

DECISION



12785 S. South  
Page II  
THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20548

FILE: B-195614

DATE: February 8, 1980

MATTER OF: Sieco, Inc. D LG 03867

DIGEST:

Grantee's solicitation requiring all responding architectural and engineering (A/E) professional services firms to furnish cost and pricing data, to be considered along with statement of qualifications in selection of A/E firm, is not shown to be contrary to terms of OMB Circular A-102, Attachment O, or Ohio law. A/E procurement procedures in 40 U.S.C. 541 (Brooks Bill), mandatory for Federal procurements for A/E services, are not per se applicable to grantee procurements.

This is a complaint by Sieco, Inc. (Sieco) concerning the propriety of the procedures used for the procurement of architectural and engineering (A/E) services under Request for Proposal (RFP) A-78-WFS issued by the Licking County Regional Planning Commission, a grantee under Community Development Block Grant B-78-DN-39-0259 awarded by the U.S. Department of Housing and Urban Development (HUD). D LG 03868  
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Sieco complains that the grantee failed to comply with applicable Federal statutes and regulations for obtaining A/E professional services as required by Office of Management and Budget (OMB) Circular A-102, Attachment O. Sieco alleges that section 11.c.(5) of Attachment O prescribes that selection of A/E professional services by competitive negotiation shall be by the two-step method provided in the Brooks Bill,

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40 U.S.C. 541 et seq. (1976). This method restricts the evaluation data that may be requested initially to the proposer's qualifications and requires that price negotiation be conducted with the highest ranked firm. If the procuring agency is unable to reach agreement with the highest-ranked A/E firm on a fair and reasonable price, negotiations are terminated and the second-ranked firm is invited to submit its proposed fee.

Sieco does not argue that the Brooks Bill itself applies to the grantee's procurement. Rather, it maintains that Brooks Bill type procedures are made applicable here under HUD regulations which incorporate OMB Circular A-102, Attachment O. Sieco submits that the grantee's procurement is defective because the grantee's solicitation required initial submission of both technical qualification data and cost and pricing data by each proposer instead of only qualification data. Sieco also maintains the grantee improperly reserved the right to make contract award on the basis of price alone without any subsequent negotiation or not to award on the basis of price alone and to negotiate simultaneously with all proposers.

We find that the Brooks Bill procedures do not apply to this procurement and have no objection to the manner in which the procurement was conducted.

HUD regulations require grantees of block grants to comply with the requirements of Attachment O of OMB Circular A-102, "Procurement Standards." 24 C.F.R. 570.507 (1979). Attachment O was revised on August 15, 1979, see 44 Fed. Reg. 47874 (1979). Sieco concedes that the grantee was not required to conduct this procurement in accordance with Brooks Bill type procedures under the superseded version of Attachment O but maintains that the new version applies here because the contract was not awarded by the grantee until October 1, 1979. Even under the new version of the Attachment, however, the grantee, in our opinion, was not required to conform to the Brooks Bill.

The current version of Attachment O states:

"2. Grantee/Grantor Responsibility.

\* \* \* \* \*

- b. Grantees shall use their own procurement procedures which reflect applicable State and local laws and regulations, provided that procurements for Federal Assistance Programs conform to the standards set forth in this attachment and applicable Federal law.

\* \* \* \* \*

11. Method of Procurement.

Procurement under grants shall be made by one of the following methods, as described herein: a) small purchase procedures; b) competitive sealed bids (formal advertising); c) competitive negotiation; d) noncompetitive negotiation.

\* \* \* \* \*

- c. In competitive negotiation, proposals are requested from a number of sources and the Request for Proposal is publicized, negotiations are normally conducted with more than one of the sources submitting offers, and either a fixed-price or cost-reimbursable type contract is awarded, as appropriate. Competitive negotiation may be used if conditions are not appropriate for the use of formal advertising. If competitive negotiation is used for a procurement under a grant, the following requirements shall apply:

\* \* \* \* \*

(5) Grantees may utilize competitive negotiation procedures for procurement of Architectural/Engineering professional services, whereby competitors' qualifications are evaluated and the most qualified competitor selected subject to negotiation of fair and reasonable compensation."

The crux of Sieco's argument is that paragraph 11.c., read in total context, must be construed to mean that if the conditions for competitive negotiations are satisfied and the grantee decides to use that method, then the provisions of subparagraph (5) "shall" apply. In other words, when selecting an Architect/Engineer by competitive negotiation Sieco maintains that the two-step Brooks Bill method must be used.

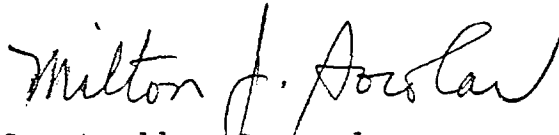
We must reject this argument. While it is true that, as Sieco points out, paragraph 11.c. states that if competitive negotiation is used for a procurement under a grant, the "following" requirements "shall" apply, this is not dispositive of the issue. Instead, reference must be made to the more specific language of the individual subparagraphs. The first three subparagraphs, dealing with obtaining adequate competition, identifying the evaluation factors, and conducting the evaluation of proposals, clearly are mandatory requirements. Subparagraphs (4) and (5), however, by their own terms are permissive rather than mandatory, with subparagraph (5) providing that grantees "may" use competitive negotiation procedures for A/E professional services, which happen to resemble those of the Brooks Bill. That language does not, in our view, mandate the use of that procedure, but only allows it.

Moreover, our conclusion that the grantee was not required to employ Brooks Bill type procurement procedures here is consistent with Ohio law.

The record indicates that Ohio Rev. Code Ann. § 307.86 (Page 1979) constitutes the only state or

local standard relevant to the procurement of the professional services under examination. The provision requires the use of competitive bidding except, in part, when A/E services are being procured. In that event, however, the statute does not prohibit the use of a process in which price competition is obtained. Rather, the state or local contracting authority has the discretion to determine what type of procurement it desires to conduct. We are unaware of any Ohio law that prohibits Ohio procurement officials or other purchasers from using a method of selecting an architect or engineer which requests price or fee information for A/E services prior to the selection of an A/E firm.

Based upon the above, the complaint is denied, as the grantee acted consistent with state law and OMB Circular A-102, Attachment O.

A handwritten signature in cursive script, reading "Milton J. Aorlan".

FOR THE Comptroller General  
of the United States