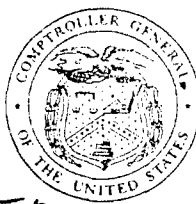


DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES

WASHINGTON, D.C. 20548

[Protest Alleging IFB Specifications Were Unduly Restrictive] ¹³⁵²⁸ *PLTT*

FILE: B-194151

DATE: April 22, 1980

MATTER OF: The Harris Corporation

DIGEST:

1. Even though Federal funds constitute less than 25 percent of contract price, GAO will review procurement by grantee when total dollar amount of Federal funds can be considered "significant."
2. In procurements by Federal grantees, mandate for maximum open and free competition of Attachment O of OMB Circulars A-102 and A-110 must be tempered by grantee's actual minimum needs. However, grantee's express reservation of right to waive any discrepancy or irregularity in equipment offered strongly suggests that invitation for bids overstates minimum needs.
3. Solicitation which permits bids based on substitute equipment, but includes neither specifications nor criteria for evaluation of substitute equipment, unduly restricts competition, since there is no common basis for preparation or consideration of bids.
4. Although grant and FCC construction permit applications require grantee to list proposed equipment by manufacturer and model number, approval of applications does not, of itself, permit grantee to restrict competition solely to that equipment if its actual needs are not so limited.
5. GAO's Public Notice regarding review of contract awards by grantees implies responsibility on part of grantor agency to solicit views of grantee and on part of grantee to make its views known to agency. When grantee is in fact contacted by agency, submits comments on administrative report, and participates in GAO conference, grantee is not denied procedural due process.

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6. Since grantee did not obtain maximum open and free competition required for all procurements by recipients of Federal funds, agency responsible for administering grant should determine whether to release funds.

The Harris Corporation (Harris) requests our review of a \$1,473,829 contract for television broadcast equipment awarded to RCA Corporation (RCA) by the Milwaukee Area Technical College. The contract, which has been substantially performed, was to be funded in part by a Federal grant.

The college expected to receive \$326,980 from the Office of Education, Department of Health, Education, and Welfare (HEW), under the Educational Broadcasting Facilities Program. Funds were to be used to upgrade the college's facilities for WMVS (Channel 10) and WMVT (Channel 36) in Milwaukee, Wisconsin.

Harris alleges that the specifications in the invitation for bids issued by the college were unduly restrictive, since more than 90 percent of them were taken verbatim from an RCA technical document, and that evaluation of its \$1,199,900 bid was deficient because it was based on these specifications -- which only RCA could meet -- and on "ambiguous standards of reliability."

The National Telecommunications and Information Administration (NTIA), Department of Commerce, which became responsible for administering the grant under the Public Telecommunications Financing Act of 1978, 47 U.S.C.A. § 390 - 398 (1979 Supp.), advised the college shortly after award was approved and the complaint filed that it would withhold funds pending our decision. We find that the maximum open and free competition required for procurements by Federal grantees was not obtained, and recommend that NTIA decide whether, in view of this conclusion, it is appropriate to release grant funds.

Jurisdiction

Both NTIA and the college have argued that our Office should not consider the complaint, since our Public Notice concerning contracts awarded by grantees states that we will not review those in which Federal funds in the project as a whole are "insignificant." 40 Fed. Reg. 42406 (1975).

In our prior decisions concerning such contracts, the level of Federal funding, when specified, has ranged from 60 to 90 percent. See, for example, Griffin Construction Company, 55 Comp. Gen. 1254 (1976), 76-2 CPD 26, and Concrete Construction Company, B-194077, June 7, 1979, 79-1 CPD 405. While percentage of Federal funding is an important consideration in determining whether that funding is "insignificant," it is by no means the sole consideration. As indicated in the Public Notice, our interest in the grants area stems at least in part from the increasing level of Federal spending via grant instruments. Thus, we believe the overall amount of the grant is also a valid consideration. Accordingly, although in this case anticipated Federal funds constitute less than 25 percent of the contract price, we believe the total dollar amount of \$326,980 is not insignificant and warrants our review.

