

DECISION



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

60727

FILE: B-185505

DATE: April 7, 1976

MATTER OF: Sola Basic Industries

99095

DIGEST:

Contract under grant to foreign government financed by AID is not subject to rules applicable to Federal procurements. Contract award should comply with criteria applicable under AID-approved solicitation and grant documents. Therefore, where all tenders are nonresponsive and record indicates that prompt award is required AID may approve grantee's selection of the nonresponsive tender which will best serve its needs, provided that award price is determined to be reasonable.

On December 10, 1975, Sola Basic Industries (Sola) protested to this Office the proposed award of a contract by the Arab Republic of Egypt to Westinghouse Electric Corporation for electrical equipment financed by the Agency for International Development (AID) through AID Grant No. 26312-001. The grant requires AID approval of procurement procedures, tender evaluation, and contract award.

By letter of January 21, 1976, AID advised us that the Egyptian Government had determined that Sola's tender was nonresponsive to the delivery and warranty provisions of the Tender Document and that AID had concurred with Egypt's finding. By letter of February 13, 1976, Sola furnished us with a detailed rebuttal. Sola contended that it was substantially compliant with all material provisions of the Tender Document. It also contended that if Egypt and AID were to apply a standard of compliance so strict as to find Sola nonresponsive, then by the same standard, Westinghouse, the proposed contractor, was nonresponsive. Sola also contended that none of the other four (4) tenderers was responsive; therefore if award is to be denied to Sola no one else should receive the award under the subject solicitation and that further competition procedures are required.

By letter of February 12, 1976, AID notified this Office of its intention to approve award to Westinghouse notwithstanding the protest because of the urgent need of the Egyptian Government for the equipment. On February 25, 1976, Sola filed an application for a preliminary injunction in the United States District Court for the

District of Columbia (Civil Action No. 76-0282) against AID's approval of an award to Westinghouse. A hearing was held on February 25, and on March 3, 1976, the Court granted the preliminary injunction. The Court ordered AID to "preserve the status quo" pending a GAO decision on the protest and consideration by the Court of that decision.

Meanwhile, on March 2, 1976, AID furnished us with its detailed comments on the Sola letter of February 13, 1976, regarding the bids of Sola and Westinghouse. Sola's comments concerning the other four tenderers were not addressed by AID since it proposed to approve the Westinghouse selection. However, by letter of March 15, 1976, AID submitted a supplemental letter to us in order to "address allegations made by Sola * * * concerning the responsiveness of * * * two other bidders who were declared responsive by the Egyptian Ministry of Power and the consulting engineers Sanderson and Porter. The two companies were McGraw-Edison Company and H.K. Porter and Company." In addition, on March 10, 1976, AID filed Action No. 76-1228 in the United States Court of Appeals for the District of Columbia Circuit, a motion for stay of the lower court's order, contending in part that a prompt award was required and that GAO was not expected to rule on the Sola protest until April 12. On March 17, AID filed a supplementary motion with the U.S. Court of Appeals requesting, inter alia, a stay of the District Court's order since GAO was not expected by AID to rule on the protest proceedings prior to April 19, 1976.

It should be noted that the original parties to the protest, Sola, AID and Westinghouse, have submitted comments on the various contentions raised by the other parties. However, neither McGraw-Edison nor H.K. Porter has submitted any comments, nor have we invited comments from these bidders. Normally other interested bidders are notified by the agency involved or by this Office of a protest which may affect them and are afforded the opportunity to communicate directly with our Office, essentially as provided in Section 20.3 of our Bid Protest Procedures, 40 Fed. Reg. 17979 (1975) (although these procedures are not directly applicable to complaints concerning contracts under Federal grants). Here, however, there is an overriding need to advise the Court of our views without further delay. We consider the Court's injunctive action as requiring handling by us of the Sola protest on an expeditious basis. Therefore, in reviewing the various tenders we have made independent determinations on the record before us consistent with the Court's desire to obtain our views.

As indicated, the Egyptian Government retained the New York firm of Sanderson & Porter, Inc. to prepare the Tender Document and conduct the tender evaluation. AID's approval of the procurement procedures, tender evaluation, and final award is required by the Grant Agreement (Article II, Section 2.01). The agreement also provides that goods shall be procured at reasonable prices on a fair and competitive basis in accordance with procedures prescribed in implementing letters (Article III, Section 3.04). Implementation letter No. 1, issued by AID states:

"C. Reasonable Price (Section 3.04). Sanderson and Porter, Inc. prepared the Invitation for Bid in accordance with A.I.D. regulations and procedures using A.I.D. Handbook 11, Chapter 3, entitled Country Contracting, Procurement of Equipment and Materials as a guide. This Invitation is intended to elicit competitively priced offers for the equipment contained therein. Therefore, A.I.D. will consider the requirement of Section 3.04 met by the placement of orders by the Ministry of Electricity with bidders, who in response to the Invitation for Bid, have provided responsive bids with the lowest prices."

