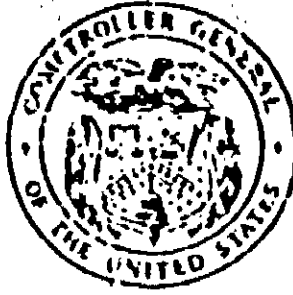


DECISION



Martin
118622
**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548**

FILE: B-202075 **DATE:** June 7, 1982
MATTER OF: Wismer & Becker Contracting Engineers
DIGEST:

1. Notwithstanding complainant's view that grantor agency, by remanding matter to grantee for further consideration, afforded grantee a second opportunity to "think up a reason" to reject its bid, selection was for grantee to make as contracting party. Grantor's role was limited to assuring that grantee complied with federal requirements in expending grant funds.
2. Federal norm does not preclude rejection of bid which contains incomplete list of equipment offered and which does not fully explain model numbers of equipment listed. In direct federal procurement, bid would be considered nonresponsive.
3. Complainant has not shown that grantee evaluated bids unfairly by overlooking serious defects affecting responsiveness of awardee's bid where contention is unsupported by the record.
4. Fact that low priced nonresponsive bid is received does not establish that 16 percent more costly, responsive bid is unreasonably expensive. Moreover, record does not show that grantee abused its discretion in determining that awardee's bid price was reasonable.

Wisner & Becker Contracting Engineers (W&B) complains of the award of a contract to Motorola Inc. for a bus radio system. The contract was awarded by the Tri-County Metropolitan Transportation District of Oregon (Tri-Met) but is 80 percent funded by the Urban Mass Transportation Administration (UMTA). We consider W&B's complaint pursuant to our public notice entitled "Review of Complaints Concerning Contracts under Federal Grants," 40 Fed. Reg. 42406, September 12, 1975. As discussed below, the complaint is denied.

W&B advances various reasons in support of its view that the rejection of its bid and Tri-Met's award to Motorola were improper.

W&B says its lower priced bid was in line for award but that Tri-Met improperly rejected it as nonresponsive because Tri-Met incorrectly believed the bid should have contained information which its solicitation had not requested. According to W&B, UMTA, which initially reviewed its complaint, agreed with W&B that its rejection was improper.

W&B argues that, since UMTA originally agreed with it, UMTA should have instructed Tri-Met to award it the contract, but instead, remanded the matter for further consideration, affording Tri-Met a second opportunity to "think up a reason," in W&B's words, to justify selecting Motorola. As a result, W&B complains, UMTA's review of Tri-Met's decisions was a sham.

Further, W&B says Tri-Met did not apply the same standards in reviewing its and Motorola's bid and should have rejected Motorola's bid. According to W&B, Motorola offered equipment which is not available under the part numbers listed, and data submitted with Motorola's bid shows that reception and power requirements will not be met.

Finally, W&B asserts that Motorola's price, which was \$340,000 more than W&B quoted, represents the highest price known for this kind of equipment and is unreasonable.

We review the propriety of contract awards made by grantees to insure that federal Government agencies are requiring their grantees, in awarding contracts, to comply with any applicable federal legal requirements, including the terms of the grant agreement. See Copeland Systems, Inc., 55 Comp. Gen. 390 (1975), 75-2 CPD 237. Tri-Met's grant

agreement with UMTA permits it to follow local procurement procedures so long as they meet the minimum requirements of Attachment O to Office of Management and Budget Circular A-102, which requires a grantee to conduct all procurements in a manner that provides maximum open and free competition. This requirement that UMTA's grantees comply, in effect, with federal competitive procurement norms is complemented by Oregon law which provides that federal laws, rules, and regulations shall govern in any case where federal funds are involved if there is a conflict between state and federal procurement requirements. ORS § 279.056. Our review is founded, therefore, on whether Tri-Met's actions were consistent with the fundamental principles of federal procurement inherent in the concept of competition. See, e.g., International Business Machines Corp., B-194365, July 7, 1980, 80-2 CPD 12.

