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DECISION



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

FILE: B-194151

DATE: July 16, 1980

MATTER OF: The Harris Corporation *(REQUEST FOR)*
Reconsideration]

DIGEST:

1. Upon reconsideration, prior decision which held grantee's reservation of right to waive any and all discrepancies or irregularities in substitute equipment offered suggested invitation overstated minimum needs is modified since applicable State regulation only permitted waiver of minor irregularities and, therefore, grantee did not have unlimited discretion to waive irregularities.
2. Recommendation that agency responsible for administering grant determine whether to release funds is withdrawn.

On April 22, 1980, our Office issued its decision on the request for review of The Harris Corporation (Harris) (B-194151, April 22, 1980, 80-1 CPD 282) concerning the award of a contract to the RCA Corporation (RCA) for television broadcast equipment by the Milwaukee Area Technical College (MATC). The contract was funded, in part, by a Federal grant currently being administered by the National Telecommunications and Information Administration (NTIA), Department of Commerce.

Our decision found that since MATC had, in the solicitation, specifically reserved the right to waive any discrepancies or irregularities in the equipment offered, it appeared MATC had overstated its minimum needs in the specifications and that particular features of the RCA equipment were not essential. Because we concluded that MATC did not obtain maximum open and free competition, we recommended that NTIA determine whether to withhold the Federal grant funds

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or whether extenuating circumstances may make it appropriate to fund the grant notwithstanding the degree of competition.

MATC has requested that our Office reconsider the April 22 decision because the clause contained in the solicitation regarding waiver is acceptable under the Federal Procurement Regulations (FPR) and past decisions of our Office.

The clause in question, reads as follows:

"Substitutions may be bid but must be identified. It will be the responsibility of the vendor to show his product's equivalency to specification, generic identification, manufacturer, brand, stock number, trade name, and/or other specific designation. MATC Purchasing shall be the sole judge of equivalency, and reserves the right to waive any and all discrepancies or irregularities, and to select the bid(s) that best serves the interest of MATC."

MATC also argues that the Ampex Corporation, supra, decision relied on by our Office in the April 22 decision is inapplicable to the instant situation. We cited Ampex for the proposition that the college's reservation of the right to waive any discrepancies or irregularities in the equipment offered strongly suggested that its minimum needs were overstated. Ampex, which was decided under Oklahoma law, held that the reservation was improper. MATC contends that under Wisconsin law, which it argues is controlling, such a reservation is specifically permitted.

We note that Wisconsin's VTAE (Vocational, Technical, and Adult Education) Procurement Policy was applicable to this procurement. VTAE provides that minor irregularities in bids may be waived but that irregularities which could substantially change the bids made by other vendors may not be waived. The VTAE example is a specification calling for swivel chairs and a bid offering non-swivel chairs. According to VTAE, this

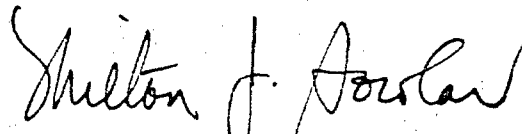
irregularity could not be waived since bids could change substantially if other vendors were allowed to rebid on the non-swivel chairs.

Although it remains our position that the above-quoted clause, standing alone, is objectionable for the reasons stated in our prior decision, we are persuaded that MATC could not waive other than minor irregularities under the clause because of the applicable local law on the matter. Upon reconsideration, therefore, we conclude that the clause did not prevent open and free competition for this procurement.

Moreover, we see no reason to resolve Harris' complaint. Harris contended that its substitute equipment was functionally equivalent to the specified equipment. For example, the specification called for traveling wave antenna. Harris' bid was rejected in part because it offered a batwing antenna, which MATC concluded would not meet its needs. Harris argued that its antenna was well suited for MATC's needs.

Even if we were to agree with Harris, the award to RCA could not be terminated, since the contract has been substantially performed. Thus, the only remaining question is whether the grant funds should be released. As we stated in our prior decision, this is a question properly for NTIA as part of its grant administration function. NTIA has already concluded that MATC acted reasonably in the matter. In the circumstances, no useful purpose would be served by our review of the complaint at this point.

Therefore, our prior recommendation to consider withholding of funds is withdrawn.



Acting Comptroller General
of the United States