DECISION

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

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FILE: B-180278 DATE: October 17, 1975

MATTER OF: Copeland Systems, Inc.

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DIGEST:

1. GAO will undertake reviews concerning propriety of contract awards under Federal grants made by grantees in furtherance of grant purposes upon request of prospective contractors where Federal funds in a project are significant.

2. To extent grant reviews will be concerned with application and interpretation of local procurement law, with which grantees should be familiar, they will not be disadvantaged. In other cases, since review will only be concerned with application of "basic principles," rather than all intricacies of Federal norm, it will not result in mechanistic application of Federal procurement law.

3. Basic principles of Federal norm of competitive bidding are intended to produce rational decisions by those who purchase for Federal Government; to extent, therefore, that grantee's procurement decision (and concurrence in decision by grantor agency) is not rationally founded, it may be in conflict with fundamental Federal norm. Procurement under "rational basis" test does not require detailed knowledge of GAO decisions.

4. Multiple layers of Federal, state and local government involved in typical grant review situation will not impose enormous burden on Federal grantor in producing report responsive to request for review of contract under Federal grant.

5. Grantee's decision to give greater weight to long-range operating cost, rather than initial capital cost, in selecting successful bidder can be rationally supported so long as evaluation criteria for award makes clear basis upon which bids will be evaluated.

6. Prior reviews of contracts awarded under Federal grants are considered consistent, in the main, with principles enunciated here. However, to extent any prior precedent may be inconsistent it should not be followed. See B-178960, September 14, 1973.

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7. GAO will consider requests for review of contracts awarded "by or for" grantees. Where record shows that grantee's engineering consultant drafted specifications, evaluated subcontractors' bids, recommended that grantee award subcontract to specific proposed subcontractor, and grantee instructed prime contractor to award questioned subcontract to company proposed by consultant, award is considered to be "for" grantee because grantee's participation had net effect of causing subcontractor's selection.

8. Corrective action is not recommended concerning questioned subcontract awarded under Federal grant since it cannot be concluded that questioned temperature specification for incinerator project was ambiguous or that company receiving award submitted bid which was nonresponsive to specification.

Copeland Systems, Inc. requests that GAO review the award of a subcontract by Pittman Construction Company, Inc., on behalf of the Sewerage and Water Board of New Orleans (grantee) to Dorr-Oliver, Inc., for the incinerator portion of a project to expand and upgrade a waste treatment plant. The contract was financed in significant part (75 percent) by Environmental Protection Agency (EPA) funds.

GAO REVIEW ROLE-CONTRACTS AWARDED UNDER FEDERAL GRANTS

During the pendency of Copeland's complaint, EPA urged that we clarify our Office's current views concerning acceptance of "bid protests under grants." Specifically, EPA suggested that whether our Office should review complaints against awards under grants should depend on the consideration of: (1) the degree of the Federal financial interest involved; (2) the primary Federal interest (which may not be "based solely upon mechanistic application of Federal procurement practices or policies"); (3) the grantee interest (which may involve greater concern with long-term operating costs rather than the absolute amount of capital costs for construction projects); (4) the relative lack of procurement law knowledge possessed by grantees in general; the even greater lack of awareness by grantees of the procurement law decisions of our Office; (5) the greater difficulty attending the preparation of agency reports responsive to complaints against awards made under grants given the complex layers of Government and private contractors involved in grant matters (for example, in the subject case five entities were involved--(1) EPA, including its Dallas Regional Office; (2) the state agency; (3) the municipal

grantee; (4) the consulting engineer acting on behalf of the grantee; and (5) the prime contractor); and (6) GAO precedent which seems to evidence different approaches on handling complaints against contracts awarded under Federal grants.

Complaints about awards of contracts under Federal grants have previously been reviewed by our Office. See, for example, 37 Comp. Gen. 251 (1957); B-154606, August 20, 1964; B-161681, August 11, 1967; B-172196, May 27, 1971; 52 Comp. Gen. 874 (1973); Chicago Bridge & Iron Company, B-179100, February 28, 1974, 74-1 CPD 110; Thomas Construction Company, Inc., et al., B-183497, August 11, 1975, 55 Comp. Gen. _____. Our reviews have been made for the purpose of insuring that contract awards by grantees have complied with any requirements made applicable by law, regulation or the terms of the grant agreement.

We continue to be of the view that our review role is appropriate notwithstanding the concerns expressed by EPA. Because of this view, we recently issued a Public Notice entitled "Review of Complaints Concerning Contracts Under Federal Grants," 40 Fed. Reg. 42406, September 12, 1975. This notice provides that we will undertake reviews concerning the propriety of contract awards made by grantees in furtherance of grant purposes upon request of prospective contractors. It specifically provides, however, that these complaints are not for consideration under our bid protest procedures (see 40 Fed. Reg. 17979, April 24, 1975), since there is no direct contractual relationship between the Federal Government and the party engaged in contracting with the grantee. Further, it states we will not review complaints where Federal funds in a project as a whole are insignificant.

