DECISION

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

61101

FILE: B-185790 DATE: July 9, 1976

MATTER OF: Griffin Construction Company 98325

DIGEST:

1. Where grant conditions indicate that State law shall govern procurement by grantee and State law exists on specific point in question and is followed, GAO cannot say result reached is irrational. However, since here no State law exists as to particular point in question, then consideration of the matter under Federal frame of reference is appropriate.

2. Rational support is found for rejection by grantee and concurrence by grantor agency of low bid submitted by "Ethridge & Griffin Const. Co. * * * a corporation, organized and existing under the law of the State of Ga * * *" and signed by individual as secretary. Corporation was and is nonexistent. Award to Griffin Construction Company would be an improper substitution. Rationale for objecting to award to entity other than named in bid is that such action could serve to undermine sound competitive bidding procedures.

3. Where grantor agency issues regulation requiring grantees to make contract awards under grants through maximum competition to low responsive, responsible bidder, unless grantor takes action necessary to assure grantee compliance, there will be no guarantee that conditions which agency requires to carry out congressional purposes will be met.

The subject complaint involves the award of a contract by the city of Monticello, Georgia, for improvements and additions to its municipal water distribution facilities made under a grant from the Economic Development Administration (EDA), Department of Commerce. The grant was made pursuant to title I of the Public Works and Economic Development Act of 1965, as amended, Public Law 89-136, 42 U.S.C. §§ 3121, 3113-3136 (1970). The grant called for the Government to provide 60 percent of the actual cost of the project.

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Monticello solicited bids for the construction of the water system. The two lowest bids received were as follows:

Firm	Price
"Ethridge & Griffin Const. Co."	$1,006,637.77
Turner Murphy Company	1,008,427.45

Subsequent to the receipt of bids, the city attorney of Monticello advised the mayor and city council that the low bid was not proper for consideration based on grounds characterized as "technical" and as "serious." The technical problems were as follows: "* * * the bid is not dated; the correct names of the bidders are not set forth in the bid proposal; the amount of the bid on Section A is not given in the Base Proposal, but instead is given in Subtotal Section 'A' by stating one figure with a second figure beneath to be subtracted from the figure above." The serious problems were as follows: "* * * the bid is not signed by Ethridge Construction Co. or any authorized agent for it nor is there any bond for the Ethridge Construction Company attached to the subject bid; further, signature for Griffin Construction Co. is apparently by the secretary, without having that signature attested to or the corporate seal affixed." Because of the above, he concluded "that the subject bid by Ethridge Construction Co. and Griffin Construction Co. would not be binding on the subject bidders and consequently is not a proper bid for consideration by the City on the referenced project."

By resolution of November 21, 1975, the city of Monticello accepted the bid of Turner Murphy Company as the lowest acceptable and proper bid.

Griffin thereafter protested this action to the city. The matter was also brought to the attention of EDA's Southeastern Regional Office. By memorandum of December 9, 1975, EDA's regional counsel indicated that he could find no basis to say that the decision of Monticello in not awarding to Griffin was wrong. Consequently, the indication was made that EDA should concur in the grantee's proposed award to Turner Murphy. By letter of December 22, 1975, Monticello was advised that the EDA regional office concurred in the award of the contract to Turner Murphy.

Choice of Law

The EDA regulations regarding the award of contracts by its grantees, 13 C.F.R. § 305.95 (1975), provide that:

"Recipients may use their own procurement procedure regulations which reflect applicable State and local law, rules, and regulations, provided that procurements made with Federal grant funds adhere to the following standards:

* * * * *

"(5) * * * Awards shall be made to the responsible bidder whose bid is responsive to the invitation, price, and other factors considered. Any and all bids may be rejected when it is in the grantee's interest and such action is in accord with applicable law.

