DOCUMENT RESUME

02343 - [A1332308]

[Grantee Approved Substitution of Subcontractors by the Prime Contractor]. B-186962. May 6, 1977. 5 pp.

Decision re: Air Products and Chemicals, Inc.; by Paul G. Dembling, General Counsel.

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: Environmental Protection Agency; Union Carbide Corp.; Amherst, NY; Huber, Hunt & Nichols, Inc.
Authority: 40 C.F.R. 35.938-4(h). General Services Procurement Regulation, sec. 5B-2.202.70(f). 55 Comp. Gen. 139. 52 Comp. Gen. 874. 55 Comp. Gen. 262, 263. 54 Comp. Gen. 767. 55 Comp. Gen. 391. B-183235 (1975).

A subcontractor requested the review of the summary dismissal by the Environmental Protection Agency (EPA) of the firm's appeal from an adverse decision of an EPA grantee, the Town of Amherst, New York. Required listing of proposed subcontractors is not a prohibition against bid shopping, and there was no ground for objection to a grantee approved substitution of subcontractors by the prime contractor. There was insufficient basis to determine that the prime contractor acted "for" the grantee, so the propriety of the prime contractor's actions was not reviewed. (Author/SC)

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Roger Ayer
Proc. II

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

FILE: B-186962 DATE: May 6, 1977

MATTER OF: Air Products and Chemicals, Inc.

DIGEST:

1. Where grantee's solicitation required prime contractor to list proposed subcontractors in order to insure that Major Equipment items received were either equivalent to those designated in solicitation or otherwise acceptable to grantee's engineer GAO concludes that the listing requirement is not a prohibition against bid shopping and that there is no ground for objection to a grantee approved substitution of subcontractors by the prime contractor.

2. Where grantee involvement in subcontractor selection is limited to making a determination regarding proposed subcontractors' responsibility there is an insufficient basis upon which to found determination that prime contractor acted "for" grantee. Therefore, GAO will not review propriety of prime contractor's substitution of another firm for the subcontractor listed in its bid.

Air Products and Chemicals, Inc. (Air Products), a subcontractor, requests our review of the Environmental Protection Agency's (EPA) summary dismissal of its appeal from an adverse decision of the Town of Amherst, New York, an EPA grantee. Air Products had objected to the substitution of Union Carbide Corporation (Union Carbide) for Air Products as the supplier of oxygenation equipment under EPA Grant No. C-36-618 by Huber, Hunt & Nichols, Inc. (HHN), the prime contractor.

On November 13, 1975 bids were opened by the Town of Amherst on Contract 10, Phase II, General Construction, for the Amherst water pollution control facilities project. The apparent low bidder was HHN. Air Products was named in HHN's bid as the proposed supplier of oxygenation equipment. The grantee initially rejected Air Products as a proposed supplier on the ground that Air Products was not responsible. Thereupon HHN submitted Union Carbide as a proposed subcontractor in lieu of Air Products.

On December 12, 1975 Air Products complained to the grantee about the latter's nonresponsibility determination. On January 20, 1976 the grantee rejected Air Products' complaint and Air Products petitioned EPA for review. Prior to the completion of the EPA review the grantee reconsidered its earlier decision and found that Air Products was a responsible supplier. Award of Contract 10 was thereupon made to HHN.

When a series of complex negotiations between Air Products and HHN failed to culminate in a subcontract, HHN, with the grantee's approval, entered into a subcontract with Union Carbide. Air Products then unsuccessfully complained to the grantee about HHN's substitution of Union Carbide. EPA reviewed the grantee's decision and summarily dismissed it as not being for EPA consideration under EPA regulations.

Air Products presents two contentions. First, it is Air Products' contention that post-award bid shopping by prime contractors should be prohibited where federal funds are involved. Air Products notes that some federal agencies prohibit bid shopping on the ground that it can only benefit the prime contractor and that it may be detrimental to the best interests of the Government. Air Products states that:

> "/I/f an equipment supplier knows that he will have a second opportunity after the bids have become public to submit a price, he will initially propose an inflated price, or submit no price at all, and reserve his best price until later, after he has had an opportunity to review his competitive posture. Obviously, the real winner from such a procedure will be the general contractor, whose price, although low in comparison to those submitted by other bidders, will nevertheless be artificially inflated. After receiving a contract from the grantee based upon his unrealistic price, he will then be able to force his potential suppliers to reduce their original prices, but he will not be compelled to reduce commensurately his price to the grantee, which price will remain at the artificially high level."

