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DECISION



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

FILE: B-200647

DATE: October 19, 1981

MATTER OF: Motorola Communications & Electronics, Inc.

DIGEST:

1. GAO will not consider allegation that grantor agency's handling of protest violated Attachment O of OMB Circular A-102 because provisions of Attachment O regarding grantor's consideration of protests have no direct relationship to validity of grantee's award decision. In this instance GAO has before it positions of grantor, grantee and all interested parties and therefore can properly consider whether grantor has ensured that grantee's proposed award complies with requirements made applicable by law, regulation or grant terms.
2. Bid offering mobile radio which contained some modules which could not be removed without clipping or unsoldering was non-responsive to solicitation provision requiring all modules to be removable without clipping or unsoldering.
3. Although nonresponsive bid must usually be rejected, nonresponsive bid may be accepted here where radio offered would meet purchaser's actual needs and where record shows that the other bids submitted were unacceptable for different reasons and it appears likely that bidders would offer same radios on resolicitation.

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Motorola Communications & Electronics, Inc. objects to the decision of the Urban Mass Transportation Administration (UMTA) to withhold funding of a contract awarded to Motorola by the Memphis Area Transit Authority (Transit Authority) which, under the terms of Grant Project TN-05-0006, was to be 80 percent funded by UMTA. Motorola maintains that UMTA improperly overruled the Transit Authority's determination that Motorola's bid was responsive to a solicitation for a transit radio communication system. That firm contends that UMTA's actions violated Office of Management and Budget (OMB) Circular A-102, which limits grantor agency review of grantee procurement decisions, and also maintains that its bid was responsive to the solicitation. We do not believe that the grantor's protest procedures are relevant to our review of the propriety of the award and we find that the Motorola bid was nonresponsive. Nevertheless, we conclude that acceptance of Motorola's bid would not prejudice the other bidders.

BACKGROUND

On May 15, 1980, the Transit Authority issued a solicitation for a transit radio communication system to be installed in city buses. Section 8.4.1.1 of the solicitation specifications provided:

"Modular construction shall be utilized throughout the radio with a plug-in interconnection system for ease of maintenance. All modules shall be removable from the radio set without clipping or unsoldering."

The three bidders at the July 9 bid opening were Motorola at \$1,257,759, IAL Communications Systems, Inc. at \$1,299,960 and Wismer & Becker at \$1,440,881. Motorola offered its Mitrek radio while IAL and Wismer & Becker offered General Electric (GE) MASTR II radios.

Following bid opening IAL filed a protest with the Transit Authority on July 11, alleging that Motorola's bid was nonresponsive because the Mitrek radio it proposed did not comply with the modularity requirement of section 8.4.1.1 of the specifications. Thereafter, by a letter dated July 15, the Transit Authority responded to IAL's protest and indicated

that it considered Motorola's bid to be responsive. On July 17, IAL sent a telegram to the Transit Authority with a copy to UMTA, again alleging that Motorola's bid was nonresponsive. That same day, Wismer & Becker sent a mailgram to both the Transit Authority and UMTA challenging, among other things, the responsiveness of Motorola's bid with respect to section 8.4.1.1 of the specifications.

Following receipt of IAL's protest, UMTA on July 18, notified the Transit Authority that it had received a protest from IAL and requested further information regarding IAL's allegations. By letter of the same day, the Transit Authority responded to UMTA's request outlining the reasons it considered Motorola's bid to be responsive. Thereafter on July 23, the Transit Authority Board of Directors met and decided to accept Motorola's bid and the Transit Authority made award to Motorola contingent upon funding from UMTA. The Board of Directors also decided that if UMTA refused to fund Motorola's contract that it would cancel the solicitation and resolicit because it considered IAL's bid to be nonresponsive for reasons other than modularity and Wismer & Becker's bid price to be excessive. Subsequently, on July 25 GE, the nonbidding manufacturer of the radio proposed by IAL and Wismer & Becker, filed a protest with UMTA objecting to the Transit Authority's decision to make award to Motorola and its decision to cancel and resolicit if UMTA failed to fund Motorola's contract.

