

DECISION



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

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FILE: B-183497

DATE: August 11, 1975

MATTER OF: Thomas Construction Company, Incorporated, et al.

DIGEST:

1. GAO will consider protest against contract awarded by grantee in order to advise grantor agency whether Federal competitive bidding requirements have been met and since courts before which present matter is being litigated have expressed interest in GAO views.
2. Where applicable regulations of Federal Government agency require that procurements by grantees be conducted so as to provide maximum open and free competition, certain basic principles of Federal procurement law must be followed by grantee. Therefore, rejection of low bid under grantee's solicitation as nonresponsive was improper where basis for determining responsiveness to minority subcontractor listing requirement was not stated in IFB and bidder otherwise committed itself to affirmative action requirements. It is therefore recommended that contract awarded to other than low bidder be terminated.

Thomas Construction Company, Incorporated, DiCarlo/Brown, and J. E. Dunn, Jr., and Associates each protests rejection of its bid and award of a contract to another bidder by the Kansas City Area Transportation Authority (KCATA) under Urban Mass Transportation Administration (UMTA), Department of Transportation, Project No. IT-03-0020.

Pursuant to a capital grant contract between UMTA and KCATA executed on December 13, 1973, UMTA agreed to provide a grant to KCATA to assist in the construction of a centrally located transportation complex. Subsequently, KCATA, through Monroe and Lefebvre Architects, Incorporated, issued an invitation for bids (IFB) for the facility. All prospective bidders on the project were required to submit an acceptable Affirmative Action Assurance Plan (AAA Plan) in the areas of employment and utilization of minority subcontractors.

The KCATA's plan for utilization of minority subcontractors was based on a set-aside of eight craft areas for minority business. Under part I of the subcontractor program directions, all bidders were required to set aside for competitive bidding among prospective minority

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subcontractors the areas of electrical, excavation, mechanical, sprinkler system, asphalt, concrete, landscaping and fencing, and insurance work. Also, each bidder was to submit a program expressing the details of its AAA plan. Under part II, the program contents were spelled out, with examples of the attachments to be submitted. As part of its bid, each bidder was required to submit a specified letter of transmittal (Attachment A), the Affirmative Action Program Proposal (Attachment B-Part I), a Policy Statement on affirmative action (Attachment B-Part II), a Compliance Report Form (Attachment B-Part III), and an Affidavit of Intended Minority Entrepreneurship (Affidavit) (Attachment C). Under part IV of the program directions, KCATA advised that bids would be rejected for failure to submit an adequate and acceptable AAA plan.

On February 5, 1975, bid opening date, the following base bids were received:

<u>Bidder</u>	<u>Bid</u>
Thomas Construction Company	\$9,320,000
DiCarlo/Brown	9,487,700
Sharp/White	9,696,727
J. E. Dunn, Jr. and Associates	\$9,825,200

Pursuant to the IFB, the Kansas City Department of Human Relations (DHR) evaluated the various AAA Plans required to be submitted by the bidders. The DHR concluded that the bids of Thomas and DiCarlo/Brown were nonresponsive due to affidavits which listed electrical subcontractors which were not then minorities, but that Sharp/White's plan was acceptable. Although the Board of Directors of KCATA passed a resolution concluding that the DHR exceeded its authority in determining the Thomas bid nonresponsive, UMTA subsequently advised KCATA that UMTA would submit its required concurrence only for an award to Sharp/White or, alternatively, for rejection of all bids and readvertisement.

Subsequent to this notification, Thomas, DiCarlo/Brown, and Dunn protested to our Office relative to the rejection of their bids. Also, DiCarlo/Brown filed two suits in the Circuit Court of Jackson County, Missouri, regarding this entire matter. When the defendant Sharp/White's motion to add the Secretary of Transportation as a third party defendant (or alternatively as a defendant) was granted, the matters were removed to the United States District Court for the Western District of Missouri. These suits have been remanded to the state court, with the exception of certain matters regarding the Secretary of Transportation, and both Courts have expressed interest in the opinion of our Office regarding the matter. We are advised that KCATA awarded a contract to Sharp/White on July 15, 1975, and that such contract includes a "no-cost" termination clause.

