DOCUMENT RESUME

01666 - [A1051951]

[Complaint against the Award of a Contract by the Recipient of a Federal Grant]. B-187617. April 7, 1977. 8 pp.

Decision re: Union Carbide Corp.; by Robert F. Keller, Acting Comptroller General.

Issue Area: Federal Procurement of Goods and Services: Reasonableness of Prices Under Negotiated Contracts and Subcontracts (1904).
Contact: Office of the General Counsel: Procurement Law II.
Budget Function: General Government: Other General Government (806).
Organization Concerned: Environmental Protection Agency; John T. Brady and Co.; Westchester County, NY.
Authority: Federal Water Pollution Act Amendments of 1972, title II (P.L. 92-500; 86 Stat. 833; 33 U.S.C. 1281 et seq. (Supp. V)). 17 Comp. Gen. 554. 38 Comp. Gen. 532. 39 Comp. Gen. 570. 40 Comp. Gen. 679. 42 Comp. Gen. 383. 43 Comp. Gen. 209. 47 Comp. Gen. 778. 48 Comp. Gen. 605. 53 Comp. Gen. 586. 53 Comp. Gen. 730. 54 Comp. Gen. 6. 54 Comp. Gen. 791. 54 Comp. Gen. 967. 55 Comp. Gen. 139. 55 Comp. Gen. 262. 55 Comp. Gen. 390. B-168434 (1970). B-168215 (1970). B-173216 (1971). B-178582 (1973).

The complainant considered the award to have contravened the requirements of the Federal grant agreement on the grounds that the bid was nonresponsive since it was based on a system that deviated substantially from the solicitation specifications. The complaint was denied. (Author/SS)

01666

DECISION

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

FILE: B-187617 DATE: April 7, 1977

MATTER OF: Union Carbide Corporation

DIGEST:

1. Complaint by would-be supplier to prime contractor that grantee's award of a contract was inconsistent with Federal competitive bidding principles applicable to grant is not sustained. Record shows that there was maximum and free competition among all bidders and that no bidder was prejudiced as result of alleged deficient specification provisions.

2. Solicitation provision which allows bidders to submit bid based on specified design and alternate bid deviating from those design features, the latter subject to post-bid opening qualification procedures, does not fatally taint procurement. Although provision gives bidders "two bites at the apple" with respect to alternate bid, bidders are bound by their basic bids and bidder who was low on both basic and alternate systems did not have option of deciding, after bid opening, whether to remain in competition.

This case involves a complaint by a would-be supplier against the award of a contract by the recipient of a Federal grant. The complainant states that the award contravened the requirements of the grant agreement that award be made to the low responsive, responsible bidder after competitive bidding. The basis for the complaint is the assertion that the bid accepted by the grantee was nonresponsive in that it was based on a system that deviated substantially from the specifications included in the solicitation. For the reasons stated herein, we find the complaint to be without merit.

The complaint was filed by Union Carbide Corporation (UC) against the award made to John T. Brady and Company (Brady) by Westchester County, New York. The procurement, which involves the addition of secondary treatment capability to the existing primary sewage treatment plant located in the City of New Rochelle, New York, is funded in substantial part (75 percent) by a grant from the Environmental Protection Agency (EPA) pursuant to Title II of the Federal Water Pollution Act Amendments of 1972, Public Law 92-500, 86 Stat. 833, 33 U.S.C. § 1281 et seq. (Supp. V 1975).

Pursuant to the grant, Westchester County issued an invitation for bids (IFB) for the project which contemplated the award of four separate contracts. Contract 1912G, for general construction, is the subject of UC's complaint. Line item 2 of that contract solicited bids for furnishing and installing an "Oxygen Equipment System."

Section 350 of the IFB's specifications set forth certain design features and performance parameters for the system and provided that the system's oxygen supply equipment consist in part of a "pressure swing absorber (PSA) or equivalent" oxygen generator.

However, Article 8 of the IFB, entitled "MAJOR EQUIPMENT BID ITEMS AND PREQUALIFICATION", informed bidders that "one system had been used in preparing the * * * specifications," but that the specifications "do not name any supplier," and that bidders, in addition to inserting in the space provided on the bid form (lines [a 1] and [a 2]) the name of its supplier and total price for furnishing and installing the oxygen equipment system, could propose (on lines [b 1] and [b 2]) "another supplier and total price for furnishing and installing the system." Article 8 further advised that if the alternate system required "any modification on the arrangements or details indicated or specified" in the IFB, the contractor, upon the system's acceptance by Westchester County, would be responsible for preparing detailed drawings showing all the necessary modifications and for payment of any increased costs to the other prime contractors resulting from the modifications. It was further provided that within 5 days after receipt of bids, "each bidder shall submit material for prequalification of suppliers for all parts of the * * * modified items * * *."

