DOCUMENT RESUME

02730 -- [A1882938]

[Objection to Procurement Procedures]. B-187734. July 1, 1977. 7 pp.

Decision re: Clinton Bogert Associates; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services: Definition of Performance Requirements in Relation to Need of the Procuring Agency (1902).
Contact: Office of the General Counsel: Procurement Law II.
Budget Function: General Government: Other General Government (806).
Organization Concerned: Lynn, MA; Environmental Protection Agency.
Authority: Federal Water Pollution Control Act of 1972, title II (33 U.S.C. 1251 et seq. (Supp. II)). 40 C.F.R. 35.937-4. 40 C.F.R. 35.937-6(b)(2). 40 C.F.R. 35.939(h).

The protester objected to the procurement practices used by the City of Lynn, Massachusetts, in the selection and award of a contract for professional engineering services for a sewage treatment plant and to the actions of the U.S. Environmental Protection Agency (EPA) in upholding the actions of Lynn. The protester was not denied an equal evaluation. Taken as a whole, the actions of the city administration were not in violation of the minimum requirements of EPA's regulations, and there was no basis to object to EPA's action in the matter. (Author/SC)

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DECISION

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

Ayer
P.L.II

FILE: B-187734 DATE: July 1, 1977

MATTER OF: Clinton Bogert Associates

DIGEST:

1. Where GAO review of Mayor's veto message, which is alleged to have misled City Council's source selection determination, reveals a reasonable interpretation which is consistent with the facts of record, GAO can not conclude that competing firm was denied opportunity to have proposal fairly evaluated by City Council.

2. Where, after one offeror has been eliminated from competition, offerors remaining in competition are uniformly afforded opportunity to provide officials responsible for selection with site visits to facilities previously constructed by offerors, the eliminated offeror is not prejudiced.

3. Where prospective grantee violates 40 C.F.R. § 35.939(h) (1976) by making an award notwithstanding offeror's appeal of grantee's adverse determination to grantor and grantor agency cures violation by withholding approval of executed contract until rendition of its final decision of the appeal, offeror is not prejudiced by technical violation.

4. Local procurement procedures enable Mayor to veto City Council selection of contractor, but also provide for City Council override of Mayor's veto. Where Mayor refuses to fully explain the bases of his exercise of the veto, and where City Council fails to override such veto, GAO can not conclude that the actions of the city administration taken as a whole are violative of the minimum requirements of grantor's regulations.

Clinton Bogert Associates (CBA) objects to the procurement procedures employed by the City of Lynn, Massachusetts (Lynn) in selection and award of a contract for professional engineering services in connection with the engineering design and construction of the Lynn Regional Sewerage Treatment Plant. CBA also objects to the actions of the United States Environmental Protection Agency (EPA) in upholding the actions of Lynn.

Lynn is a prospective recipient of grant assistance under authority of Title II of the Federal Water Pollution Control Act of 1972, 33 U.S.C. § 1251 et seq. (Supp. II, 1972). EPA has taken the position that for purposes of its regulations Lynn should be considered to be a grantee. It is therefore agreed that the costs of the contract will, in all probability, be covered by an EPA grant. It is further agreed that two factors have impacted so as to cause Lynn's selection of an engineer to be negotiated with a sense of urgency. First, Lynn is subject to a sewage discharge permit which requires 1. that Lynn submit for EPA review the final plans/specifications for its new sewage facilities by October 1, 1976 and 2. that Lynn award a contract for the construction of the approved facilities by May 1, 1977. The second factor is a suit brought by the United States against Lynn because of the lack of timely progress toward the achievement of the above goals. EPA advises that the suit seeks "civil monetary penalties and injunctive relief requiring the City to expeditiously meet the above goals (U.S. v. City of Lynn, et al., U.S.D.C. Mass. Civil Action No. 76-2184G)." Lynn's local procurement procedure for contractor selection consists of the following steps: 1. a Commission of Ways and Drainage (Commission) reviews the offers and makes a recommendation, 2. the City Council accepts or rejects the recommendation, 3. the Mayor approves the Council's action, or the Mayor vetoes it, and 4. if the Mayor vetoes, the City Council may override the veto.

