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DECISION



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

[Protest Alleging Equipment Offered by Awardee Doesn't Satisfy IFB Specifications]

FILE: B-198180

DATE: August 19, 1980

MATTER OF: Peerless Pump Company DLG05089 R.

DIGEST:

1. GAO will undertake reviews concerning propriety of contract awards by foreign governments under combination of AID grant and loan if amount of Federal grant funds in project as whole is significant, even though project was initially funded only as loan. Here, grant funds (\$8 million dollars) are significant when compared to foreign exchange cost of project as whole (\$19 million dollars).
2. IFB clause permitted alternative pumping methods. Under this clause bid of "solid shaft" motor meeting performance requirements cannot be questioned even though "hollow shaft" motor was described.
3. GAO's in camera review of proprietary cost information discloses that cost of foreign motor and switchgear does not exceed 50 percent test of source/origin IFB provisions.
4. Under contract containing source/origin provisions requiring end products of United States origin, foreign motor which is modified and assembled with pump in United States, is component of total pumping unit and does not violate provisions. Moreover, GAO cannot question technical position that foreign motors, even as modified, meet "standard design" IFB provision.

✓ Peerless Pump Company (Peerless) has requested our review of the Arab Republic of Egypt, Ministry of Irrigation's (Egypt) award to Patterson Pump Company (Patterson) pursuant to the Agency for International Development's (AID) Project No. 263-0040. The purpose of the project is to replace 20 existing pumping stations, install 17 new pumping stations along the Nile River and to provide the electrical equipment and spare

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parts for these stations. There were two procurements involved in the project--one with a format similar to a two-step advertisement for pumping equipment (including motors, circuit breakers, and switchgear) and another for the construction of the pumping stations. Peerless' request for review only concerns the former.

Peerless contends that the motors offered by Patterson do not satisfy the specifications set forth in the invitation for bids (IFB). In addition, Peerless argues that the motors and circuit breakers of the switchgear are manufactured outside of the United States and that their cost exceeds an applicable percentage limit set forth in the source/origin provisions of the IFB. Peerless' last argument is essentially that even if the cost of the motor and circuit breaker does not exceed the limit the motor is a foreign end product, not a component, and cannot be accepted under these provisions.

Initially, AID questions whether GAO has jurisdiction to consider this complaint because the procurement was originally funded by an AID loan. Notwithstanding this question, AID's position with respect to whether the motors meet the specifications is that the IFB permitted flexibility (alternate approaches to pumping methods) and that the configuration offered by Patterson was technically acceptable. Regarding Peerless' second and third arguments, AID responds that the percentage of the cost of the motor and circuit breaker to the total pump is less than 50 percent which does not violate the source/origin provisions and that the motor is not a foreign end product. We cannot question AID's position on the merits of the protest based on our review of the record, but disagree with its position on jurisdiction.

Jurisdiction

On September 27, 1977, AID and Egypt entered into a loan agreement for \$11 million dollars to finance the foreign exchange costs of the Irrigation Pumping Project; however, the IFB was not advertised until December 1978. Seven firms submitted technical tenders (first step submissions) which were reviewed by Egypt, and each firm was advised of the necessary changes

required to make their tenders responsive. On September 21, 1979, the final technical tenders and the sealed bid prices (commercial tenders) were submitted.

After a review of the tenders, it was determined that three bids were technically responsive. On November 26, 1979, the bid prices for the three bids were opened with the result that Patterson and El Nasr Company submitted the lowest combined total bid price - \$30,138,175 - of which \$15,016,955 represents Patterson's bid for pumps and equipment. It was at this point clear that there was a need for additional funds. Since AID believed that the "importance of the project was sufficiently great," it provided "a grant of \$8 million dollars to permit the project to go forward." The \$19 million grant and loan dollars are to be used to finance the foreign exchange cost of the project.

It is AID's position that GAO should not assert jurisdiction since "[t]his project was planned and approved by AID for loan funds" and "was never intended to be anything else." AID stresses that had costs not escalated, grant funds would not have been utilized. Moreover, AID contends that the utilization of grant funds was the only possibility available, given the time restraints, to allow the project to proceed. Under these circumstances, AID argues that our earlier decision, in Niedermeyer-Martin Co., 59 Comp. Gen. 73 (1979), 79-2 CPD 314, holding that GAO will assert jurisdiction over procurements under a combination of grant and loan funds if the amount of Federal grant funds in the project as a whole is significant, is not applicable. Apparently, AID believes that Niedermeyer-Martin Co. is limited to the situation where a project's original funding was a grant-loan combination.

