

DOCUMENT RESUME

02382 - [A1472499]

[Procurement Policies of Federal Grantee]. B-184562. May 24, 1977. 6 pp. + 2 enclosures (2 pp.).

Decision re: Apex Corp.; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).
Contact: Office of the General Counsel: Procurement Law II.
Budget Function: General Government: Other General Government (806).

Organization Concerned: Office of Education; Ohio: Educational Television Network Commission; Northeastern Educational Television of Ohio, Inc.

Authority: Communications Act of 1934 (47 U.S.C. 390 et seq.).
45 C.F.R. 100a.105(a)(2). 45 C.F.R. 100a.100. 45 C.F.R. part 60. ONB Circular A-102. Rewco, Inc. v. City of Cleveland, 183 N.E.2d 646 (Ohio 1961). Hog. v. Cleveland (1915) 27 Ohio Dec. 62, 18 Ohio N.P., N.S., 49. Tucker v. Newark (1897) 19 Ohio Cir. Ct. R1. 10 McQuillin, Municipal Corporations, sec. 2942, p. 294. B-184562 (1976). B-184562 (1977).

The protester objected to the award of a contract by a Department of Health, Education, and Welfare grantee to the highest bidder. Since the grant provisions permit the grantee to use its own procurement practices, State laws must be used to judge the complaint. The invitation to bid, which permitted deviations in bids to some undefined extent and which provided no criteria for evaluating bids which deviated from the stated specifications, did not satisfy Ohio's competitive bidding requirements. (Author/SC)

DECISION



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

FILE: B-184562

DATE: May 24, 1977

MATTER OF:

Ampex Corporation

DIGEST:

1. Where HEW grant terms and regulations reference and include provisions which state that grantee (Ohio Educational Television Network Commission) may use own procurement policies, grant complaint is reviewed against State law bearing on issue.
2. Invitation to bid, which permitted deviations in bids to some undefined extent and which provided no criteria for evaluating bids which deviated from stated specifications, did not satisfy Ohio's competitive bidding requirements.

Ampex Corporation (Ampex) has requested review of the award of a contract by Northeastern Educational Television of Ohio, Inc. (NETO), to RCA Corporation for two video tape recorders. The funds used for the procurement were provided under a grant from the Department of Health, Education, and Welfare (HEW), Office of Education, to the Ohio Educational Television Network Commission for the use and benefit of NETO. The grant was made pursuant to the Communications Act of 1934, 47 U.S.C. § 390, et seq. (1970).

NETO initially solicited bids for the video tape recorders. In response to the solicitation, Ampex bid \$184,500, and RCA bid \$220,757. Ampex filed a complaint with the cognizant State authorities after learning of an impending award to RCA. Ampex was subsequently advised by the Office of Education that:

"-- the U.S. Office of Education -- concluded that the specifications were to some degree lacking in reflecting the salient features that must be met and apparently not adequate to provide maximum open and free competition.'; and 'Accordingly, * * * Northeastern Television of Ohio, Inc., Kent, Ohio has agreed with our conclusion and the requirement will be re-advertised at an early date, being more specific in their solicitation requirements.'"

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Kent State University, apparently acting as agent for NETO, resolicited bids for the video tape recorders. The invitation to bid specified "Two new quadruplex videotape machines RCA TR70C equivalent or better."

According to Ampex, the solicitation included an increased number of design and performance characteristics which were peculiar to RCA video tape recorders. Because of this, Ampex filed a complaint with NETO. Despite its complaint, Ampex, along with RCA, submitted bids. RCA bid \$204,100, and Ampex bid \$178,500 or \$25,600 less than RCA.

NETO rejected Ampex's lower bid and submitted the bids to HEW with the following explanation:

- "1. The Ampex equipment is not compatible with NETO's current equipment. NETO maintains that compatibility is not a negotiable item.
- "2. The instant start feature of RCA equipment is essential for operation of our television stations.
- "3. The RCA TR70C machine's automatic mode selection is essential.
- "4. The RCA TR70C has higher electronic standards in most areas as evidenced by the specifications. This will enhance overall broadcast quality.
- "5. The Ampex VR1200C is no longer in production. Selection of an obsolete machine is not negotiable."