Between July 25 and September 16, UMTA met with representatives of IAL, Wismer & Becker, GE and Motorola regarding the protest. UMTA also conducted an examination of the radios proposed by each firm. Thereafter, by letter dated September 16, UMTA advised the Transit Authority that it had determined that Motorola's bid did not comply with section 8.4.1.1 of the specifications because some of the modules in Motorola's radio required clipping or unsoldering for removal. UMTA also advised the Transit Authority that it had

determined that the additional objections to Motorola's bid raised by Wismer & Becker and IAL were without merit, but that it did not consider GE's objections because UMTA did not have the Transit Authority's views on GE's allegations.¹ Apparently, UMTA later advised the Transit Authority that it would not fund the contract awarded to Motorola. Motorola then filed its complaint with our Office challenging UMTA's involvement and its determination not to fund Motorola's contract.

ALLEGED FAILURE OF GRANTOR TO COMPLY WITH OMB CIRCULAR A-102

Motorola contends that UMTA's actions in this procurement violated OMB Circular A-102 which, among other things, limits grantor agency review of grantee procurements. Motorola's objections are essentially threefold: First, Motorola asserts that UMTA was prohibited by Section 5 of Attachment O of OMB Circular A-102 from entertaining the protests of IAL, Wismer & Becker and GE because UMTA had not promulgated formal protest procedures relating to grant procurements. Next, Motorola maintains that even if UMTA's admittedly informal protest procedures satisfy the requirements of Attachment O and thus UMTA could entertain the protests, UMTA acted improperly because it did not require the protesters to exhaust their remedies at the grantee level. Finally, Motorola alleges that UMTA's actions violated Attachment O because UMTA did not limit its review to whether the Transit Authority's award decision violated Federal law or regulations.

Since the provisions of Attachment O regarding the grantor's consideration of protests have no direct relationship to the validity of the grantee's award decision, we see no reason to consider Motorola's detailed objections to UMTA's process of reviewing the protests filed with it by IAL, Wismer & Becker and GE. In our public notice entitled

¹ The only issue before us is Motorola's compliance with the modularity requirement of 8.4.1.1. The other objections regarding Motorola's bid raised by IAL, Wismer & Becker, and GE before the Transit Authority and UMTA have not been raised in this proceeding. Thus, our review is limited to the responsiveness of Motorola's bid under section 8.4.1.1 and the propriety of the award to Motorola.

"Review of Complaints Concerning Contracts Under Federal Grants", 40 Fed. Reg. 42406 (1975), we advised that our Office would undertake reviews concerning the propriety of contract awards made by grantees in furtherance of grant purposes upon the request of prospective contractors. The primary focus of our review in grant matters is on the efficacy of the grantor's process for ensuring that its grantees' awards comply with requirements made applicable by law, regulation or the terms of the grant. International Business Machines, B-194365, July 7, 1980, 80-2 CPD 12. Consequently, when the grantor agency has formal written protest procedures we require a party to pursue its complaint with the grantor agency prior to seeking our review of the matter. See Sanders Company Plumbing and Heating, B-196075, February 6, 1980, 80-1 CPD 99. Nevertheless in a case such as this where the grantor agency has issued a protest decision, we are not particularly concerned with the details of the procedures, or lack of them, which the grantor agency has established to control its grantees but with whether those procedures result in grantee awards which are in accordance with the above-cited standard.

