

PL-II
14078

DECISION



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

FILE: B-192478

DATE: June 19, 1980

MATTER OF: Edward L. Nezelek, Inc.

DIGEST:

[Protest Alleging Awardee's Bid Was Nonresponsive]

1. Although grantor agency has procedures providing for agency review of grantee contract awards, GAO review as provided for in 40 Fed. Reg. 42406 (1975) is appropriate since GAO concern is with efficacy of agency review in fostering grantee compliance with requirements flowing from grant.
2. Agency's argument against GAO review of grantee award because there remains unresolved litigation before Federal court is rejected where record shows material issues under consideration by court are different from those before GAO.
3. Where grantee's engineer determined that low bidder's equipment contained material deviations from solicitation's design specifications, bid was nonresponsive and grantee's subsequent award to that bidder was inconsistent with grantor agency regulation requiring award to responsive bidder.
4. Where performance under improperly awarded contract is virtually completed, recommendation for corrective action with respect to specific award is not feasible.

112603

~~011045~~

This matter involves a complaint by Edward L. Nezelek, Inc. (Nezelek) against the award of contract S-98B (revised) to Poole and Kent Company (Poole and Kent) by the Miami-Dade Water and Sewer Authority, the recipient of grants from the U.S. Environmental Protection Agency (EPA) under Title II of the Federal Water Pollution Control Act, 33 U.S.C. §§ 1281 et seq. (1976). The grants are for an addition to the Central District Wastewater Treatment Plant, Virginia Key, Miami, Florida, including sludge dewatering facilities. The grants are for approximately 75 percent of the total estimated project cost.

Although the procurement history is complex, Nezelek's allegations can be summarized rather simply: that Poole and Kent's low bid should have been rejected as nonresponsive because the centrifuge proposed by the firm (a model manufactured by Enviro Development Company, Inc. (EDC)) did not comply with certain design specifications and because the contract to Poole and Kent was subject to the condition that acceptable equipment be substituted, thereby violating established principles of competitive bidding, applicable EPA regulations, and state and Federal law.

EPA questions our jurisdiction to consider the merits of this complaint. EPA points out that its regulations provide a two-part administrative review of protests against grantee awards, first by the grantee and then by EPA's Regional Administrator. See 40 C.F.R. § 35.939 (1979). EPA states that its Regional Administrator's review is not limited to the record developed by the grantee or its consultant, but provides an in-depth analysis of a grantee's procurement activities to determine compliance with all grant-related requirements and whether there exists a rational basis for a grantee's award determination. Since EPA's Regional Administrator reviewed this matter, EPA submits that no purpose would be served by creating a new administrative record for review by this Office.

Although EPA has often suggested that our review of complaints arising from grantee awards is inadvisable and inappropriate, see, e.g., Copeland Systems, Inc., 55 Comp. Gen. 390 (1975), 75-2 CPD 237; BBR Prestressed Tanks, 56 Comp. Gen. 575 (1977), 77-1 CPD 302, we remain unconvinced by EPA's arguments that our review of such matters is unnecessary. In our public notice entitled "Review of Complaints Concerning Contracts Under Federal Grants" 40 Fed. Reg. 42406, September 12, 1975, we advised that our Office would undertake reviews concerning the propriety of contract awards made by grantees in furtherance of grant purposes upon the request of prospective contractors. We believe that our review serves a useful function and is appropriate to the exercise of our statutory responsibility to investigate all matters relating to the application of public funds (31 U.S.C. §§ 53, 54 (1976)) where the involvement of Federal funds in the grant project is considerable. We undertake such reviews to insure that grantor agencies are requiring their grantees, in awarding contracts, to comply with any requirements made applicable by law, regulation or the terms of the grant agreement. See Copeland Systems, Inc., and BBR Prestressed Tanks, supra. We fail to see why the existence of EPA's review process should negate the need for our review since in effect it is the efficacy of the EPA process in specific cases which is the subject of our review. Indeed, as discussed below, we feel that in this case the EPA process did not insure grantee compliance with the applicable regulations, and in fact prompted the grantee to act inconsistently with the regulatory requirements.