Many grant agreements require application of "local" procurement law (usually State) to govern the procurement procedures being followed in the award of contracts under the grants. Presumably grantees are familiar with local procurement law and practices. To the extent our reviews will be partially concerned with the application and interpretation of local procurement law of which the grantee should have a degree of familiarity, we do not think the grantee will be disadvantaged. To the extent our reviews will be concerned with Federal procurement policy, it will not be mechanistically applied. On the contrary, we will only be concerned with the application of "basic principles." As we stated in Illinois Equal Employment Opportunity Regulations for Public Contracts, 54 Comp. Gen. 6 (1974), 74-2 CPD 1:

"It is clear that a grantee receiving Federal funds takes such funds subject to any statutory or regulatory restrictions which may be imposed by the Federal Government. 41 Comp. Gen. 134, 137 (1961); 42 Comp. Gen. 289, 293 (1962); 50 Comp. Gen. 470, 472 (1970), State of Indiana v. Ewing, 99 F. Supp. 734 (1951), cause remanded 195 F.2nd 556 (1952). Therefore, although the Federal Government is not a party to contracts awarded by its grantees, a grantee must comply with the conditions attached to the grant in awarding federally assisted contracts.

"We believe that, where open and competitive bidding or some similar requirement is required as a condition to receipt of a Federal grant, certain basic principles of Federal procurement law must be followed by the grantee in solicitations which it issues pursuant to the grant. 37 Comp. Gen. 251 (1957); 48 Comp. Gen., supra. In this regard, it is to be noted that the rules and regulations of the vast majority of Federal departments and agencies specify generally that grantees shall award contracts using grant funds on the basis of open and competitive bidding. This is not to say that all of the intricacies and conditions of Federal procurement law are incorporated into a grant by virtue of this condition of open and competitive bidding. See B-168434, April 1, 1970; B-168215, September 15, 1970; B-173126, October 21, 1971; B-178582, July 27, 1973. However, we do believe that the grantee must comply with those principles of procurement law which go to the essence of the competitive bidding system. See 37 Comp. Gen., supra. One of these basic principles is that all bidders must be advised in advance as to the basis upon which their bids will be evaluated, so that they may compete for award on an equal basis. 36 Comp. Gen. 380, 385 (1956); 37 Comp. Gen., supra; 48 Comp. Gen., supra; B-179914, March 26, 1974."

Obviously, it is difficult to detail all that is "fundamental" to the Federal system of competitive bidding. However, basic Federal principles of competitive bidding are intended to produce rational decisions and fair treatment. To the extent, therefore, that a grantee's procurement decision (and the concurrence in that decision by the grantor agency) is not rationally founded, it may be considered as conflicting with a fundamental Federal norm. The decision will, in all likelihood, also be considered inconsistent with fundamental concepts inherent in any system of competitive bidding.

Under a "rational basis" test we do not consider that a grantee's possible ignorance of our decisions or the intricacies of Federal procurement law will work to the grantee's disadvantage since what is "rational" under the particular circumstances involved will be more a matter of logic than knowledge of detailed rules. Nor do we think that the multiple layers of Federal, state and local governments involved in the typical grant review situations will impose an enormous burden on a Federal grantor in producing a report responsive to the complaint in question. For example, in the instant case, a comprehensive report reflecting the views of the governments involved, including the grantee's expressed concern with the importance of operating costs, was produced within a reasonable time period. Moreover, it is not uncommon in bid protests under direct Federal procurements that the views of several agencies and private individuals have to be assembled before the record is ready for our decision.

It is our further view that a grantee's decision to give greater weight to long-range operating cost, rather than initial capital cost, of an item in determining the successful bidder can be rationally supported so long as the evaluation criteria for award make this greater weight reasonably clear to all bidders.

EPA's expressed concern that our prior approaches in the grant area are inconsistent is based on observation that there have been prior reviews of awards under grants (B-161570, January 29, 1968, and B-166808, June 16, 1969) which concede the grantor agency's primary authority to determine whether the grantee has properly awarded a contract, although other decisions (B-171919, May 28, 1971, and B-177042, January 23, 1973, among others) imply that we may question a grantor agency's determination. Additionally, EPA cites B-178960, September 14, 1973, where we declined to respond to a request to review the award of a contract under a grant because we viewed the request to be comparable to a protest of a subcontract award. Mention is also made of B-178972, August 16, 1973, where we declined to exercise bid protest authority over a protest concerning the initial awarding of a grant.

We think our prior grant cases are consistent, in the main, contrary to EPA's suggestion. We do not perceive any inconsistency, for example, in recognizing the grantor's primary authority to determine the grantee's compliance with grant provisions while also recognizing our right to recommend corrective action when we think

the determinations reached are not rationally founded. To the extent any of our prior precedent is inconsistent with this position it should not be followed. See B-178960, supra. Our decision B-178972, supra, is also considered to presently express our policy decision not to exercise legal review authority over the initial awarding of grants because these awards are usually not governed by competitive bidding principles imposed by statute or regulation.