We have before us the detailed positions of the grantee, grantor and the interested parties regarding the propriety of an award to Motorola. Although it is true that the Transit Authority was forced to postpone its proposed award to Motorola because of UMTA's determination of the other firms' protests, the underlying issue is the responsiveness of Motorola's bid. Consequently, we see no reason to consider Motorola's allegations concerning the propriety of the procedures followed by the grantor in arriving at its conclusion that the Transit Authority's proposed award was improper. We will simply consider whether the grantee reasonably determined that Motorola's bid was responsive. Further, the issue of whether a bid is responsive concerns a basic principle of Federal contract law and is one which our Office has often considered in the context of a grant complaint. Edward L. Nezelek, Inc., B-192478, June 19, 1980, 80-1 CPD 431.

RESPONSIVENESS OF MOTOROLA'S BID

UMTA maintains that Motorola's bid was nonresponsive and could not be properly accepted by the Transit Authority because the Mitrek radio bid by Motorola did not comply with

section 8.4.1.1 of the specifications which required modular construction of the radios.² The grantor asserts that the specification involved has been used in numerous procurements conducted by local authorities receiving UMTA grant funds and has generally been interpreted by the industry as including radios such as the GE MASTR II and the Motorola Micor which use separate readily replaceable function boards, thus facilitating fast, low cost repair. Although UMTA acknowledges that the GE MASTR II and Motorola Micor radios do not literally meet the specification because the radios require some degree of clipping or unsoldering to remove modules, UMTA maintains that the Mitrek radio bid by Motorola differed so significantly from the GE MASTR II and the Motorola Micor, that it did not meet the "industry interpretation" of a modular radio. UMTA asserts that the Motorola Mitrek radio differs substantially from the industry interpretation of a modular radio because it combines elements which are separate modules in the Micor radio into a single board and requires a greater degree of clipping and unsoldering. UMTA argues that acceptance of Motorola's bid offering Mitrek radios would be prejudicial to other bidders, especially in view of the fact that it has been advised by IAL that it intended to modify the GE MASTR II to be in full compliance with the specification. Consequently, UMTA maintains that Motorola's bid should not have been accepted by the Transit Authority and that the procurement should be resolicited because the Transit Authority considers IAL's bid to be nonresponsive and Wismer & Becker's bid price to be excessive.

Motorola denies that the mobile radio industry considers only radios such as the GE MASTR II and its Micor to be modular. Motorola contends that the fact that its Mitrek radio combined some of what are separate modules in its Micor radio into one large module did not make its Mitrek radio any less modular than the GE MASTR II and Motorola Micor. Although Motorola concedes that its Mitrek radio did not literally satisfy the requirements of 8.4.1.1 because some of its modules could not be removed without "clipping or unsoldering," it asserts that this is also true of the GE MASTR II and the Motorola Micor radios.

² GE and IAL have filed comments with our Office regarding the complaint and their positions are consistent with UMTA's views.

In addition, Motorola contends that the solicitation specifications were not intended to be design requirements but were intended to establish performance requirements. Motorola argues that since its Mitrek radio is more durable than both its Micor radio and the GE MASTR II radio, its failure to meet the literal requirements of section 8.4.1.1 was not significant because it met the overall performance requirements of the solicitation.

Motorola further argues that none of the bidders was prejudiced by the Transit Authority's acceptance of its bid because all would have offered the same radios they originally offered had the specifications clearly permitted the Mitrek radio to be bid and that a resolicitation would only result in an auction, thereby compromising the integrity of the competitive bidding system. Motorola disputes IAL's contention that it intended to modify the GE MASTR II to be in full compliance with the specifications and states that IAL indicated in its bid that it was offering a GE MASTR II radio without stating that the radio was being modified to meet section 8.4.1.1. Motorola argues that IAL's intent should be determined by its bid and not by self-serving statements made after bid opening.

The solicitation provides in its bid evaluation clause that in determining the successful bidder "responsiveness to these specifications" will be considered. Further, the grant agreement between UMTA and the Transit Authority incorporates Attachment O which states at section 11(b) that in a formally advertised procurement, as this one, the contract must be awarded to the "responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids is lowest in price."

