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

FILE: B-207441 **DATE:** June 2, 1983

MATTER OF: Anderson and Wood Construction Company, Inc.

DIGEST:

1. Protest against award of subcontract on behalf of Government by Department of Energy prime contractor is appropriate for GAO review under standards of Optimum Systems, Inc., 54 Comp. Gen. 767 (1975), 75-1 CPD 166. Nonunion protester, whose bid prime contractor did not open, is interested party, in particular circumstances, for purposes of protesting requirement for subcontractors to have union agreement notwithstanding that protester withdrew its bid.

2. GAO will consider protest challenging requirement by Department of Energy prime contractor for subcontractors to have agreement with onsite unions since significant issue is involved.

3. Requirement by Department of Engergy prime contractor for subcontractors to have agreement with onsite unions neither unduly restricts competition nor conflicts with Federal norm so long as prime contractor permits nonunion firms to compete for contracts and affords them opportunity to seek prehire agreements under the National Labor Relations Act.

Anderson and Wood Construction Company, Inc. (Anderson), protests a subcontract procurement conducted on behalf of the Department of Energy (DOE) by the Morrison-Knudsen Company, Inc. (MK), a DOE construction management contractor. All parties agree that this subcontract protest is appropriate for our review under our decision in Optimum Systems, Inc., 54 Comp. Gen. 767 (1975), 75-1 CPD 166.

We deny the protest.

25766

MK initiated this procurement in February 1982 by issuing a "request for proposals" (RFP) for the upgrading of an electrical substation at DOE's Idaho National Engineering Laboratory (INEL). The RFP stated that proposals were due on March 18, 1982, "after which the public bid opening will promptly commence." (In view of this language, we will treat this as an advertised procurement.) MK solicited bids from 11 firms and also provided copies of the solicitation to several contractor associations.

MK is party to a collective-bargaining agreement with the unions in the INEL area. The agreement stipulates, in part, that MK will not subcontract any work at the INEL site to any contractor which is not also party to a union agreement. This agreement was not mentioned in the solicitation.

During the first week of March 1982, Anderson contacted MK to obtain a copy of the solicitation. This contact precipitated written advice to Anderson from an MK representative that Anderson "would not be accepted" unless MK received Anderson's "commitment to use union personnel." On March 17, Anderson representatives met with officials of the local union of the International Brotherhood of Electrical Workers (IBEW). As we understand the meeting, the local asked that Anderson accept a companywide bargaining agreement applicable anywhere within the local's jurisdiction, while Anderson sought an arrangement applicable only to the site. The meeting ended without agreement.

Anderson submitted its bid and a sealed letter on March 18. At the appointed time, MK's representative opened and read the other bids and then opened Anderson's letter. The letter stated that Anderson fully intended to abide by all INEL practices but that Anderson had been unsuccessful in working out an accord with the local union; therefore, the company "[found] it very difficult to comply with [MK's] 'union-only' request." After reading Anderson's letter, MK's representative announced that the public bid opening was closed, but did not open Anderson's bid. DOE insists, however, that MK informed Anderson that it would "take Anderson's bid under advisement." After some discussion, Anderson sought and obtained the return of its unopened bid.

Anderson protested orally to MK on April 6, 1982, and was advised by MK that its protest would have to be filed in writing within 10 days in order to be considered. Anderson

filed its protest with MK on April 12. DOE denied Anderson's protest on April 28. Anderson filed this protest with our Office on May 10, 1982.

Anderson contends that MK's failure to open its bid was tantamount to a rejection of its bid solely because Anderson is a nonunion firm and argues that MK excludes nonunion firms from the competition for these subcontracts. Anderson asserts that this policy is unduly restrictive and violates the requirement that prime contractors contracting for the Government adhere to the "Federal norm"--a shorthand reference to certain fundamental principles of Federal procurement law applicable to subcontract awards reviewable by our Office. Anderson also asserts that MK cannot justify this policy on the basis of concern for labor unrest because the onsite unions cannot strike against MK or any other contractor at INEL to enforce the restrictive subcontracting clause in MK's collective-bargaining agreement without violating the "no-strike" provisions of that agreement or the National Labor Relations Act. Anderson also asserts that if the unions were to picket Anderson, it would neither disrupt Anderson's work nor, given the remote location of the substation, would it affect other work at INEL. Last, Anderson contends that the restrictive provisions of MK's collective-bargaining agreement are irrelevant to this protest because "the only issue here is whether the union-only practice is in conformance with the 'federal norm,' not whether the practice has its origins in a collective-bargaining agreement."