We do not agree. Whether a project is originally funded by a grant-loan combination or such combination arises sometime later in the award process is not a critical concern. The essential question involves the significance of the grant funds in the project as a whole; if the funds are found to be significant, we will consider the matter. Niedermeyer-Martin Co., supra. We find the amount of the instant grant (\$8 million dollars) when compared to the project as a

whole (\$19 million dollars) to be significant. Accordingly, we will review Peerless' complaint.

Motor Specification

Peerless' initial argument is that Part E, Article 15.1, of the IFB, requires the use of "vertical hollow shaft motors." It is Peerless' position that the motor offered by Patterson is not a vertical hollow shaft motor and, thus, does not satisfy the IFB specifications. Furthermore, Peerless states that Reliance Electric Company, Patterson's supplier, advised Egypt, by letter dated February 21, 1980, that the company did not manufacture vertical hollow shaft motors. Moreover, Peerless argues that while Part E, Article 1.9, Alternative Pumping Methods, as its title implies, permits alternative methods (and motors), the following objections should have prevented acceptance of Patterson's motors: (a) "vertical hollow shaft motors were specified as a means of establishing a standard for drivers on the vertical pumps;" (b) "[s]olid shaft motors can be used when driving through inline reduction gears" but, "the ease of adjustment of the line shaft is lost;" and (c) "vertical hollow shaft motor as specified insures an easy method of adjustment for impeller tolerance," which "is very important where field service is accomplished by semi-skilled personnel."

Even if Peerless' interpretation of Article 15.1 is correct, it is clear that vertical hollow shaft motors were not the only type of motor that could be provided under Article 1.9 of the IFB which stated:

"All alternative pumping methods, systems or devises proposed in the Tender shall be accepted provided they perform according to required discharge and static lift requirements given in the schedules * * *"

Also, Part E, Article 2.1, provides that "59 horizontal pump and motor units and 69 vertical pump and motor units" will be installed and mentions the possibility of "alternatives."

Furthermore, Part E, Article 9.20, states:

"The motors can be direct coupled or coupled through reduction gears, according to requirements of the site."

AID explains:

"* * * This provision [Article 9.20] clearly permits either solid or hollow shaft motors to be bid since a motor coupled through reduction gears can be one with either a hollow or solid shaft in the motor, in turn, geared to a hollow shaft running to the impeller unit at the base of the shaft. * * * Either configuration, i.e., hollow shaft in motor directly linked to the impeller or solid shaft in the motor linked by reduction gears by means of a hollow shaft to the impeller, were viewed as equally acceptable alternatives by the buyer. * * *"

We see nothing in the IFB or the record to contradict this explanation, notwithstanding Peerless' objections.

Commercial Tenders

Peerless also, alleges that the IFB, Part B, Article 6.2 and 7.3, requires the commercial tenders to be on equipment previously agreed to as submitted in the technical tender. However, Peerless states that Patterson initially indicated the manufacturer of the switchgear to be Siemens-Allis but that Patterson's commercial tender showed another manufacturer.

With respect to Peerless' interpretation of Articles 6.2 and 7.3, we believe that the interpretation is incorrect. Article 6.2, amended by Addendum No. 4, provides, among other things, that "[the] commercial tender will be based upon the Tender's own revised technical tender." Since the "revised technical tender" obviously includes revisions deemed appropriate by the offeror, the equipment offered will not necessarily be the same as set forth in the initial technical tender. The only requirement is that the commercial tender be based upon and submitted at the same time as the revised technical

tender. Patterson complied with this requirement; therefore, we reject this ground of complaint.

Source/Origin Provisions

The second aspect of Peerless' complaint is that Patterson's bid violates the IFB's source/origin provisions because the cost of the motor and circuit breaker of the switchgear, manufactured outside the United States, exceeds 50 percent of the cost of the pumping unit. Peerless, in support of its argument, points out that Part C, Article 3.1.3, of the IFB provides that "the only eligible source country * * * is the United States" and that "commodities [end products] not having their source and origin in the U.S. shall not be eligible for AID financing." Also, Part C, Article 3.3 provides that if the total cost of the foreign components exceed 50 percent of the "lowest price" at which the supplier makes the end products available for export sale, it will not be eligible for AID financing.