On February 26, 1976 CBA presented its qualifications to the Commission. The Commission, which is composed of several members of the City Council and the Mayor, notified CBA on March 2, 1976 that it, along with four other firms, had been selected to present a sealed proposal. On March 8, 1976, CBA submitted its proposal. The estimated cost of the CBA proposal was such that it was the second low of the five proposals submitted while the proposal of VTN Consolidated, Inc. (VTN) was third low. The Commission voted to recommend the selection of CBA, which was then reported to the City Council. On March 9, 1976 the City Council voted to table the Commission's report. CBA alleges and Lynn admits that it was at about this time that:

> "* * * there was anonymously circulated to the members of the Lynn City Council and the Mayor certain newspaper articles and other materials designed to injure Clinton Bogert Associates' selection by the grantee."

On March 15, 1976 the City Council afforded CBA an opportunity to present and discuss its proposal. The Mayor was not present

during the CBA presentation. After the presentation, the City Council voted to award the design contract to CBA. On March 17, 1976, the Mayor wrote to EPA seeking some assurances on the advisability of selecting CBA. EPA responded by telephone and advised the Mayor that it could not respond to his inquiry. On March 23, 1976 the Mayor sent the following message to the City Council:

> "As you are aware, the City of Lynn has been struggling over the selection of an engineering firm to design our sewage treatment plant.
>
> "As Mayor of this City, I am disturbed and concerned about the choice of Clinton Bogert Associates, because this was the only applicant about whom we received adverse information.
>
> "Consequently, on March 17, 1976 I addressed a letter to the E. P. A. * * *. In this letter, I requested that the E. P. A. give me some assurance as to the advisability of selecting this particular firm.
>
> "I outlined in my letter and enclosed a copy of the article that appeared in the Bergen County Record on February 1, 1976. I also expressed concern where the E. P. A. itself expressed doubt as to the actions of the Clinton Bogert firm in Bergen County and also where Congressman Andrew Maguire (New Jersey) made several accusations against Clinton Bogert Associates.
>
> "Since then, I have been advised today, by a phone call from [EPA] * * * that [it] cannot forward this assurance to us.
>
> "I have further advised the E. P. A. that it was within my power to veto the selection within ten days. Time being of the essence, and because it is my desire to comply with the E. P. A.'s request, I hereby veto the Council Order of March 15, 1976, which indicates that a majority voting No. awards the contract to the Clinton Bogert firm; and I urge the Honorable City Council to proceed to make a new selection as soon as possible.
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> "It is my sincere desire to protect the City of Lynn in the future. I feel that any hasty actions at this time could be very detrimental." (Emphasis supplied.)

CBA also alleges that the Mayor made it known that even if the City Council were to override his veto he would not sign a contract with CBA.

Subsequent to March 23, 1976 various members of the City Council made site visits to inspect treatment facilities which had been designed by the four remaining contenders for the contract.

On May 6, 1976 the City Council approved the selection of VTN as the professional engineer for the Lynn project. CBA immediately protested to Lynn the procurement procedures used in VTN's selection. Lynn, after reviewing CBA's written arguments, denied the protest by letter dated July 15, 1976. On the same day Lynn entered into a contract with VTN. CBA thereupon sought EPA review of Lynn's adverse determination of its protest.

During the course of the EPA review the Mayor was questioned regarding the basis of his veto decision. The Mayor stated that:

> "* * * First of all, my veto of the Clinton Bogert [proposal] is an authority that I have vested in me as the Mayor of the City of Lynn. That veto can be overridden by the City Council by an eight vote, so that not only did I have the power to veto, but also the City Council played their part sustaining my veto. So this is not an action solely by the Mayor. It is an action of the City Administration.
>
> "In addition to the reason outlined in my letter for the veto, I was Mayor once prior to this particular term in which we had contracts from the firm [CBA] with the City of Lynn, and I recall we had one contract that started at a million three hundred thousand dollars to install two water tanks. * * * The original contract for a million three hundred thousand ended up to well over two million dollars for the two tanks."

Notwithstanding the above the Mayor said that he had at the time of the City Council selection sufficiently mixed emotions regarding CBA that he would not have automatically vetoed the selection. However, the aforementioned circulated newspaper articles caused him sufficient concern that he sought some kind of EPA approval of the proposed CBA selection. EPA, as has been noted, would not comment on the matter. The Mayor further indicated that citizens of Lynn were phoning his office and urging him to not engage CBA. Finally, the Mayor said that his veto was partially based on confidential information which he chose not to disclose.