"(6) Competition shall be obtained to the maximum extent possible. * * *"

Our Office has held that, where grant conditions indicate that State law shall be followed in certain aspects of procurements handled by Federal grantees, the initial frame of reference for deciding the propriety of those actions is the State and local law. Lametti & Sons, Inc., 55 Comp. Gen. 413 (1975), 75-2 CPD 265; Blount Brothers Corporation, et al., B-185322, March 11, 1976, 76-1 CPD 172. This is consistent with attachment "0" of Federal Management Circular (FMC) 74-7 which permits the use by the grantee of its own law (with certain exceptions) in awarding contracts under Federal grants. FMC 74-7, para. 3 of attachment "0." As recognized in Copeland Systems, Inc., 55 Comp. Gen. 390 (1975), 75-2 CPD 237:

"Many grant agreements require application of 'local' procurement law (usually State) to govern the procurement procedures being followed in the award of contracts under the grants. Presumably grantees are familiar with local procurement law and practices. To the extent our reviews will be partially concerned with the application and interpretation of local procurement law of which the grantee should have a degree of familiarity, we do not think the grantee will be disadvantaged. * * *"

In Copeland, supra, we further recognized the grantor's primary authority to determine the grantee's compliance with grant provisions and also our right to recommend corrective action when we believed that the determinations reached were not rationally founded. As can be seen in Lametti, supra, and Blount, supra, where the grant indicates that State law shall govern and State law exists on the specific point in question and is followed, even if that State law differs from Federal law, GAO cannot say that the results reached in following State law were not rationally founded.

Therefore, where grant conditions indicate that State and local law will govern, the initial frame of reference must be to State law. However, if no State law exists as to the particular point in question, then consideration of the matter under a Federal frame of reference is appropriate. While this would appear to diminish the intent of the grant conditions to allow State and local law to control, it must be noted that FMC 74-7 in paragraph 3 of attachment "0" and, indeed, most grant conditions seek to have grantee procurements accomplished with a maximization of competition and fairness to all participants. To that end, these policy statements are entirely consistent with basic Federal principles of competitive bidding which are intended to produce rational decisions and fair treatment. See Copeland Systems, supra. Therefore, it would seem that to the extent that a grantee decision is not rationally founded, it could be considered inconsistent with almost any system of competitive bidding, i.e., the aim of FMC 74-7 and the grant conditions such as 13 C.F.R. § 305.95, supra. As we stated in Copeland--

> "Under a 'rational basis' test we do not consider that a grantee's possible ignorance of our decisions or the intricacies of Federal procurement law will work to the grantee's disadvantage since what is 'rational' under the particular circumstances involved will be more a matter of logic than knowledge of detailed rules. * * *"

With regard to the instant case, it would appear that the initial frame of reference as to the applicable law must be State and local law. As noted above, the regulations provide that the grantee may utilize its own State and local law and there is no indication that anything other than State and local law was followed by Monticello in reaching its conclusion. Moreover, EDA in

its report states that "* * * this matter represents an interpretation of State and local law rather than the allegation of a violation of Federal law or regulations * * *." But, the complainant does indicate that State precedent in the area of bid responsiveness is lacking and the matter should be resolved by resorting to the Federal frame of reference. We agree since our review has also uncovered no Georgia law specifically on the issue involved in the protest.

Griffin's Alleged Nonresponsiveness

Griffin argues that the bid in the name of "Ethridge & Griffin Const. Co." indicates an intention on its part to perform the work which was the subject of the IFB as a joint venture. However, it indicates that no joint venture was ever in fact formed and, therefore, Ethridge was never bound on the bid in that the only signatory was "Tommy L. Griffin, Sec." Griffin also argues that listing both firms on the bid did not alter the actual legal relationship which existed between the firms at the time of bid opening, i.e., that they were two separate entities and not a joint venture. It is for this reason that Griffin states that the bid bond had to be written in favor of an existing entity, Griffin Construction Company. Griffin argues, therefore, that since it was listed as a bidding entity, the bid was signed by Tommy L. Griffin and the bid bond listed Griffin Construction Company as principal, it is entitled to award of the subject contract irrespective of the fact that Ethridge Construction Company is also listed as a bidding entity.

Griffin's argument, however, overlooks what the bidding entity indicated as its status in the bid. The bid states:

> "Proposal of Ethridge, & Griffin Const. Co. (hereinafter called 'Bidder') a corporation, organized and existing under the laws of the State of Ga, a partnership, or an individual doing business as _____."