It is a basic principle of Federal contract law that a bid to be responsive, must at the time of bid opening be an unequivocal offer to provide the requested item in conformance with the material terms and conditions of the solicitation. Edward L. Nezelek, Inc., supra. Otherwise bidders will not be competing on an equal basis, with the result that one bidder may get an unfair advantage over another. See Thomas Construction Company, Inc., B-184810, October 21, 1975, 75-2 CPD 248.

It is undisputed that Motorola's Mitrek radio does not meet the literal requirements of section 8.4.1.1 of the specifications because it requires some degree of clipping or unsoldering to remove some of the radio's modules. Although Motorola contends that the solicitation was not intended to impose design requirements, but only performance requirements and, thus, it was not required to satisfy section 8.4.1.1, we cannot accept this view. Section 8.0 of which section 8.4.1.1 is a part is entitled "Design Specifications" and sets forth a large number of technical requirements which can only be classified as design requirements. Thus, we must conclude that the solicitation imposed design requirements which all parties admit Motorola's Mitrek radio did not meet.

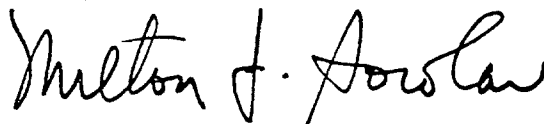
Nevertheless, we do not believe that the procurement should be resolicited or the proposed award to Motorola disturbed. Although a nonresponsive bid must usually be rejected, we have permitted a nonresponsive bid to be accepted where the awarded contract will serve the purchaser's actual needs and no bidder will be prejudiced by the acceptance of the nonresponsive bid. See Union Carbide Corporation, 56 Comp. Gen. 487 (1977), 77-1 CPD 243; George Hyman Construction Company, Blake Construction Company, Inc., B-188603, June 15, 1977, 77-1 CPD 429. In fact, acceptance of a nonresponsive bid under the above circumstances is preferred over cancellation and resolicitation since resolicitation would result in an auction, thereby compromising the integrity of the competitive bidding system. GAF Corporation, Minnesota Mining and Manufacturing Company, 53 Comp. Gen. 586 (1974), 74-1 CPD 68. It is clear from the record in this instance that literal compliance with the requirements of section 8.4.1.1 of the specifications was not considered by the Transit Authority to be essential to its needs. Indeed, although the language used in section 8.4.1.1 does not indicate that less than 100 percent modularity would be acceptable, the Transit Authority admits it never intended that the radios be completely modular, but just easy to maintain. Further, both the second and third low bidders submitted bids offering GE MASTR II radios which, like Motorola's Mitrek, failed to meet the literal requirements of 8.4.1.1 and therefore were also technically nonresponsive. Although UMTA argues that IAL advised it that it intended to

modify the GE MASTR II to comply with the requirements of the specifications, IAL's bid does not reflect that intent.

It also appears that IAL's bid was nonresponsive for reasons other than its failure to meet the requirements of section 8.4.1.1: among other things, IAL's bid offered a 40-watt version of the GE MASTR II, while the solicitation required a 75-watt mobile radio, and included a list of "terms and conditions" which conflicted with the general provisions of the solicitation. In addition, Wismer & Becker's bid price was considered excessive and therefore would not have been accepted even if responsive.

Further, all parties agree there were a limited number of mobile radios which could be bid on this procurement. Therefore, we believe it is likely that the bidders would have offered the same radios even if the specifications had clearly permitted acceptance of Motorola's Mitrek radio and the bidders would likely offer the same radios if the procurement is resolicited. Under these circumstances, we fail to see how any bidder was prejudiced by MATA's acceptance of Motorola's bid.

Since the Transit Authority believes that Motorola's Mitrek radio will meet its actual needs and UMTA does not dispute the Transit Authority's conclusion that the radios will perform properly, it is not necessary for the Transit Authority to cancel the procurement and resolicit its needs. The Motorola bid may be accepted. Accordingly, Motorola's complaint is dismissed in part and sustained in part.

for 
Comptroller General
of the United States