EPA also points to litigation pending before a Federal district court concerning a prior solicitation of this requirement. EPA cites various decisions of this Office where we state our policy not to decide matters where the material issues involved are before a court of competent jurisdiction unless that court expresses an interest in receiving our views. The litigation, however, involving an action by Poole and Kent regarding the grantee's previous attempt to award a contract for this requirement, does not involve the issues raised in Nezelek's complaint. Accordingly, this litigation is no barrier to our consideration of Nezelek's complaint.

Under the solicitation the successful bidder was to furnish all materials, labor and equipment necessary to construct two gravity thickening tanks, two gas storage spheres and two buildings. Nezelek maintains that Poole and Kent's bid did not conform with the specification for the eight sludge dewatering centrifuges required for the project. As amended, those specifications required that each centrifuge be capable of specified performance levels with regard to feed rate, feed consistency, cake discharge, polymer addition, and capture level. They also required that a bidder submit with its bid the centrifuge manufacturer's name, model number, and references to installations to demonstrate to the satisfaction of the grantee and its engineers that the proposed equipment is capable of meeting these performance requirements. In addition, after contract award, the contractor was required to deliver and provide temporary installation of one centrifuge of the exact model and size proposed. The equipment was required, within 270 calendar days from notice to proceed, to perform as specified. A final acceptance test for each installed unit would be required prior to contract completion. The solicitation also listed numerous design characteristics for the centrifuges such as the construction of the frame and cover assembly and the requirements for hard-surfacing.

Bids under the solicitation were opened on October 6, 1977 with Poole and Kent submitting the low bid at \$5,975,340, followed by Nezelek at \$6,147,600.

Poole and Kent proposed to supply EDC Model 25 centrifuges; Nezelek proposed centrifuges of a different manufacturer. Nezelek protested to the grantee that the Poole and Kent bid failed to provide the necessary information regarding other installations of the EDC Model 25 centrifuge.

Although Poole and Kent's bid included a table containing theoretical performance ratings for the offered model, it contained no information on other EDC 25 installations since the EDC 25 was a new model not previously installed. The grantee consequently determined that Poole and Kent's bid was deficient, and resolved to accept the Nezelek bid.

Both Poole and Kent and EDC filed protests with the grantee, which denied them. The denial was appealed to EPA's Regional Administrator.

On May 18, 1978, the EPA Regional Administrator issued his determination, finding that the grantee lacked a rational basis for rejecting Poole and Kent's bid. He noted that there was no clear language in the specifications warning that failure to list experience and performance data for installations of the proposed model would result in rejection of a bid. He further determined that while the installation provision was not an "experience clause" per se, the grantee's interpretation of that provision, in effect, violated 40 C.F.R., § 35.936-13(c) (1977) which addresses experience clause restrictions and provides for submission of a bond or deposit in lieu of a specified experience period. He noted that EDC had offered to supply such a bond, and concluded that not to permit the substitution of a bond or deposit in lieu of an installation history would have a chilling effect on competition. Paramount to this conclusion was the fact that the grantee reserved final approval of the equipment until after completion of a field test or actual installation of the centrifuges at the site.

Thus, he stated that the bidder's risk in this and similar instances should be limited to the substitution of acceptable equipment (perhaps at a higher cost to the bidder, and without reimbursement from the grantee) in the event that the grantee ultimately determined that the proposed equipment, after field testing, failed to meet the performance specifications.

As a result, he concluded that the grantee could not reject Poole and Kent's bid as nonresponsive for the reasons offered, and instructed the grantee to obtain the information necessary to make an evaluation of the EDC Model 25 to determine whether "it is a performance equivalent of equipment listed in the specifications."

