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DECISION

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

FILE: B-189441 DATE: February 14, 1978

MATTER OF: W.M. Lyles Company

DIGEST:

1. Contrary to position of complainant, amended bidding documents in grantee procurement did not reasonably require identification of proposed suppliers of major equipment items which interpretation is confirmed by subsequent grantee decision denying complaint. Additionally, amended bidding documents did not warn bidders--either by express direction or clear implication--that bids would be rejected for failures to identify proposed suppliers.

2. GAO precedent involving rejection of bid through application of "Qualified End Products" clause used in direct Federal procurements is not dispositive in grantee procurement containing requirement that suppliers of major equipment be identified after bid opening, since clause, unlike grantee bidding documents, specifically requires that identity of qualified product be contained in bid. Further, grantee procurement is not for "qualified products" as such, but for entire construction project.

3. Notwithstanding bidder's failure to identify major equipment suppliers in bid, bidder was otherwise obligated under terms of signed bid to furnish listed items of major equipment or equivalent"alternative equipment." Because of obligation of bidder, and since amended bidding documents did not reasonably require identification as of bid opening, bid's failure to show suppliers was not significant.

4. Requirement to identify proposed suppliers of equipment within 1 week of bid date does not affect bid responsiveness (or attendant concept of "minor informalities") but bidder responsibility. Consequently, decisions cited by complainant involving bid responsiveness are not for application.

W.M. Lyles Company (Lyles) has requested our review of a contract for wastewater treatment facilities awarded to a joint venture bidder by the City of Ceres, California, under a construction grant awarded to the City by the Environmental Protection Agency (EPA).

The bidding documents describing the facilities set forth a schedule of "lump sum work items" (A-K) which were separately identified so that work might be classified "for additional federal and state funding consideration." The schedule also contained a list of separately identified "Major Equipment Items" (1-13), a sample item of which reads as follows:

"Description & Reference	Manufacturer	Installed price
Grit Washer	(a) FMC Corp.	$_____
	(b) Rexnord	$_____
	(c) Dorr Oliver	$_____"

In addition to the listing of the work by "lump sum" and "Major Equipment" categories, prospective bidders were instructed to submit "total base" bids for all the work involved.

Before the "Major Equipment Item Schedule," the following "Note" was inserted:

> "The Contractor shall encircle the letter preceding the name of the manufacturer indicating thereby the price utilized in the Total Base Bid. Failure to do so will be understood to mean the lowest price listed was used."

By addendum No. 2 to the bidding documents, bidders were informed as follows:

"GENERAL PROVISIONS, SECTION 3, BID FORMS:
Prices for work items 'A' through 'M' will not be required at the time of bid. The low bidder will be required to submit the prices for work items 'A' through 'M' within one week of the bid date.
Prices for major equipment items 1 through 13 will not be required at the time of bid. All bidders shall encircle the letter preceding the name of the manufacturer selected for each major equipment item. The low bidder will be required to submit prices for major equipment items within one week of the bid date."

Lloyd E. Tull, Inc., El Camino Construction Co., and Environ-Con Engineering, Inc., a joint venture, submitted the lowest "total base" bid of $4,123,000. Lyles submitted the next lowest bid of $4,242,000.

Although the joint venture bid did not contain the circled names of the bidder's selected manufacturers for the "Major Equipment Items," the bidder did circle the names of (and supply individual item prices for) the items within one week of bid opening. Since the low bid was otherwise considered acceptable to the City, award was proposed to be made to the joint venture.

Lyles' initial complaint to the City against the proposed award raised two grounds of protest, namely: (1) the joint venture bid was nonresponsive for failing to contain circles preceding the "name of the manufacturer selected for each major equipment item;" and (2) acceptance of the joint venture bid would violate an EPA prohibition against use of the "single base bid method of solicitation and parts." (This ground of protest was subsequently withdrawn by the company.)

Both the City and EPA rejected Lyles' complaint. The City rejected the complaint through a reading of addendum 2 in connection with the note preceding the "Major Equipment Item Schedule." Under the City's reading,

the encircling of the named manufacturers was to be done within 1 week of bid date and since the joint venture complied with this requirement Lyles' complaint was found to be without merit.

