

DECISION



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

*Fitzmaurice
Proc I
4368*

*Protest of Contract Award For Microwave Communications
Systems*

FILE: B-193610

DATE: July 22, 1980

MATTER OF: Cardion Electronics, A Division of
General Signal Corporation

DLG01752

DIGEST:

1. Since affidavits from number of people present at bid opening testify that bid was received before bid opening and complainant accepts that affidavits were made in good faith, bid is concluded to have been timely received.
2. Bid should not be rejected for failure to acknowledge amendment where amendment is acknowledged in cover letter to bid.
3. Where procurement is advertised in accordance with state law, there is compliance with Federal requirements, only bid received is determined to be reasonable and there is no evidence of deliberate effort to preclude complainant from competition, GAO will not object to funding of contract under grant.
4. Notwithstanding bidder received resolicitation 96 hours before bid opening and next 3 days are weekend and holiday, GAO finds no abuse of discretion by subgrantee in establishing time period for preparation of bids since bidder had competed under original solicitation, technical changes were not extensive, any questions bidder had could have been resolved by bidding in alternative, and subgrantee had complied with state law and made good-faith effort to comply with Federal norm.
5. Although there was some delay in obtaining information necessary for resolution of case, delay was not due solely to grantor agency action as contended by complainant.

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Cardion Electronics, a Division of General Signal Corporation (Cardion), has filed a complaint against the award of a contract by the Sheriff's Department, Chautauqua County, New York (county), to Motorola Communication and Electronics, Inc. (Motorola), for a microwave communications system.

The procurement is being funded under a Law Enforcement Assistance Administration (LEAA) grant awarded to the State of New York Division of Criminal Justice Services (State) under the authority of 42 U.S.C. § 3731, et seq. (1976). The county is a subgrantee.

Cardion filed a prior complaint with our Office concerning this same procurement. In response, we issued a decision, Cardion Electronics, A Division of General Signal Corporation, B-193610, October 4, 1979, 79-2 CPD 241, in which we recommended that the county's requirement for a microwave communication system be resolicited. We based our recommendation on the fact that under the Federal norm, which was controlling, both Cardion's and Motorola's bids should have been rejected as nonresponsive. LEAA and the county accepted our recommendation, and the county proceeded to resolicit the requirement. The present complaint arises out of this resolicitation.

Cardion argues that:

- (1) Motorola's bid is untimely and thus should not be considered;
- (2) even if timely, Motorola's bid offers an unreasonably high price;
- (3) the county did not obtain adequate competition since only two bidders were solicited and only one bid was received;
- (4) there is evidence that the county deliberately tried to preclude Cardion from competing;
- (5) the county did not allow an adequate amount of time for the preparation of bids;

- (6) the mere fact that the county complied with New York General Municipal Law Section 103 regarding the publication of notice of the procurement in the local newspapers is not controlling over the question of whether an adequate number of bidders were solicited; the county was also required to comply with Office of Management and Budget (OMB) Circular A-102, Attachment O;
- (7) the county did not issue amendment No. 7 in sufficient time so that all prospective bidders could consider it prior to submitting their bids;
- (8) it appears from the record that Motorola failed to acknowledge amendment No. 7; thus, its bid should have been rejected as nonresponsive; and
- (9) there were sufficient ambiguities in the procurement specifications to justify Cardion's request for an extension of the bid preparation period and clarifications from the county.

Based on the foregoing, Cardion believes that any award to Motorola would be improper and requests that the requirement be resolicited. However, for the reasons indicated below, we will not object to the funding of the contract between Motorola and the county.

As noted in Cardion Electronics, A Division of General Signal Corporation, supra, our Office will consider complaints concerning contracts under Federal grants, but our review of such complaints is limited to determining whether there has been compliance with applicable statutory requirements, agency regulations, and grant terms. All parties agree that under Attachment O, section 2b, Office of Management and Budget (OMB) Circular A-102 (Revised, October 22, 1979), the grantee is permitted to use its own procurement procedures which reflect applicable state and local law, rules, and regulations so long as the procurement adheres to certain minimum

Federal standards. However, neither LEAA, the State nor our own research has discovered a body of State or local rules applicable to all the allegations raised by Cardion. Therefore, we shall apply the Federal norm when necessary.

The one law which LEAA and the State do cite as controlling in this matter is section 103 of the New York General Municipal Laws (McKinney). Among other things, this statutory provision requires:

- (1) the use of formal advertising to solicit bids; and
- (2) at least 5 days prior to the date set for bid opening, a notice of the solicitation must be published in the local newspaper(s) designated to publish legal notices.

