DECISION

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

61377

FILE: B-184810 DATE: August 20, 1976

98648

MATTER OF: Thomas Construction Company, Inc.--
Request for Reconsideration

DIGEST:

1. Where request for reconsideration of GAO decision fails to clearly demonstrate errors of fact or law, decision is affirmed.

2. Where bidder protests planned award by grantee and GAO review indicates compliance with grant terms, agency regulations and applicable statutory requirements, decision that grantee is proper authority to determine factual issue of prejudice is affirmed.

Thomas Construction Company, Inc. (Thomas), has requested reconsideration of our decision Thomas Construction Company, Inc., B-184810, October 21, 1975, 75-2 CPD 248. The decision held that a bid which quoted two sets of unit prices for use in the administration of certain contract changes, instead of the single unit price sought by the solicitation need not be rejected, if acceptance of the bid would be advantageous to the grantee and would not prejudice other bidders. The low bidder for the work, Universal Construction Company (Universal), instead of submitting the single set of prices, for possible changes (either increasing or decreasing the amount of excavation, concrete, piling or painting work) which might be ordered during the performance of the contract, submitted two sets of prices. One set of Universal's prices was for changes increasing the work while the other set was for changes decreasing the amount of work. The prices in the increase work set were higher than those in the decrease work set. Thomas, the second low bidder, submitted one set of prices applicable to both additions and deletions, as requested by the solicitation.

Thomas urged that it was prejudiced by the consideration of the Universal bid to the extent that:

> "* * * Universal's bidding enables it to 'maximize its chances for gain' on additional work while minimizing its 'chances for loss on a reduction in quantity,' thereby negating the risk inherent in relying on a single unit price for changes in the required work." Thomas Construction Company, Inc., supra.

Thus, Thomas claimed that it was forced to include a contingency in its basic bid price in order to offset the risk which single unit pricing entailed. This contingency, it is urged, resulted in Thomas' bid being higher than it otherwise would have been had Thomas been permitted to furnish dual prices.

It was the opinion of this Office that Thomas would be prejudiced only if it could have bid substantially lower than it did had it also been permitted to furnish dual unit prices. It was known that Universal was the low bidder ($11,775,000 on the base bid and $12,251,962 with the accepted alternates) while Thomas was second low ($11,810,000 on the base bid and $12,457,300 with the alternates) and that approximately $35,000 separated the bidders on the base bid while approximately $205,000 separated them if the selected alternates were included. It was, however, unclear the extent to which Thomas had increased its bid in order to cover the risk of the single unit price. Since the record did not contain sufficient evidence upon which to make a determination as to whether the protester was prejudiced, we concluded that this matter should be resolved by the grantee. The grantee, following consultation with its architect, concluded that the greatest additional cost which a contractor could reasonable expect to incur as a result of the unit prices was approximately $20,000.00 which the grantee found insufficient to show that Thomas had been prejudiced.

Thomas questions our holding regarding the responsiveness of the bid and it also contends that this Office should have decided the issue of prejudice.

In letters dated November 11, 1975, May 7, 1976, and July 7, 1976, respectively, counsel for Thomas has argued that our decision in this case is inconsistent with Bristol Electronics, Inc., 54 Comp. Gen. 16 (1974), 74-2 CPD 23; Spartan Oil Co., B-185182, February 11, 1976, 76-1 CPD 91 and AFB Contractors, Inc., B-181801, December 12, 1974, 74-2 CPD 329; and Williamsburg Steel Products Co., B-185097, January 23, 1976, 76-1 CPD 40. We do not agree.

In Spartan, supra, we upheld the rejection of a bid as nonresponsive where the bidder had failed to acknowledge receipt of

an amendment which materially changed the contractor's performance obligations. That circumstance is not present here: Universal's performance obligations are unaffected by its entry of dual unit prices. It is erecting the same building as bid upon by the other bidders who submitted single unit prices.

The same observations are applicable to AFB Contractors, supra, and Williamsburg Steel Products, supra. In the former, the bidder failed to acknowledge receipt of an amendment which added work to a construction contract; in the latter, the bidder submitted its bid upon a pre-printed commercial form containing provisions which conflicted with the terms of the solicitation such as the liquidated damages, termination and disputes provisions. AFB's and Williamsburg's bids could not have been accepted because to have done so would have resulted in a contract imposing materially different obligations from those upon which the other bidders bid. AFB would have been obligated to construct pier utilities less extensive than those which were desired and Williamsburg would have had less onerous contractual obligations than the other bidders in the event it was late in delivery, the Government terminated its contract for default or convenience, or disputes arose under the contract. In contrast, Universal is obligated to construct the same project as that bid upon by its competitors and it is subject to the same legal obligations as one of them would have been. The deviation in Universal's bid affects only the amount of money which is to be paid in the event certain items of work are changed.

