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DECISION

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

FILE: B-189150 DATE: November 15, 1977

MATTER OF: The Babcock & Wilcox Company

DIGEST:

1. Grantee's decision to reject all bids received, two being nonresponsive and one unreasonably priced, and negotiate on price only was proper under Federal Management Circular 74-7, attachment O and applicable Massachusetts law. Grantee did not have to revise specifications and readvertise procurement as grantee had determined specifications constituted minimum needs.

2. GAO does not review grantee's affirmative determination of responsibility unless fraud has been alleged or solicitation contains definitive responsibility criteria which have allegedly not been applied. This is consistent with position of GAO in Federal procurement area.

3. Buy American Act (41 U.S.C. § 10 (1970)) provisions do not apply to contracts made by grantees.

The Babcock & Wilcox Company (B & W) has requested our Office's review of an award by the Massachusetts Bay Transportation Authority (MBTA) to Mitsui & Co., Inc. (Mitsui). MBTA is a recipient of the Urban Mass Transportation Administration (UMTA) grant funds under Capital Project No. MA-03-0037, wherein 80 percent of the project is funded by Federal funds under section 3(f) of the Urban Mass Transportation Act of 1964 (49 U.S.C. § 1602(f) (1970)).

On February 10, 1977, the following three bids were received by MBTA for contract No. 997-76 for the furnishing of three steam generators:

B & W	$1,994,500
Combustion Engineering, Inc. (C-E)	$2,155,000
Mitsui	$2,423,100

B & W submitted with its bid five pages of "Technical Clarifications and Exceptions" and 24 pages of "Commercial Exceptions and Clarifications."

C-E's bid contained 22 pages of exceptions and clarifications to the technical specifications and to the General Terms of the solicitation. Mitsui took the following exceptions in its bid:

1. It did not currently possess an ASME "S" Stamp required by the specifications;

2. Efficiency of collector is 87 percent not 90 percent required by specifications;

3. Dust collector tubes to be cast iron rather than specified carbon steel; and

4. Two flue gas dampers required were excluded.

The MBTA's consulting engineers found that the bids of B & W and C-E were nonresponsive and that Mitsui's bid was responsive as the engineers did not find the four exceptions to the specifications to be material. Paragraph 9 of the Instructions to Bidders reserved for MBTA the right to waive minor irregularities.

After receiving the engineers' report, MBTA contacted the three bidders and advised B & W and C-E that the exceptions in their bids could render the bids nonresponsive. Also, Mitsui was told that its bid price was too high. B & W and C-E responded that they could not accept the MBTA's conditions and terms as stated in the solicitation and Mitsui advised that it would not modify its price.

Based on the above information, MBTA requested UMTA's permission to reject all bids and negotiate price and the terms and conditions with the three firms. UMTA replied that all bids could be rejected and price only negotiated or the specifications could be revised and the solicitation readvertised. MBTA decided to negotiate on price only.

Following discussions, B & W and C-E declined to submit a price based on the terms and conditions required by MBTA while Mitsui submitted a price of $2,240,000 and stated it would supply the two gas flue dampers previously omitted. On July 15, 1977, award was made to Mitsui.

B & W asserts that the decision to restrict negotiation to price only was violative of the requirement for maximum free and open competition under the applicable regulations. UMTA's grantee procurements are subject to attachment O of Federal Management Circular 74-7. B & W contends that MBTA could have rejected all bids as it did, but should not have negotiated but revised the specifications and readvertised.

Section 3(c)(5) of attachment O states, in part, that:

> "* * * Any or all bids may be rejected when it is in the grantee's interest to do so, and such rejections are in accordance with applicable State and local law, rules, and regulations."

Chapter 30, section 39M(a) of the Massachusetts General Laws states that bids may be rejected if it is in the public interest to do so. We find nothing improper in MBTA's determination to reject all bids in the circumstances here.

Concerning the decision to negotiate, B & W contends that such action was unauthorized under the applicable regulations. B & W bases this contention on the memorandum filed with our Office by UMTA stating that it was determined that all three prices submitted were unreasonably high. B & W argues that neither the consulting engineers nor MBTA stated that the prices of B & W and C-E were unreasonable but only the price of Mitsui was too high. UMTA continues in its memorandum that it is permissible to negotiate without readvertising when all bids are rejected based on unreasonable prices under Federal Procurement Regulations § 1-3.2?4 (1964 ed. circ. 1), which section is based on the authority contained in 41 U.S.C. § 252(c)(14) (1970). B & W states that since its and C-E's prices were not unreasonable, as evidenced by the eventual award to Mitsui at a higher price, no authority existed for negotiation.