By letter of June 7, 1978, the grantee's engineering consultant advised the grantee that he had reviewed the specifications of the EDC Model 25 "without consideration of EDC's responsiveness to the references of installation." He found the EDC Model 25 did not comply with various design specifications listed in the solicitation:

- "(a) The Contract Specifications required the centrifuges to be furnished with fused carbide wear inserts at the feed zone to provide an abrasion resistant material at this critical zone. EDC uses stainless steel strips.
- "(b) The Contract Specifications required the conical section of the bowl to be completely covered for wear protection by sintered tungsten carbide tiles. EDC again uses stainless steel strips, a material less resistant to wear.
- "(c) The Contract Specifications call for the flights in the feed area to be hard surfaced with Coast 53C. EDC does not show compliance with this requirement.
- "(d) The Contract Specifications call for a cast iron framed centrifuge. EDC uses a welded steel frame less resistant to corrosion and vibration."

The report did not mention whether the EDC Model 25 conformed with the performance criteria listed in the solicitation.

Notwithstanding these findings, the grantee convened a meeting on June 8, 1978, and resolved to make award to Poole and Kent. Excerpts of the transcript of that meeting reveal considerable confusion and disagreement over whether the Regional Administrator's decision of May 18 still required award to Poole and Kent in view of the findings of the grantee's engineering consultant. After discussion of delays incurred throughout the procurement by protests and reference to the fact that the Regional Administrator's May 18 decision had not required that the project be resolicited, the grantee apparently concluded that award to Poole and Kent was mandated by the Regional Administrator's decision on the grounds that Poole and Kent's "risk" was limited to substitution of equipment acceptable to the grantee's engineer.

Nezelek then protested to the grantee that its determination was not in conformity with the Regional Administrator's May 18 determination, arguing that his decision did not require award to Poole and Kent but merely held that the bid could not be summarily rejected for failure to supply operating experience data. Nezelek contended that the findings of the grantee's engineering consultant, set out in the June 7 letter, indicate that the equipment does not meet various design specifications which are distinct from, and ascertainable without regard to, the performance history of the equipment. Nezelek pointed out that at the time the Regional Administrator issued his determination, he was not aware the EDC equipment failed to comply with material design specifications.

By letter of June 19, 1978, the grantee dismissed Nezelek's latest protest, resting on its interpretation of the Regional Administrator's decision that if the grantee found EDC's equipment materially deficient without regard to "references of installation," the risk of Poole and Kent was limited to substitution of acceptable equipment. As for the deficiencies cited by the consulting engineer, the grantee directed attention to the fact that they were likely to impact on performance of the equipment (susceptibility to corrosion and vibration) and thereby characterized them as direct functions of performance. As such the grantee maintained that this matter could not be resolved until the centrifuges had been installed and put into operation.

Nezelek appealed to the EPA Regional Administrator who, on July 13, 1978, summarily dismissed the protest.

While the Regional Administrator concurred with Nezelek's contention that the grantee's evaluation was not consistent with the terms of the Administrator's May 18 determination [presumably because that determination instructed the grantee to evaluate the EDC equipment to determine compliance with performance specifications], he found that Nezelek was not entitled to relief because "the ultimate conclusion regarding performance equivalency of EDC's equipment * * * will not influence the determination of the low bidder."

By letter of the same date to the grantee, the Regional Administrator advised the grantee of his view that the engineer's evaluation bore little relationship to the question of "performance equivalency" and that on the basis of the record at that date, the Regional Administrator found no reason to condition the award of the contract to Poole and Kent upon the substitution of alternative equipment. Once again, he instructed the grantee to make a determination of the equipment's performance equivalency.

On the basis of the grantee's letter of June 19, 1978 rejecting Nezelek's protest, it appears that the grantee determined that the Poole and Kent bid offering the EDC centrifuge was not nonresponsive despite the engineering consultant's determination that the equipment did not comply with the design specifications; and, it was apparently later determined by EPA that there would be no requirement for substitution by Poole and Kent of alternative centrifuges, at least until the EDC model had been installed under contract and an evaluation had been made of its operating performance under the performance specifications.

It is not clear from the record whether in fact the Poole and Kent bid was accepted by the grantee on the basis of substitute equipment or on the basis of the EDC Model 25. In either event, we would view the award as improper.

