DECISION

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

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FILE: B-191887 DLG 00497 50498 DATE: February 15, 1979

MATTER OF: Malott & Peterson-Grundy, Contractors; Vibra Whirl and Company--request for reconsideration

DIGEST:

1. Where request for reconsideration of decision dismissing complaint against award of contract under Federal grant only restates facts and arguments fully considered by GAO, decision is affirmed.

2. Suggestion that grantee reject all bids received and then negotiate with bidders is rejected, since in response to invitation properly reflecting grantee's minimum needs grantee received at least one responsive bid at reasonable price.

Malott & Peterson-Grundy, Contractors, and Vibra Whirl and Company (Malott) request reconsideration of our decision in Malott & Peterson-Grundy, Contractors; Vibra Whirl and Company, B-191887, January 2, 1979. The decision concerned a request that we review the award of a contract to Atlas All-Weather Tracks (Atlas) by the Ysleta Independent School District, El Paso County, Texas, under a grant from the Economic Development Administration (EDA), Department of Commerce.

The grantee's invitation requested bids for the construction and renovation of outdoor recreational facilities, including the installation of an "Atlas All-Weather Track Surface, or an approved equal." Malott, the apparent low bidder, had drawn lines through the brand name "Atlas" that was preprinted in the invitation and inserted the brand name "Reslite." Malott's bid was determined nonresponsive because it had not complied with the solicitation's required procedure to obtain approval of Reslite as an "equal" product, and award to Atlas, the second low bidder, was recommended.

In its complaint, Malott contended that the bid was responsive notwithstanding the failure to follow

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the approval procedure, because the grantee had actual knowledge of Reslite's specifications. EDA agreed with Malott in a report on the complaint, but argued that the bid was nevertheless not acceptable because Reslite contains a sand-and-gravel filler prohibited by the solicitation.

In response, Malott contended in part that the brand name or equal specification and the sand-and-gravel-filler prohibition were unduly restrictive and reflected an improper predetermination to award a contract to Atlas. Malott also argued that the real reason for the rejection of Malott's bid was the grantee's view that Reslite was not sufficiently durable, a criterion that was not listed in the solicitation.

We stated that it is the responsibility of the procuring activity to establish its minimum needs, and we would not dispute the judgment that those minimum needs can only be met by the use of a brand name or equal specification or the basis for such judgment unless clearly shown by the objector to be unreasonable. We then quoted from a letter to a school district representative from the county's engineer to the effect that the subject specification and prohibition were arrived at after a comprehensive review of various track materials, which included visiting tracks in Texas, New Mexico, Utah, Orgeon, and California. As a result, three base materials, each in a different price range, were judged suitable: rubber-asphalt (the Atlas All-Weather Track), rubber-urethane, and urethane. The engineer further stated:

> "The sand-asphalt-aggregate surfaces such as 'Reslite' * * * were not selected because most of the ones seen suffered from spalling of the surface leaving exposed rock and loose sand.* * *"

Our view was:

> "Although Malott may disagree with the result of the engineer's review (which we note does not foreclose consideration

> of bids based on rubber-urethane surfaces, or bids by firms other than Atlas offering the brand name or offering 'equals'), and the judgment based thereon, we do not consider that Malott has shown them to be unreasonable."

Since it was not disputed that Reslite contained a sand-gravel filler, we agreed that the bid was not responsive. Therefore, we found the matter of the durability of Reslite as a cause for rejection academic and not for consideration.

In the request for reconsideration, Malott essentially restates the arguments it presented in response to EDA's report on the complaint that the brand name or equal specification and the sand-and-gravel-filler prohibition were unduly restrictive, and that product durability was improperly considered by the grantee. Malott also restates its disagreement with the results of the county engineer's review, pointing out that the engineer did not name the specific locations visited where "sand-asphalt-aggregate surfaces * * * suffered from spalling," whereas Malott cited a number of locations where such surfaces allegedly have been found satisfactory. In addition, Malott suggests that the grantee should have rejected all bids and awarded a contract on the basis of negotiation between the three bidders, citing our decision in The Babcock & Wilcox Company, 57 Comp. Gen. 85 (1977), 77-2 CPD 368.

With the exception of the suggestion that all bids should have been rejected, the matters raised in Malott's request for reconsideration were fully considered by our Office in our review of the record on Malott's complaint and our January 2 decision. We found no basis in the facts of record upon which the complaint could be sustained. Although Malott now reargues its case based on those facts, they have not been shown to be erroneous. In view thereof, we consider that Malott has failed to demonstrate any error of law or information not previously considered, and we remain of the view that Malott's bid was properly rejected by the grantee.

Regarding Malott's newly proposed suggestion, in the cited case none of the three bids received by the grantee was acceptable. Under such circumstances, negotiation was authorized by attachment "O" to Federal Management Circular 74-7, which sets forth "Procurement Standards" for use by State and local governments in establishing procedures for conducting procurements using Federal grant funds. Section 3(c)(6)(f) thereof states in pertinent part that "procurements may be negotiated by the grantee if * * * [no] acceptable bids have been received after formal advertising." Here, in contrast, at least one bid meeting the grantee's minimum needs and at a reasonable price was received.

Our decision of January 2 is affirmed.

Deputy Comptroller General
of the United States