According to the State, the county has complied with this provision. The record indicates that the county advertised for bids in two local newspapers on November 2, 1979. This notice directed potential bidders to submit sealed bids to the county sheriff's office in Mayville, New York, at or before 1 p.m. on Tuesday, November 13, 1979. A copy of the invitation for bids (IFB) was mailed to Cardion on Monday, November 5, 1979, and was received at Cardion's local post office on the afternoon of Thursday, November 8, 1979. It was not picked up, however, until the next morning. That same day, November 9, 1979, Cardion sent a telegram informing the county that the bid opening date of November 13 only allowed it one normal working day in which to obtain the required bonding and to prepare and deliver its bid--Monday, November 12, 1979, being Veterans Day, a national holiday. In this telegram, Cardion also requested additional time in which to prepare and submit its bid and notified the county that it would protest any contract awarded as a result of the scheduled bid opening. Having received no reply to its telegram by 12 p.m. on November 13, Cardion telegraphically confirmed its protest to the county and filed a complaint with our Office.

Motorola, on the other hand, was never sent an IFB through the mail. Motorola's local representative apparently learned of the new solicitation through the newspaper advertisements and requested that the county

sheriff's office forward a copy of the IFB to the Silver Creek Police Department where he could pick it up more conveniently. This was done and Motorola subsequently submitted the only bid that the county received. This bid, however, was not opened on November 13 until 1:10 p.m., some 10 minutes after the time set for bid opening. It is this delay in bid opening which Cardion believes shows that Motorola's bid was untimely and, therefore, should not be considered for award.

However, the State has submitted affidavits from a number of people present at the bid opening who testify that the Motorola bid was received at the county sheriff's office at approximately 12:30 p.m. on November 13, 1979. Cardion has accepted that these statements are made in good faith and we find no basis to challenge them. Therefore, we conclude that the Motorola bid was timely received.

Cardion also argues that Motorola's bid should be rejected for Motorola's failure to acknowledge amendment No. 7. The State, however, has provided our Office with a copy of the cover letter to Motorola's bid. In this letter, Motorola clearly acknowledges receipt of the amendment. Therefore, this ground of complaint is without merit.

Regarding amendment No. 7, Cardion also claims that the county failed to issue the amendment within a sufficient time prior to bid opening so that all prospective bidders could consider it before submitting their bids. However, since for various other reasons Cardion never submitted a bid, we do not believe that the alleged failure on the county's part prejudiced Cardion in anyway. Consequently, we need not consider this allegation further.

As Cardion points out, under Federal procurement practice, an award may be made even though one bid has been received provided that there has been significant effort to obtain competition, a reasonably priced bid has been received, and there is no evidence of a deliberate effort to preclude a particular bidder from competing.

Culligan Incorporated, Cincinnati, Ohio, 56 Comp. Gen. 1011 (1977), 77-2 CPD 242. But, in Cardion's opinion, these three factors are not present in this case and, therefore, an award to Motorola as the sole bidder would not be proper.

Regarding the need for adequate competition, Cardion argues that it was not obtained in this instance because, while Cardion and Motorola were solicited, the county did not provide sufficient time for Cardion to prepare a bid and the county knew 4 days before bid opening that Cardion would not be bidding. In response, the State argues that the county complied with section 103 of the General Municipal Law and that this compliance is all that was required. But, while conceding that the county satisfied section 103's requirements for a formally advertised solicitation, Cardion contends that the county was also required to meet the requirements established by OMB Circular A-102, Attachment O, section 11b. In Cardion's opinion, the county did not comply with the OMB circular and, as a result, should be required to cancel the IFB and resolicit.

Section 2b, Attachment O, OMB Circular A-102, states that "Grantees shall use their own procurement procedures which reflect applicable state and local laws and regulations" except that procurements under grants shall also conform to the standards set forth in Attachment O and applicable Federal law. Thus, we agree with Cardion that the county was required not only to satisfy section 103's requirements for obtaining adequate competition but Attachment O's requirements as well.

In this connection, section 11b(1)(b) requires that there be "[t]wo or more responsible suppliers * * * willing and able to compete effectively for the grantee's business" and section 11b(2)(a) provides:

"A sufficient time prior to the date set for opening of bids, bids shall be solicited from an adequate number of known suppliers. In addition, the invitation shall be publicly advertised."

Thus, reading these two sections together, Attachment O's minimum standards will be met so long as at least two responsible suppliers are willing and able to compete for the county's business, notice of the solicitation is

publicly advertised, and potential suppliers are solicited a "sufficient time" prior to the date set for bid opening to allow for the preparation of bids.

While Cardion indicated prior to bid opening that it was not willing to bid on the procurement because of the short bid preparation time it was provided, it appears that there was a good-faith effort to comply with Attachment O. Both Motorola and Cardion submitted bids on the original solicitation so there was good reason to believe that both bidders were potential suppliers and were willing and able to compete on the reprocurement. Further, Cardion was invited to submit a bid both by the constructive notice of the procurement on November 2, 1979, when the county published a notice in the local newspaper, and the actual invitation it received prior to bid opening.

