19646

DECISION

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

FILE: B-201613 DATE: October 6, 1981

MATTER OF: Brumm Construction Company

DIGEST:

1. GAO will review complaints regarding procurements under EPA construction grants, provided complainant has exhausted administrative remedies by seeking review by grantor agency.

2. In future, grant complaints regarding matters other than alleged solicitation deficiencies must be filed with GAO within reasonable time, and four months after adverse decision by grantor agency will not be considered reasonable time.

3. GAO will consider complaint regarding contract modification when it is alleged that modification changed scope of contract and therefore should have been subject of new procurement.

4. GAO review of grantor agency decision on complaint regarding grantee procurement will be limited to whether decision was reasonable, in light of agency regulations encouraging free and open competition.

5. Contracting officer may not make award which he knows is not based on conditions under which performance will occur, since such action undermines integrity of competitive procurement system and deprives Government of lower price or better terms which it might otherwise obtain.

116534

018700

6. When complainant has not shown what actual bid price would have been under revised specifications, complainant has not shown that it had substantial chance for award, entitling it to bid preparation costs.

Brumm Construction Company has filed a complaint with our Office regarding modification of a contract for construction of sanitary sewers by an Environmental Protection Agency (EPA) grantee. Brumm appeals a decision by an EPA regional administrator holding that the grantee properly used the changes clause of the contract to reduce the scope of work involved and that readvertisement therefore was not necessary.

We find that by awarding the contract with the apparent intent to modify it, the grantee undermined the integrity of the competitive procurement system. We therefore are sustaining the complaint.

Background:

The grantee is the Marquette County, Michigan, Board of Public Works, which received approximately $8.8 million, or 75 percent of the total estimated cost of a sewage collection system and treatment plant addition, from EPA under the Clean Water Act, 33 U.S.C. § 1251-1376 (1976).

The apparent low bidder for the contract in question was Proksch Construction Company at $620,041. Shortly after opening Proksch claimed a mistake of $150,000, which would have brought its price to within two percent of the second-low bidder's price of $786,598. Brumm was third-low at $833,720.

The grantee refused to allow Proksch to withdraw or correct its bid and instead made award to it on June 7, 1978. A notice to proceed was issued on June 22, 1978, and on the same day the grantee's engineer and Proksch executed the protested change order. Approximately a month later, Brumm obtained copies of the original plans for the sewers and compared them to the work in progress. Brumm subsequently obtained copies of the new plans and made similar comparisons, then protested to the grantee in a letter dated August 4, 1978.

Brumm's Protest:

Brumm alleged that changes in alignment of the sewer lines reduced the amount and difficulty of work; that these changes represented an attempt to compensate Proksch for its claimed mistake-in-bid, since Proksch would have met financial disaster if it had been required to install the sewers according to original specifications; and that the integrity of the competitive procurement system had been compromised because Brumm was not given an opportunity to bid on the sewers as actually constructed. The second-low bidder joined Brumm in this protest, but has not complained to our Office.

Grantee and EPA Decisions:

Following a hearing, the grantee found Brumm's protest untimely because it had not been filed within one week after receipt of revised drawings, which had been mailed by the city engineer on June 29, 1978. (The one-week requirement is contained in EPA regulations covering protests on grantee procurements, 40 C.F.R. § 35.939(b)(1).)

On appeal, EPA's Region V administrator, in a decision dated August 14, 1980, found that there was no obligation for an unsuccessful bidder to monitor construction and that Brumm had acted promptly upon actual knowledge that the sewers were being installed according to plans other than those on which its bid had been based. The regional administrator therefore considered the extent and effect of the changes.

There is no dispute as to the facts. The completed sewer line was approximately 260 feet shorter than the 10,200 feet originally specified, due to having been moved from the north to the south side of the street for 1/10 of its length. In addition, the line was not as deep as originally specified for 3/4 of its length. The horizontal realignment reduced the amount of sod and the number of driveways and curbs which had to be restored, and the vertical realignment enabled the contractor to avoid two existing 12-inch sewer lines. As a result of these changes, Proksch's contract price was reduced by $53,000; Brumm, however, contends that actual savings were much greater.