The scope of UMTA's review of W&B's complaint was similarly limited. Tri-Met, not UMTA, was to be the contracting party. UMTA's function was to determine whether Tri-Met's actions in selecting a contractor were consistent with its obligations under UMTA's grant. As indicated, UMTA disagreed with Tri-Met's interpretation of the solicitation requirements. It was not, however, UMTA's responsibility to determine Tri-Met's obligations under Oregon law. Even if W&B could show, therefore, that its bid was entitled to award, we would have no basis for questioning UMTA's decision to remand the matter for reconsideration by Tri-Met or for concluding that UMTA's decision to do so indicates that its review of Tri-Met's decisions was a sham.

Addressing the merits of Tri-Met's complaints, we first consider whether Tri-Met's rejection of W&B bid violated any federal standard or norm.

The record indicates that Tri-Met's solicitation invited offerors to bid on 9 line items and required each offeror to complete a preprinted form entitled "DETAILED EQUIPMENT LIST." The form consisted of one page listing the 9 line items. Bidders were advised to attach additional pages if more space was needed. W&B's bid included the preprinted form and one supplemental sheet. W&B listed equipment model and part numbers for each line item.

Tri-Met initially found W&B's bid to be nonresponsive because it concluded that W&B's equipment list did not provide sufficient detail to permit a proper determination of responsiveness. What Tri-Met expected was a list which it could use to establish that each offeror proposed equipment meeting each of Tri-Met's operating requirements.

However, W&B says it simply listed major system components. It did not interpret the equipment list requirement as calling for a listing of subcomponents or miscellaneous parts. W&B argues that it was not on notice of Tri-Met's intention to use the list to verify that each of Tri-Met's operating requirements would be met, and insists that if Tri-Met wanted such information, it should have asked for it. According to W&B, its bid, including its equipment list, performance bond and stated intention to comply with all operating requirements, was fully responsive.

Tri-Met's initial review of W&B's bid, however, is not before us. When W&B initially protested its rejection to UMTA, UMTA found that the solicitation contained no explanation or instructions to bidders to guide them in preparing the equipment list, and it agreed with W&B that the solicitation did not require as specific a listing of equipment as Tri-Met expected. UMTA remanded the case to Tri-Met with a recommendation that Tri-Met reevaluate all bids.

Tri-Met, after reconsidering its evaluation in light of UMTA's decision, again concluded that W&B's bid was nonresponsive. Essentially, Tri-Met found that the information W&B did furnish was incomplete, creating uncertainty regarding its intent. This second decision was thereafter reviewed and approved by UMTA.

It is this set of decisions which is before us for review. As explained below, we find no basis in the record to question these decisions because we conclude that W&B's bid would have been nonresponsive had this been a direct federal procurement. As a result, W&B's rejection violated no federal procurement norm.

Tri-Met's second decision focused on specific deficiencies in W&B's bid. For example, Tri-Met concluded, W&B listed some but not all major equipment items in its bid. The solicitation required a tape recording system capable of simultaneously recording all transmissions on 40 separate channels on a 24-hour per day, 365 days per year basis. This unit was not listed, nor was it included in any item of equipment which was listed.

Moreover, Tri-Met's reevaluation disclosed that in a number of instances W&B listed generic model numbers for equipment, without specifying the exact equipment which it was proposing.

For example, the solicitation required fixed base equipment served by a number of antenna sites; since the quality of reception would depend upon where a mobile bus transmitter

happened to be at the time, the signal from each of the sites was to be monitored by a "voting receiver and comparator" which was to select the best signal available. Tri-Met found:

"Wisner & Becker only listed the GE brand name for the voting receiver and comparator equipment. Since the manufacturer markets many different models and options of this equipment, some of which would meet specifications and some which would not, it is impossible to determine if the equipment meant to be bid is compliant."

Tri-Met cites other examples. The fixed base system was to include equipment (in addition to the recording equipment mentioned above) which would automatically record all transmissions received allowing Tri-Met to replay garbled messages. The solicitation required a voice back-up system. Mobile (bus) radios were to include built-in timing devices. While all of these features may have been available, as W&B contends, they were optional features. Tri-Met could not determine whether the options were to be included.