Air Products further argues that the only competition which can in any way benefit the funding entities is that which occurs prior to bid opening.

Second, Air Products contends that it should have received the subcontract for the supply of oxygenation equipment as it was the low, responsive, responsible bidder for that portion of the work. Air Products argues that the grantee has, by passing upon the responsibility of Air Products, so injected itself into the subcontract award process that "the grantee is obligated to make its

decision with regard to the selection of a subcontractor or supplier in the same manner and subject to the same requirements as where it makes an award to a prime contractor, i.e. to the low, responsive, responsible bidder in accordance with 40 C.F.R. 35.938-4(h)."

Regarding Air Products' first contention, the solicitation does not contain clauses analogous to the federal clauses which require subcontractor listing in order to preclude the practice of bid shopping. An example of such a clause is that used by the General Services Administration which reads, in part, as follows:

> "(e) Except as otherwise provided herein, the successful bidder shall not have any of the listed categories involved in the performance of this contract performed by any individual or firm other than those named for the performance of such categories.
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> * * * * *
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> "(j) No substitutions for the individuals or firms named will be permitted except in unusual situations and then only upon the submission in writing to the contracting officer of a complete justification therefor and receipt of the contracting officer's written approval. * * * In the event the contracting officer finds that substitution is not justified, the contractor's failure or refusal to proceed with the work by or through the named subcontractor shall be grounds for termination of the contract * * *." General Services Procurement Regulation § 5B-2.202.70(f).

In the instant solicitation the subcontractor listing requirement is geared toward insuring that Major Equipment items received will be either equivalent to those designated in the solicitation or otherwise acceptable to the grantee's engineer. Clause IB-13 of the solicitation provides that "/n/o contract will be signed until the Engineer has accepted the manufacturers or suppliers of all major equipment items offered by the Bidder." It does not evidence a concern that the particular firm listed actually perform the work. We, therefore, conclude that there is no bid shopping prohibition applicable to this solicitation. We also note that the grantee has approved the complained of substitution.

Turning to Air Products' second contention we have taken the position that:

> "* * * under contracts made by grantees of Federal funds, the Federal Government is not a party to the resulting contract. However, the cognizant Federal agency has the responsibility to determine whether there has been compliance with the applicable statutory requirements, agency regulations, and grant terms, including a requirement for competitive bidding. In such cases we have assumed jurisdiction in order to advise the agency whether the requirements for competitive bidding have been met. Thomas Construction Company, Incorporated, et al., 55 Comp. Gen. 139 (1975), 75-2 CPD 101; 52 Comp. Gen. 874 (1973)." O.C. Holmes Corporation, 55 Comp. Gen. 262, 263 (1975), 75-2 CPD 174.

Air Products has cited our decision Air Products and Chemicals, Inc., B-183235, November 6, 1975, 75-2 CPD 281, as a basis upon which we can assume jurisdiction of what is essentially a prospective subcontractor's complaint against a subcontract awarded under a federal grant. There we assumed jurisdiction only because of our finding that the facts of record indicated that the prime contractor's award of the questioned subcontract could be deemed to have been made "for" the grantee. In effect, by the grantee's involvement, the subcontract was "promoted" to a station comparable to that of the prime contract and as a consequence became a subject matter fit for our consideration. The grantee's involvement in the cited case stemmed from the structure of the prime contractor's bid. The prime's bid contained three subcontractor bids for the oxygenation work, only one of which would be awarded the subcontract. The picture was further complicated by the existence of a bidding requirement that each prospective subcontractor provide a computation of 10-year average electrical power costs for the system that the subcontractor proposed. The grantee took both the proposed subcontractor bids and the proposed power calculations and submitted them to an engineering consulting firm for further evaluation. This is not the situation here presented. In this case the prime's bid does not reveal the price that the subcontractor proposed nor does it indicate alternative subcontractors from which the grantee may select. It appears that the grantee's involvement is limited to

passing upon the proposed subcontractor's responsibility. We do not believe that this is a sufficient basis upon which to found a determination that the prime contractor's actions were "for" the grantee. Therefore, in this matter we will follow our general policy of not considering complaints against awards of subcontracts by prime contractors. See, Optimum Systems, Incorporated-Subcontract Protest, 54 Comp. Gen. 767 (1975), 75-1 CPD 165; Copeland Systems, Inc., 55 Comp. Gen. 391 (1975), 75-2 CPD 237.

Accordingly, the matter will not be considered further.

Paul G. Dembling
General Counsel