Initially, it is argued by several parties to the matter, including UMTA, that this Office should not consider the protests for the reasons that this Office is without jurisdiction to do so and that as a matter of policy resolution of the questions presented are more properly determined by a local forum fully conversant with local law. Since this Office's bid protest authority runs to award of a contract by or for a Federal agency whose accounts are subject to settlement by GAO, GAO Bid Protest Procedures § 20.1(a), 40 Fed. Reg. 17979 (1975), it is argued that the award of a contract by a Federal grantee is not included therein for purposes of GAO jurisdiction, and that a question of a Federal payment is not involved. Also, UMTA believes that, pursuant to the Department of Transportation Act, 49 U.S.C. §§ 1651 et seq. (1970), the proceedings of the Department or any of its administrations or boards are to be reviewed in U.S. District Court, where such matters are more appropriately considered, citing Pullman, Inc. v. Volpe, 337 F. Supp. 432 (E.D. Pa. 1971). In this regard, Sharp/White argues that GAO's role in this matter, if any, is stipulated to be an accounting function under 49 U.S.C. § 1608(b) (1970), and that our bid protest authority has thereby been expressly precluded. Also, Sharp/White believes that our lack of decisional authority was recognized in Lombard Corporation, B-182515, December 17, 1974, regarding our inability to render an authoritative decision on a matter involving Federal revenue sharing funds. It is further contended that, since state law is to control the contract, GAO's Federal procurement expertise is inapposite to the problem.

We recognize that under contracts made by grantees of Federal funds, the Federal Government is not a party to the resulting contract. It is the responsibility, however, of the cognizant Federal agency, such as UMTA, to determine whether there has been compliance with the applicable statutory requirements, agency regulations, and grant terms, including a requirement for competitive bidding. In such cases we have assumed jurisdiction in order to advise the agency whether the requirements for competitive bidding have been met. F. J. Busse Company, Inc., B-180075, May 3, 1975; Computer Communications, Inc., B-179797, May 3, 1974; 52 Comp. Gen. 874 (1973). Furthermore, as noted above, the Courts in which litigation pertaining to this matter is pending have expressed interest in receiving our views. In these circumstances, we believe the matter is appropriate for our consideration.

With regard to the Lombard case, the Federal revenue sharing funds involved therein were disbursed under the State and Local Assistance Act of 1972, Public Law 92-512, 31 U.S.C.A. §§ 1221 et seq. (Supp. 1975). As such, these funds were required to be expended in accordance with the laws and procedures applicable to state or local government revenues, 31 U.S.C.A. § 1243(a) (4) (Supp. 1975), and were not subject to Federal competitive bidding requirements. Therefore, we have declined to assume jurisdiction of protests involving revenue sharing funds.

A threshold question has also been raised as to the standards to be applied in reviewing the validity of the rejection of these bids. UMTA contends that since the contracts of its grantees are not Federal contracts they are not subject to the Federal Procurement Regulations, citing Pullman, Inc. v. Volpe, supra. Furthermore, it is argued that Federal Management Circular 74-7, issued by the General Services Administration (implemented in UMTA External Operating Manual, Chapter III C-5), which promulgates standards for establishing consistency and uniformity among Federal agencies in the administration of grants, and requires that procurements by grantees be conducted " * * * so as to provide maximum open and free competition * * *", does not apply in this instance. UMTA's position in this regard is based upon the fact that FMC 74-7 also permits grantees to use their own procurement regulations to the extent they are not inconsistent with the standards set forth in FMC 74-7. It is argued, therefore, that it was within UMTA's discretion under the Department of Transportation Act, 49 U. S. C. §§ 1651, et seq. (1970), to determine in the first instance whether bids were properly rejected under the terms of the solicitation and in conformity with local law, which is reviewable by the state and local Federal courts and not by this Office.

In the case of Illinois Equal Employment Opportunity regulations for public contracts, 54 Comp. Gen. 6 (1974), we made the following statement with respect to the applicability of basic principles of Federal procurement law to awards by grantees:

"It is clear that a grantee receiving Federal funds takes such funds subject to any statutory or regulatory restrictions which may be imposed by the Federal Government. 41 Comp. Gen. 134, 137 (1961); 42 id. 289, 293 (1962); 50 id. 470, 472 (1970), State of Indiana v. Ewing, 99 F. Supp. 734 (1951), case remanded, 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.

