

DECISION

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

FILE: B-217254

DATE: June 12, 1985

MATTER OF: Consolidated Food Management Company

DIGEST:

1. Office of Management and Budget Circular A-102, attachment "O," does not require that a grantee's food service management contract be formally advertised. The grantee is responsible for determining how to satisfy its own requirements, including the method of procurement to be used, and GAO will not question a grantee's determination unless it is shown to be unreasonable.
2. Offeror's financial capability generally should not be considered as a technical evaluation factor unless the grantee can offer special justification for its use. However, an offeror is not prevented from competing by a requirement for financial data, since it pertains to responsibility and must be furnished so that it can be considered in that context.
3. Bonding requirement in grantee's RFP for school lunch program management is justified where disruption in contract performance would harm students and contractor will use school property in performing contract.

Consolidated Food Management Company, in a complaint filed before the due date for proposals, alleges that Battle Ground School District No. 119, Battle Ground, Washington, improperly proposed to negotiate a food service management contract, rather than awarding it to the lowest responsible bidder. Consolidated also complains that certain of the specifications included in the school district's request for proposals (RFP) were unduly restrictive and that the RFP did not clearly set forth the minimum essential characteristics and standards for the services sought. The contract was awarded to Saga Corporation in January of 1985. The school district

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receives funds for its lunch program from the Department of Agriculture under the National School Lunch Act, as amended, 42 U.S.C. §§ 1751-1769 (1982).

We deny the complaint.

The school district argues preliminarily that we should not consider the complaint since Consolidated, which did not submit a proposal, failed to exhaust its administrative remedies at the grantee level, as required by attachment "O" of Office of Management and Budget (OMB) Circular A-102.^{1/} We do not think that Circular A-102 precludes our review. Although as of January 29, 1985, we discontinued our review of complaints concerning contracts under federal grants, 50 Fed. Reg. 3,978 (1985), Consolidated's complaint was filed before the effective date of this notice. Until that time, we reviewed the propriety of contract awards made by grantees in furtherance of grant purposes upon the request of prospective contractors, and we did not require the exhaustion of administrative remedies at the grantee level before undertaking such review. International Business Machines Corp., B-194365, July 7, 1980, 80-2 CPD ¶ 12.

Consolidated argues that the school district's food service management contract should have been formally advertised rather than competitively negotiated. The complainant contends that award to the contractor whose proposal was the most advantageous to the school district would be inconsistent with Department of Agriculture regulations implementing the School Lunch Program, set forth at 7 C.F.R. § 210.19a(c) (1984). These require adherence by school authorities to the standards set forth in OMB Circular A-102. The school district argues in response that OMB Circular A-102 does not require that food service management contracts be awarded through competitive bidding.

^{1/} Section 5 of attachment "O" provides in relevant part that: "No protest shall be accepted by the grantor agency until all administrative remedies at the grantee level have been exhausted."

OMB Circular A-102 provides for four different methods of procurement, including competitive sealed bids (formal advertising) and competitive negotiation. The former is to be used where a complete specification is available, two or more responsible suppliers are willing to compete, the procurement lends itself to a firm, fixed-price contract, and selection of the successful bidder can appropriately be made principally on the basis of price; the latter is to be used where these conditions are not present. The Circular specifically provides that in competitive negotiation, award may be made to the responsible offeror whose proposal will be most advantageous to the procuring party, price and other factors considered.

The school district justifies its decision to negotiate the contract on grounds that selection of a food service manager did not lend itself to a firm, fixed-price contract, that precise specifications could not be drafted, and that award on the basis of the lowest management fee would not necessarily ensure the lowest overall cost to the school district. We have previously recognized that a federal grantee is responsible for determining how to satisfy its own requirements, and we will not question a grantee's determination unless it is shown to be unreasonable. McAuto Systems Group, Inc., B-206556, May 14, 1982, 82-1 CPD ¶ 460. A grantee's determination of how to satisfy its requirements necessarily encompasses a decision as to the method of procurement to be used. The complainant in this case has offered no evidence whatsoever that the school district's decision to negotiate the food service management contract was unreasonable, while the district has offered ample justification for its decision to negotiate. We accordingly have no legal basis for questioning the grantee's method of procurement.

Consolidated argues, secondly, that the RFP was unduly restrictive in requiring that an offeror submit with its offer financial statements for the past 3 years and proof of 3 to 4 weeks' cash-flow to pay for food, salaries, and other costs pending reimbursement from the school district. The school district responds that these factors were intended to assure that the contractor selected had the financial capability to perform, and that financial ability was clearly a relevant evaluation criterion.

In direct federal procurement, an offeror's financial condition is ordinarily considered to be a matter of responsibility. See the Federal Acquisition Regulation (FAR), 48 C.F.R. § 9.104-1 (1984).^{2/} Responsibility determinations generally are made after proposal evaluation because they concern whether an offeror has the capacity to perform the contract work. This is in contrast to proposal evaluation under stated evaluation criteria, which is used to assess the relative merits of individual proposals. While in proper circumstances procuring agencies (or grantees) may consider certain responsibility-related factors when evaluating proposals, those factors generally are limited to such areas as experience, available facilities, and personnel qualifications. In Andover Data Systems, Inc., B-209243, May 2, 1983, 83-1 CPD ¶ 465, we stated that:

" . . . agencies should not need, generally speaking, to make a comparative evaluation of competing offerors' financial condition. It therefore should continue, in most cases, to be an element in determining responsibility; its use as a technical evaluation criterion is to be discouraged, and any future use for other than responsibility determinations should be fully justified by the contracting agency."

