DECISION

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

04697

FILE: B-188813 DATE: December 23, 1977

MATTER OF: Motorola Inc.

DIGEST:

Where portion of low bid containing delivery and installation schedule was marked "trade secret," bid should not have been accepted by grantee, since it was nonresponsive in that public opening was required. If Government procurement were involved, termination of contract would have been recommended but for state of work and liability for it.

Motorola Inc. has filed a complaint concerning the award of a contract to General Electric Company (G.E.) made by the Southern California Rapid Transit District (SCRTD) under grants from the Department of Transportation, Urban Mass Transportation Administration (UMTA). Motorola contends that G.E.'s bid was nonresponsive since much of the bid was marked "trade secret," thereby precluding public inspection of the bid in violation of basic principles of Federal procurement law.

Pursuant to Capital Grant Project Nos. CA-03-0034, CA-03-0046, CA-03-0049, and CA-03-0090, SCRTD issued an invitation for bids (IFL), for the purchase of bus mobile radios and related equipment and the establishment of a communications system on November 7, 1975. After several delays due to revised specifications, complaints and an indefinite postponement of bid opening, final solicitation was made on September 23, 1976, and bids were opened on November 22, 1976. SCRTD Bulletin No. 6, which constituted the final solicitation, provided that: "Bidders must clearly identify trade secrets as such. All other material submitted [illegible] public record, and is subject to disclosure upon request." In addition, paragraph C16 of SCRTD Bulletin No. 6 provided that "All bids will be opened in public at the bid opening. At that time, any person present shall have the right to have any part of the bids read aloud."

At the time of bid opening, Motorola requested that the bids be read aloud and that it be allowed to inspect the bid submitted by G.E. Motorola was informed of the price, quantity and certain delivery aspects contained in Volume I of G.E.'s bid. However, because of G.E.'s labeling Volume II of its bid as "trade secret," Motorola, as well as others, was denied access to Volume II of G.E.'s bid.

UMTA and SCRTD maintain that the procurement is controlled by State law rather than Federal procurement law and that State law was complied with. Additionally, UMTA and SCRTD assert that the California Public Records Act, section 6250, et seq., of the California Government Code, prevented SCRTD from disclosing Volume II of G.E.'s bid. The California Public Records Act provides that writings containing information relating to the conduct of the public's business in the hands of a governmental agency are public records and open to public access. However, trade secrets in the hands of governmental agencies are not public records open to public inspection.

Motorola, however, asserts that basic principles of Federal procurement law control since the grant contracts between UMTA and SCRTD require that the grantee provide for "free, open, and competitive bidding," thus incorporating the competitive bidding requirements of Federal Management Circular (FMC) 74-7, attachment O. In addition, Motorola maintains that UMTA's own External Operating Manual requires that basic principles of Federal procurement law apply.

FMC 74-7, issued by the General Services Administration and implemented in UMTA External Operating Manual, chapter III C-5, promulgates standards for establishing consistency and uniformity among Federal agencies in the administration of grants and requires that procurements by grantees be conducted "* * * so as to provide maximum open and free competition * * *." All of the grant contracts between UMTA and SCRTD specifically require that SCRTD provide for "free, open, and competitive bidding." We have held in the past that where the grant contracts between the grantor and the grantee require that there be open and competitive bidding or some similar requirement, certain basic principles of Federal procurement law which go the essence of the competitive bidding system must be followed. Illinois Equal Opportunity Regulations for Public Contracts, 54 Comp. Gen. 6 (1974), 74-2 CPD 1; Thomas Construction Company, Inc., 55 Comp. Gen. 139 (1975), 75-2 CPD 101.

Of particular importance in this case is the fact that paragraph 3c(5) of the FMC 74-7 attachment O, section 84B.3 of the SCRTD rules and regulations and paragraph C16 of the SCRTD bulletin that solicited bids for the procurement all require bids to be opened in public. A public opening has been interpreted to mean that the bid must publicly disclose to all competing bidders the essential nature and type of the product offered and those elements of the bid which relate to price, quantity and delivery terms. Computer Network Corporation, B-183639, November 12, 1975, 75-2 CPD 297; Cadre Corporation, 53 Comp. Gen. 24

(1973). A bid which restricts such disclosure is nonresponsive. Computer Network Corporation, supra. The purpose of a public opening of bids is to protect both the public interest and bidders against any form of fraud, favoritism or partiality. Computer Network Corporation, supra; Page Airways, Inc., et al., 54 Comp. Gen. 120, 129 (1974), 74-2 CPD 99; 47 Comp. Gen. 413, 414-15 (1968). Nothing has been presented by any of the parties which establishes that "public opening" has a different legal meaning or that a bidder's restriction of a material part of its bid from public disclosure does not affect the responsiveness of the bid. In the latter respect, paragraph 3c(5) of the FMC 74-7 attachment O and section 8.7 of the SCRTD rules and regulations both require that the successful bidder be responsive to the invitation for bids.