Using Brumm's prices per linear foot for various depths, the regional administrator calculated that the changes in specifications would have reduced Brumm's bid

by $219,000, but that Brumm's price for the revised job would still have been $48,000 more than Proksch's, given the difference between the two original bids. The regional administrator seemingly rejected Brumm's argument that its unit prices might have been different if it had been bidding to the new specifications, because these prices did not appear to be based on any exact formula incorporating factors such as type of soil, depth to groundwater, terrain, commercial development, or location of water, sewer, and gas mains. Nevertheless, the regional administrator stated that he was "inclined to agree" that there was no way to predict what the bids would have been if the project had been readvertised.

Readvertisement was ruled out, however, by the regional administrator's finding that the changes were not in the nature of cardinal changes. Citing American Air Filter Co., Inc., 57 Comp. Gen. 285 (1978), 78-1 CPD 136, and a reconsideration of that decision, 57 Comp. Gen. 567 (1978), 78-1 CPD 443, as well as later decisions by our Office and the Court of Claims, the regional administrator stated that the cardinal change cases were useful because they provided standards for determining whether a changed contract was essentially the same as the original.

The regional administrator found that the initial and final points of the sewer line had remained the same under both contracts. In addition, he stated, the sewer followed essentially the same route as originally planned and carried the same wastewater in the same quantity to the same destination. He therefore concluded that the changes had not resulted in a fundamentally different undertaking between Proksch and the grantee; that they properly had been dealt with under the changes clause of the contract; and that they were not so extensive as to require readvertisement.

These conclusions are the subject of Brumm's complaint to our Office. Although the contract has been fully performed, Brumm requests that we issue a decision "analogous to a declaratory judgment" and award it bid preparation costs.

GAO Analysis - Preliminary Issues:

There are several preliminary issues which must be considered before we reach the questions of the propriety of the contract modification and the applicability of the cardinal change standards.

A. Comptroller General Authority

First, as it has in the past, EPA argues that our Office lacks authority to resolve complaints regarding procurements under EPA construction grants unless the agency specifically requests or acquiesces in our review. We frequently have exercised such authority, however. See, for example, Garney Companies, Inc., B-196075.2, February 3, 1981, 81-1 CPD 62, and Carolina Concrete Pipe Company, B-192361, March 4, 1981, 81-1 CPD 162. Our review is particularly appropriate where the complaint involves the fundamental requirement for full and free competition. Id., and cases cited therein. Our only requirement is that complainants first exhaust their administrative remedies when, as here, the grantor agency has procedures for complaints to it. Sanders Company Plumbing and Heating, 59 Comp. Gen. 243 (1980), 80-1 CPD 99. Brumm's complaint meets this criterion.

B. Timeliness

Second, EPA argues that under a new timeliness standard set forth in Caravelle Industries, Inc., B-202099, April 24, 1981, 81-1 CPD 317, Brumm's complaint to our Office is untimely.

We formerly held that the specific time limits of our Bid Protest Procedures, 4 C.F.R. § 21.2 (1981), apply only to protests of direct Federal procurements. Carolina Concrete Pipe Company, supra. In Caravelle, however, we stated that while it might not always be appropriate to establish strict time limits for grant complaints, they must be filed within a "reasonable" time so that we can decide an issue while it is still practicable to recommend corrective action if warranted. We added that in most instances, the only "reasonable" time for filing complaints in which solicitation deficiencies were alleged would be the time required by the Bid Protest Procedures, i.e., before bid opening or the time for receipt of proposals.

In Brumm's case, the EPA administrator's decision was signed on August 14, 1980, and mailed to all parties on August 23, 1980; however, Brumm's complaint was not filed with our Office until December 22, 1980. If the Bid Protest Procedures had been applied, any request for our review should have been filed within 10 days after Brumm knew or should have known of the EPA decision. Again, while it may not always be appropriate to apply the 10-day rule to

grant complaints involving matters other than alleged solicitation deficiencies, we believe such complaints must be filed within a "reasonable" time after the basis for them is known.