In Bristol, the solicitation required offerors to quote identical prices for base and option quantities. The low offeror on the base quantity, however, quoted higher prices for its option quantity, and it was clear that if the option quantity were exercised the standing of the offerors would be affected. Under the circumstances we concluded that it was prejudicial to the other offerors to waive the low offeror's failure to quote identical prices. Here, of course, we were concerned with exactly the same issue and for this reason we asked the grantee to determine whether Universal's failure to quote the same prices for increases and decreases would prejudice the other bidders.

Since Thomas has failed to clearly demonstrate errors of fact or law in our decision, our decision as it pertains to this issue is affirmed.

With regard to the second issue we noted in our previous decision that:

> "* * * some $35,000 separates the base bids of Universal /the low bidder/ and Thomas, but more than $200,000 separates the bids when the selected alternatives are considered. In view of this record, we are unable to determine whether prejudice to Thomas could result from acceptance of Universal's bid. Therefore, we believe that this determination should be made by the grantee, since we think the Medical Center itself is in a more suitable position to evaluate this matter."

We also pointed out in the same decision that:

> "* * * this case does not involve a direct Federal procurement. However, the regulations implementing the Hill-Burton program require the grantee to 'employ adequate methods of obtaining competitive bidding' and to 'award the contract to the responsible bidder submitting the lowest acceptable bid,' 42 CFR 53.128 (1975), and it is the responsibility of HEW to determine whether there has been compliance with the requirements. See 52 Comp. Gen. 874 (1973). Our role in a case such as this is to advise the Federal grantor agency if the requirements for competitive bidding have been met. Thomas Construction Company, Incorporated, B-183497, August 11, 1975, 55 Comp. Gen.___, 75-2 CPD 101; 52 Comp. Gen. 874, supra."

When we announced in the Federal Register, 40 Fed. Reg. 42406 (1975), our concern with regard to the propriety of the contracting procedures being used by grantees we also made it clear that

> "/t/he purpose of our reviews will be to foster compliance with grant terms, agency regulations, and applicable statutory requirements."

The above-cited HEW regulations implementing the Hill-Burton program are authorized by 42 U.S.C. § 291(c). Published in 1972 and amended in 1973, the regulations are somewhat sparse when it comes to delineating the relationship between grantees and construction contractors who submit bids for Hill-Burton work. The enabling legislation for the Hill-Burton program fails to provide

either specific policies or requirements in this area. However, the customary relationship in the construction industry is one where the owner, in this case the grantee, and its architect-engineer, together, direct the detailed course of the construction from inception through to completion. We note that one of the purposes of the Hill-Burton legislation is:

> "* * * to assist the several States in the carrying out of their programs for the construction and modernization of such public or other nonprofit community hospitals and other medical facilities as may be necessary, in conjunction with existing facilities, to furnish adequate hospital, clinic or similar services to all their people * * *." 42 U.S.C. § 291(a)

The United States Department of Justice has argued that the Hill-Burton program evidences:

> "* * * a congressional design to induce the States, upon joining the program, to undertake the supervision of the construction and maintenance of adequate hospital facilities throughout their territory." Simkins v. Cone Memorial Hosp., 323 F. 2d 959, 968 (4th Cir. 1963).

Given the above we believe our prior decision fulfilled the announced goal of "fostering compliance with grant terms, agency regulations and applicable statutory requirements." 40 Fed. Reg. 42406 (1975). Further, it is our opinion that the grantee and its architect obviously were in the best position to ascertain the likelihood of changes and whether it was probable that the magnitude of the changes could be such as to jeopardize Universal's position as the low bidder. Moreover, even though Universal did not comply with the solicitation's single unit price provision its deviation from the provision affected only the price. Since the bidder committed itself to do all the work which the solicitation specified and since the grantee has determined that Universal's bid represented the lowest total cost for the project we believe it was reasonable to make award to Universal notwithstanding its failure to quote single unit prices.

Accordingly, the decision of October 21, 1975, is affirmed.

R. F. Keller

Deputy Comptroller General
of the United States