Restrictive Specifications

The invitation issued by the college called for bids for antennae, transmission lines, transmitters and other miscellaneous equipment for Channels 10 and 36. The record supports Harris' allegation that only RCA could have been completely responsive to this invitation. For example, although two other manufacturers produce the type of antenna specified for Channel 10, apparently neither would have been able to meet requirements for 10 years' production and at least 15 installations of similar equipment.

NTIA, in its report to our Office, acknowledges the close parallel between the drawings and specifications in the solicitation and those of RCA. The college argues that, due to the complexity of this procurement, it was fully justified in specifying very particular features and qualities for the equipment which it wished to obtain, i.e., to use design specifications, and was not obligated to define those features in general performance terms. Both NTIA and the college note that a number of specifications were modified following discussions with Harris before bid opening.

Harris, however, states that it was assured during those discussions that equipment which offered performance characteristics similar to those of the RCA equipment would be accepted. Moreover, Harris points out, the invitation for bids permitted substitute bids, so long as bidders showed their equivalency. The Standard Conditions of Bid § 7, stated:

"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 [Milwaukee Area Technical College] 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."

Substitutes offered by Harris, however, were rejected as nonresponsive. For example, specifications for the Channel 10 antenna called for a traveling wave antenna with a radome cover for weather protection; Harris offered a batwing antenna, which it argues meets all weather protection requirements and would have been better suited for use in the college's location on the shore of Lake Michigan. For Channel 36, the solicitation required a slotted cylinder antenna with an aluminum outer conductor; Harris offered a steel outer conductor, but argues that since weight is the critical factor and its antenna actually weighs less than RCA's, it should have been found acceptable.

Similar arguments have been made with regard to transmission line equipment. The specifications called for an inner conductor with an expansion bullet "constructed with a wristband expansion joint to prevent galling" (a condition which apparently shortens the life of the equipment). Harris contends that the transmission line which it offered contained an expansion bullet and was functionally equal to that specified; however, it was rejected because it did not have the wristband expansion joint.

Harris also argues that the transmitter specifications were unduly restrictive. NTIA and the college, challenging the scope of review by our Office, have produced documents indicating that the grant was not intended to cover the transmitter and argue that since no Federal funds are involved in the procurement, we should not consider this portion of Harris' complaint.

Finally, Harris contends that the college demonstrated a preference for RCA equipment by naming RCA in applications filed with HEW and the Federal Communica-

tions Commission (FCC). The college denies that it was committed to any particular manufacturer and states that it was merely complying with regulations of HEW and the FCC, whose respective forms for grants and construction permits require listing proposed equipment by manufacturer and model number.

GAO Analysis

As a general rule, in Federal procurement, the contracting activity is responsible for establishing its minimum needs. We have applied this rule to procurements by grantees, stating that the mandate for maximum open and free competition of Attachment O, Office of Management and Budget (OMB) Circular A-102, which applies to state and local governments, and Circular A-110, which applies to institutions of higher education, must be tempered by a grantee's actual minimum needs. For this reason, we have upheld a grantee's refusal to revise somewhat restrictive specifications when it has been shown that they actually represent its minimum needs. See The Babcox and Wilcox Company, 57 Comp. Gen. 85, 88 (1977), 77-2 CPD 368.

In the present case, however, the college specifically reserved the right to waive any discrepancies or irregularities in the equipment offered. This strongly suggests that its minimum needs were overstated in the technical specifications and that particular features of RCA equipment were not essential. See Ampex Corporation, B-184562, April 12, 1977, 77-1 CPD 252.

If, as the college now argues, these features were essential to carrying out the grant purpose of upgrading its television facilities, the college should have sought approval to purchase RCA equipment on a negotiated, sole-source basis. Id.; see also Ampex Corporation, B-184562, May 24, 1977, 77-1 CPD 360. In these two cases, also involving RCA equipment for educational television, we found that solicitations which permitted substitutions but contained neither specifications for substitute equipment nor criteria for evaluation of such equipment unduly restricted competition. We stated that such solicitations, in effect, invited vendors to draft their own specifications, and that bids presumably were to be evaluated on a subjective basis, since there obviously was no common basis on which all bids could be considered.

