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DECISION

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

[Protest Against Bid Rejection]

FILE: B-198297 DATE: September 29, 1980

MATTER OF: Xcavators, Inc.

DIGEST:

1. GAO will consider complaint by bidder on solicitation issued by recipient of Federal financial assistance through cooperative agreement.

2. Recipient of Federal financial assistance through cooperative agreement properly rejected bid submitted by firm that at bid opening lacked certificate of responsibility required at bid opening by recipient's solicitation and state law.

Xcavators, Inc. complains that the Deer Creek Water Management District (District), a Mississippi public agency, improperly rejected Xcavators' bid for a contract to perform channel clearing services in connection with a watershed work plan formulated by the District and the Soil and Conservation Service, Department of Agriculture (Service). The District rejected Xcavators' bid because at the time bids were opened Xcavators lacked a current state Certificate of Contractor Responsibility required by the invitation for bids and Mississippi law.

The District receives substantial Federal funding from the Service under the Watershed Protection and Flood Prevention Act, as amended, 16 U.S.C. §§ 1001-1009 (1976 & Supp. I 1977), which authorizes the Secretary of Agriculture "to cooperate and enter into agreements with and furnish financial and other assistance to local organizations." 16 U.S.C. § 1003. In this case, the Service in exercising that authority entered into a "cooperative agreement" with the District in accordance with the Federal Grant and Cooperative Agreement Act of 1977, 41 U.S.C. §§ 501-509 (Supp. I 1977), whereby the Service agreed to fund a substantial portion of the watershed work plan.

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Initially, we point out that in 1975 we stated in a Public Notice that pursuant to our statutory obligation and authority under 31 U.S.C. § 53 (1976) to investigate the receipt, disbursement, and application of Federal funds we would undertake reviews concerning the propriety of contract awards made by "grantees" in furtherance of "grant" purposes. 40 Fed. Reg. 42406. Our stated purpose was to determine whether there had been compliance with applicable statutory and regulatory requirements, and with grant terms. The term "grant" used therein was intended to describe an agreement, other than a contract resulting from a Federal agency's direct procurement action, which required significant Federal funding and imposed certain conditions for payment upon the recipient. See E.P. Reid, Inc., B-189944, May 9, 1978, 78-1 CPD 346.

Subsequently, the Federal Grant and Cooperative Agreement Act of 1977, in order to clarify the differences between Federal procurement relationships and the various Federal assistance relationships, specifically characterized the terms "contract," "grant agreement," and "cooperative agreement," and required agencies to properly define the instruments they use in accordance with those characterizations. With respect to grant agreements and cooperative agreements, when no substantial Federal involvement during performance of the contemplated activity is anticipated the agency must use the former, 41 U.S.C. § 504; if substantial Federal agency involvement during performance is anticipated, the agency must enter into a cooperative agreement. 41 U.S.C. § 505; see Burgos & Associates, Inc., 58 Comp. Gen. 785 (1979), 79-2 CPD 194.

Thus, the only basic distinguishing factor between grants and cooperative agreements under the statute is the degree of Federal participation during performance. There is no meaningful difference between the two for purposes of the review contemplated by our Public Notice.

Accordingly, we will review complaints concerning the propriety of contract awards made by recipients of Federal financial assistance through cooperative agreements as well as through grant agreements, provided, of course, that substantial Federal funding is involved.

We now proceed to discuss the background and merits of Xcavators' complaint.

The District's invitation for bids, No. MISS-DC-2, stipulated that no bid shall be opened or considered unless the bidder has a current certificate of responsibility issued by the Mississippi State Board of Contractors, or a similar certificate issued by a similar board of another state, and the certificate's number is affixed to the bid's container. This certification requirement stems from Mississippi Code Annotated § 31-3-151 (1972), which provides that:

> "No contract for public works or public projects costing in excess of $25,000 shall be issued or awarded to any contractor who did not have a current certificate of responsibility at the time of the submission of the bid * * *. Any contract issued or awarded in violation of this section shall be null and void."

The envelope containing Xcavators' bid indicated that Xcavators possessed certificate of responsibility number 3779, and therefore on February 29, 1980, Xcavators' bid was opened with several others. Xcavators was the low bidder. However, the District subsequently learned from the Mississippi State Board of Contractors that Xcavators' certificate of responsibility number 3779 had expired at the close of 1979 and Xcavators did not receive a new certificate of responsibility (or renew the old one) until March 4, 1980, four days after bid opening. The District therefore rejected Xcavators' bid and proposed to accept the next lowest bid subject to the Service's approval, obtained shortly thereafter.

Xcavators complains that it substantially complied with Mississippi Code § 31-3-15 by securing a certificate of responsibility only 4 days after bid opening, and that in any event the Mississippi statute contravenes the principle of Federal procurement law that the requirement in an invitation that a bidder have a particular license to be eligible for a contract award involves the bidder's responsibility, i.e., the ability to meet the contractual obligation, which may be established after bid opening. See What-Mac Contractors, Inc., 58 Comp. Gen. 767 (1979), 79-2 CPD 179.

In this respect, Xcavators observes that Attachment O to Office of Management and Budget (OMB) Circular A-102, which sets forth terms and conditions for use with cooperative agreements with state and local governments, provides that "Grantees may use their own procurement regulations which reflect applicable State and local law," provided in part that procurement transactions are conducted "in a manner to provide, to the maximum extent practicable, open and free competion." Xcavators maintains that this provision mandates that the District follow the cited Federal licensing principle.

We first note that the cooperative agreement between the Service and the District does not incorporate the OMB Circular. The agreement only requires, as a condition to Federal financial assistance, that the District "receive, protect, and open bids, * * * determine the lowest qualified bidder and, with the written concurrence of the State Administrative Officer, make award." While the Service's Administrative Handbook references OMB Circular A-102 as applicable to all cooperative agreements, and the Service advises that "sponsors" (fund recipients) are "required" to follow the Handbook's provisions, it appears from the record that the requirement essentially is an informal one.

In any event, the policy reflected in Attachment O to OMB Circular A-102 and our cases in the area recognize that procurements conducted by recipients of Federal financial assistance generally should be in accordance with state law, see, e.g., The Eagle Construction Company, B-191498, March 5, 1979, 79-1 CPD 144 (concerning state "buy-state" preference statutes); Burroughs Corporation, B-194168, November 28, 1979, 79-2 CPD 376, so long as state and local requirements are consistent with the usually-imposed Federal requirement that goods and services be obtained in such a way as to promote full and free competition consistent with the nature of the goods or services being procured. See Fiber Materials, Inc., 57 Comp. Gen. 527 (1978), 78-1 CPD 422. We do not view the state's licensing requirement in issue here as being restrictive of competition since the license was readily available and all bidders were notified of the state requirement that it be obtained prior to bid opening.

As regards Xcavators' contention that it substantially complied with the statute, we are aware of no Mississippi court decisions which have permitted the acceptance of a firm's bid where the firm did not have a certificate of responsibility on the bid opening date.

Therefore, we believe the District properly rejected Xcavators' bid. The complaint is denied.

Milton J. Socolar

For the Comptroller General
of the United States