We will, however, consider Brumm's complaint on the merits because it was filed before the Caravelle decision was issued. It took EPA more than six months to respond to our request for a report, and Caravelle was decided during the interim. Although we do not think it appropriate to apply the new timeliness standards for grant complaints retroactively, in the future, a complaint filed four months after an adverse agency decision will not be considered filed within a "reasonable" time.

C. Scope and Standard of Review

Other preliminary questions involve the scope and standard of our review. As a general rule, we do not consider protests concerning contract modifications, since these are matters of contract administration and thus for resolution by procuring agencies. We will, however, consider protests or complaints on this basis when, as here, it is alleged that the modification changed the scope of the contract and should have been the subject of a new procurement. Die Mesh Corporation, B-190421, July 14, 1978, 78-2 CPD 36.

Since it involves review of an EPA decision, however, our consideration will be limited to whether that decision was reasonable, Carolina Concrete Pipe Company, supra, in light of the agency's regulations which encourage free and open competition in grantee procurements. See 40 C.F.R. § 35.936-3 (1980).

GAO Analysis - Substantive Issues:

A. Award with Intent to Modify

Turning to the substance of Brumm's complaint, we see the primary issue as whether the award was made with the intent to change contract specifications. We recognize that circumstances may change during performance, and that the Changes Clause is designed to permit the Government and the contractor legally to modify their agreement to reflect conditions which were not anticipated at the time of award. However, a contracting officer may not make an award which he knows or should know is not based on the conditions under which the performance will occur, since such action tends to undermine the integrity of the competitive procurement

system. The potential injury is the same whether there is a material change in specifications or a material change in the conditions of performance. In either case the Government (or in this case the grantee) is deprived of the full benefit of competition--a lower price or better terms which it might otherwise have obtained. Moore Service, Inc., B-200718, August 17, 1981, 81-2 CPD 145, citing A&J Manufacturing Company, 53 Comp. Gen. 838 (1974), 74-1 CPD 240.

In its arguments to EPA, Brumm asked why, if realignment of the sewers was desirable after bid opening or at time of award, was it not equally desirable during design or bidding, especially since it significantly reduced the contract price. The EPA decision does not address this issue.

The change was agreed to two weeks after award, on the same day that the contractor was notified to proceed. It closely followed Proksch's claimed mistake-in-bid and the grantee's refusal to allow correction or withdrawal. Moreover, the contract price was reduced, but the record contains no evidence (other than the grantee's statement) that this accurately reflected reductions in length and depth of the sewer, the amount of restoration, and the number of existing sewer lines to be avoided.

In our opinion, the execution of the modification, making changes which were at least arguably significant, and simultaneous issuance of the notice to proceed, under such circumstances were tantamount to award of a contract with the intent to modify it. These actions, in our view, effectively distorted the competition on which the award was based. See Lamson Division of Diebold, Incorporated, B-196029.2, June 30, 1980, 80-1 CPD 447.

We therefore cannot conclude that the EPA decision was reasonable and, by letter of today, are so advising the Administrator of EPA. We do not find it necessary to consider whether, as Brumm alleges, EPA's reliance on the cardinal change doctrine was misplaced.

The complaint is sustained.

B. Bid Preparation Costs:

As for bid preparation costs, the Court of Claims requires a bidder or offeror to show, among other things, that it had a substantial chance of receiving an award

before it is eligible for reimbursement of such costs. Decision Sciences Corporation - Claim for Proposal Preparation Costs, 60 Comp. Gen. 36 (1980), 80-2 CPD 298. We do not believe Brumm has made such a showing, since what it actually would have bid for the sewer construction job under the revised specifications is an open question. Under these circumstances, we do not reach the question of whether bid preparation costs are available on a procurement by a Federal grantee. See The Eagle Construction Company, B-191498, March 5, 1979, 79-1 CPD 144.

Milton J. Socolar

Acting Comptroller General
of the United States