Nevertheless, we do not believe that in this case the requirement for information on its financial capability prevented Consolidated from submitting an offer. While the record lacks further justification for the school district's use of the information to determine the relative merits of competing proposals, the grantee obviously would have been required to consider it before award. OMB

^{2/} None of the parties has cited, and we are not aware of, any applicable state or local law. We therefore consider the complaint in light of the FAR and decisions of our Office, which provide the basis for the "Federal norm" to which grantees are subject. See Dantec Electronics, Inc., B-213247, Aug. 27, 1984, 84-2 CPD ¶ 224.

Circular A-102, attachment "O," states that award should be made "only to responsible contractors that possess the potential ability to perform successfully under the terms and conditions of the proposed procurement" and specifically directs grantees to consider the financial resources of prospective contractors in making responsibility determinations. Thus, Consolidated could not have avoided the requirement to submit financial statements and proof of cash flow, as requested by the school district, if not with its proposal, then at some time before award. Its complaint on this basis therefore is denied.

The complainant further argues that the RFP was unduly restrictive in requiring a \$50,000 bid bond and a \$300,000 performance bond; it contends that if a bond is required, evidence of financial capability was unnecessary. Since in direct federal procurement a bid bond may be required only when a performance (or a performance and payment) bond is required, 48 C.F.R. § 28.101-2, our discussion will focus on the performance bond requirement.

The school district argues that a substantial disruption to its food service program would harm students and that the bonds were required to protect against this eventuality. In a similar case involving a requirement for a 100-percent performance bond in an RFP for food management services at a naval hospital, the Navy argued that the performance bond was necessary due to the critical nature of the services sought and the large inventory of government-furnished equipment that the contractor would be required to use in performing the contract. We concluded that these determinations were consistent with 48 C.F.R. § 28.103-2 regarding the justification for requiring a performance bond for nonconstruction services. Space Services International Corp., B-215402.2, Oct. 22, 1984, 84-2 CPD ¶ 430.

Although the school district has not argued in its submission that the food service contractor would use its property in performing the contract, this is apparently the case. Thus, the very same justifications for requiring a performance bond exist in this case as existed in Space Services. We accordingly conclude that the performance bond requirement was justified, and we reject the

complainant's argument that if a bond is required, any evidence of financial capability is unnecessary. A bond cannot serve as a substitute for a determination of financial responsibility. 48 C.F.R. § 28.103-2(d); Tonka Equipment Co., B-215724, Dec. 11, 1984, 84-2 CPD ¶ 647. The complaint on this basis is denied.

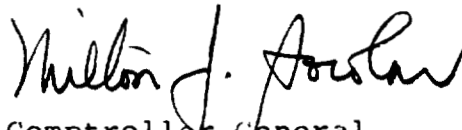
Consolidated's final ground of complaint is that the school district did not set forth in a clear manner the "minimum essential characteristics and standards which a contractor must meet in order to qualify." The complainant objects to the following evaluation criteria:

- professional attitude, appearance and conduct of contractor's management personnel;
- contractor's financial statement;
- contractor's experience, ability, responsibility, and work record;
- contractor's ability to provide support personnel to the district at no additional cost;
- the kind of support personnel available to the district at no additional cost; and
- contractor's cash-flow and line of credit.

The complainant's contention that the school district did not define the minimum characteristics of an acceptable proposal confuses the requirements for procurement through formal advertising with the requirements for procurement through competitive negotiation. OMB Circular A-102, attachment "O," provides for the award of a formally advertised contract to "the responsible bidder whose bid, conforming with all material terms and conditions of the invitation for bids, is lowest in price." In other words, the characteristics of the minimally acceptable product or service must be defined. In competitive negotiation, by contrast, award is to be made to the responsible offeror "whose proposal will be most advantageous to the procuring party, price and other factors considered." In other words, the level of minimum competency is not significant. Rather, it is the relative standing of offerors with regard to listed evaluation criteria that provides the basis for award.

With regard to the specific evaluation factors to which the complainant objects, as noted above, we have concluded that the contractor's financial condition (as evidenced in its financial statement and proof of cash-flow) was essential to a responsibility determination. The contractor's ability to provide support personnel to the district at no additional cost is clearly a relevant evaluation factor since it will influence overall contract price. The other evaluation factors noted by the complainant relate to personnel qualifications and contractor experience. We have already noted that in appropriate circumstances, responsibility-related factors such as contractor experience, available facilities, and personnel qualifications may be evaluated on a comparative basis. Andover Data Systems, Inc., B-209243, supra, 83-1 CPD ¶ 465.

The complaint is denied.

for 
Comptroller General
of the United States