"We believe that, where open and competitive bidding or some similar requirement is required as a condition to receipt of a Federal grant, certain basic principles of Federal procurement law must be followed by the grantee in solicitations which it issues pursuant to the grant. 37 Comp. Gen. 251 (1957); 48 Comp. Gen., supra. In this regard, it is to be noted that the rules and regulations of the vast majority of Federal departments and agencies specify generally that grantees shall award contracts using grant funds on the basis of open and competitive bidding. This is not to say that all of the intricacies and conditions

of Federal procurement law are incorporated into a grant by virtue of this condition of open and competitive bidding. See B-168434, April 1, 1970; B-168215, September 15, 1970; B-173126, October 21, 1971; B-178582, July 27, 1973. However, we do believe that the grantee must comply with those principles of procurement law which go to the essence of the competitive bidding system. See 37 Comp. Gen., supra. * * *"

We believe these principles are applicable here, where 80 percent of the cost of the project is to be funded by the Federal Government and both the Federal Management Circular and UMTA's regulations contemplated grantee awards pursuant to competitive bidding principles. While UMTA certainly has the discretion to review and concur, or refuse to concur, in its grantees' awards, and courts may ultimately review the matter, we do not see this as a bar to our review, particularly where the cognizant Courts have expressed interest in our views.

Thomas, the low bidder, argues that its bid was not defective since its Affidavit listed minority subcontractors to the best of its knowledge as required, that the Affidavit did not require the minority firms to be minorities at bid opening, and that the bid did not indicate that failure to list a subcontractor not then a minority would require rejection of the bid as nonresponsive. Specifically, Thomas states that MacKay Electric's original bid for electrical subcontract work was not accepted by Thomas because MacKay Electric was not a minority firm, and that Thomas advised MacKay that only a bid by a minority electrical firm would be acceptable. Thereafter, Thomas received a bid from MacKay & Associates, a "minority joint venture." Thomas further states that it accepted this bid only after verifying with MacKay that "MacKay & Associates" was a true minority firm within the meaning of the solicitation. On this basis, Thomas argues that it used its best efforts to solicit and submit a minority bid for the electrical work. Furthermore, Thomas contends that under the bid it is committed to the KCATA plan and therefore even if MacKay & Associates is not a proper minority subcontractor, Thomas should be permitted to remedy such "minor" defect by substituting a new electrical subcontractor pursuant to the substitution provision of the IFB.

UMTA contends that the IFB required listing of eight current minority subcontractors, that Thomas' bid was materially defective for failing to do so, and that Thomas did not make a commitment to the Plan since the Affidavit was the vehicle for the commitment and Thomas' affidavit was defective. UMTA regards any attempt by Thomas to cure its defective bid by substitution as an effort to cure a nonresponsive bid after opening.

As we stated in Bartley, Incorporated, 53 Comp. Gen. 451, 452 (1974):

"We have consistently held that a bidder's failure to commit itself, prior to bid opening, to affirmative action requirements of a solicitation requires rejection of the bid. * * * Accordingly, the responsiveness of [a] bid must be measured * * * by its commitment or noncommitment to the solicitation's affirmative action requirements * * *."

A bidder does not commit itself to affirmative action requirements of a solicitation merely by signing the bid when the IFB requires something more. Locascio Electric Co., Inc., B-181746, December 13, 1974. However, failure to comply with each specific procedural requirement of the affirmative action provisions of an IFB need not result in bid rejection so long as the material commitment is evident. Veterans Administration re Welch Construction, Inc., B-183173, March 11, 1975. In ascertaining whether the commitment requested was supplied by the bidder, the entire contents of the bid, plus supporting documentation, must be taken into account. Chicago Bridge & Iron Company, B-179100, February 28, 1974; B-177846, March 27, 1973. We consider these decisions to be controlling here since they reflect basic principles of Federal procurement policy which must be followed by the grantee in a procurement conducted pursuant to this grant. Illinois Equal Employment Opportunity regulations for public contracts, supra.

UMTA, and several bidders, urge that this situation is controlled by Rossetti Contracting Company, Inc. v. Brennan, 508 F. 2d 1039 (7th Cir. 1975), and, to a lesser extent, by Northeast Construction Company v. Romney, 485 F. 2d 752 (D. C. Cir. 1973). In Rossetti, the plaintiff was a bidder on a Federally-assisted construction contract and failed to submit with its bid the appropriate commitment required by the "Chicago Plan" for minority hiring. Although Rossetti was required to state in Appendix A to the IFB its specific percentage of minority manpower utilization for the trades listed therein (within prescribed ranges), Rossetti placed brackets around the trades required and listed a utilization percentage not within the aforementioned ranges. Thus, its bid was nonresponsive because its failure to supply the proper information created doubt as to what commitment was made. In Northeast, concerning the similar "Washington Plan," the bid was nonresponsive because the bidder's failure to list any utilization goals whatsoever in Appendix A also cast doubt on the nature of the bidder's commitment. Our view of the Northeast bid (which preceded the Court action) was the same. 50 Comp. Gen. 844 (1971).