After reviewing the submission, HEW advised NETO that there was compliance with "* * * the applicable Federal Procurement Standards in your solicitation for Video Tape Machines. We have no objection to your proceeding with the award to RCA." Thereafter, the contract was awarded to RCA.

Ampex subsequently filed a complaint with our Office alleging that the invitation to bid contained proprietary RCA specifications which unduly restricted competition; the award of the contract to RCA, the higher bidder, was a noncompetitive, sole-source award which violated 45 C.F.R. § 100a.105(a)(2) (1975) and which also violated the invitation to bid which specified that the contract would be awarded to the lowest qualified bidder.

Ampex also commented on the rationale for the rejection of its bid, as follows:

1. Its VR1200C recorder, contrary to NETO's contention, is compatible with NETO's current equipment. If interchangeability of RCA headwheel assemblies was essential, then, the procurement of video recorders was not a competitive procurement pursuant to 45 C.F.R. § 100a.100 (1975), because headwheel assemblies are available only from RCA.
2. The RCA TR70C recorder does not have an instant start feature which NETO considered essential.
3. The RCA TR70C machine's automatic mode selection is an exclusive RCA feature. The inclusion of this proprietary requirement unduly restricted competition "to a degree that it is contrary to applicable competitive procurement standards."
4. The solicitation provided no finite presaward factor to measure electronic standards. Moreover, all prudent broadcasters do not share NETO's opinion that the RCA TR70C has higher electronic standards which will enhance overall broadcast quality.
5. The Ampex VR1200C recorder is still in production. It is carried as standard catalog equipment and Ampex's marketing plan for fiscal year 1976 includes sales of new VR1200's.

HEW's notification of grant award in the present case stipulated that 45 C.F.R. part 60 (1975), and Office of Management and Budget Circular A-102, where applicable, governed the performance of the grant. Under standards identical to these, we reviewed a complaint involving a contract awarded under a grant by HEW against applicable State law bearing on the issue. See Ampex Corporation, B-184562, October 6, 1976, 76-2 CPD 311.

After carefully reviewing the record and based upon our own investigation, we find that only an RCA recorder could have met all of the specifications in the invitation to bid. The recorder is not available through RCA dealerships or distributorships. It can be purchased only directly from RCA.

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For example, the invitation to bid specified that the video recorders must be equipped with headwheel panel assemblies, a proprietary RCA feature, so that the headwheel panel assemblies could be interchanged with existing RCA video recorders. Moreover, the record reflects that Ampex's bid was rejected in part because Ampex did not offer--and as a practical matter could not offer--headwheel panel assemblies which were interchangeable with the existing RCA recorders.

In Rewco, Inc. v. City of Cleveland, 183 N.E.2d 646 (Ohio 1961), the Supreme Court of Ohio was confronted with a situation somewhat similar to the facts presented here. In that case, plaintiff sought to enjoin the City of Cleveland and various city officials from proceeding further with a contract to purchase 15 refuse collection truck bodies. At the time, there were five principal types of refuse bodies on the market. However, only the patented Roto-Pac body could have satisfied the requirements of "continuous loader type" and "escalator type conveyor" set out in the specifications. The court held in pertinent part that:

"Under some circumstances the specifications for bids may call for patented materials or articles; otherwise the public would lose the benefit of many valuable technological developments.

"* * * The municipality has such power only 'when it is clearly to the public interest to do so, after carefully considering the serviceability and cost of the material of article for which the contract is made.' 10 McQuillin, Municipal Corporations, sec. 2942, page 294. See Mog. v. Cleveland (1915) 27 Ohio Dec. 62, 18 Ohio N.P., N.S., 49; Tucker v. Newark (1897) 19 Ohio Cir. Ct.R.1

"The City made no such determination in the instant case. In fact, Defendant * * * admitted that he had caused the specifications to call for Roto-Pacs so that he would determine the validity of the recommendation of the New York authorities after a large number of Roto-Pacs had been bought and used. The value of a patented article should

be determined before the specifications are drawn, not after it is bought. The City certainly has facilities for getting this information without making a substantial investment first.

"Asking for bids in the alternative is permissible, but the specifications must be accurate and complete as to each alternative. Then, when the bids have been received, the City may select one alternative after careful comparison with the others and award the contract to the lowest and best bidder. The L & M Properties Co., Inc. v. Burke, Mayor, et al., (1949) 152 Ohio St. 2S, 86 N.E.2d 768. The City made no such comparison in the instant case."