Patterson's costs, which are proprietary information, have been provided to our Office for our in camera review. Accordingly, to protect the confidentiality of the information we have reviewed, our discussion is necessarily limited to our conclusion. Based on our review, we cannot question AID's determination that the 50-percent test has not been exceeded.

We are aware of Peerless' allegation that an AID employee informally advised it that only motors manufactured in the United States would be acceptable. However, Part B, Article 3.3, of the IFB clearly informed prospective bidders that "any interpretation to the IFB * * * will be made only by formal addenda to the IFB." Thus, Peerless was aware that informal advice would not be binding.

Peerless' last contention is that even if the cost of the motor and circuit breaker are less than 50 percent of the pumping unit, the motor itself is a foreign end product, not a component of the pumping unit and, therefore, not acceptable under the IFB. Peerless argues that "[t]he motor is strictly a driver

in this operation and, in many cases, is often purchased independent of the pump." Further, Peerless cites Part C, Article 4, of the IFB which provides:

"ARTICLE 4: STANDARIZATION

"The Tenderer shall standardize items of equipment, materials and components thereof within his Tender to the maximum practical and economic degree. Standardization shall apply to such items as engines, pumps, gear boxes, switchgear, transformers and motors, and components such as bearings, couplings, brakes, pulleys, valves, fuses, breaker switches and lighting fittings."

Peerless argues that the word "items" is synonymous with the phrase "end product" and that the article clearly identifies a motor as an end product, contrary to AID's position.

Patterson admits that the electric motors will be manufactured in West Germany. The company states that the motors will then be sent to a United States subsupplier where the motors will be "modified and assembled with the Dodge Gear Reducers." Patterson states that as a result of the modifications "the motors will be substantially different in form." In addition, Patterson advises that "[a]fter assembly of the components, the gear motors will be tested and shipped to Patterson for final assembly with the pump." Considering these facts, it is Patterson's position that "[t]he motors form a component of the vertical pumping unit."

AID also believes that the pump motor is a component part of the total pump unit, not a separate end product. This view was expressed in AID's September 12, 1979, letter to Patterson's United States subsupplier:

"It is our opinion that the motors would be considered components if the motors are ready for assembly and are tested in the United States and shipped with the

remainder of the pump parts for final assembly in Egypt."

Furthermore, AID in a March 11, 1980, letter to Peerless expressed its view that the motor was a component of the completed pumping unit. Based on our review, we also conclude that the foreign motor is a component of the total pumping unit, not an end product.

Part C, Article 3.1.2, of the IFB provided, in effect, that an end item would still be considered to be of United States origin even if composed of imported components if:

"* * * as a result of manufacturing, processing, or assembly in such country, a commercially recognized new [end item] is produced that is substantially different in basic characteristics or in purpose or utility from any of its imported components."

As noted above, the motors were modified, assembled and tested in the United States and then Patterson assembled them into pumps for final test purposes. El Nasr Company would, in addition to its other tasks, install the total operable pumping units in the stations which was the purpose of the contract. Further, while Article 4 does use the word "item," we do not accept Peerless' argument that this means "end product" for the purpose of applying the source/origin provisions of the IFB; rather, we are of the opinion that Article 4 refers only to the goal of interchangeability, discussed below. Consequently, it is our view that Patterson's use of foreign components did not alter the United States origin of the produced pumping units under Part C, Article 3.1.2, of the IFB.

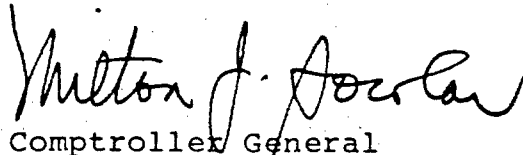
Finally, Peerless contends that the foreign motors, as modified, cannot meet the "interchangeability" and "standard design" requirements of the IFB. These requirements (set forth in Part E, Article 9) provided:

"All equipment * * * will be supplied from single sources of manufacture,

all being interchangeable and conforming to standard specifications. All * * * motors * * * should be of standard design, available ex stocks * * *."

Although the motors are modified, it is apparent that AID and the grantee consider that the modifications do not affect the interchangeable character of the motors and that the motors must still be viewed as of standard design and available "ex stock" even as modified. We do not consider that Peerless has shown the AID/grantee positions on these technical questions to be clearly erroneous.

Accordingly, we deny the complaint.



For the Comptroller General
of the United States