Although the award provision in the solicitation was silent as to the matter of responsiveness, providing merely that the contract be "awarded to that responsible Bidder whose evaluated bid totals the lowest number of dollars", the applicable EPA regulations provide that unless all bids are rejected, award must be made to "the low, responsive, responsible bidder" [emphasis added]. 40 C.F.R. § 35.938-4(h)(2) (1977). See Union Carbide Corporation, 56 Comp. Gen. 487 (1977), 77-1 CPD 243. There is no indication that any party disputes the requirement that award in this instance must be made to a "responsive" bidder; rather the dispute centers on whether the Poole and Kent bid was in fact responsive.

It is a basic principle of Federal contract law that a bid, to be responsive, must at the time of bid opening be an unequivocal offer to provide the requested item in conformance with the material terms and conditions of the solicitation. Sentinel Electronics, Inc., B-185681, June 24, 1976, 76-1 CPD 405. Otherwise, bidders will not be competing on an equal basis, with the result that one bidder may get an unfair advantage over another bidder. See Thomas Construction Company, Inc., B-184810, October 21, 1975, 75-2 CPD 248. This concern is also reflected in Florida law. See Harry Pepper and Associates, Inc. v. City of Cape Coral, Florida, 352 So. 2d 1190 (Fla. App. 1977), where the court stated:

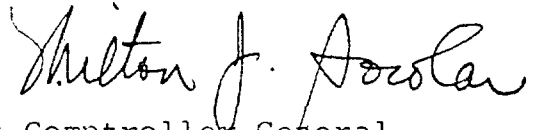
" * * * The test for measuring whether a deviation in a bid is sufficiently material to destroy its competitive character is whether the variation affects the amount of the bid by giving the bidder an advantage or benefit not enjoyed by the other bidders * * *."

We believe Poole and Kent could have had such an advantage here. The grantee's engineers reported that the EDC Model 25 centrifuge proposed by Poole and Kent did not meet several of the design requirements listed in the solicitation. There is no indication in the solicitation nor does any party argue that those design requirements are not material to the design of the centrifuge or that the centrifuges are not a significant part of the project. Certainly, it appears that the deviations noted by the engineers make the EDC centrifuge a less expensive item than that called for by the specifications. Under the circumstances, we think Poole and Kent could well have had a competitive advantage by bidding on the basis of furnishing a less costly piece of equipment than what other bidders, relying on the specifications, planned to furnish. Thus, we believe the bid as submitted was nonresponsive and should not have been accepted. Neither could the bid be made responsive, under both basic Federal principles and Florida law, by permitting the substitution of a conforming centrifuge after bid opening but prior to award. See Harry Pepper and Associates, Inc. v. City of Cape Coral Florida, supra; Thomas Construction Company, Inc., supra. This result is

not altered by the fact that Poole and Kent could be required, under contract performance provisions, to supply different centrifuges at its expense if the model it supplied failed the performance test under the contract. Although those provisions may compel a contractor ultimately to furnish centrifuges that meet the specified performance criteria, they do not appear to reach design discrepancies if those discrepancies do not adversely impact on performance. Thus, while perhaps the design specifications should not have been included in the solicitation if centrifuge acceptability was to be based solely on compliance with the performance levels specified, waiver of the design specifications for one bidder, as indicated above, could well be prejudicial to other bidders who complied with those specifications.

Consequently, we feel that the grantee's award decision and EDC's acquiescence in it was inconsistent with the "basic Federal principles" embodied in the applicable regulation (40 C.F.R. § 35.938-4(h)(2)) requiring award to a responsive bidder.

Due to various delays incurred in our accumulation of a record sufficient to permit our review of this matter, the foremost being a delay by EPA of almost eight months in responding to our request for an agency report, our files were not adequately developed until performance of the contract had been virtually completed. Therefore, it is not feasible for us to recommend corrective action with respect to this award. However, by letter of today to EPA's Administrator, we are directing his attention to the conclusion reached in this case.



Acting Comptroller General
of the United States