THE SPECIFIC SITUATION

A threshold question--whether Copeland's status as a prospective subcontractor precludes it from requesting our review of the award in question--is initially for decision.

We have decided to consider requests for review of contracts awarded "by or for" grantees. Here the record shows that the grantee's engineering consultant drafted the specifications, evaluated subcontractor bids, and recommended to the grantee that Dorr-Oliver, rather than Copeland, be selected for award. The grantee then directed Pittman to award the subcontract in question to Dorr-Oliver. Although Pittman was the party actually awarding the subcontract in question, the award must be considered to have been made "for" the grantee because the grantee's participation in the award process had the net effect of causing Dorr-Oliver's selection. Cf. Optimum Systems, Inc., B-183039, March 19, 1975, 54 Comp. Gen. _____, 75-1 CPD. 166.

Turning to the substance of the subject complaint, Copeland asserts that a provision of the bidding document for the incinerator was critically ambiguous in that it failed to provide a common base for evaluating and comparing projected 20-year operating costs for the systems proposed by Copeland and Dorr-Oliver. (Award was to be based on a price comparison of capital and projected operating costs for the incinerator systems proposed.)

The provision referenced by Copeland reads: "Design shall be based on flue gas inlet temperature of 1600° F. (1800° F. max.), air outlet temperature 1000° F. (1200° F. max.). American Schack is the approved source." Copeland states that operating costs consist of the fuel costs incurred to pre-heat air to 1600° F. (Under the specification 1800° F. is the maximum inlet temperature. The 1600° F. figure is apparently cited because both Copeland and Dorr-Oliver used this figure in computing fuel costs.) The pre-heating process is partially assisted by using heated exhaust air (at an outlet temperature of 1000° F.-1200° F. from the incinerator). The pre-heated air is then injected into the incinerator reactor where the waste is burned.

Copeland argues that it based its fuel costs on the assumption that the temperature of the exhaust air for preheating would be 1000° F.; Dorr-Oliver, Copeland further argues, based its bid for fuel cost on the assumption that the temperature of exhaust air would be 1200° F. Since the preheating process would obviously be better aided by exhaust air at a 1200° F., rather than a 1000° F., temperature, Copeland argues that Dorr-Oliver would necessarily need less fuel to preheat air to the 1600° F. temperature needed for operation of the incinerator. Thus, Copeland asserts that the lower projected operating cost for Dorr-Oliver's incinerator (which made Dorr-Oliver's overall bid for the incinerator lower than Copeland's overall bid even though Copeland's proposed capital cost for the incinerator was less than Dorr-Oliver's proposed capital cost) was due to Dorr-Oliver's advantage in calculating fuel costs from a temperature of 1200° F. rather than 1000° F.

Copeland contends Dorr-Oliver's bid is nonresponsive because the specification required bidders to use 1000° F. rather than 1200° F. (used by Dorr-Oliver) as the temperature "base" for determining fuel costs. This position is based on argument that the 1200° F. figure was listed in parenthesis and followed by the notation "max." and that bidders were, therefore, being instructed to compute fuel costs at the "design" temperature base of 1000° F. rather than the "maximum limit" temperature of 1200° F. To buttress this position, Copeland recites advice allegedly furnished by various individuals that its interpretation is correct. Alternatively, Copeland suggests the specification is ambiguous because it permitted bidders to submit operating costs on an unequal basis.

The grantee and EPA both adopted the consulting engineer's view of the specifications in question. The engineer's view was that the specifications reasonably allowed "each manufacturer some leeway in his design to obtain optimum performance of his equipment." Based on this view, the grantee and EPA concluded that the specifications were not ambiguous, as claimed, and the grantee then made an award to Dorr-Oliver.

Since temperature leeway was to be allowed bidders (an intent which we think is reasonably clear from a reading of the specification, notwithstanding the use of parenthesis and the notation "max." associated with the 1200° F. and 1800° F. temperatures),

we do not agree that Dorr-Oliver's use of 1200° F. was non-responsive to the specification. The use simply conformed to one of the temperature limits imposed on all bidders. The decision to use this limit (or any other temperature level between 1000° F. - 1200° F.) was within the informed discretion of each bidder. Each bidder's decision was obviously based on competitive and capital operating cost "trade-off" considerations. To the extent all bidders were competing within the same temperature range, competition was had on an equal basis.

Thus, we find rational support for the procurement decisions questioned by Copeland.

CONCLUSION

We find no basis to question EPA's enforcement of the competitive bidding requirement of the subject grant agreement insofar as the award to Dorr-Oliver is concerned.

R. F. Keller

Deputy Comptroller General
of the United States