While the memorandum from UMTA states the reason for the rejection of bids and subsequent negotiation to be unreasonable prices, this is a restatement of the letter from MBTA to UMTA dated April 11, 1977, which read, in pertinent part, as follows:

> "* * * The three bids contained technical 'exceptions and clarification' with Babcock & Wilcox and Combustion Engineering submitting 'exceptions and clarifications' to the commercial terms and conditions. Our Engineer estimates that as a result of the 'exceptions' B & W and C-E's 'adjusted bid price' is practically equal.
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> "Due to the above, the Authority has obtained from the bidders a two week extension for consideration of the proposals to April 25, 1977, and as a result of all of the areas of concern, it is now the Authority's opinion that it would be in our best interest to reject all bids and to attempt to negotiate a contract with the three bidders and Zurn Industries in accordance with the 'negotiating principles' of the Federal Procurement Regulations. We recommend the rejection of bids based on the fact that exceptions were taken and all bids substantially exceeded our Engineer's estimate of $1,500,000.00."

Based on the above, it appears MBTA considered all three bids unreasonably priced. However, even if the bids of B & W and C-E were found to be reasonably priced, as contended by B & W, MBTA still could have negotiated as it did under attachment O, section 3(c)(6) (f) which states:

> "(6) Procurements may be negotiated if it is impracticable and unfeasible to use formal advertising. Generally, procurements may be negotiated by the grantee if:
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> * * * * *
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> "(f) No acceptable bids have been received after formal advertising;"

The bids of B & W and C-E were unacceptable or nonresponsive because of the exceptions taken to the terms and conditions of the solicitation and, therefore, even if their prices were reasonable, negotiation was proper in the circumstances.

Regarding the contention that the specifications should have been revised and the procurement readvertised, B & W argues that by negotiating only on price, MBTA limited the number of competitors to one, Mitsui, because B & W and C-E had advised MBTA that there were certain terms and conditions they could not accept in the solicitation as drawn. Therefore, MBTA did not obtain the maximum, open and free competition required by attachment O. The mandate for maximum competition must be tempered by a grantee's actual minimum needs. MBTA was aware of B & W's objections to certain areas of the specifications and terms and conditions but chose not to alter the solicitation. We believe this act shows that MBTA determined these areas to be its minimum needs and, therefore, while possibly precluding competition by certain firms, necessary to the procurement. We have recognized in the Federal procurement area that it is the responsibility of the procuring activity to establish its minimum needs and we believe this Federal norm is equally applicable to grantee procurements as a basic principle of Federal procurement law to be followed by grantees. See Allen and Vickers, Inc., 54 Comp. Gen. 445 (1974), 74-2 CPD 303, and Illinois Equal Employment Opportunity Regulations for Public Contracts, 54 Comp. Gen. 6 (1974), 74-2 CPD 1. Therefore, we have no objection to MBTA's decision not to revise the specifications merely to appease B & W and C-E because MBTA has shown that the specifications reasonably represent its minimum needs.

Next, B & W states that it believes Mitsui is a nonresponsive bidder because the contractor accepted two areas of the specifications without objection which B & W and C-E advised MBTA during a prebid conference were unreasonable. These two areas of the specifications were guarantees of 0.04 lb. of particulate/106 BTU and sound pressure of the fans and drives. By agreeing to the specifications, B & W argues, this shows Mitsui's lack of responsibility. B & W also questions Mitsui's ability to comply with various clauses in section 10 of the solicitation relating to Equal Employment Opportunity, Air and Water Pollution and Utilization of Minority Business Enterprises. Further, B & W contends that the responsibility is suspect because Mitsui has no established record in the United States of satisfactory performance on similar applications. MBTA has found Mitsui to be responsible.

Our office does not review protests against affirmative determinations of responsibility by Federal contracting officers unless either fraud has been alleged or the solicitation contains definitive responsibility criteria which have allegedly not been applied. See Central Metal Products, Incorporated, 54 Comp. Gen. 66 (1974) 74-2 CPD 64. We see no reason to expand this scope of review in connection with the grantee's determinations.

B & W also questions whether the price-only negotiation constituted an "auction" because bidders were informally advised of their competitors' positions. We have found no evidence of a price leak during negotiations and, moreover, there was only one firm, Mitsui, which submitted a price during the negotiation process, which would preclude an auction.

Finally, B & W states that the solicitation did not contain the normal incentives to domestic suppliers and, therefore, violated the Federal policy which encourages the procurement of American-made products. The Federal policy alluded to by B & W is the Buy American Act (41 U.S.C. § 10a-d (1970)). However, that act only applies to the Federal Government, not grantees and, therefore, we find nothing objectionable with the solicitation.

Based on the foregoing, we find nothing improper in the award to Mitsui.

R.F. Keller

Deputy Comptroller General
of the United States