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DECISION

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

FILE: B-184562 DATE: October 6, 1976

MATTER OF: Ampex Corporation

DIGEST:

1. Where HEW grant terms and regulations reference and include attachment "O" to Federal Management Circular 74-7--stating that grantee (State of Wisconsin) may use its procurement regulations which reflect State and local law--and there is no indication that anything other than State or local law was followed, initial frame of reference for GAO review of complaint concerning grantee's award of contract is Wisconsin law.

2. Where brand name camera submitted in "Standard form" bid was found not to meet specifications, grantee's acceptance of substitute camera model listed in alternate bid in making award based on standard form bid was improper. Wisconsin law prohibits any correction or alteration of bid after bid opening, with one exception which is not pertinent to present case.

3. HEW's observation that question of whether charges to grant funds should be disallowed is normally for determination during grant closeout process is not directly pertinent to complaint requesting GAO review of contract award by HEW grantee. GAO reviews under 40 Fed. Reg. 42406 (1975) are concerned with propriety of grantee's contract awards, not with Federal grantor agencies' administration of grants. Determination that no corrective action can be recommended with respect to grantee's improper award in present case fulfills scope of GAO review.

Ampex Corporation has requested that we review the award of a contract to RCA Corporation by the Bureau of Facilities Management, Department of Administration, State of Wisconsin, a recipient of Federal funds under a grant from the Department of Health, Education, and Welfare (HEW). This review is made under the procedures described in 40 Fed. Reg. 42406 (1975), where we stated that we would consider complaints concerning contracts awarded under Federal grants.

The grant was made under 47 U.S.C. § 390, et seq. (1970), to provide assistance for noncommercial educational television. The grantee's procurement in question was for certain television equipment for the University of Wisconsin--Stout. Ampex contends essentially that the bids submitted by RCA were nonresponsive and therefore should have been rejected.

Background

While we have examined the parties' submissions to our Office and the copy of the RCA bids furnished by the grantee, we find that not all of the facts are entirely clear. The following is our understanding of the pertinent facts of this matter.

The grantee states that its invitation to bid allowed bidding on a brand name or equal basis, in accordance with the following clause:

> "Whenever a material, article or piece of equipment is identified on the Drawings or in the Specifications by reference to manufacturers' or vendors' names, trade names, catalog numbers, etc., it is intended merely to establish a standard; and, any material, article, or equipment of other manufacturers and vendors which will perform adequately the duties imposed by the general design will be considered equally acceptable provided the material, article or equipment so proposed is, in the opinion of the Architect/Engineer of equal substance and function. It shall not be purchased or installed by the Contractor without the Architect/Engineer's written approval. No compromise in quality level, however small, will be acceptable."

The invitation called for bids on several separate groups of items. Two of these groups are pertinent to this decision. "Base bid number three" called for certain videotape equipment and "base bid number four" for certain camera equipment. Acceptable brand name products were listed by name under each of these groupings. Under base bid number four, the RCA TK-28 camera was listed as an acceptable brand name product.

The invitation allowed bidders to submit combined bids comprised of any or all of the base bids, but bidders doing so were also required to submit separate bids for each of the base bids comprising their combined bids.

RCA submitted a bid using the standard bid form provided by the grantee and also submitted an unsolicited alternate bid:

	RCA Standard Form Bid	RCA Alternate Bid
Base bid number three	$175,193	(No price shown)
Base bid number four	169,891	$208,498
Combined bid price	321,987	356,851

There are inconsistent statements in the record as to what type of camera equipment RCA offered to furnish for base bid number four. From examination of the bid, it appears to us that in its standard form bid, RCA offered its TK-610B camera as a claimed equivalent item, and that the RCA alternate bid offered the TK-28 camera.

Ampex complained to the grantee that the RCA standard form bid was nonresponsive because the TK-610B camera did not meet the specifications and alleged that RCA had been allowed to reduce the price of it alternate bid (offering the brand name TK-28 camera) in order to make it the lowest-priced combined responsive bid.