Here the IFB's Affidavit of Intended Minority Entrepreneurship provided in pertinent part:

"Comes now _____, of lawful
(Affiant's Name)
age, and being duly sworn, upon his/her oath
states as follows:

1. This affidavit is made for the purpose of complying with that part of the specifications of Kansas City Area Transportation Authority Affirmative Action Assurance Plan which requires that I, as a general contract bidder on the project, set forth the names of minority contractors, sub-contractors and suppliers with whom I will contract if awarded the general contract for construction of this project, the area(s) and scope of work of each listed contractor, sub-contractor and supplier, and the approximate dollar amount of each listed item; and that I provide a detailed narrative of efforts made to involve minority contractors, sub-contractors and suppliers.

2. That the following list is true and accurate to the best of my knowledge:

<u>Contractor</u>	<u>Area/Scope of Work</u>	<u>Dollar Amount</u>
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* * * * *

3. That the following narrative is a summary of efforts exhausted in attempts to involve minority contractors, sub-contractors and suppliers. "

* * * * *

While we agree with UMTA that the Affidavit is the primary document to establish the bidder's commitment to the plan, we do not believe, as UMTA contends, that the listing of a subcontractor whose minority status is not established at bid opening negates the commitment otherwise established therein. An examination of paragraph 1 of the affidavit indicates that it was made by Thomas for the express purpose of complying with the KCATA plan requirements for the utilization of minority subcontractors. Furthermore, Thomas included a listing of proposed subcontractors which, to the "best of my knowledge," were minority firms, as required by the solicitation. In this regard, it appears that Thomas complied with the requirements of the IFB by receiving verification from MacKay & Associates prior to bid opening that it was a minority joint venture. Moreover, all other bid documents were completed as required by KCATA, including the cover letter which stated that the bidder submitted the attached plan "in order to comply with the Affirmative Action Program submission requirements of said requirements." Although UMTA argues that Thomas' listing of MacKay in paragraph 2 qualified the commitment expressed in the initial paragraph, we do not agree.

As noted in Illinois Equal Employment Opportunity regulations for public contracts, supra, one of the basic principles of competitive bidding is that all bidders must be advised in advance as to the basis upon which their bids will be evaluated, so that they may compete on an equal basis, and the solicitation must contain the necessary definite minimum standards and criteria apprising prospective bidders of the basis upon which their compliance with the affirmative action requirements will be judged. In the instant case, although bidders were required to list their proposed minority subcontractors in the eight set-aside categories, the solicitation contained no information, guidelines, or criteria as to what constituted a minority firm or what, if any, steps a bidder was required to take to establish the minority status of a proposed firm. In the absence of a definite statement in this regard, bidders were deprived of an intelligent basis upon which to determine the qualifications of proposed subcontractors, and were subject to having their bids rejected as non-responsive on the basis of unannounced criteria. Therefore, it is our view that Thomas' bid was improperly rejected. 48 Comp. Gen. 326 (1968).

Ideally the procurement should be resolicited under standards and criteria which apprise bidders of the basis upon which their compliance with the affirmative action requirements will be determined. However, we recognize that this project already has been long delayed and that any further delay necessitated by a resolicitation may not be in the best interests of all concerned. We also recognize that the status of Thomas' proposed electrical subcontractor as a minority firm has been questioned. In this connection, we note that KCATA has proposed to permit Thomas to substitute a new electrical subcontractor prior to award. Accordingly, we recommend that Thomas be requested, if necessary, to substitute an acceptable electrical subcontractor in accordance with Article 7.1.3 of the Solicitation's Instructions to Bidders.

Thereafter, if Thomas' bid is determined responsive, and if Thomas is determined responsible, we recommend that UMTA advise KCATA that the contract with Sharp/White be terminated at no cost and an award be made to Thomas. In view of our conclusion, the responsiveness of the other bids need not be considered.

As this decision contains a recommendation for corrective action to be taken, it has been transmitted by letters of today to the congressional committees named in section 232 of the Legislative Reorganization Act of 1970, Public Law 91-510, 84 Stat. 1170, 31 U. S. C. § 1172 (1970).


Deputy Comptroller General
of the United States