Eighteen bids were received by the date set for bid opening, March 3, 1976. The bid submitted by Brady, as well as the bids of the other 17 potential prime contractors for the general construction contract, proposed for line item 2 a PSA system to be supplied by UC and, alternatively, a system to be supplied by Air Products and Chemicals, Inc. (APC). Brady's total bid of $16,779,525 with the UC equipment and its alternate bid of $16,421,525 utilizing the APC equipment were both lower than the bids submitted by the other competing firms. Upon examination of the bids and the material submitted subsequent to bid opening, Westchester County determined that the APC system was acceptable and on April 15, 1976, awarded the contract in question to Brady, based on Brady's bid to furnish and install the APC oxygenation system.

Following notification of the award to Brady, UC filed a protest (April 21, 1976) with Westchester County, which was subsequently denied by a written determination dated May 5, 1976. UC thereafter filed a protest with the EPA Regional Administrator, Region II. On September 7, 1976, the Regional Administrator issued a written determination denying UC's protest. On October 1, 1976, EPA denied UC's request for reconsideration of that decision. UC, on October 12, 1976, then filed a complaint with this Office and on October 22, 1976, filed suit in the United States District Court for the District of Columbia

(Union Carbide Corporation v. Russell E. Train, et al., Civil Action No. 76-1973), seeking in part to enjoin EPA from permitting, directing, or approving the expenditure of Federal grant funds for that part of Contract 1912G relating to the "Oxygen Equipment System" pending our decision in this matter. On November 22, 1976, the United States District Court dismissed UC's action for failure to join Westchester County and Brady as parties. On November 26, 1976, UC filed a comparable action in the United States District Court for the Southern District of New York (Union Carbide Corporation v. Russell E. Train, et al., Civil Action No. 76-5272). On February 8, 1977, the court issued an order denying UC's motion for a preliminary injunction but deferred action on defendants' cross-motions for summary judgment until this Office could rule on whether the award of the contract complied with applicable regulations.

It is the practice of this Office not to render a decision on a matter where the issues involved are likely to be disposed of in litigation before a court of competent jurisdiction. See, e.g., Nartron Corporation, 53 Comp. Gen. 730 (1974), 74-1 CPD 154. However, we will consider matters where the court desires and expects our decision. Lametti & Sons, Inc., 55 Comp. Gen. 413 (1975), 75-2 CPD 265. Therefore, in view of the court's order, we consider it appropriate to consider the merits of UC's complaint.

UC asserts that the award was contrary to the terms of the IFB and violated applicable EPA regulations because the APC oxygen supply system is not equivalent to the system described in detail by Section 350 of the specifications and because Brady was permitted to establish the acceptability of the APC system after bid opening. EPA and Westchester County do not take issue with UC's position that APC's cryogenic system is not equivalent to the complainant's PSA oxygen generator. They assert, however, that the IFB, particularly in view of Article 8, permitted acceptance of bids based on systems other than that described by Section 350 and that the bid accepted was fully responsive. In this connection, it is stated that the specifications were developed around UC's PSA generator system because that was the only acceptable system known to the County at the time but that, in an effort to avoid a sole source situation, the County intentionally did not identify UC as the equipment supplier and included Article 8 in the IFB so as to permit competition on the basis of any other system which, although unknown to the County, would be acceptable. UC, on the other hand, argues that Article 8 does not permit bidders to propose an oxygen equipment system not incorporating a PSA generator or equivalent, but only allows bidders to propose an alternate supplier for the system, which still has to meet the specified requirements for the PSA generator.

At the outset, we point out that this case does not concern a Federal procurement and the Federal Government is not a party to the awarded contract. In such a case, we are not called upon to determine the legality of the contract award. Rather, our rule is to determine whether there has been compliance with applicable statutory requirements, agency regulations, and grant terms, and to advise the Federal grantor agency, which has the responsibility for administering the grant, accordingly. O. C. Holmes Corporation, 55 Comp. Gen. 262 (1975), 75-2 CPD 1974; Thomas Construction Company, Inc., 55 Comp. Gen. 139 (1975), 75-2 CPD 101; 52 Comp. Gen. 874 (1973).