In response, the grantee in a letter to Ampex stated that because the RCA standard form bid was properly filled in without any exceptions, qualifications, or substitutions, the bid was responsive. The grantee stated that it found, however, that the TK-610B camera offered by RCA in the standard form bid could not be accepted as an "or equal" product under the specifications.

It appears that the grantee then decided to accept the RCA TK-28 camera (originally offered in the alternate bid) as part of a contract awarded at the $321,987 total price offered in RCA standard form bid. In this regard, the grantee's letter advised Ampex that since RCA had made an "or equal" offer in the category of film cameras, but the allegedly equal TK-610B camera did not meet the specifications, RCA was obligated to provide a camera which did meet the specifications. The grantee further advised Ampex that no reduction in the price of any bid was allowed, since Wisconsin law prohibits the allowing or making of any correction or alteration of a bid. The grantee further stated that the unsolicited, voluntary

alternate bid submitted by RCA was not a "bid" within the meaning of applicable Wisconsin law.

It appears, then, that the grantee's position amounts to the following: the only RCA bid was the "standard form" bid, priced at $321,987; this bid was responsive because it did not take any exceptions to the specifications; the purported "or equal" product offered in the bid did not, however, meet the specifications; and it was therefore appropriate to accept a substitute item, the TK-28 camera, as part of the bid in making the award.

Choice of Law

HEW's notification of grant award in the present case stipulated as a "special condition" Office of Management and Budget (OMB) Circular A-102, "where applicable." Also, HEW's report to our Office on this matter notes that 45 C.F.R. § 100a.100, et seq. (1975), prescribes procurement standards for its grantees. These standards (45 C.F.R. §§ 100a.100 through 100a.109) are taken from the procurement standards for grantees prescribed in attachment "O" to OMB Circular A-102. It appears, then, that the attachment "O" procurement standards were made a condition of the grant.

We note that while OMB Circular A-102 has been superseded by Federal Management Circular (FMC) 74-7, September 13, 1974, attachment "O" has been made a part of FMC 74-7. See 34 C.F.R. § 255 (1975).

Attachment "O" states that grantees may use their own procurement regulations which reflect applicable State and local law, rules and regulations, provided that procurements made with Federal grant funds adhere to a number of prescribed standards. Some of these standards, for example, are that all procurements shall be conducted in a manner so as to provide maximum open and free competition, and that where advertised bids are obtained the award shall be made to the responsible bidder whose bid is responsive to the invitation and is most advantageous to the grantee, price and other factors considered.

Standards very similar to these were considered in a recent decision of our Office involving a contract awarded under a grant by the Department of Commerce. See Griffin Construction Company, B-185790, July 9, 1976, 55 Comp. Gen. ___, 76-2 CPD 26, where we stated:

"Our Office has held that, where grant conditions indicate that State law shall be followed in certain aspects of procurements handled by Federal grantees, the initial frame of reference for deciding the propriety of those actions is the State and local law. Lametti & Sons, Inc., 55 Comp. Gen. 413 (1975), 75-2 CPD 265; Blount Brothers Corporation, et al., B-185322, March 11, 1976, 76-1 CPD 172. This is consistent with Attachment 'O.' * * * As recognized in Copeland Systems, Inc., 55 Comp. Gen. 390 (1975), 75-2 CPD 237:

> "'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. * * *'

"In Copeland, supra, we further recognized the grantor's primary authority to determine the grantee's compliance with grant provisions and also our right to recommend corrective action when we believed that the determinations reached were not rationally founded. As can be seen in Lametti, supra, and Blount, supra, where the grant indicates that State law shall govern and State law exists on the specific point in question and is followed, even if that State law differs from Federal law, GAO cannot say that the results reached in following State law were not rationally founded.

"Therefore, where grant conditions indicate that State and local law will govern, the initial frame of reference must be to State law. However, if no State law exists as to the particular point in question, then consideration of the matter under a Federal frame of reference is appropriate. * * *

"With regard to the instant case, it would appear that the initial frame of reference as to the applicable

law must be State and local law. As noted above, the regulations provide that the grantee may utilize its own State and local law and there is no indication that anything other than State and local law was followed * * *."