CBA argues that Lynn and EPA should have taken steps to correct the erroneous impression which the Mayor's letter to the City Council conveyed. CBA is particularly concerned with the letter's characterization of the nature of EPA's oral communication to Lynn concerning CBA's acceptability to EPA. CBA believes that EPA should have remanded the selection issue back to the City Council with the advice that EPA did not have an opinion regarding the merits of CBA. It is CBA's position that the failure to correct the false impression created by the letter and the failure to remand the selection operated together to prevent the CBA proposal from being uniformly evaluated pursuant to 40 C.F.R. 35.937-4 (1976).

We believe that the merits of this argument must rest or fall on the meaning ascribed to the phrase in the Mayor's letter to the City Council which reads: "* * * and because it is my desire to comply with the E.P.A.'s request * * *." It is our opinion that the phrase is at best ambiguous. While it could be read as CBA argues, we believe it can also be read to mean that the Mayor was, at EPA's request, promptly deciding the issue of whether he would veto the selection of CBA. We believe the latter to be the more reasonable interpretation because of the acknowledged pressure on the Mayor to act quickly in order to mitigate the threat posed by the EPA civil action against Lynn. We, therefore, conclude that the Mayor's message to the City Council did not operate to deny CBA an equal evaluation. Moreover, no member of the City Council appears to have thought the reference to EPA of sufficient importance to question the Mayor regarding it.

CBA also argues that its offer was not uniformly evaluated because CBA, unlike the remaining four offerors, was not afforded an opportunity to furnish the City Council with a tour of an operational treatment facility of its design. Assuming that the site visits could be construed to constitute new evaluation criteria, it is our opinion that, in a negotiated procurement such as this, once CBA was properly excluded from the competition by the Mayor's veto and the City Council's failure to override it CBA was not prejudiced by the uniform application of new criteria to those remaining in the competition.

CBA further argues that Lynn's execution of the contract with VTN, with EPA's knowledge, prior to a final determination of CBA's protest,

> "* * * clearly violated the provisions of 40 C.F.R. 35.937-6(b)(2) and 40 C.F.R. 35.939(h), especially

> where that contract contains no condition precedent or condition subsequent on the grantee's [Lynn's] obligations thereunder in the event Clinton Bogert Associates' protest is upheld."

40 C.F.R. 35.937-6(b)(2)(iv) provides that an applicant/grantee shall submit for EPA review:

> "* * * a copy of the proposed subagreement document. The EPA Project Officer will review the complete subagreement action and approve the grantee's compliance with appropriate procedures prior to award of the subagreement. The grantee shall be notified upon completion of review."

40 C.F.R. 35.939(h) provides that a grantee confronted with a protest must defer contract award until ten days after the delivery of the grantee's determination to the participating parties.

EPA takes the position that:

> "* * * although the actions of the City in executing the disputed contract with VTN, Inc., on the same day its own determination of Clinton Bogert's protest was issued constituted a violation of 40 CFR 35.939(h), such a violation did not prejudice Clinton Bogert. This finding clearly was rational because the EPA withheld approval of the contract during the pendency of the protest at the Regional level (EPA is required to approve all subagreements in excess of $100,000 pursuant to 40 CFR 35.937-6(b)(2)). Additionally, the agency did not authorize any work to proceed on the contract until after the determination of the Regional Administrator issued on October 21, 1976."

We find that, the EPA subagreement review operated as a condition subsequent to the executed contract for there could be no federal funding without it. We, therefore, concur with EPA's finding that CBA was not prejudiced by Lynn's technical violation of 40 C.F.R. 35.939(h).

Finally, CBA argues Lynn's failure to provide and EPA's failure to require the complete bases for the Mayor's veto constituted a violation of the minimum requirements of EPA's regulations. We can not agree. The Mayor appears to have properly exercised a discretionary power vested in his office. The exercise of the power

was at all times subject to being overridden by the City Council. Therefore, taken as a whole we can not find that the actions of the city administration were violative of the minimum requirements of EPA's regulations.

Accordingly, we find no basis to object to EPA's action in the matter.

Deputy Comptroller General
of the United States