Based upon our reading of Rawco, supra, we could not fault NETO under Ohio law for specifying and selecting RCA video recorders if, under the circumstances, it was in the public interest to do so. The invitation to bid, however, contained the following deviation provision:

"DEVIATION:

"It will be the responsibility of the bidder to furnish with his bid, a list and clarification of deviations from the specifications, written or implied, in order that a fair and proper evaluation be made. Equipment proposed by the bidder which does not conform to the specifications shall be fully described by technical literature including performance data and drawings.

"Those bidders not submitting a list of deviations will be presumed to have bid as specified."

This provision indicates that other than RCA recorders may have satisfied NETO's legitimate needs, and, consequently, the specifications could be considered to be unduly restrictive. However, if it were in the public interest to procure RCA video recorders and considering the fact that the recorders could be procured only from RCA, NETO should have considered applying to HEW for approval to purchase the recorders on a negotiated sole-source basis. In this regard, we note that 45 C.F.R. § 100a.105(a)(2) (1975) provides:

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"(a) Procurements may be negotiated by State or local government recipients if it is not practicable or feasible to use formal advertising. Generally, procurements may be negotiated if one or more of the following conditions prevail:


* * * * *

"(2) The material or service to be procured is available from only one person or firm; all contemplated sole source procurements where the aggregate expenditure is expected to exceed \$5,000 shall be referred to the Commissioner for prior approval;"

Further, it appears that under Ohio law, specifications must be accurate and complete for each alternative bid, which was not the case here. The invitation to bid contained a deviation provision which permitted vendors to submit alternative bids (i.e., bids which deviated from the specifications). However, the invitation to bid contained no specifications for alternative bids; neither did it contain any other limitations or guidelines concerning the type of alternative bid which could be submitted; nor did it establish any criteria for evaluating alternative bids. In effect, the invitation to bid invited vendors to draft their own specifications. Alternative bids presumably were to be evaluated on a subjective basis. We conclude, then, that the invitation to bid did not meet Ohio's competitive bidding requirements. See Ampex Corporation, B-184562, April 12, 1977.

Since the video recorders have been procured, no meaningful remedial action can be recommended. By letter of today, we are calling the conclusion reached here to the attention of the Secretary of Health, Education, and Welfare to possibly prevent a recurrence.

Deputy


Comptroller General
of the United States



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

MAY 24 1977

B-184562

The Honorable
The Secretary of Health,
Education, and Welfare

Dear Mr. Secretary:

We refer to a letter dated October 17, 1975, with enclosures, from your Acting Deputy Assistant Secretary for Grants and Procurement Management, which reported on a request by Ampex Corporation that our Office review the award of a contract to RCA for the procurement of two video tape recorders. The funds used for the procurement were provided under a grant from the Department of Health, Education, and Welfare, Office of Education, to the Ohio Educational Television Network Commission for the use and benefit of the Northwestern Educational Television of Ohio, Inc.

Enclosed is a copy of our decision of today which concludes that the invitation to bid involved in the instant complaint did not satisfy Ohio competitive bidding requirements. Our decision does not recommend any corrective action because the contract has apparently been performed.

Our reviews under 40 Fed. Reg. 42406 (1975) are concerned with the propriety of grantee awards and do not directly involve the question of disallowances of charges to grant funds or other matters concerned with the administration of the grant. However, we believe that the conclusions reached in this review should be noted by your responsible grants personnel for whatever relevance they may have to the possible prevention of future improprieties.

Sincerely yours,

R. F. KILLEA

Deputy

Comptroller General
of the United States

Enclosure

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Richard K. Larson
Thru

MAY 24 1977

Director, LCD

Paul G. Dumbing

General Counsel - Paul G. Dumbing

Grant Complaint - Asper Corporation, B-184562 (Ohio)

We sincerely appreciate the assistance which was furnished by Richard D. Moura and Donald L. Kirich in connection with the subject grant complaint. As with the Asper complaint involving Oklaiana (B-184562, April 12, 1977), the information provided proved to be most helpful in evaluating the issues raised by the complainant. Attached is a copy of the decision on this matter.

Attachment