 19, 1980, 80-1 CPD 431:

" * * * In our public notice entitled 'Review of Complaints Concerning Contracts Under Federal Grants', 40 Fed. Reg. 42406, September 12, 1975, we advised that our Office would undertake reviews concerning the propriety of contract awards made by grantees in furtherance of grant purposes upon the request of prospective contractors. We believe that our review serves a useful function and is appropriate to the exercise of our statutory responsibility to investigate all matters relating to the application of public funds (31 U.S.C. §§ 53, 54 (1976)) where the involvement of Federal funds in the grant project is considerable. We undertake such reviews to insure that grantor agencies are requiring their grantees, in awarding contracts, to comply with any requirements made applicable by law, regulation or the terms of the grant agreement * * *."

We believe that our review is particularly appropriate where the complaint involves whether the fundamental requirement for full and free competition has been met. See, e.g., BBR Prestressed Tanks, 56 Comp. Gen. 575 (1977), 77-1 CPD 302.

(2) Whether the complaint is moot

Both the EPA and Pomona point out that after Carolina's complaint was filed in our Office the Regional Administrator determined in a second unrelated protest that the grantee's specifications were defective. EPA required that the grantee resolicit its requirements. EPA and Pomona argue that once the new solicitation was issued, Carolina's complaint to our Office became moot.

However, we have been informally advised by EPA that the grantee's resolicitation included the same specification in issue here. Since EPA and the grantee have already reviewed the challenged specification under what for all material purposes were identical circumstances, and found the specification to be proper, we believe it would be unreasonable to require Carolina to duplicate its steps in bringing this matter before our Office.

(3) Timeliness

Pomona argues that the complaint is untimely under our Bid Protest Procedures, 4 C.F.R. part 20 (1980), and thus should not be considered on the merits.

However, while we have recognized the necessity for the diligent filing and expeditious consideration of grant complaints, see Malott & Peterson-Grundy, Contractors; Vibra Whirl and Company, B-191887, January 2, 1979, 79-1 CPD 3, the specific time limits set out in our Bid Protest Procedures apply only to protests against procurement actions by Federal agencies, not grantees.

(4) Carolina's "standing"

Pomona contends that at best Carolina is only a potential supplier of materials to the prime contractor and therefore is not a proper party to seek GAO review. Pomona relies on our decision in Hydro-Clear Corporation, B-189486, February 7, 1978, 78-1 CPD 103, where we declined to review a complaint by a proposed subcontractor (not excluded from the competition by the grantee's specifications) that the bid in line for the prime contract award was not responsive. There, we stated our view that in that situation the legitimate recognizable interests in the prime contract award were

adequately protected by limiting the class of parties eligible to request our review under our Public Notice at 40 Fed. Reg. 42406 to firms that submitted bids, none of which had complained.

However, Carolina's complaint is not against the award of a prime contract to a particular bidder, but against an allegedly unduly restrictive specification in the grantee's solicitation which precludes Carolina from participating in the project as a subcontractor. In direct Federal procurements we consider protests by potential subcontractors against relevant specifications in the solicitation for the prime contract basically because the Government is responsible for the specifications and because we recognize that in such situations the subcontractors' interests would not be adequately protected if our forum was restricted to firms competing for the prime contract. See Hydro Conduit Corporation, B-188999, October 11, 1977, 77-2 CPD 282; Truland Corporation; Compuguard Corporation, B-189505, September 26, 1977, 77-2 CPD 226.

Our review of Carolina's complaint is consistent with both our policy in direct Federal procurements and our review role in grant situations as discussed above.

DISCUSSION OF MERITS

Before approving grants for treatment works projects, the Administrator of EPA is required by 33 U.S.C. § 1284(a)(6) to determine:

" * * * that no specification for bids in connection with such works is written in such a manner as to contain proprietary, exclusionary, or discriminatory requirements other than those based upon performance unless such requirements are necessary to test or demonstrate a specific thing or to provide for necessary interchangeability of parts and equipment, or at least two brand names of comparable quality or utility are listed and are followed by the words 'or equal' * * *."

The implementing regulations at subparagraph (1) of 40 C.F.R. § 35.936-13(a) add that a grantee must "be prepared to substantiate the basis for the selection" of a single material or class of material if a single material or class

is specified. Subparagraph (2) of the regulation requires that project specifications provide, to the extent practicable, for the maximum use of materials "which are readily available through competitive procurement." The statute and regulations are consistent with the Federal norm regarding the requirement for full and free competition and the avoidance of restrictive specifications. BBR Prestressed Tanks, supra. Thus, restrictive specifications that do not reflect the grantee's bona fide performance needs are improper.

Further, EPA's Process Design Manual for Sulfide Control in Sanitary Sewer Systems (1974) (Manual) sets forth the engineering considerations that generally should go into a grantee's determination of whether and how to replace a wastewater system. The Manual suggests that any grantee planning to install or replace pipe should conduct investigations as to the character of the wastewater, including performing a flow/slope analysis of the system and examining the total sulfide, dissolved sulfide, oxygen reaction rate, temperature, and acid and other conditions in the wastewater. EPA Manual at p. 45.

