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J. C. ...
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DECISION



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

FILE: B-189486

DATE: February 7, 1978

MATTER OF: Hydro-Clear Corporation

DIGEST:

GAO will not consider complaint by proposed supplier to second low bidder under procurement funded by EPA grant against low bidder's responsiveness and responsibility. Complaint essentially involves low bidder's subcontract award, and matter does not come within situations enumerated in Optimum Systems, Inc., 54 Comp. Gen. 767 (1975), 75-1 CPD 166. Moreover, legitimate recognizable interests in prime contract award are adequately protected by limiting parties eligible to request GAO review under Public Notice at 40 Fed. Reg. 42406, September 12, 1975, to firms that submitted bids, none of which have expressed dissatisfaction with conduct of procurement.

The City of Daytona Beach, Florida, issued an invitation for bids for a wastewater treatment plant to be funded by a 75-percent grant from the Environmental Protection Agency (EPA). Bidders were to list on the bid form one or more suppliers for each element of the plant. The following appeared below the lines for the listings:

"Note: Descriptive literature concerning size, type, model, operating characteristics and efficiencies shall be submitted with the bid on all items by manufacturers not named in the specifications."

Paragraph 23 of the specifications concerned a requirement for a tertiary filter system "capable of treating 15 MGD of secondary waste effluent, with or without pre-treatment," under all of 14 listed conditions. The specifications did not name a manufacturer for that item.

B-189486

Nine of the 17 bids received named Lyco-ZF as the supplier of the tertiary filter system. The remainder named Hydro-Clear Corporation.

Grumman Ecosystems Corporation (Grumman) was the low bidder, and proposed to furnish the Lyco-ZF system. In response to the descriptive literature requirement set out above, Grumman included in its bid the Lyco-ZF system model number ("TF-384"), capacity ("15 MGD"), and certain characteristics ("4 mg/l BOD5-5 mg/l S.S.");

Hydro-Clear, which was named as the tertiary filter system supplier by the second low bidder, filed a protest with the City against the proposed award to Grumman. Hydro-Clear argued that Grumman's bid should be rejected as nonresponsive, on the basis that it failed to comply with the descriptive literature requirement. Hydro-Clear's argument was rejected by the City's consulting engineer on April 11.

A hearing on the protest was held by the City Manager on April 25. The testimony included a statement by a Lyco-ZF representative that his firm had furnished a very similar system at the Seneca Creek, Maryland, wastewater treatment plant.

On May 4, the City Manager determined that Grumman's bid was responsive to the solicitation. The Mayor of Daytona Beach concurred with that determination on the same date.

Hydro-Clear then filed a protest with the EPA Regional Administrator against Grumman's responsiveness and responsibility. In addition, Hydro-Clear argued that the testimony of the Lyco-ZF representative at the grantee's hearing in regard to the similarities between the proposed Daytona Beach system and the Seneca Creek, Maryland, system "contained misrepresentations of material facts."

The protest was denied on June 21. Concerning Grumman's responsiveness and responsibility, the Regional Administrator held that Hydro-Clear, as

B-189406

a potential subcontractor, lacked standing under an EPA regulation at 40 C.F.R. § 35.939(6) (1976) to protest those matters. That regulation provides that a protest against a subcontract award will not be considered unless it concerns allegedly unduly restrictive specifications, subcontracts under agreements for architectural or engineering services, or subcontracts under construction contracts. In regard to the alleged misrepresentation at the hearing, the Regional Administrator stated that the record did not substantiate that Hydro-Clear's allegations indicate a violation of 40 C.F.R. § 30.245(a) (1976), which states in part that "subagreements awarded by grantees * * * must be accomplished free from bribery, graft, cutbacks, and other corrupt practices." However, the Regional Administrator forwarded his decision to the EPA Security and Inspection Division in accordance with 40 C.F.R. § 30.245(d) (1976), which provides:

"If any allegations, evidence, or even appearance of such illegality or corrupt practices comes to the attention of any other EPA employee, he must promptly report briefly in writing the substance of the allegation or evidence to the Director, EPA Security and Inspection Division."

By letter of June 24, Hydro-Clear filed a complaint in our Office concerning Grumman's bid and the EPA Regional Administrator's findings.