The instructions to tenders, as approved by AID, provided that nonresponsive tenders would be rejected. Responsive tenders and material modifications were defined as follows:

"2. A responsive Tender is one which accepts all of the terms and conditions of the Tender Documents without material modification. A material modification is one which affects in any way the price, quantity, quality, or delivery or installation date of Apparatus or materials; or, the price, quality, scope, delivery date, or completion date of Apparatus and materials, or other services to be supplied or performed; or, which limits in any way any responsibilities, duties, or liabilities of the Tenderer or any rights of the Ministry or of A.I.D., as any of the foregoing have been specified or defined in the Tender Documents. The Ministry may waive any minor informality in a Tender which does not constitute a material modification."

Thus, it is clear that formal advertising procedures would be used to procure this equipment.

The Sola Tender

In our opinion, Sola offered a delivery schedule which does not meet the solicitation's requirements. There follows a listing of the delivery schedule required by the solicitation and that proposed by Sola:

<u>Solicitation</u>	<u>Sola</u>
180 units (50% of total) in 126 days From Opening of Letter of Credit	12 units FAS N. Y. in 170 days From Award of Contract
270 units (75% of total) in 182 days From Opening of Letter of Credit	30 units FAS N. Y. in 270 days From Award of Contract
360 units (100% of total) in 224 days From Opening of Letter of Credit	360 units FAS N. Y. in 380 days From Award of Contract

AID has estimated that the letter of credit will be opened not prior to 45 days after award. Giving Sola the benefit of this 45-day period, the delivery terms of Sola's tender nevertheless deviate significantly from the required deliveries. The overall period in which Sola offers to make its deliveries exceeds the total time-frame required by approximately 50 percent. In addition, Sola proposed to deliver approximately 88 percent of the units at the end of its delivery period, thereby failing to meet the increments required by the Tender Documents.

Sola also substituted its own guarantee terms for that required in Article 41 of the instructions to tenders. Article 41, in part, required the contractor, at his own expense, to restore, make good or renew, to the satisfaction of the buyer, any unsound or defective equipment, including replacement and/or repair of defective parts during operation if such defect is due to faulty design or defective construction or workmanship rather than to ordinary wear and tear. The buyer reserved the option of accepting or rejecting equipment for noncompliance with the guarantee terms and specifications and requiring the contractor to deliver to Port of Entry, Egypt, the necessary new equipment. The contractor was required to bear the expense of furnishing new equipment or making alterations to installed parts or apparatus and of any necessary tests resulting from equipment failures. Such expenses were to include removal and reinstallation costs, if any, and related transportation and insurance costs. In the case of default, the buyer was to have the right to carry out the necessary work for the contractor and at his risk and expense.

Sola's tender took exception to the terms of the guarantee as specified and substituted the following in lieu of other express and implied warranties:

- "a. GUARANTEE: Seller warrants equipment and parts manufactured by it and supplied thereunder to be free from defects in materials and workmanship for a period of one year from placing in service providing:
1. Purchaser shall notify Sola Basic Industries, Inc. in writing, of the date the equipment is placed in service, within two weeks after said date. If purchaser fails to deliver said written notice, the term of warranties shall be a period of one year after shipment.
 2. The total term of warranties shall not be longer than a period of 18 months after shipment.

If within such a period any such equipment or parts shall be proved to Seller's satisfaction to be defective, such equipment or parts shall be repaired or replaced for installation at Buyer's expense, at Seller's option. Seller's obligation hereunder shall be limited to such repair and replacement, F.O.B. its factory, and shall be conditioned upon Seller's receiving written notice of any alleged defects within ten (10) days after its discovery and at Seller's option, return of such equipment or parts prepaid to its factory. This warranty shall not apply to equipment or parts not manufactured by Seller or to equipment or parts which shall have been repaired or altered by others than Seller so as, in its judgment, adversely to affect the same, or which shall be subject to negligence, accident, damage by circumstances beyond Seller's control, or improper operation, maintenance or storage, or to other than normal use or service or to parts whose normal span of life might be shorter than the over-all warranty period. With respect to equipment and parts not manufactured by Seller, the warranty obligations of Seller shall in all respects conform and be limited to the warranty extended to Seller by the Supplier.