Although Cardion contends that it did not receive the invitation "a sufficient time" prior to bid opening, once Cardion actually became aware of the reprocurement, it had approximately 96 hours in which to prepare its bid and acquire the necessary bonding. This would have required Cardion to work over a weekend and possibly a holiday, but it must be noted that Cardion was familiar with the county's requirements from the prior solicitation. In this regard, the resolicitation stated that the prior equipment specifications remained in effect except for listed revisions. The revisions were a page and a half long. Only two of the revisions covered the equipment specifications: one deleting a requirement and the other an explanation of a requirement. The other revisions listed were a statement about a site visit, a statement that the solicitation is an invitation for bids, not a request for proposals, and an explanation of how bids will be evaluated, a substitution of a clause regarding reaction time to service calls, a statement of when the work is to begin, a statement of when billing may commence and a notice of who to contact regarding technical inquiries. The specifications in the resolicitation are substantially the same as the original specifications and the revisions do not appear to be the kind that require an enormous amount of time to review and evaluate for the preparation of a bid.

Cardion states that there are a couple of requirements in the original specifications incorporated into the reprocurement which are ambiguous and there was no time to obtain clarification because the solicitation stated that inquiries had to be directed to the county by November 7, which was 2 days before it received the solicitation. However, to overcome that problem in the timeframe available for the submission of bids, Cardion could have prepared bids on an alternate basis. In that connection, we note that Cardion's concern was whether the county was amenable to only the specified alarm system or would accept a better system and whether 12- or 24-volt batteries are to be supplied.

With respect to the system, it is not that the specification is "ambiguous" as to what is required. Something is ambiguous when it is susceptible to more than one reasonable interpretation. 48 Comp. Gen. 757, 760 (1969). Cardion admits that it knew what was required. Cardion's concern was whether it could offer something better. With respect to the batteries, it seems apparent to us that a 12-volt size was called for. The specifications for the microwave radio equipment and the multiplex channel equipment both provide for reversion to "12 V DC battery" operation. In any event, rather than refuse to bid, Cardion could have offered a separate price for each system and a separate price for each size battery and left the option to the county to select the system and battery.

Therefore, since the county did in fact comply with the New York State law concerning the solicitation of bids and also complied with the Federal norm, we do not believe that an abuse of discretion occurred.

Cardion also claims that Motorola's bid should be rejected for offering an unreasonable price. The record indicates that: (1) the county had no cost estimate for either the 1978 or 1979 solicitation; (2) in 1978, Motorola bid \$204,986 and Cardion \$110,635; and (3) in 1979, Motorola bid \$202,516, while Cardion claims it would have bid approximately \$124,500. Thus, based on the considerable disparity between these prices, as well as the lack of a cost estimate, Cardion argues that the county has no basis for concluding that Motorola's latest price was reasonable.

We do not agree. Under the Federal norm, there is no requirement in advertised procurements, other than construction procurements, for the Government to prepare a cost estimate. Custom Antenna Service, Inc., B-196425, November 5, 1979, 79-2 CPD 325. In addition, Cardion has not cited, nor have we found, any local rule or regulation which would require the county to prepare a cost estimate. Moreover, the determination of whether or not a bid price is reasonable is a matter of administrative discretion which our Office will not question unless it lacks a rational basis or there is a showing of bad faith or fraud. Forest Scientific, Inc., B-192827, B-192796, B-193062, February 9, 1979, 79-1 CPD 188. In this connection, we have recognized that the contracting agency may base its determination of price reasonableness on a Government estimate, past procurement history, current market conditions, or other relevant factors, including any which may have been disclosed by the bidding. See, e.g., Westinghouse Electric Corporation, 54 Comp. Gen. 699 (1975), 75-1 CPD 112.

According to the State, both county officials and its own communication specialists reviewed Motorola's bid price and concluded that it was reasonable. Cardion disputes this conclusion, but presents no evidence showing an abuse of discretion, fraud or bad faith on the part of these officials. Therefore, allegations which, in effect, amount to no more than disagreement with a contracting agency's administrative discretion are not sufficient to carry Cardion's burden of proof. See, James G. Biddle Company, B-196394, February 13, 1980, 80-1 CPD 129. Accordingly, we find no basis to question the determination made in this matter.

As to Cardion's claim that the county deliberately tried to preclude Cardion from competing, the only indication that Motorola was treated any differently from Cardion is that it was allowed to pick up a copy of the invitation at the Silver Creek Police Department. But, according to the State, this arrangement was agreed to because Motorola requested it. The State further maintains that the county would have done the same for Cardion if the request had been made. Under the circumstances, we do not find any evidence that there was a deliberate attempt to preclude Cardion from the competition.

Cardion also has complained about the delays our Office encountered in obtaining reports on the procurement. However, we note that after LEAA filed its initial report with our Office, Cardion requested an extension of time for submitting comments thereon to obtain additional information from the county. As a result, almost 4 weeks passed before Cardion submitted comments on the agency report. In these comments, Cardion set out more detailed objections to the conduct of the procurement than it had previously raised. Thus, we were required to request a supplemental report from LEAA. Another month passed before we received this report as well as additional comments from Cardion.

In light of this, we conclude that although there was some delay in obtaining all the information necessary for the resolution of this case, it was not due solely to LEAA. We do not find that there was a deliberate attempt to prejudice Cardion's interests or that the delay that did occur was unreasonable.



For The Comptroller General
of the United States