

**DECISION**

25887  
**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D. C. 20548

**FILE:** B-208918**DATE:** August 2, 1983**MATTER OF:** General Construction Company/Reidel  
International**DIGEST:**

1. Where a grantee state's regulations for a construction project provide that the grantee may reject an unbalanced bid if it is found to be detrimental to the grantee, that regulation is not violated when grantee, after examining the situation, finds that acceptance of the bid would not be detrimental.
2. Where solicitation does not preclude submission of a front-loaded bid, a mathematically unbalanced bid is not nonresponsive to the solicitation and bidder's post-bid opening submission of a construction schedule indicating that the bid was not front-loaded did not result in a nonresponsive bid being made responsive.
3. Where acceptance, after bid opening, of the low bidder's agreement to perform according to a construction schedule and to charge for possible additional work based on its actual costs did not represent material changes to the solicitation and did not result in a reduction of the contract obligations for which all bidders competed, competition was conducted on an equal basis.
4. Where the low bidder certifies in its bid that it will comply with minority subcontracting requirements, its bid is responsive on the point, and whether it actually carries out this legal obligation during performance is a matter of contract and grant administration within the purview of the grantee and grantor.

026299  
122018

General Construction Company/Reidel International (GRI), a joint venture, complains of the award of a contract to Paschen Contractors, Incorporated under solicitation No. 190-1 (199)1, issued by the Washington State Department of Transportation (WSDOT). This solicitation was for Phase I of the construction of the third Lake Washington Floating Bridge. The project is 90 percent funded by a grant administered by the Federal Highway Administration. We consider grant complaints like this pursuant to our public notice entitled "Review of Complaints Concerning Contracts Under Federal Grants," 40 Fed. Reg. 42406, September 12, 1975. GRI principally contends that Paschen's bid was unbalanced and thus should have been rejected by WSDOT. We find the complaint to be without merit.

Bids under the solicitation were publicly opened on May 19, 1982. Of the seven bids received, Paschen's was low at \$32,459,382. GRI's bid of \$32,631,230 was second low. Award under the solicitation was to be made to the acceptable bidder offering the lowest total price for the 39 construction items, so Paschen was in line for the award. By letter of May 28, however, GRI complained to the grantee that several items in Paschen's bid were priced far in excess of the estimates for those items. It noted, for example, that Paschen's pricing of item 7 at \$3,612,000 was significantly excessive when compared to the state's estimate of \$516,000. Similarly, Paschen's pricing of items 21 and 24 at \$2,000,000 and \$480,000 respectively, far exceeded the state's estimated costs of \$740,000 and \$90,000. GRI concluded that Paschen's bid was unbalanced and should have been rejected under the State of Washington Standard Specifications for Road and Bridge Construction, section 1-02.13. That regulation, entitled "Irregular Proposals," provides that:

"A proposal may be considered irregular and may be rejected by the Secretary [of WSDOT] for any of the following reasons:

•           \*           \*           \*           \*

"(d) If the Secretary deems any of the unit prices to be excessively unbalanced either above or below the amount of a reasonable bid for the item of work to be performed to the potential detriment of the State."

The record indicates that in a May 28 letter, WSDOT requested that Paschen submit a breakdown for the seemingly unbalanced items in its bid and a construction schedule for major events under the contract. No such schedule was required under the solicitation, which merely provided that the work was to be completed during the 30-month performance period. The grantee apparently intended to review the schedule to determine whether Paschen in fact planned to perform the seemingly overpriced items at the front end of the contract. Such front end loading apparently could be deemed detrimental to the grantee in the sense that it would lose interest which could have been earned on any disproportionately large payments made early in the contract period.

Paschen submitted the requested information in a June 10 letter. The grantee advised Paschen in a June 16 letter that based on its review of the schedule, "there does not appear to be any front end loading which would be to the potential detriment of the State." The letter further asked Paschen to agree to charge for construction of any additional anchors which may be necessary based on the actual costs incurred by suppliers and subcontractors. Paschen agreed. The grantee advised GRI in a separate June 16 letter that Paschen's bid had been reviewed and was not considered potentially detrimental to the state. The contract was awarded to Paschen on August 17, and incorporated by reference both Paschen's June 10 letter which set forth Paschen's scheduled major work events and estimated progress payments, and its agreement to construct additional anchors based on actual cost.

GRI contends that because Paschen's bid was significantly unbalanced at the time of bid opening, it should have been rejected as potentially detrimental to the state under the cited regulation. GRI maintains that it was improper for the grantee to rely on the construction schedule furnished after bid opening as the basis for finding that Paschen's pricing scheme would not be detrimental, since Paschen was not bound to perform in accordance with that schedule. The schedule was not binding, in GRI's view, since it was not required under the solicitation and was not part of Paschen's original bid. GRI believes it was improper for Paschen to be permitted to submit a construction schedule in any event since the other bidders were not afforded the opportunity to do the same.

