088011

DECISION

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

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FILE: B-183444 DATE: October 31, 1975

MATTER OF: Lametti & Sc ;, Inc.

DIGEST:

1. FPR does not apply to award made under EPA grant for municipal sewer construction, since FPR pertains to direct Federal procurements and reference in EPA grant regulations to "Federal law" does not incorporate FPR by reference.

2. Regulations incorporating FPR cost principles in situations involving allocation and allowability of cost on grants to other than educational institutions or State and local governments does not make FPR generally applicable to procurements by EPA grantees. In fact, where State or local government is grantee, OMB Circular A-87 regarding allowabilility of costs applies and not FPR.

3. While IFB clause, stating that aggregate total of lump-sum and unit price items, based on estimated quantities, shall be basis for comparison of bids, assumes that extended price for each item will equal product of unit price times estimated quantity, it does not indicate that where there is inconsistency one shall prevail over other.

4. IFB provision stating, if discrepancy occurs between written and figure prices, price most favorable to municipality will be taken as bidder's intention applies where discrepancy exists between price stated in words and same price stated in figures and not where there is mistake between unit and extended price.

5. Contract awarded under Iowa law pursuant to EPA grant to City of Davenport, Iowa, appears to be improper. City's construction of bid, which contained discrepancy between unit price and extended price for one item which resulted in displacement of another bid, was not proper because intended bid price for item

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was subject to more than one reasonable interpretation. Valid and binding contract comes into being under Iowa law only if essence of contract awarded is contained within four corners of bid submitted.

This matter involves a procurement for the construction of a riverfront sanitary interceptor sewer system by the City of Davenport, Iowa, under a grant from the United States Environmental Protection Agency (EPA) pursuant to Title II of the Federal Water Pollution Control Act Amendments of 1972, Public Law 92-500. EPA's share of the cost of the project is 75 percent, which is approximately $6 million.

Pursuant to the grant, the City of Davenport issued an invitation for bids (IFB) for the construction. Four bids were submitted by the date set for bid opening, February 25, 1975. Lametti & Sons, Inc. (Lametti), submitted a bid of $7,972,971, while Johnson Bros. Highway & Heavy Constructors, Inc. (Johnson), submitted a bid in the amount of $8,702,645. The two other bids submitted were both in excess of $9 million.

Item 8 of Johnson's bid as submitted read:

"Item No.	Quantity and Unit	Description	Total Price (Figures)
8	2,577 L.F.	72 inch (I.D.) RCP Class IV in Tunnel (Avg. Depth 33.2 ft.) including rock excavation and manholes. Complete in place at the unit price per lineal foot of	
Five Hundred Seventy and no/100 (In Writing)	($570.00) (Figures)		$2,241,990 (Figures)"

After the bid opening, the bids were delivered to the Director of Public Works for the City of Davenport, who reviewed the bonds and insurance. The bids were then delivered to the office of Warren and Van Fraag, Inc., the consulting engineers for Davenport,

with instructions to review the bids, check the calculations and prepare a tabulation sheet for bid comparison.

During the calculation check, an apparent error in item 8 of the Johnson bid was discovered in that, if the $570 unit price is multiplied by the stated quantity (2,577), the extended price is $1,468,890 rather than the $2,241,990 quoted. Conversely, if the $2,241,990 extended price on item 8 is divided by the stated quantity (2,577), the unit price is $870 instead of $570.

What happened after the discovery of the error is disputed. The manager of the Davenport office of Warren and Van Praag, Inc., asserts in an affidavit that:

> "* * * Johnson Bros. representatives were notified informally and told that the review was not complete.
>
> "During the day of February 26, the four bids were reviewed in detail. The error in the extension of Item 8 of Johnson Bros. bid was corrected by my staff and the total of the unit price items and the lump sum item was corrected accordingly. * * *"

Lametti contends on the other hand that Johnson was asked whether the unit price or the extended price was the intended price and then advised Warren and Van Praag, Inc., that the unit price was the intended price.