The differences between SCRTD, UMTA and Motorola have centered around whether the restriction G.E. placed on public disclosure of Volume II of its bid rendered the bid nonresponsive. Much of the arguments focused on whether the restriction precluded Motorola and the public from knowing the essential nature of the product offered by G.E. Because Motorola stated in its initial complaint to our Office that it was informed as to the "price, quantity, and delivery aspects" of G.E.'s bid, UMTA has taken that as a concession by Motorola that the bid was responsive in that regard. However, the only reference in Volume I of G.E.'s bid to delivery was made in the context of the price of delivery as a breakdown in G.E.'s total bid price. Volume I did not contain information which set forth G.E.'s delivery and installation schedule. That information was in Volume II which was restricted from disclosure.

Thus, Motorola's acknowledgement that it was informed of the "delivery aspects" of G.E.'s bid was not a reference to G.E.'s delivery and installation schedule. This is evidenced by an affidavit of a Motorola employee present at the bid opening which states that after bids were opened SCRTD read out lump-sum figures from the bids for the following categories:

	Wismer & Becker	Metromedan	G.E.	Motorola
Equip. & Materials	$5,202,575	$4,520,124	$3,593,494	$6,038,572
6% Tax	312,754	271,207	215,610	362,314
Delivery	F.O.B.L.A.	36,735	24,640	F.O.B.L.A.
Installation	387,452	835,480	631,866	1,053,389
Total	$5,912,871	$5,663,546	$4,465,610	$7,454,275

The Motorola employee further states that "[SCRTD] would furnish no additional information as to the bids submitted." In addition, the fact that Volume II contained G.E.'s delivery terms and was not publicly disclosed until 5 months after bid opening evidences that Motorola's reference to the "delivery aspects" of G.E.'s bid was made only in regard to the delivery charge in the context of the total bid price. Inasmuch as G.E.'s bid restricted the disclosure of the terms of delivery, it was nonresponsive and should not have been accepted. Computer Network Corporation, supra.

As noted above, UMTA and SCRTD maintain that the grant contracts provided that the grantee would not be required to violate State law and that SCRTD was prevented by the California Public Records Act from disclosing Volume II of G.E.'s bid. We do not believe that this assertion is relevant to the complaint. While the grant contracts provided that the grantee would not be required to violate State law, adherence to basic principles of procurement law would not have required SCRTD to violate California's law against the public disclosure of private trade secrets in the hands of Government agencies. Had SCRTD declared G.E.'s bid nonresponsive, it would not have violated the California Public Records Act. We also note that UMTA maintains that the subsequent release of Volume II of G.E.'s bid upon the approval of G.E. 5 months after bid opening cured the defect in the bid. However, the basis upon which a bid is submitted is determined as of the bid opening. Computer Network Corporation, supra; New England Engineering Co., Inc., B-184119, September 26, 1975, 75-2 CPD 197. Therefore, the subsequent release of Volume II containing G.E.'s delivery terms did not cure the defect in G.E.'s bid.

In view of the conclusion reached, we see no reason to consider the additional points regarding the nonresponsiveness of the G.E. bid raised by Motorola. UMTA has stated that if the award to G.E. is found to be improper it should not be terminated because G.E. has completed a substantial portion of the work and SCRTD would have to pay nearly the entire contract price. Motorola, on the other hand, relying on the California decision of Miller v. McKinnon, 124 P.2d 34 (1942), contends that SCRTD is under no obligation to pay G.E. for the work performed because the contract between SCRTD and G.E. is void. However, the cited decision is distinguishable from the immediate situation in that the decision did not involve a question as to the responsiveness of a bid but rather involved a contract let without advertising for bids when advertising was required. Absent a California court decision relevant to the immediate situation, we will look to our own decisions for guidance. Our Office does not consider an award to be a nullity unless

it is plainly or palpably illegal. 52 Comp. Gen. 213 (1972). The criteria for determining that an award is plainly or palpably illegal are set forth in the 52 Comp. Gen. decision. The criteria are absent here.

If this were a Government procurement we would be inclined, but for the state of the work and the liability for it, to recommend that the contract be terminated.

Deputy Comptroller General
of the United States