Seller further warrants that all services performed for the Buyer hereunder will be performed in a good and workmanlike manner. Seller's obligation and liability with respect to such warranty shall be limited to the amount received by it from the Buyer on account of such services.

THE FOREGOING WARRANTIES ARE IN LIEU OF ALL OTHER EXPRESS AND IMPLIED WARRANTIES (EXCEPT TITLE) INCLUDING WITHOUT LIMITATION WARRANTIES OF MERCHANTABILITY AND FITNESS FOR PURPOSE. Seller shall not be subject to any other obligations or liabilities whatsoever with respect to equipment, parts or services manufactured or furnished by it, or any undertakings, acts or omissions relating thereto; provided, the Seller may be liable for any damages (except damage to machinery or parts furnished by Seller or consequential or contingent damages of any nature) directly attributable to negligence of any of its officers or employees.

- b. LIMITATION OF LIABILITY: The Seller is not liable for consequential or contingent damages."

Sola's tender would require the buyer to bear the expense of installing any repaired or replaced part whereas the buyer required the contractor to bear any reinstallation costs. While Sola also sought to retain the option of either repairing or replacing defective equipment or parts, the buyer required that it have the option of rejecting apparatus and requiring the contractor to furnish new equipment as may be necessary. Moreover, Sola limited its obligation for repair and replacement "F.O.B. its factory," conditioned upon return of the equipment or parts prepaid to its factory. Sola now argues that, consistent with its usual practice, it never intended to require the buyer to absorb the expense of shipping repairable equipment contrary to Article 41. In our opinion the substitution by Sola of the above guarantee provision has the effect of deleting the buyer's Article 41 guarantee from the contract documents and significantly diminishes certain of the buyer's rights. We think Sola's substituted guarantee would require the buyer to absorb shipping expenses for repairable equipment.

While additional bases for rejecting the Sola tender have been presented for our consideration, it is clear from the above discussion that Sola's tender is nonresponsive to the specified delivery and guarantee requirements.

The Westinghouse Tender

We have concluded that the alternative tender of Westinghouse, which Egypt proposes to accept with AID's approval, is also nonresponsive to material requirements in at least two respects.

Sections 4.3 and 5.1 of the specifications provide that each of the 360 transformer points to be furnished, consisting of an 11 KV primary section, a 300 KVA transformer and a low voltage switchgear, be a factory coordinated, compact unit assembly which is wired, adjusted and tested at the factory. A number of tests were specified to be performed on each unit after assembly of the equipment. However, Westinghouse proposed to ship, untested, the two component parts of each transformer point package in separate containers, for final hook-up in Egypt. It acknowledges that the two component parts of each transformer point would be produced at separate Westinghouse factories. However, in view of the technical simplicity of connecting them Westinghouse states that it decided to effect economies by eliminating shipments between factories and separately shipping the components to Egypt. Although it proposed to assemble and test one unit in the United States, the remaining units would be furnished under guarantee but without testing. Westinghouse states that its equipment is of well-known and reliable design, complies with standard electrical specifications, complies with the ratings and safety rules contained in the specifications section of the solicitation, and that its tender is accompanied by the required descriptive data. It contends that the final hook-up in Egypt rather than in the United States does not materially affect the basic performance characteristics of this equipment.

Although it is clear from the Tender Document that alternate tenders were permitted to deviate from the design specifications, under Article 13(b)(5) of the solicitation alternate tenders were required to comply with the general conditions of the tender, including factory testing (Article 27) and delivery (Article 24). Therefore, the nonperformance of factory testing is a material modification which limits the duties of the tenderer.

Moreover, Westinghouse was nonresponsive to the solicitation's delivery requirement. As indicated above, the solicitation required the first increment of 180 units (or 50 percent of the total quantity) to be delivered within 18 weeks after the effective date of the contract. Westinghouse admits that a reasonable interpretation of delivery offered in its alternate tender indicates that it would

deliver the full 180 units within 21 weeks. Nevertheless, it argues that it substantially has complied with the delivery requirements, since the buyer seeks to obtain 100 percent of the equipment as soon as possible and the Westinghouse timetable represents a substantial improvement in the overall schedule.

Under the terms of the solicitation, a material modification is one which affects in any way the delivery of apparatus or materials or the liabilities of the tenderer. Where, as here, the General Conditions provide for assessment of liquidated damages for delay in delivery of the whole contract supply or any installment thereof, we must conclude that the Westinghouse alternative tender is nonresponsive to the delivery requirements.