However, in any event, it is clear that Warren and Van Praag, Inc., altered the bid of Johnson by striking the extended total price for item 8 ($2,241,990) and inserting in lieu thereof the figure of $1,468,890. The aggregate of the total item prices in the Johnson bid was then revised downward from $8,702,645 to $7,929,545, which was $43,426 less than the Lametti bid.

Following the correction of the Johnson bid, Lametti filed a protest with the city. After a series of meetings involving the Director of Public Works for Davenport, representatives of Johnson and Lametti and the Corporation Counsel of Davenport, the City Council passed resolutions on March 5 and 12, 1975, to award the contract to Johnson based upon reports of the Davenport Corporation Counsel and the Director of Public Works. Those reports indicated that the actions taken with respect to the Johnson bid were proper since (1) they were in accordance with instructions to bidders paragraph 5-f relating to discrepancies in bid prices; (2) the principal

law governing the award was that the State of Iowa and the correction of the Johnson bid was in accordance with the holding in Wigodsky v. Town of Holstein, 192 N.W. 916 (Iowa 1923); and (3) the correction of the Johnson extended bid for item 8 to conform to the unit price for that item was consistent with paragraph 2 of the IFB.

Lametti thereafter filed a protest with the EPA Regional Administrator. On April 11, 1975, the Regional Administrator rendered a decision derying the protest of Lametti on the basis that under Iowa law correction of the Johnson bid was not improper even though it displaced Lametti's seemingly low bid. Following the adverse EPA decision, Lametti filed a protest with this Office and instituted an action for declaratory relief in the United States District Court for the Southern District of Iowa, Davenport Division, entitled Lametti & Sons, Inc. v. City of Davenport, Iowa, Civil Action No. 75-28-D. Johnson intervened in this action.

We have decided to undertake reviews of complaints concerning contracts under Federal grants. See 40 Fed. Reg. 42406 (1975). However, our Office will not consider a matter pending before a court of competent jurisdiction except when the court indicates its interest in obtaining our views. See Thomas Construction Company, Incorporated, et al., B-183497, August 11, 1975, 55 Comp. Gen. ____, 75-2 CPD 101. On June 9, 1975, the court issued an order inviting this Office to participate in the case either through an amicus brief or an advisory opinion.

Lametti asserts that the award of the contract for construction of the sewer system by Davenport to Johnson was illegal and the contract should be awarded to it. As the basis of its contention, Lametti raises the following main arguments:

1. The Federal rule (set out in the Federal Procurement Regulations) prohibiting the displacement of the apparent low bidder, unless both the existence of a mistake and the intended bid are apparent from the displacing bid itself, is applicable to the award of this contract; and

2. The Federal rule precluded the displacement of Lametti's bid.

When the Federal Government makes grants, it has a right to impose conditions on the grants. State of Indiana v. Ewing, 99 F.Supp. 734 (1951), vacated as moot, 195 F.2d 556 (1952). Therefore, although the Federal Government is not a party to contracts awarded by its grantees, a grantee must comply with the conditions attached to the grant in awarding federally assisted contracts. See Illinois Equal Employment Opportunities Regulations for Public Contracts, 54 Comp. Gen. 6 (1974), 74-2 CPD 1. In this case, the grant to the City of

Davenport was subject to restrictions imposed by the enabling legislation (33 U.S.C. § 1251 (Supp. III 1973)), applicable regulations and the terms and conditions in the grant agreement.

Lametti contends that the applicable EPA regulations, 40 C.F.R. § 35.900, et seq. (1974), incorporate by reference the Federal Procurement Regulations (FPR), 41 C.F.R. chapter 1 (1974) (and decisions interpreting them), and make them applicable to procurements by EPA grantees. Lametti specifically cites 40 C.F.R. §§ 35.935-4, 35.939(a) and 35.939(b) in support of this contention. Section 35.935-4 states:

> "The construction of the project, including the letting of contracts in connection therewith, shall conform to the applicable requirements of State, territorial, and local laws and ordinances to the extent that such requirements do not conflict with Federal laws and this subchapter." (Emphasis supplied.)

