

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

FILE: B-190722

DATE: March 29, 1978

MATTER OF: Edsall Construction Company

DIGEST:

1. Where Economic Development Administration grant allows grantee to follow state and local law in conducting procurements and provides that if no state or local law exists on particular point in question, Federal Procurement Regulations (FPR's) will control, complaint concerning bid responsiveness is reviewed under FPR's because there is no Montana or local law on point.
2. Under Federal procurement law, failure to respond to invitation requirement for prices on alternate deductive items is not sufficient basis to reject basic bid which offers to perform entire work called for, since failure does not prejudice Government's interests or give bidder unfair advantage over other bidders.

Edsall Construction Company (Edsall) has requested that we review the award of a contract to Quality Construction Company (Quality) by Ravalli County, Montana, under a grant from the Economic Development Administration (EDA), Department of Commerce. Our review is undertaken pursuant to 40 Fed. Reg. 42406 (1975), where we stated that we would consider complaints concerning contracts awarded under Federal grants.

The grantee's invitation requested basic or base bids for the construction of a courthouse wing. It also requested alternate bids for nine items. These involved the deletion of portions of the construction work; if the grantee decided to accept certain alternates, the amount quoted for those alternates would be deducted from the basic bid. Section 4.1.5 of the Instructions to Bidders stated that "All requested alternates shall be bid." Section B(1) of the bid form also provided:

H-190722

"Bidding Procedures Involving Base Bid and Alternate Deduct Bids:

"If Base Bid is within the amount of funds available to finance the construction contract and Owner wishes to accept alternate deductive bids, then the contract award will be made to that responsible bidder submitting the low combined bid consisting of Base Bid and Alternate Deduct Bids. Under this procedure, if Owner wishes to make award on only the Base Bid, then contract award will be made to that responsible bidder submitting the low Base Bid."

Quality submitted the low basic bid of \$883,223. In its bid the spaces for prices on the nine alternate items were blank. Edsall's basic bid was \$902,000. For one of the alternates, it inserted "N/C"; for the others, it inserted amounts ranging from \$18,900 to \$216,700.

Edsall maintains that Quality's bid was non-responsive to the invitation because of its failure to quote prices for the alternate items. Edsall points out that a bid must comply in all material respects with the invitation so that all bidders are competing on an equal basis, citing Federal Procurement Regulations (FPR) § 1-2.301(a) (FPR circ. 1, 2d ed., June 1964). Further, Edsall contends that the omissions in Quality's bid could not be considered waivable minor informalities or irregularities under FPR § 1-2.405 (FPR circ. 1, 2d ed., June 1964) because they were not trivial or negligible. Edsall also argues that the omission of alternate prices from Quality's bid prevented the grantee from comparing basic bid prices and deductives to arrive at the lowest feasible cost. In this connection, Edsall alleges that the grantee either formally or informally did obtain alternate deductive prices from Quality after bid opening, and that this shows that the information was considered by the grantee to be material. Edsall contends, in summary, that the after-the-fact determination to accept Quality's base bid could not make Quality's bid responsive.

B-190722

EDA states that its grant requirements have been met and believes that under the terms of the grant the responsiveness of Quality's bid is to be determined under Montana and local law. EDA states it is informed that Montana law is not contrary to the grantee's actions and maintains that Federal resolution of the controversy is not required.

The grant included EDA's Standard Grant Terms and Conditions, June 1977, which provided as follows in paragraph 28:

"The Grantee agrees that it may use its own procurement regulations which reflect applicable State and local law, rules and regulations, for procurement made with Federal grant funds, provided that the regulations adhere to the standards set forth in Attachment O of FMC 74-7, as amended. In the event that no State or local law exists as to a particular point in question, the Grantee agrees that the Federal Procurement Regulations will control consideration of the matter."

In this regard, Edsall asserts that Montana law on the subject of bid responsiveness is non-existent. Edsall advises that the only State statute concerning bidding (section 16-1803 of the Revised Code of Montana, 1947) merely refers to making awards to the lowest and best responsible bidders and does not mention bid responsiveness. Our research has not uncovered any pertinent Montana case law, and none of the parties have contended that any local (other than State) law is in point.

In light of this and the terms of the grant, we agree with Edsall that the responsiveness issue is to be reviewed under the FPR's and Federal procurement law generally.

There is no provision in the FPR's which treats the specific issue involved here. However, our Office

B-190722

has held that in Federal procurements the failure of a bid to respond to an invitation requirement for prices on alternate items is not a sufficient basis to reject the bid, where the bid as made offers to perform the entire work called for. See 51 Comp. Gen. 792 (1972). In such circumstances, the failure to bid the alternates does not prejudice the Government's interests, nor does the bidder gain any unfair advantage over other bidders; rather, by failing to respond to the alternates the bidder runs the risk that its bid will be eliminated from consideration if the Government elects to accept alternate items. See 42 Comp. Gen. 61 (1962).

Further, we see no merit in Edsall's argument that Quality's failure to quote alternate item prices prevented the grantee from determining the lowest overall cost. The grantee decided not to accept any of the alternate deductives, and Quality's bid for the total job was lower than Edsall's. In addition, whether the grantee informally obtained alternate item prices from Quality after bid opening, as Edsall alleges, is not in our view pertinent, since the fact remains that the award was made on the basis of Quality's basic bid for the total job. Finally, there is no evidence in the record of any formal alteration or modification of Quality's bid after bid opening, i.e., that the bid accepted by the grantee was other than the bid submitted by Quality at bid opening.

The complaint is denied.

Deputy


Comptroller General
of the United States