As Griffin itself notes, the joint venture represents a partnership for a single transaction. Bowman v. Fuller, 66 S.E. 2d 249 (Ga. 1951); 46 Am. Jur. 2d Joint Venture § 4 (1969). However, the bidder's representation that it was a corporation (by filling in the appropriate blank with "Ga") rather than a partnership is determinative of the represented status of the bidding entity. It is clear

from the record that no corporation named Ethridge & Griffin Const. Co. was ever formed. Thus, we have a situation of a bid submitted by a nonexistent corporate entity, i.e., Ethridge & Griffin Const. Co., signed by a similarly "nonexistent" secretary. Further, the solicitation required that a bid submitted by a corporation was to be impressed with the corporate seal. This, however, was not done with regard to the instant bid.

The instant case is analogous to an earlier decision of our Office, Martin Company, B-178540, May 8, 1974, 74-1 CPD 234. There, the bid was also submitted by an entity which had certified itself to be a corporation incorporated in the State of Oklahoma. However, no such corporation existed. The bid was, however, executed by "Terry L. Martin, Vice President." The issue was raised as to whether an award could have been made to the Martin Company which was a sole proprietorship, even though the bid was signed showing a corporate status. We concluded that Martin Company, an existing sole proprietorship, could not properly be substituted for the bidding entity, Martin Co., Inc., since an award to anyone other than the bidder named in the bid as bidding entity would be an improper substitution. See, also, 41 Comp. Gen. 61 (1961); 33 id. 549 (1954). Cf. Oscar Holmes & Sons., Inc., et al., B-184099, October 24, 1975, 75-2 CPD 251. In the latter decision, we set forth the rationale for this approach as follows:

> "* * * We stated that such action could serve to undermine sound competitive bidding procedures in that it would facilitate the submission of bids through irresponsible parties, whose bids could be avoided or backed up by the real principals as their interests might dictate."

Based on the above, we conclude that the rejection of the low bid was proper. While the precise reasons enunciated by the city attorney for rejecting the low bid are not identical to the analysis expressed above, we believe that the concern of the city of Monticello, EDA, and our Office was the same--the lack of a binding commitment by the bidding entity. Therefore, we find rational support for the procurement decision made by the city of Monticello and the concurrence in that decision by EDA. In view of this conclusion, we see no reason to address further the detailed reasons for Monticello's actions.

The Assistant Secretary for Economic Development, Department of Commerce, expresses concern as to GAO's role in reviewing the award

of contracts by grantees of the Federal Government. In this regard, he states:

> "We are aware of the General Accounting Office's heightened interest in reviewing grantee contract award procedures as published in 40 FR 42406-7, 9/12/75, and in the Matter of Lametti & Sons, Inc. B-183444, October 31, 1975, in which the Deputy Comptroller General found, inter alia, that a city improperly awarded a contract under an EPA grant. We believe, however, any future GAO guidelines which would place upon Federal grantor agencies responsibility for monitoring and passing upon grantee contract awards beyond acceptance of competent legal advice from local counsel would derogate from State and local responsibilities under FMC 74-7, Attachment O, and would place an onerous administrative burden upon grantor agencies."

It has long been recognized that when the Federal Government makes grants it has the right to impose conditions upon those grants. State of Indiana v. Ewing, 99 F.Supp. 734 (D. D.C., 1951), vacated as moot 195 F.2d 556 (D.C. Ct., 1952). See Illinois Equal Employment Opportunity Regulations for Public Contracts, 54 Comp. Gen. 6 (1974), 74-2 CPD 1. With regard to the instant case, the regulations under which grantee awards were to be made were issued pursuant to 42 U.S.C. § 3211 (12) (1970) which authorizes the Secretary of Commerce to "establish such rules, regulations, and procedures as he may deem appropriate in carrying out the provisions of this chapter" (42 U.S.C. §§ 3121-3226 (1970)). As noted in part above, the subject regulations require that EDA grantees award their contracts on the basis of procurement procedures that provide for maximum competition with award to be made to the low responsive, responsible bidder. Under these circumstances, we believe that unless a grantor takes such actions as circumstances indicate are necessary to assure compliance with conditions it imposes upon grantees, there will be no guarantee that what the agency requires to carry out congressional purposes will be met.

We recognize again that in grantee awards a review of the grantee's compliance is primarily within the grantor's authority although GAO does have a right to make further recommendations when the determinations reached with regard to grantee compliance are not rationally founded.

Paul H. Gumbiling

For The Comptroller General
of the United States