In a Public Notice entitled "Review of Complaints Concerning Contracts Under Federal Grants," 40 Fed. Reg. 42406, September 12, 1975, our Office issued the standards and procedures under which we will consider such complaints. Generally, the purpose of our review is to further compliance with grant terms, agency regulations, and applicable statutory requirements. Barber Electric, B-184670, December 4, 1975, 75-2 CPD 371. In accordance with the intent of that Notice, we will consider a complaint regarding the award of a subcontract when the award can be said to be "by or for" the grantee under the tests enunciated in Optimum Systems, Inc.,

B-189486

54 Comp. Gen. 767 (1975), 75-1 CPD 166. See Bally Case & Cooler, Inc., B-190808, January 16, 1978; Custom Control Panels, B-189066, July 14, 1977, 77-2 CPD 28; Barber Electric, supra.

Although Hydro-Clear's complaint is characterized as relating to the entitlement of Grumman and Hydro-Clear's potential prime contractor to the prime contract award, it essentially involves the award by Grumman to Lyco-ZF of a subcontract for the tertiary filter system. Under Optimum Systems, as applied to the grant area, our Office will consider subcontract award complaints only where (1) the prime contractor is acting as the purchasing agent of the grantee; (2) the active or direct participation of the grantee in the selection of a subcontractor has the net effect of causing or controlling the rejection or selection of potential subcontractors, or of significantly limiting subcontractor sources; (3) fraud or bad faith in the approval of the subcontract award by the grantee is shown; (4) the subcontract award is "for" the grantee; or (5) an entity entitled to the same requests an advanced decision. See Bally Case & Cooler, Inc., supra.

As a complaint against the award of a subcontract, the present case does not fall within any of the listed situations, and would not be for consideration on its merits. We see no reason to view the case differently merely because Hydro-Clear focuses its complaint on Grumman's bid rather than on the filter system subcontract award.

Moreover, even if we were to consider the complaint as involving only Grumman's responsiveness and responsibility we would not review its merits. In the above cited Notice we stated:

"* * * we will undertake reviews concerning the propriety of contract awards made by grantees in furtherance of grant purposes upon request of prospective contractors."
(Emphasis added.)

By that language, we intended to limit the parties that can initiate our review to those with direct and recognizable interests, i.e., generally bidders under the grantee's solicitation. Our consideration of subcontractor complaints against subcontract awards in the grant area under the limited criteria set out above in effect represents our recognition of the rights of nonbidders to reviews where they have recognizable interests which might not adequately be protected if our reviews were restricted to bidders. On the other hand, we have recognized a bidder's right to allow its bid to expire and to commit its resources elsewhere in reliance on an adverse agency determination. Electrol, Inc., 56 Comp. Gen. 730 (1977), 77-1 CPD 441.

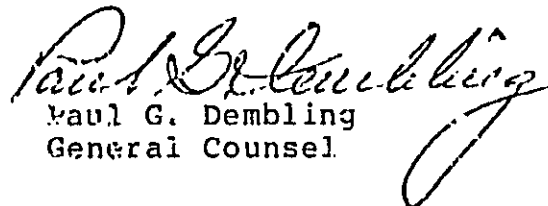
Under the present circumstances, we believe that the legitimate recognizable interests in the prime contract award to Grumman are adequately protected by limiting the class of parties eligible to request our review to firms that submitted bids and are, therefore, "prospective contractors." Here, no bidders on the prime contract, including any of Hydro-Clear's potential prime contractors, have expressed dissatisfaction with the conduct of the procurement. Cf. Infodata Systems, Inc., B-190479, November 21, 1977, 77-2 CPD 390, where the issues raised by a proposed subcontractor related to selection of the prime contractor. We dismissed the protest because the proposed subcontractor was not an "interested party" under the Bid Protest Procedures, 4 C.F.R. § 20.1(a) (1977).

However, we do note that 40 C.F.R. § 35.939(6) (1976), the regulation under which the EPA Regional Administrator determined that Hydro-Clear lacked standing to pursue its protest at EPA against Grumman's responsiveness and responsibility, concerns protests against subcontract awards, whereas Hydro-Clear protested the prime award. Hydro-Clear's standing before EPA should have been determined under 40 C.F.R. § 35.939(a) (1976), which states in part:

B-189486

"General. A protest * * * may be filed against a grantee's procurement action by a party with an adversely affected direct financial interest. * * *"

Although the record before our Office does indicate that this requirement was considered, it is clear that the ultimate decision by the EPA Regional Administrator that Hydro-Clear lacked standing was based on 40 C.F.R. § 35.939(6) (1976).


Paul G. Dembling
General Counsel