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DECISION



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

FILE: B-205914.2

DATE: December 20, 1982

MATTER OF: Tennant Company

DIGEST:

Where grantee drafted specifications around specific product and grantee permitted the submission of deviating products for "approved equal" status, failure of grantee to refute complainant's assertions that its product met or exceeded certain disapproved deviations from the specifications results in conclusion that specifications exceeded minimum needs and were unduly restrictive of competition.

Tennant Company (Tennant) complains of the award of an advertised contract for two industrial scrubbers to American Lincoln, Division of Scott & Fetzer Co. (American Lincoln), by the Southeastern Michigan Transportation Authority (SEMTA), pursuant to grant No. MI-03-0061, administered by the Urban Mass Transportation Administration (UMTA). We sustain the complaint.

Under the original solicitation for this requirement, Tennant offered its model 550, which the company asserts met all the specifications of that solicitation. For reasons not apparent from the record, SEMTA canceled the solicitation for lack of "advertising" and issued a new solicitation. Tennant again bid model 550, claiming that it "met the specifications in every respect with no exceptions." The specifications were apparently drawn around Tennant's model 550.

SEMTA proposed to award this contract to American Lincoln. Tennant asserted that American Lincoln's offered model 7000 did not meet the specifications, and "is actually a much smaller piece of equipment, and not in the class or size required." Tennant complained to SEMTA and our Office, alleging that the model 7000 failed to meet 14 requirements

of the solicitation specifications. UMTA, acting pursuant to section 3(a)(2)(C) of the Urban Mass Transportation Act of 1964 (49 U.S.C. § 1602(a)(2)(C)) (1976), would not agree to SEMTA's request for concurrence in its proposed award and instructed SEMTA to reject all bids, revise the solicitation to maximize competition, and readvertise. UMTA found that SEMTA had not adhered to the specifications of the IFB and had not provided a process for obtaining approved equals.

The instant solicitation was issued with new specifications. We note that the solicitation contained no "Brand Name or Equal" clause. Following a procedure established by SEMTA at a prebid conference, Tennant, proposing to bid its smaller model 527, which admittedly did not meet several of the requirements, submitted a request to SEMTA that the model 527 be approved as an "equal" product. SEMTA approved a large number of deviations, but disapproved others which were deemed essential. Tennant appealed to SEMTA, contending that the specifications were unduly restrictive and that only American Lincoln could comply. SEMTA denied that the revised specifications were discriminatory and stated that Tennant could bid its larger model 550, which would meet the specifications.

Tennant and American Lincoln submitted the only bids. Tennant was the low bidder but, as its offered model 527 had not been given "approved equal" status, the Tennant bid was rejected as nonresponsive.

SEMTA requested that UMTA concur in the award to other than the low bidder. SEMTA submitted a "needs analysis" to UMTA. UMTA concurred in the award to American Lincoln, but advised SEMTA that UMTA's participation in the cost of the contract was dependent upon resolution of Tennant's complaint to this Office. SEMTA has informed us that award to American Lincoln was made in July 1982 and, as a 30-day delivery period was required, we assume the contract has been performed.

Tennant contends that the specifications of the instant solicitation are unduly restrictive in that they are unnecessarily written specifically around American Lincoln's model 7000. Further, Tennant has provided the detailed information submitted to SEMTA before bid opening to support

its position that the model 527 is equivalent to the model 7000. Tennant states that even though model 527 has a 43-inch total cleaning path rather than the 50-inch specified, because of the 527's "greater aggressiveness and far superior water pickup, it can actually scrub more square footage per man hour." It further states that while the 527 has a 65-gallon solution tank as opposed to a 100-gallon tank as specified, "because of the unique Tennant patented scrubbing principle and water reuse of approximately 40 percent the difference * * * becomes really only a difference of 9-10 gallons."

SEMTA based its "needs analysis" favoring model 7000 on a cost per man hour evaluation based on design differences between the products. SEMTA determined that the model 7000 would "clean * * * in 47 minutes at [\$16.00] per hour, which represents a labor cost of \$12.64/day or \$3,286.40 per year; whereas, the Tennant 527 requires 1.76 hours to clean the same area at \$16.00 per hour or \$28.16/day or \$7,321.60 per year."

A solicitation provision which limits potential offerors' freedom to propose products they believe are suitable is an undue restriction on competition unless the contracting activity can establish a prima facie basis for the requirement. Therefore, a contracting agency may impose a restriction on the competition only if it can be shown that after careful consideration of all relevant factors, the restriction is deemed necessary to meet the agency's actual minimum needs, since the benefit of competition, both to the Government and to the public in terms of price and other factors, is directly proportional to the extent of the competition. Thus, this Office has taken the position that restrictions on competition need not be regarded as unduly restrictive when they represent the actual needs of the agency. See Data Card Corporation, Orbitran Division, B-202782, October 8, 1981, 81-2 CPD 287.

From the record, it appears that SEMTA's revised specifications are virtually copied from American Lincoln's model 7000 specifications. This is not in and of itself improper, as long as the agency establishes that those specifications are reasonably related to its minimum needs. Precision Dynamics Corporation, 54 Comp. Gen. 1114 (1975),

75-1 CPD 402. However, SEMTA has not adequately defended the reasonableness of those needs.

SEMTA has not responded to Tennant's specific contentions concerning the alleged equivalency of the model 527 to the model 7000, neither in its reply to Tennant's request for "approved equal" status, nor in its "needs analysis" submitted to UMTA. SEMTA's "needs analysis" does not consider the allegedly superior aspects of the model 527, which allegedly compensate for the design differences between the products. While we do not decide the issue, we note that if the smaller 43-inch path is offset by the model 527's greater scrubbing action, or if the smaller capacity solution tank is offset by the patented water reuse feature, then it is possible that the model 527 would be able to clean approximately the same area as the model 7000 in an equivalent time. In sum, SEMTA merely restated certain design differences between the models without any apparent consideration of Tennant's position.

When SEMTA revised its specifications in accordance with UMTA's instruction to maximize competition, the effect was to eliminate competition. SEMTA's justification that Tennant could have bid its model 550 is irrelevant. It is clear that the model 550 is a much larger and more expensive scrubber which would far exceed SEMTA's minimum needs. This is evidenced by SEMTA's prior willingness to accept the American Lincoln bid, which deviated in many significant respects from specifications written around the model 550. By drafting specifications around the model 7000 and then allowing for deviations to an unspecified extent, SEMTA's conduct shows that, to some degree, the specification exceeded minimum needs. This, combined with the absence of an adequate rebuttal to Tennant's position on the unapproved deviations, calls for our concluding that the specifications were unduly restrictive.

The complaint is sustained.

In these circumstances, we would ordinarily recommend resolicitation. As mentioned above, delivery of the scrubbers has taken place, so this Office cannot recommend remedial action. As for UMTA's participation in the cost

of the contract, this Office does not object to the funding of the grant. We see no evidence of lack of good faith on SEMTA's part which would impact adversely on such funding. See Tri-County Metropolitan Transportation District of Oregon, B-190706, July 21, 1978, 78-2 CPD 58. However, we are advising UMTA, by letter of today, that "needs analyses" from grantees in support of specifications be carefully scrutinized to assure adequate competition.

for *Milton J. Fowler*
Comptroller General
of the United States