In so doing, we do not strictly and mechanistically apply the rules governing Federal procurements, merely because there is a Federal grant requirement that contracts be awarded on the basis of competitive bidding. For example, in Illinois Equal Employment Opportunity Regulations for Public Contracts, 54 Comp. Gen. 6 (1974), 74-2 CPD 1, we stated the following:

> "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. * * *[326 (1968)]. 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. * * *"

In Copeland Systems, Inc., 55 Comp. Gen. 390 (1975), 75-2 CPD 237, we further explained:

> "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."

Thus, in the absence of a requirement that the precise Federal rules be followed, the grantee's effecting a procurement through the use of local procedures which are "not entirely consistent with Federal competitive bidding principles" will not be regarded as contrary to competitive bidding requirements of a Federal grant, see General Electric Company, 54 Comp. Gen. 791 (1975), 75-1 CPD 176, unless it can be said that there has been a violation of some basic, fundamental principle inherent in the concept of competitive bidding. The EPA regulations applicable to this case, 40 C.F.R. § 35.938 (1975), requiring the grantee to use competitive bidding and to award a contract to the low responsive responsible bidder, must be read in this light.

In formally advertised Federal procurements, the specifications are required to describe adequately the Government's minimum needs so that all bidders can compete on an equal basis. In other words, the use of an invitation which solicits bids on the basis of specifications other than those set forth in the invitation would be improper, and the acceptance of a bid which deviated from the stated specifications generally would not be permitted. 39 Comp. Gen. 570 (1960); 40 id. 679 (1961); 42 id. 383 (1963); 43 id. 209 (1963). Moreover, under Federal procedures a bidder cannot make his bid acceptable by submitting information or documentation after bid opening, since to allow such a practice would give the bidder an unfair opportunity to decide, after his competitors' prices have been exposed, whether it would be advantageous to qualify for the award. 38 Comp. Gen. 532 (1959); Veterans Administration re Welch Construction, Inc., B-183173, March 11, 1975, 75-1 CPD 146; see P. Shnitzer, Government Contract Bidding, 239 (1976).

The basis for the strict rules governing bid responsiveness is grounded in the need to protect the integrity of the competitive bidding system by assuring that all bidders compete on an equal footing. See 17 Comp. Gen. 554 (1938); P. Shnitzer, supra, at 237. In most cases, of course, the integrity of the system can be preserved only by strict application of the responsiveness rules. However, in cases where it appeared that acceptance of a deviating bid would result in a contract which would satisfy the Government's actual needs and would not prejudice any other bidder, we

permitted acceptance of the bid notwithstanding that the bid was technically nonresponsive, GAF Corporation et al., 53 Comp. Gen. 586 (1974, 74-1 CPD 60; Thomas Construction Company, Inc., B-184810, October 21, 1975, 75-2 CPD 248; 38 Comp. Gen. 532 (1957); see also Keco Industries, Inc., 54 Comp. Gen. 967 (1975), 75-1 CPD 301, since the integrity of the competitive system was not adversely affected thereby.

Here, it is clear that the bid accepted by the County resulted in a contract which the County and EPA believe will satisfy the County's requirements. It is also clear that no other bidder was prejudiced by acceptance of that bid. All 18 bidders based their bids on supplying, alternatively, either UC's system or APC's system. Thus, it appears that all 18 bidders interpreted that provision as the grantee intended, so that it cannot be said that any bidder was misled. Furthermore, Brady bid low on both alternatives, and so would be in line for award in any event. Even UC concedes that, with respect to the 18 bidders, they competed equally among each other.

Notwithstanding this, however, UC asserts that the award contravened grant requirements because it and other potential suppliers to the successful bidder were misled by the specific IFB requirement for a system incorporating a PSA generator. UC states that the requirement kept other suppliers from competing and kept it from either offering a less expensive system or offering its PSA system at a lower price. Thus, concludes UC, there was not "free and open competition" as "encourage[d]" by 40 C.F.R. § 35.938-2.