Section 35.939(a) provides:

> "The grantee is primarily responsible for selecting the low, responsive, and responsible bidder in accordance with applicable requirements of State, territorial, or local laws or ordinances, as well as the specific requirements of Federal law or this subchapter directly affecting the procurement (for example, the nonrestrictive specification requirement of § 35.935-2(b) or the equal employment opportunity requirement of § 35.935-6) and for the initial resolution of complaints based upon alleged violations. * * *" (Emphasis supplied.)

Taken together, we believe that these regulations require that the contractor for the project be selected by the grantee in accordance with local, State, or territorial law, except where there is a conflict between State, local or territorial law and a specifically applicable Federal law, in which event the Federal law shall govern. We do not believe that FPR constitutes such a specifically applicable law since by its own terms it applies only to procurements made by Federal agencies. See FPR §§ 1-1.002 and 1-1.004 (1964 ed. amend. 141) and Shaw-Henderson, Inc. v. Schneider, 335 F.Supp. 1203, 1215 (W.D. Mich. 1971), affirmed 453 F.2d 748 (6th Cir. 1971).

Lametti cites the following portion of 40 C.F.R. § 35.939(b) regarding the incorporation of FPR:

> "* * * If the grantee proposes to award the contract or to approve award of a specified sub-item under the contract to a bidder other than the low bidder, the grantee will bear the burden of proving that its determination concerning responsiveness of the low bid is in accordance with Federal law and this subchapter * * *."

However, for the reason just indicated, we do not believe that FPR is applicable to this section. Moreover, the section applies to a situation where the grantee proposes to reject a bid for lack of responsiveness which is not the case here.

For the incorporation of FPR, Lametti also relies upon 40 C.F.R. § 30.701 (1974) which states:

> "Except as otherwise provided by statute, allocation and allowability of costs will be governed in the case of grants to educational institutions by the provisions of Office of Management and Budget (OMB) Circulars Nos. A-21 (Revised), and A-88, and in the case of grants to State and local governments by the provisions of OMB Circular A-87. All other grants shall be governed by the policies and principles established in the Federal Procurement Regulations, Title 41, Code of Federal Regulations, Chapter 1, Subpart 1-15.2 to the greatest practicable extent."

Contrary to the position of Lametti, this regulation does not make FPR generally applicable to procurements by EPA grantees. This regulation pertains solely to "allocation and allowability of costs" by grantees and establishes for that limited purpose what shall apply. In that situation, where a State or local government is a grantee, as here, OMB Circular A-87 applies and not FPR.

Thus, we disagree with Lametti's position that FPR has been incorporated into the EPA regulations governing the award of contracts by its grantees. Therefore, we believe that the instant procurement is governed by State and local law in accordance with 40 C.F.R. § 35.939(a).

The leading Iowa case on the displacement of the low bidder is Wigodsky v. Town of Holstein, supra. That case involved the issuance of an IFB by a municipality which sought bids on various classes of pavement. The resolution of the town council for the paving work provided that class "L" would be for paving 7 inches thick and class "M" would be for the same paving 6 inches thick. However, the IFB mistakenly designated classes "L" and "M" as 6- and 7-inch paving, respectively.

Of the five bids received, all but one contained a higher price for class "L" than for class "M." The council concluded that this was a clear error due to the transposed order and treated the lower prices for the class "M" paving as the bids for the 6-inch paving. The bidder who was determined to be low by this method of evaluation admitted making such an error when questioned after the bid tabulation. The court after discussing the purpose of the statute requiring that contracts be let upon competitive bids stated in upholding the award that the mistake of the bidder was "so patent that the council could not well have construed the bid otherwise than it did."