In the present case, as in Griffin, the grant allowed the grantee to use State and local law, and there is no indication that anything else was followed.

Responsiveness of RCA Bids

There is Wisconsin law which bears upon the responsiveness of RCA's bids. The parties are apparently agreed that section 16.855, Wisconsin Statutes, is applicable to this procurement. The statute provides in pertinent part:

"(1) The department shall let by contract to the lowest qualified responsible bidder all construction work when the estimated construction cost of the project exceeds $15,000. * * *

"(2) Whenever the estimated construction cost of a project exceeds $15,000, the department shall:

"(a) Advertise for proposals * * *

* * * * *

"(c) Publicly open and read aloud, at the time and place specified in the notice, all bids * * *

"(d) Not allow or make any correction or alteration of a bid except as provided in sub. (6).

* * * * *

"(6) Nothing contained in this section shall prevent the department from negotiating deductive changes in the lowest qualified bid not to exceed 5% of the total bid in order to bring the bid within the limits imposed by authorized funds." (Emphasis added.)

To our knowledge, the Wisconsin courts have not construed this language. However, there are Wisconsin cases which have dealt with similar statutory provisions calling for award to the "lowest responsible bidder." Such language has been held to imply the exercise of discretion on the part of contracting officials which ordinarily will not be interfered with by the courts. See State ex rel. Hron Brothers Co. v. City of Port Washington, 265 Wis. 507, 62 N.W.2d 1 (1953). Thus, in a case where a Wisconsin statute called for purchase from the lowest responsible bidder and authorized alternative bidding, it was stated that the exercise of discretion in choosing one alternative bid over another was subject to challenge only by a claim of flagrant abuse of discretion amounting to fraud. Automatic Merchandising Corp. v. Nusbaum, 60 Wis.2d 362, 210 N.W.2d 745 (1973). However, the procuring officials' discretion is not unlimited. In a recent decision it was pointed out that judicial review would be available to determine whether a bidding authority acted in an arbitrary or unreasonable manner in deciding to award a contract to one other than the low monetary bidder. Aqua-Tech., Inc. v. Como Lake Protection and Rehbailitation District, 71 Wis.2d 541, 239 N.W.2d 25 (1976).

Moreover, we note that the Wisconsin courts have had occasion to object to the actions of contracting officials under statutory provisions of this type. See Chippewa Bridge Co. v. City of Durand, 122 Wis. 85, 99 N.W. 603 (1904), which involved contracts for construction of a bridge under a city charter which called for award to be made to the "lowest reasonable and responsible bidder." In regard to the bridge superstructure contract, it was found, among other things, that each bidder was permitted to vary the details of the work, that the contract did not accord with any bid formally submitted or with the invitation for bids, and that the contract was made as the result of negotiations between the city officers and the bridge company which materially changed the price of the work and the terms of payment from what other bidders had the opportunity of considering. In finding the contracts void, the court stressed at some length the fixed and particular steps prescribed by the city charter for making such contracts and stated:

> "The law permits no private negotiations with an individual bidder, no change of plans and specifications submitted for the competition, no variance for the purpose of obtaining a change in the bid of one or more bidders. The whole matter is to be conducted with as much fairness, certainty, publicity, and absolute impartiality, as any proceeding requiring the exercise of quasi judicial authority. * * *"

In Bechthold v. City of Wauwatosa, 228 Wis. 544, 280 N.W. 320 (1938), it was recognized that notwithstanding the considerable measure of discretion vested in the municipal officers, failure to comply with statutory provisions essential to accomplishment of the legislative purpose of the bidding statute--to prevent fraud, favoritism, imposition and improvidence--would invalidate the contract. The case involved a statutory requirement to run an advertisement for bids not less than once a week for two successive weeks.