The Other Tenders

Sola also objects to an award to any other tenderer on the basis that the four other tenderers are nonresponsive and in such circumstances further competitive bidding procedures are required. In this connection, the buyer has determined that the tenders of McGraw-Edison Company and H.K. Porter and Company are responsive. AID has addressed Sola's arguments regarding the responsiveness of these bidders and has concluded that the buyer's findings in this regard are reasonable and justifiable, although AID has not determined whether the prices offered are reasonable. Although other firms have submitted tenders which were rejected by the buyer as nonresponsive, there has been no question raised regarding such rejections.

Based on the record before us we have concluded that the tenders of McGraw-Edison and H.K. Porter are also nonresponsive.

Article 14(b) of the instructions to tenderers reserved to the buyer the right to decrease or increase by 10 percent the quantities to be ordered of any item in the schedule of prices. McGraw-Edison's tender stated that it would accept variations of up to 10 percent of the quantities offered. However, we note that elsewhere in the tender McGraw-Edison stated that it would "only accept an order for the total quantity of 360 Transformer Points." Transformer points are included as items in the schedule of prices.

In our opinion, McGraw-Edison's general acceptance of the 10 percent variation provision, while applicable to other schedule items, does not apply to transformer points. Accordingly, its refusal to accept an order for less than the full quantity of transformer points renders its tender nonresponsive.

Finally, with regard to H.K. Porter Company, Inc. we note that it has taken exception to Article 29 of the Tender Document.

Article 29 provides, inter alia, that the Ministry may terminate the contract if the contractor has failed to perform or progress in accordance with contract terms, and has not remedied such failure within 10 days after notification. H.K. Porter has proposed, instead, a 30 day period to cure failures. We regard this as a material deviation from the General Conditions and therefore we believe that the firm is nonresponsive.

Under the terms of the Grant Agreement and Tender Documents, award was required to be made to the lowest evaluated responsive, responsible firm. However, contrary to AID's assertion, it appears from the record that none of the firms was fully responsive to the material terms of the tender. In reaching this conclusion we have not attempted to measure degrees of nonresponsiveness but rather have considered whether each of the tenders was materially responsive under the standards applied in formally advertised procurements by the United States. We believe our conclusions are consistent with Article 13(a)(2) of the Tender Document which explains that a responsive tender is one which accepts all of the terms and conditions of the Tender Documents without material modification. Article 13(a)(2) further states that the purchaser can waive any minor informality which it does not consider a material modification, while Article 13(a)(3) reserves to the Ministry the right to waive any informalities or minor irregularities in a tender if its best interest will be served thereby. As stated, it is our opinion that each of the tenders discussed above is materially nonresponsive to the terms and conditions of the Tender Documents.

We have been advised by AID in a letter dated March 31, 1976, that the grant is authorized under Section 532 of the Foreign Assistance Act of 1961, as amended (22 U.S.C. 2346a (1970, Supp IV)). General authority for providing such funds is contained in Section 531 of the Act, 22 U.S.C. 2346, which authorizes the President to furnish assistance to friendly countries "on such terms and conditions as he may determine, in order to support or promote economic or political stability." The requirement for competition in this case resulted from the grant agreement and the ensuing Tender Documents. As a general rule contracts financed by AID are not subject to the rules which govern direct Federal procurements. B-169755, October 6, 1970 and B-169468, May 27, 1970. Nevertheless, we have recognized that fundamental fairness requires that proposed procurement actions comply with the criteria provided in the Tender Documents. B-158620, April 11, 1966.

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It is Sola's position that under these circumstances AID is required to seek further competition by means of negotiation. In this connection, Sola points out that under the Foreign Assistance Act, 22 U.S.C. 2151, AID is to furnish assistance "in such a manner as to promote efficiency and economy in operations so that the United States obtains maximum possible effectiveness for each dollar spent." It is our opinion that this policy does not mandate a requirement for maximizing competition under all circumstances. Under direct Federal procurements this kind of situation would call for resolicitation or negotiations as time would permit. While ideally it would be desirable to seek further competition, in this case it may not be feasible to do so since the record indicates that a prompt award must be made. If the circumstances require an immediate award, it would not be contrary to the Foreign Assistance Act and the Grant Agreement for AID to approve the grantee's selection of the nonresponsive tender which will best serve its needs, provided that the award price is determined to be reasonable.

R. F. Keller
Acting Comptroller General
of the United States