Although we reviewed the cited Ampex cases under applicable State laws, it is also a basic principle of Federal procurement law that full and free competition cannot be obtained unless specifications are sufficiently definite to permit preparation and evaluation of bids on a common basis. If bidders are invited to offer equipment varying from the specifications to some undefined extent, they may loosely be said to be in an equal position in that each may offer what he chooses, but they totally lack any knowledge of what they are bidding for or against. There can be no legal competition unless all bidders are competing on a common basis; no intelligent bidding unless all bidders know what the contract requirements will be. 39 Comp. Gen. 570, 572 (1960); Murphy Machinery Company, B-192760, February 9, 1979, 79-1 CPD 90.

The college points out that in specifying RCA's designs, it considered not only initial cost, but also such factors as future operating and maintenance costs, life expectancy, and adaptability for future expansion or changes in method of operation or technology. If only RCA could have met the college's requirements in this regard, we would not object to specifications or evaluation criteria reasonably reflecting these requirements even if, as a result, other manufacturers could not compete. Here, however, the college's willingness to consider bids on substitute equipment leads us to believe that the college did not consider its minimum needs, but rather simply concluded that Harris' equipment would be less desirable than RCA's. This is inconsistent with the Federal procurement norm. See Penske Detroit Diesel Allison, B-190658, May 16, 1978, 78-1 CPD 373 and cases cited therein.

We therefore find the solicitation, which did not provide bidders with a common basis for competition and overstated the college's minimum needs, unduly restrictive. We do not -- in fact cannot -- reach the specific issue of the responsiveness of Harris' equipment. Nor do we need to consider whether the solicitation requirements for 10 years' experience and 15 installations were unduly restrictive. Since we have determined that the solicitation is deficient on an overall basis, we need not decide whether that portion of the solicitation which pertains to the transmitters is within our jurisdiction.

We recognize that the original HEW grant application, as well as the FCC construction permit application, required the grantee to list proposed equipment by manufacturer and model number. However, we do not believe that approval of such applications then permits a grantee to restrict its procurement competition solely to that equipment if its actual needs are not so limited; obviously, a contrary view would be inconsistent with the competition mandate of Attachment O.

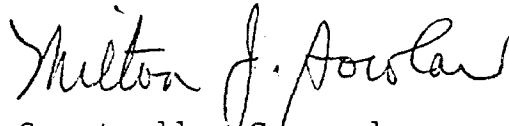
We believe that it should be made clear to grantees (as an NTIA form which is newer than the HEW one involved in this case indicates) that manufacturers' names and model numbers serve to identify the quality of equipment proposed, but that approval does not, of itself, justify procurement of the named equipment. Moreover, as counsel for the college acknowledges, grant agreements and FCC construction permits may be amended if, as a result of subsequent competitive procurement, a grantee purchases equipment other than that listed in its applications.

We note that counsel for the college complains of a lack of procedural due process in our review of complaints regarding procurements by grantees, primarily because our Office did not contact the college or its counsel directly until the time of scheduling a conference on Harris' complaint. Our Public Notice, supra, regarding review of contracts by grantees, states that upon the filing of a complaint, we will solicit a report from the grantor agency which sets forth its views and the views of the grantee. This, we believe, implies responsibility on the part of the grantor agency to solicit the views of the grantee and on the part of the grantee to make its views known to that agency. Since the college was in fact contacted by NTIA, was given an opportunity to comment on the administrative report, and participated in a GAO conference, we do not believe there was any lack of procedural due process.

Since the contract has been substantially performed, the only question remaining is whether the grant funds should be released. We believe it is properly for NTIA, as part of its grant administration responsibilities, to determine whether to withhold funds because the grantee's procurement cannot be regarded as consistent with the

competition requirements of Attachment O, or whether there are extenuating circumstances which may make it appropriate to fund the grant notwithstanding the degree of competition obtained by the college. By letter of today, we are advising the Secretary of Commerce of our views.

The complaint is sustained.

A handwritten signature in cursive script, reading "Milton J. Fowler".

Acting Comptroller General
of the United States