The EPA Regional Administrator having authority over the grant upheld the City's determination. The Administrator reasoned that:

> "* * * [t]he alleged omission in the bid of the Joint Venture is not a deficiency pertaining to a material factor in that it does not affect the quality, quantity, or amount of the bid nor does it give the Joint Venture a competitive advantage over other bidders. I have concluded that the alleged omission was an informality for which the City reserved the right to waive non-compliance. While the City's determination was based on its interpretation of the plans and specifications rather than its right to waive informalities, there is a rational basis for its decision * * *."

The basic point of Lyles' complaint to our Office is the same as that raised before the City and EPA, namely: that the joint venture's bid was nonresponsive for its failure to specify equipment manufacturers as of the date of bid opening.

In so arguing, Lyles principally relies on B-166255, August 1, 1969, which involved the rejection of a bid caused by application of a "Qualified End Products" clause. EPA distinguishes that case from the circumstances present here, as follows:

> "The GAO decision offered by Lyles as dispositive is inapposite to the subject facts. The procurement at issue in the referenced decision concerned direct Federal procurement for radiometers which also involved a set-aside for small business

offerors. The issue was whether the protestant's bid was properly held nonresponsive for its failure to conform to the 'Qualified End Products' clause in the solicitation, which required that a bidder identify in its bid the qualified product being offered (the protestant had merely included a letter of intent to acquire a company which produced a qualified product).

"Your office determined that the issue of conformance to the clause was determined by the Armed Services Procurement Regulations, which required that only bids offering products which are qualified prior to the opening of bids shall be considered in making awards. The solicitation was unequivocal in that regard, thus, the contracting officer had no way in which to determine at bid opening that the protestant was offering a qualified product in accord with the invitation. Accordingly, the determination of nonresponsiveness was affirmed.

* * * * *

"The challenged procurement of the EPA grantee does not involve requirements which are imposed to insure that only a particular class of approved manufacturers' products would be used. Nor does the procurement evidence grantee intent that all major equipment suppliers be listed, or otherwise selected, as a matter of bid responsiveness. These types of requirements usually are established by regulation and, where stated in solicitations for bids, are accompanied by express warnings that failure to conform to the requirement will make the bid nonresponsive."

We agree that the above EPA reasoning is correct--especially since the grantee was essentially contracting for the facilities on a "base bid," "entire project" basis rather than for individual "qualified products" equipment items. Although the solicitation as initially issued may have evidenced the grantee's intent to require bidders to identify by bid opening their proposed suppliers as a condition of bidding (to prevent the supposed evils of "bid shopping"), the grantee's amendment of the solicitation reasonably eliminated that condition. Further, the grantee's decision in denying Lyles' complaint obviously revealed that it drafted the amendment with the intent of eliminating the condition. Additionally, the amended solicitation did not warn bidders--either by express direction or clear implication--that bids would be rejected for failures to contain identities of proposed suppliers.

Additionally, Lyles argues that the failure of the joint venture bidder to identify its proposed "major equipment" prevented the grantee from determining whether the joint venture proposed to furnish acceptable equipment.

Notwithstanding the joint venture's failure to identify the "major equipment" suppliers in its bid, the company was otherwise obligated under the standard form language of its signed bid to "perform all work * * * as provided in the Contract Documents * * * as set forth on the drawings and in the specifications and other contract documents." The joint venture bidder, once awarded any contract, was further obligated as contractor either to furnish the listed items of the major equipment suppliers incident to the entire construction work or to propose "alternative equipment" that would be equivalent to that specified. Because of these provisions, and since the bidding documents, as amended, did not reasonably require identification--as of bid opening--of the major equipment suppliers to be utilized, the joint venture's decision not to identify the suppliers in its bid is of no legal importance.

Thus understood, the requirement for bidders to identify proposed suppliers within 1 week of bid date must be viewed not as affecting bid responsiveness (or the attendant concept of "minor informalities" as LPA concluded) but bidder responsibility--that is, the ability of the proposed awardee to give evidence as to the acceptability of its proposed suppliers. See Titan Southern States Construction, B-189441, November 15, 1977, 77-2 CPD 371.

Consequently, the decisions cited by Lyles to buttress its additional argument--(for example, Fabcraft Inc., dba FABCO, B-186973, November 5, 1976, 76-2 CPD 384) are distinguishable because they involve situations where the bidding documents--unlike the case here--otherwise demanded descriptive literature so that the procuring agency might properly evaluate the product to be contracted for and provided that the failure to furnish the literature would result in bid rejection. Here, of course, the "product" to be contracted for was the entire project incident to which acceptable items of equipment were to be furnished.

Complaint denied.

R.F.K.,11m

Deputy Comptroller General
of the United States