The Iowa statute relevant to the instant case states that "All contracts for the construction or repair of street improvements and for sewers shall be let * * * to the lowest bidder by sealed proposals * * *." Section 391.31 Iowa Code Ann. (1975 Supp.). It has been held that a public body has some discretion in making an award under a procurement statute and that an Iowa court will not substitute its judgment for a discretionary action of a public body. Menke v. Board of Education, Independent School District of West Burlington, 211 N.W.2d 601 (Iowa 1973), Accord on a Federal level--M. Steinthal & Co., Inc. v. Seamans, 455 F.2d 1289 (D.C. Cir. 1971). It is equally clear that the municipalities of Iowa cannot properly make awards of contracts that are in violation of the procurement statutes. Atkinson v. Webster City, 158 N.W. 473, 479 (Iowa 1916). See Weiss v. Incorporated Town of Woodbine, 289 N.W. 469 (Iowa 1940); Miller v. Incorporated Town of Milford, 276 N.W. 826 (Iowa 1937); Greaves v. City of Villisca, 266 N.W. 805 (Iowa 1936); Brutsche v. Incorporated Town of Coon Rapids, 264 N.W. 696 (Iowa 1936); Northwestern Light & Power Co. v. Town of Grundy Center, 261 N.W. 604 (Iowa 1935); Urbany v. City of Carroll, 157 N.W. 852 (Iowa 1916). Moreover, section 35.939 of the EPA grant regulations imposes upon the grantee the responsibility to comply with applicable State or local legal requirements and, where complaints of violations are received, provides a reviewing procedure to assure that there has been compliance with the requirements. Therefore, the responsibility exists for the municipality to award a contract

under the procurement statutes in accordance with the legal requirements. In the circumstances, the municipality should not be allowed to defend against a complaint of a violation of the procurement statute on the basis that there was no fraud or collusion. See Menke v. Board of Education, Independent School District of West Burlington, supra.

In Atkinson v. Webster City, supra, the court held that "The object of such provisions [the procurement statute] is to prevent favoritism, corruption, extravagance, and improvidence in the awarding of municipal contracts, and they should be so administered and construed as to fairly and reasonably accomplish such purpose" and that the statute "must be strictly construed." (Emphasis supplied.) It is clear from the decision in the case that awards are to be made on the basis of the bids submitted and not upon extrinsic evidence submitted after bid opening. In that connection, the court ruled that the city council had no authority to award a contract to the low bidder, who, after bid opening, but before award, offered, at no additional cost, to provide the city with a better grade of asphalt than it had originally bid. The court, after discussing the mere possibility of future impropriety should the statute not be strictly construed, held the requirement in the statute for the contract to be let "by sealed proposals" did not allow the council to award based on extrinsic material even though it was in fact submitted by the determined low bidder and merely made the bid better for the city.

The argument is made that all Davenport did was to make a proper construction of the Johnson bid rather than to acquiesce in any claim of mistake. However, this was also the situation which existed in Wigodsky, i.e., the city realized that there was an error in the bid and what the intended bid was before the bidder agreed as to the error and the intended bid. In following Wigodsky, we believe that, if Johnson's tendered bid price for item 8 was so patent that Davenport could not reasonably have construed its bid in any other manner, then the award was proper. If, however, there is more than one reasonable construction of the Johnson bid when read in its entirety, then we believe the Wigodsky test was not met and the award was improper.

In this regard, it is argued that paragraph 2 of page 8 of the IFB supports the city's construction of the Johnson bid. That provision states:

> "The aggregate total of the above lump sum and unit price items, based on the estimated quantities, shall be the basis for establishing the amount of the performance bond and for comparison of bids. Said total

> in the case of unit price bids, shall not be understood to be a single lump sum proposal or contract price."

The memorandum of the EPA regional counsel, referenced in the Regional Administrator's denial of Lametti's protest, indicated that this provision was particularly persuasive in the disposition of the protest. The memorandum stated:

> "* * * In order to afford a uniform basis for comparison, this provision must necessarily be construed as meaning that the subtotals of unit price items making up the aggregate total must be based and correctly computed on the estimated quantities. To provide for comparison of bids based on the aggregate total of unit price extensions, even though such extensions may have been erroneously computed, would be wholly unrealistic and would multiply the opportunities and occasions for bidders to claim or refrain from claiming mistakes in bidding, whichever course might seem most advantageous."