See, also, State ex rel. Crosvold v. Board of Sup'rs of Eau Claire County, 263 Wis. 518, 53 N.W.2d 70 (1952). There, the invitation required separate bids on proposals for separate items of work and required that proposals conform exactly to the written instructions to bidders. One bidder submitted an unsolicited offer to perform two separate items of work at a combined price; other bidders submitted separate bids as instructed. In holding that acceptance of the combination bid would be unauthorized, the court noted the requirement for a common standard by which to measure all the bids. It was stated that acceptance of the combination bid would be an act of favoritism which the bidding statutes were enacted to prevent.

With these general principles in mind, we return to the Wisconsin statutory provisions quoted supra. We think the Wisconsin courts would give these provisions the plain and obvious meaning which the words convey. The statute prohibits any correction or alteration of a bid, with one exception which is not applicable here. The grantee apparently views "any correction or alteration" as referring only to a change in bid price. However, the words of the statute are clearly not so limited. An alteration of a bid could consist, for example, of the substitution, after bid opening, of an acceptable equipment item for an unacceptable equipment item which was offered in the bid.

This is apparently what occurred in the present case. The RCA standard form bid offered an item (the TK-610B camera) which the grantee found did not meet the specifications. Thus, the RCA standard form bid for base bid number four was nonresponsive to the invitation. The substitution of the TK-28 camera after bid opening was an alteration in the bid which is prohibited by the statute. Also, since RCA's standard form bid was nonresponsive as to base bid item number four, it follows that an award cou

not be made by accepting the RCA combined standard form bid covering base bid numbers three and four.

RCA's submission of an alternate bid affords no support for the grantee's action. First, the fact that the alternate bid offered an acceptable brand name camera (the RCA TK-28) has no bearing on the nonresponsiveness of the standard form bid. Also, it appears that the alternate combined bid itself was defective for failing to contain a separate bid price for base bid item number three as required. In addition, the combined alternate bid price ($356,851) is higher than the bids of Ampex on base bid number three and another bidder on base bid number four. Finally, while the Automatic Merchandising Corp. decision, supra, recognizes that alternative bidding may be permitted, there is no indication that any of the alternative bids in that case were found to be nonresponsive.

In view of the foregoing, we conclude that the award to RCA was improper under Wisconsin law.

Conclusion

In closing, it is necessary to discuss HEW's views expressed in the agency's report to our Office on this matter. The report points out that the HEW Commissioner of Education may, in his discretion, disallow as a charge to grant funds all or part of the cost of any procurement by the grantee which does not adhere to the procurement standards in 45 C.F.R. § 100a.100, supra. However, HEW suggests that the Commissioner would not be required to do so by the regulations if the procurement standards were not met. The Department points out that under 45 C.F.R. § 100a.494, decisions concerning disallowance of costs will normally occur as part of the grant closeout process, taking into consideration recommendations made in the final audit of the grant. It is suggested that disallowances could result from questioning of costs, for example, by the Department's auditors or by our Office. HEW points out, however, that in no case could a determination to disallow costs become final until the grantee has had an opportunity to appeal to the HEW Grant Appeals Board.

We believe that HEW's statements as applied to this matter involve two distinct questions or issues--the first being the propriety of an award made by a grantee and the second being a Federal agency's proper administration of its grant. Our reviews

of complaints concerning contracts awarded under Federal grants deal with the former question, not the latter. As stated in 42 Fed. Reg. 42406, supra, it is not our intent to interfere with the functions and responsibilities of grantor agencies in making or administering grants; also, Federal grantor agencies will continue to be responsible for assuring that grant administration functions adhere to the statutory requirements applicable to their grant programs.

In the present case, we have found that an improper award was made. However, since the contract has apparently been completed, no recommendation for corrective action can be made by our Office. This fulfills the scope of our review under 40 Fed. Reg. 42406. However, by letter of today we are calling the conclusion reached in this case to the attention of the Secretary of Health, Education, and Welfare for whatever relevance it may have to the possible prevention of future improper awards.

Deputy Comptroller General
of the United States