We have held that where a solicitation restricts competition to one offeror, a contracting agency may accept a proposal from another offeror provided that the former is put on notice, prior to the submission of final offers, that the procurement has been transformed from a noncompetitive to a competitive one, so that the apparent sole source offeror will have an opportunity to compete on an equal basis by amending its offer to reflect whatever changes it might deem appropriate in light of the now-competitive nature of the procurement. 48 Comp. Gen. 605 (1969); 47 id. 778 (1968); Instrumentation Marketing Corporation, B-182347, January 28, 1975, 75-1 CPD 60; B-173861, January 24, 1973. UC, however, was not a direct competitor (bidder) on this procurement; there was no privity or direct relationship recognized in law between UC and the contracting authority. UC's only relationships in this case were with Brady and the other bidders to which UC sought to provide an oxygen equipment system and it is through those relationships only that UC can assert its claim that it should

have been put on notice that its system might not have been the only one acceptable to the County. The fact that Brady and the other bidders may not have so informed UC does not mean that the competitive bidding requirements of the grant were not met.

In other words, assuming that UC and other potential suppliers were misled as alleged by UC, we could not agree that this would have destroyed the competitive nature of the procurement. The EPA grant regulations require a grantee to award its Federally assisted contracts after providing an opportunity for maximum competition and free and open competition among those bidders participating in the procurement. We cannot conclude that there was anything less than maximum competition since there is no evidence of record, nor does UC allege, that any potential contractor for Contract 1912G was precluded from competing. Furthermore, as indicated above, there was fair and equal competition among the 18 participating bidders. Federal competitive bidding principles require no more.

Moreover, even if we viewed those principles as affording protection to would-be suppliers of prime contractors, UC's position could not be sustained in this case. The record here in no way establishes that any other potential supplier of oxygen equipment systems was interested in this procurement or felt precluded from submitting a proposal to any of the bidders. Neither is there any convincing evidence of record that UC could or would have offered its own alternative system or that it would have been acceptable to the grantee. While UC may have offered a lower price for its PSA generator system had it appreciated the prospects of competition for the oxygen supply system, that possibility we think is too speculative to provide a basis for concluding that the requisite competition was not attained in this case.

In short, what the record does show is that (1) the grantee sought to avoid a sole source situation and to promote competition by permitting bids on systems other than the one with which it was familiar; (2) the IFB provisions it utilized in so doing were intended to permit bids on alternate systems but also could be read as permitting alternative bids based on furnishing a system meeting the specification features but supplied by a firm other than UC, and (3) all of the bidders understood what was intended and submitted alternative bids each based on the same alternative system. Thus, what we have here is a case where all bidders understood the specifications and responded to them in the same way, so that it cannot be said that any of the bidders was prejudiced.

(Parenthetically, we point out that if prejudice to any bidder had resulted from the situation involved here, the only appropriate remedy would have been readvertisement. Award to Brady on the basis of its furnishing UC's system would not be appropriate remedial action since it is clear that the specifications, as interpreted by UC, overstate the actual needs of the County and would not provide a proper basis for award.)

Finally, with regard to the qualification after bid opening aspects of Article 8, we think that any provision which allows bidders "two bites at the apple," that is, control after bid opening over the decision whether their bids will be responsive, is inconsistent with the Federal competitive bidding principles and should not be used. However, we concur with the EPA Regional Administration that the use of the provisions in this case did not fatally taint the procurement. As pointed out by the Administration, the unacceptable feature of Article 8 was not a serious concern here because the procurement was for "general construction services with the disputed sub-bid item being only a portion of the total bid," and the bidders, obviously interested in the total job, submitted bids on two bases, including one with which the County was familiar. While bidders may have been able to get "two bites at the apple" with respect to their alternative bids, we think bidders were bound by their basic bids. In this regard, we read Article 8 as requiring that the system to be furnished in accordance with the bid entered in the "spaces marked (a), or (a 1) and (a 2)" be a system meeting the specifications set forth in Section 350. Therefore, even though bidders were required to submit data on that system as well as on any alternative system offered, the County could have accepted a bid without the submission of such data and the bidder would have been obligated to furnish an oxygen supply system meeting the design and performance requirements of Section 350. Thus, in this case Brady was bound by the basic portion of its bid and, since it was low bidder on both the basic and alternate systems, it did not, in our view, have the option to decide after bid opening whether to remain in the competition.

For the foregoing reasons, we find the award to Brady does not contravene the competitive bidding requirements of the EPA grant agreement and regulations applicable thereto.

Acting Comptroller General
of the United States