We do not see how it can be said that the grantee violated section 1-02.13 of the state regulations. This regulation vests broad discretion in WSDOT to reject unbalanced bids it determines would be detrimental to the state. Although Paschen's bid contained several items priced far in excess of the estimates, the grantee explored the situation and ultimately determined that these would not be detrimental to the state. That is all it was required to do.

Nonetheless, what also must be considered is whether the grantee's actions here resulted in violation of any principles of Federal procurement law, known as the Federal norm, which are imposed on the grantee by the grant terms and conditions. See, e.g., Wisner & Becker Contracting Engineers, B-202075, June 7, 1982, 82-1 CPD 538; Copeland Systems, Inc., 55 Comp. Gen. 390 (1975), 75-2 CPD 237. Two fundamental requirements are that (1) a bidder cannot make its bid responsive to the solicitation after bid opening, and (2) all bidders must compete based on the same solicitation requirements.

GRI apparently believes Paschen's bid was nonresponsive because it was unbalanced, and that it was made responsive through the post-bid opening submission of the construction schedule. We do not agree. First, we note that a materially unbalanced bid in a direct Federal procurement may be rejected as nonresponsive. See, e.g., Edward B. Friel, Inc., 55 Comp. Gen. 231 (1975), 75-2 CPD 164; Tara Publications, Inc., B-182915, February 24, 1975, 75-1 CPD 110. However, Paschen's bid was not materially unbalanced as that standard is defined for Federal procurements. A mathematically unbalanced bid such as Paschen's is materially unbalanced only where there exists a reasonable doubt whether the bid, when evaluated in accordance with the terms of the solicitation, will result in the lowest cost to the Government. See Southern Structures, Inc., B-208309, May 2, 1983, 83-1 CPD 463. Second, the solicitation here provided that bids would be evaluated on the basis of the lowest total price; it did not state that the loss of interest on front-loaded bids would be taken into account in the evaluation process. Therefore, there was nothing in the solicitation to which Paschen's "unbalanced" bid was nonresponsive.

Moreover, although under the broad state regulation Paschen's bid could have been rejected if the WSDOT determined it was unbalanced to the potential detriment of the state, it is clear from how WSDOT officials proceeded under the regulation that a decision to accept or reject the bid because of what the state views as unbalancing was to be based on information obtained after bid opening and, therefore, involved not a matter of bid responsiveness but rather bidder responsibility. See Brady Mechanical, Inc., B-206803, June 7, 1983, 83-1 CPD \_\_\_\_. We note, in this regard, that Paschen's construction schedule was found to "comply with the contract requirements for sequencing," which also suggests that the schedule was utilized to determine Paschen's approach to meeting the contract requirements, which is indeed a matter of responsibility. Under the circumstances, we think Paschen's bid was responsive at bid opening and therefore the performance schedule did not serve the improper purpose of making the bid responsive after bid opening.

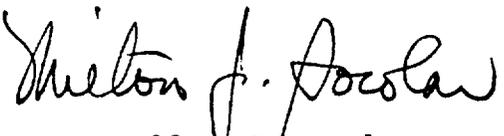
With respect to the second principle, i.e., that all bidders must compete on the same terms, GRI complains that other bidders were not given the opportunity to submit a construction schedule. Here, the addition of a construction schedule to Paschen's contract did not relax or materially change the terms of the solicitation, and in no way reduced Paschen's obligation to perform strictly in accordance with the terms of the solicitation. Similarly, Paschen's agreement to charge for additional anchor work based on actual cost does not appear to have materially altered the solicitation requirements. This agreement only covered additional work which might become necessary and, since it provided for the work to be done at cost, did not give Paschen any advantage over the other bidders. Therefore, we have no reason to believe that GRI would have reduced its bid based on these changes. See generally MAC Services, Ltd., 61 Comp. Gen. 205 (1982), 82-1 CPD 46. We conclude that all bidders competed on an equal basis.

GRI also seems to argue that Paschen should not have received the award because questions have been raised concerning its compliance with minority business enterprise (MBE) requirements. Specifically, it has been alleged that Paschen intended to satisfy the minority

business participation goals under the solicitation by having MBE firms "pass through their books" the costs of project materials and services. The record indicates that DOT's Inspector General has investigated this matter and so far has been unable to find conclusive evidence of the alleged improprieties.

GRI finally maintains that Paschen's bid should have been rejected because minority firms named in its subcontracting plan in fact do not qualify as minority firms. Paschen unconditionally certified in its bid, however, that it would comply with the solicitation's minority subcontracting requirements. Its bid therefore was responsive on this point. The manner in which Paschen carries out its obligation--that is, whether it subcontracts work to firms which qualify as minority businesses--is a matter of contract and grant administration within the purview of the grantee and grantor, respectively. See Paul N. Howard Company--Reconsideration, B-199145.2, July 17, 1981, 81-2 CPD 42.

The complaint is denied.

*for*   
Comptroller General  
of the United States