MK and DOE assert that Anderson's characterization of MK's policy as being one of excluding nonunion bidders is inaccurate. As stated by DOE:

> "It is MK's policy to solicit proposals from all qualified suppliers as evidenced by twenty four open shop firms who are on MK's bid lists. In addition, MK has awarded subcontracts to fifteen open shop firms. In each case the successful bidder has been able to negotiate a specific project agreement with the appropriate union which is limited to the work at the specific INEL job site. MK has never rejected a low bidder on the basis that it was nonunion. Based upon our previous experience

> at the INEL site and the attached letter from the IBEW [see below *], we believe that * * * Anderson and Wood * * * could have entered into a project agreement applicable only to the Scoville Substation job site."
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> * The IBEW letter to which MK refers states, in part, "On the question you asked, if we would have worked out an agreement on the substation if Anderson had gotten the job, the answer is yes."

DOE and MK also argue that MK's policy is a reasonable restriction on competition based on MK's recognized interest in avoiding labor strife and assert that the restrictive provision on which MK bases this policy is part of a legally enforceable collective-bargaining agreement with which MK is obligated to comply.

DOE and MK also question the timeliness of Anderson's protest under our Bid Protest Procedures, 4 C.F.R. part 21 (1983). In this respect, DOE and MK contend that Anderson is protesting an "impropriety apparent in a solicitation" and that Anderson therefore should have filed its protest prior to bid opening. See 4 C.F.R. § 21.2(b)(1). Alternatively, DOE and MK argue that Anderson's protest is untimely because it was not filed within 10 working days of bid opening--when Anderson, at the latest, should have learned of the basis for its protest. See 4 C.F.R. § 21.2(b)(2). DOE and MK argue that, under either interpretation of events, Anderson's protest is untimely.

DOE also argues that we have considered the precise issue here--whether a "union-only" policy comports with the Federal norm--in Motley Construction Company, Inc., B-204037, December 14, 1981, 81-2 CPD 465 (Motley), and states that Anderson's protest therefore does not fall within the "significant issue" exception to the timeliness requirements of our Procedures, 4 C.F.R. § 21.2(c).

Anderson argues that its protest is timely and that, even if it were not, we should consider it on the merits under the significant issue exception.

We need not decide whether Anderson's protest is timely because we consider the issue in this procurement to fall within the significant issue exception to our timeliness requirements. We reach this conclusion mindful of Motley. In Motley, we did not decide that any union-only policy--or actions under that policy--complies with the Federal norm. Moreover, Motley involved a protester who refused to take any steps to reach an accord with the onsite unions unlike Anderson in this procurement. If we accept Anderson's view for the moment, it was rejected solely for lacking a union agreement. Thus, we consider it appropriate to decide the propriety of the particular union-only policy involved here as well as to amplify on our observations in Motley about union-only requirements.

In our opinion, MK's policy does not unduly restrict competition and is consistent with the Federal norm so long as MK permits nonunion bidders to compete for these contracts and affords them the opportunity to seek prehire agreements with the unions.

We recognize that there is no legal justification for the rejection of the lowest bid received soley because the low bidder may not employ union labor. See 31 Comp. Gen. 561 (1952), cited by Anderson. Nevertheless, it is also settled that the potential for labor unrest is a legitimate interest in the evaluation of a prospective awardee's responsibility. Motley, supra; 43 Comp. Gen. 323 (1963). Any such evaluation must include consideration of the subcontracting restriction in MK's collective-bargaining agreement if MK is to avert labor problems. In this regard, we have held in an analogous context (see 53 Comp. Gen. 51 (1973)) that we consider it reasonable for a contractor to be more concerned with whether the contract would be performed properly and without interruption rather than with whether the contractor would ultimately prevail in litigation, a consideration which we think might occur to MK concerning the possibility of litigation to halt strikes or other labor action which might result from MK's breach of its agreement. Moreover, we find nothing in MK's collective-bargaining agreement which would give MK the right to dictate or specify the terms of the subcontractor--onsite union agreement--and we think it would be inappropriate for considerations of the Federal norm to intrude into what are essentially labor negotiations between private parties for a prehire agreement under the National Labor Relations Act.

In these circumstances, we are persuaded of the reasonableness of MK's requirement for its subcontractors to have an agreement with the onsite unions. The protest is denied.

In future procurements, however, we recommend that MK keep in mind that a potential contractor's ability or inability to avoid conflicts with onsite labor organizations is a matter of responsibility. Questions concerning a bidder's responsibility may be resolved, time permitting, after bid opening at any time up to the award of the contract. See, e.g., Gaffny Plumbing and Heating Corporation, B-206006, June 2, 1982, 82-1 CPD 521. Absent any indication in the record before us of any urgent requirement for immediate award of the contract, we are persuaded that MK should have opened and considered Anderson's bid and afforded Anderson a reasonable opportunity to reach an agreement with the onsite unions.

Futhermore, this protest is traceable directly to MK's failure to notify prospective bidders in the solicitation of this requirement and its application to this procurement. We therefore recommend that future solicitations for construction work at INEL clearly apprise bidders of this policy. In addition, future solicitations should not use, as a matter of sound policy, the designation "request for proposals" where an advertised procurement is intended.

for Milton J. Socolar
Comptroller General
of the United States