The grantee's reason for specifying clay pipe here was that some portions of its existing concrete pipe system weaken and collapse due to erosion caused by sulfuric acid. The EPA Regional Administrator's decision contains the following description from a report submitted by the grantee's consulting engineer regarding the problems encountered by the grantee with its present system:

" * * * concrete pipe, which comprises approximately eight percent of the total system, creates the majority of operation and maintenance problems. * * * the concrete pipe is eaten away at the manhole entrance. On another concrete line which was installed around 1952, severe problems have occurred since approximately 1962. Some of the problems involved are:

1. Nearby work tends to destroy the weakened concrete pipe;
2. Additional service connections are virtually impossible to make without the pipe collapsing; and,
3. Rodding is virtually impossible."

The grantee's consulting engineer anticipated that in view of soil, slope and other factors in the Chester area, conditions similar to those that historically have caused problems would exist within the new sewer lines. In this respect, the record shows that clay, the specified material, is inert and will not erode when exposed to sulfuric acid.

The crux of Carolina's complaint is that the grantee chose to specify a single material without sufficiently substantiating the exclusion of concrete pipe. Specifically, Carolina argues that the grantee's consulting engineer failed to perform an adequate engineering analysis. Carolina refers to a letter from the grantee to its consulting engineer six months prior to the issuance of the engineer's report requesting the use of clay pipe. The absence of supporting data in the engineer's report, Carolina believes, suggests that the engineer in effect simply endorsed the grantee's request that clay pipe be used. As a result, Carolina argues, neither the consulting engineer nor the grantee gave concrete pipe, particularly certain types of concrete pipe such as that composed of calcareous aggregate, fair consideration.

Carolina proffered to both the grantee and the Regional Administrator evidence to the effect that some forms of concrete pipe have been shown under both test and actual conditions to be able to withstand exposure to hydrogen sulfide and sulfuric acid for between 75 and 120 years. The evidence shows that, for example, concrete pipe composed of calcareous aggregate may be an acceptable alternative to vitrified clay pipe in some instances because it presents a much larger alkaline surface with which the sulfuric acid must interact and thus promotes a more uniform corrosion mechanism (the rate of corrosion in concrete pipe apparently is inversely proportional to alkalinity). In this regard, the EPA Manual recognizes the use of calcareous aggregate in particular as one method for combating sulfide corrosion.

In addition, Carolina submitted to the EPA Regional Administrator expert testimony and other evidence showing that alternate design approaches have been used successfully to overcome hydrogen sulfide problems in other areas of the country. The evidence showed that at least Carolina's principal expert witness prepares designs to assure that concrete pipe can be offered.

In direct Federal procurements we have stated that the determination of a user's minimum needs and how best to meet

them consistent with the requirement for the broadest practicable competition primarily is the user's responsibility, in part because the user is the one most familiar with the conditions under which the needs have arisen and have been met previously. See Therm-Air Mfg. Co., Inc., B-194185, et al., November 20, 1979, 79-2 CPD 365.

On that basis, we believe that grantee's unsatisfactory experience with its existing concrete pipe is extremely significant in determining the grantee's minimum performance needs. Moreover, we do not agree with Carolina that Chester's experience in itself improperly led to the exclusion of all concrete pipe products without some consideration of concrete pipe currently being produced.

Our review in these types of complaints is limited to whether the EPA Regional Administrator's decision was reasonable. See Garney Companies, Inc., B-196075.2, February 3, 1981, 81-1 CPD _____. Further, where the complaint involves a technical dispute our Office will question the expert technical opinion of the user only if clearly shown to be unreasonable. See METIS Corporation, 54 Comp. Gen. 612, 615 (1975), 75-1 CPD 44; 46 Comp. Gen. 606 (1967).

The record here shows that the grantee's consulting engineer in fact performed the types of analyses and investigations suggested in the EPA Manual or at least had knowledge of the relevant factors. We recognize that the engineer's analysis appears largely to have involved materials other than calcareous aggregate. However, the fact is that the consulting engineer's pre-solicitation report, which we note was prepared with knowledge of Carolina's basic position, clearly reflects the engineer's expert technical judgment that under the wastewater and soil conditions in Chester the risk of using concrete pipe is simply too great. The consulting engineer has maintained that position, supported by the grantee, throughout the rather extensive proceedings before both the grantee and EPA.

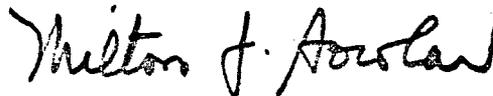
In our view, the matter involves what essentially is a technical dispute between Carolina and the grantee. The proceedings before the grantee and EPA contain Carolina's evidence and expert testimony that concrete pipe with calcareous aggregate is used under certain soil conditions in certain regions of the country notwithstanding the presence of sulfuric acid in the system. Chester and its consulting engineer, however, are adamant

that based on experience and knowledge of relevant conditions in their own geographical region, concrete pipe will not meet their needs.

We have consistently held that in technical disputes a protester's disagreement with the user's opinion, even when the protester's position is itself supported by expert technical advice, does not invalidate the opinion. See Tyco, B-194763, B-195072, August 16, 1979, 79-2 CPD 126. Rather, the complainant has the burden to affirmatively prove its case. Reliable Maintenance Services, Inc.--Request for Reconsideration B-195103, May 24, 1976, 76-1 CPD 337.

In view of the circumstances as described above, we cannot say that the Regional Administrator's opinion that the grantee adequately substantiated the decision to specify vitrified clay as the only acceptable pipe material was unreasonable.

The complaint is denied.



Acting Comptroller General
of the United States