We interpret paragraph 2 to mean simply that the arithmetic sum of the 33 "total" or extended prices (one being a lump-sum price and the other 32 being prices computed by the bidder by multiplying a unit price by an estimated quantity) would be used to compare the bids of competing potential contractors. While we agree that the provision assumes that the extended price will equal the product of the unit price times the estimated quantity, it does not indicate that where there is an inconsistency one shall prevail over the other. Even if there was such an indication, it would not preclude an error being made in the dominant price. In the immediate case, it would be equally as reasonable to conclude that for item 8 Johnson intended the $2,241,990 extended price (Lametti's price was $1,876,056) as to conclude that it intended the $570 unit price (Lametti bid $728 per unit while the other bidders bid $600 and $700, respectively). Similar situations involving inconsistencies between unit and extended prices have been considered in 49 Comp. Gen. 12 (1969); B-167303, July 18, 1969; and B-179222, August 2, 1973. In each of these decisions we concluded that since it was not evident from the bid itself if the error was in the unit price or in the extended price, correction of the bid so as to displace a lower bidder was not permissible. In view of the reasonable alternatives in the Johnson bid on item 8, we do not believe that the intended price was so patent that the city could not reasonably

have construed the bid in any other manner but that in which it did, as required by Wigodsky.

Similarly, we do not believe that paragraph 5-f of the IFB instructions to bidders, relied on by the city in construing the Johnson bid, supports the city's position. That provision in pertinent part states:

> "The price must be written in the bid, and also stated in figures, and if any discrepancy occurs between the written and figured prices, those most favorable to the municipality will be taken as the intention of the bidder. * * *" (Emphasis supplied.)

Like section 3-118(c) of the Uniform Commercial Code, this provision is a rule of construction which applies only where a discrepancy exists between the price stated in words and the same price stated in figures, i.e., where the unit price in words says one thing and the unit price in figures another. However, that is not the case in the instant situation since there is no discrepancy between the unit price stated in words and figures. As noted above, Johnson's bid for item 8 indicated both "five hundred and seventy dollars" and "$570.00." The mistake involved is between the "total," or the extended price, and the unit price (both written and figured) as multiplied. Since there is no discrepancy between the written and the figured unit price for the same item, paragraph 5-f does not apply and it appears that reliance upon it was inappropriate.

In view of the above, we do not perceive the basis within the four corners of Johnson's bid upon which the city could have relied to determine the intended bid price. The determination that for item 8 Johnson intended the $570 unit price rather than the $2,241,990 "total" or extended price therefore was based on mere surmise subsequently reinforced by Johnson's preaward actions (the precise character of which need not be decided). Our interpretation of the Atkinson and Wigodsky cases, supra, is that a valid and binding contract comes into being under Iowa law only if the essence of the contract awarded is contained within the four corners of the bid as submitted since the award must be made "to the lowest bidder by sealed proposals." See Atkinson, supra, at 479.

As set out in Iowa Electric Light & Power Co. v. Incorporated Town of Grand Junction, 250 N.W. 136, 139 (Iowa 1933), the right of a municipality to enter into a contract is derived from statute and

where an award is made in contravention of the statute the resulting contract is invalid. See also Atkinson, supra. While the Iowa courts do not consider that mere irregularities in the solicitation and award render the resulting contract void, see Urbany v. City of Carroll, supra, this has been in situations that involved form over substance such as: the publication of notice of the procurement prior to the required final approval by the budget director, Johnson v. Incorporated Town of Remsen, 247 N.W. 552 (Iowa 1933); the publication of the notice in three rather than the required four publications and providing for less than 10 days between the last publication and bid opening, Koontz v. City of Centerville, 143 N.W. 490 (Iowa 1913); and a discrepancy between the publication and the specifications as to the amount of the bid bond required, Tony Amodeo Co. v. Town of Woodward, 185 N.W. 94 (Iowa 1921). That is not the case here, since the interpretation of the bid had a material and substantive effect in that it was determinative of the award of an $8 million contract and we believe that based on Iowa law the award was improper.

Deputy Comptroller General
of the United States