The test applied to determine bid responsiveness in a federal Government procurement is whether the bid as submitted is an offer to perform, without exception, the exact thing called for in the invitation for bids which upon acceptance will bind the bidder to perform in accordance with the terms and conditions of the contract. 49 Comp. Gen. 553 (1970); Edw. Kocharian & Company, Inc., 58 Comp. Gen. 214, 217 (1979), 79-1 CPD 20.

According to W&B, it would have been obligated to perform as required notwithstanding that it did not identify the equipment it was offering in greater detail because it stated in its bid that it took no exception to Tri-Met's requirements. We have held, however, that neither a blanket certification that the specifications will be met nor the bidder's actual intention to meet them can render acceptable a bid which takes exception to, or creates ambiguity concerning the bidder's intent to comply with any material solicitation requirement. Garney Company, Inc., B-196075.2, February 3, 1981, 81-1 CPD 62; 40 Comp. Gen. 132 (1960).

Moreover, W&B's failure to identify the equipment offered in greater detail created such ambiguity because the use of the model numbers included left unclear whether W&B was offering to supply material in complete conformance with the specifications or merely offering to supply

a particular model which might not conform to the specification. Although Tri-Met did not require that W&B list subcomponents, as such, it is incumbent on any offeror to assure that his bid is free of ambiguity. In this regard, we have held that it is an essential element of a valid bid that it be sufficiently definite to enable the contracting activity to accept it with confidence that an enforceable contract will result. Leavitt Machine Company, B-187477, March 15, 1977, 77-1 CPD 191. Tri-Met's requirement for a detailed equipment list should have been read by offerors as requesting a list of equipment in sufficient detail to avoid an ambiguous bid. W&B's list was neither complete nor clear. As a result, its bid was nonresponsive.

We also find no merit in W&B's contention that Motorola's bid should have been considered nonresponsive, but instead, was evaluated under more lenient criteria than were applied in the evaluation of W&B's bid.

A number of W&B's allegations in support of this contention challenge the availability or suitability of part numbers listed by Motorola. In each instance, however, Tri-Met, based upon information contained in the bid, its files and other published information, was able to determine that the questioned parts complied with its requirements.

W&B says that the use of information not contained in Motorola's bid was improper and demonstrates bias because Tri-Met did not do the same in evaluating its bid. With respect to Tri-Met's evaluation of Motorola's bid, the information complained of appears to have existed prior to the bid opening date. Such information may be used to determine the acceptability of a bid in a direct federal procurement. Futura Company, B-193704, September 27, 1979, 79-2 CPD 227. Similar information could not have been used in a direct federal procurement to salvage a bid such as W&B submitted. This is because the defect in that bid concerns identification of the equipment proposed. While information available from sources outside a bid may help to clarify whether equipment offered is acceptable, it has no value where there is uncertainty as to what it is that a bidder is offering. Sutron Corporation, B-203082, January 29, 1982, 82-1 CPD 69.

Further, W&B argues, the specifications required radio coverage maps to verify antenna site selection and to demonstrate that transmitting power had been selected correctly. W&B says that Motorola's calculations were based

on 40 watts for the mobile transmitters but that Motorola offered 25 watt radios. W&B states that Motorola offered to furnish 75 watt base transmitters, as required, but says that the effect of power losses from other equipment was not taken into account, resulting in one instance in an effective fixed base transmitter power of about 20 watts instead of 75 watts. W&B also says that the total power losses using the equipment Motorola proposed will exceed the 7.0 dB allowed in Tri-Met's solicitation.

Regarding W&B's contention that the effective transmitting power of the base transmitters would be reduced, we point out that Tri-Met's solicitation specified power (75 watts) for the transmitter alone, without regard for subsequent losses which would occur in processing the signal before it reached the antenna and was radiated. The solicitation stated that these losses, exclusive of "line losses" associated with cables used to carry the signal, were not to exceed 7.0 dB. Tri-Met says it has double checked Motorola's figures, based on the data furnished with Motorola's bid, and finds that the 7.0 dB criterion is met. W&B bears the burden of proving that the criterion is not met; it has not explained why this is so. Consequently, its complaint on this point is not substantiated on the record.

Concerning the capacity of the mobile transmitters, Tri-Met concedes that Motorola mistakenly based its coverage maps on the use of higher power units than it bid. According to Tri-Met, two of the Motorola maps indicated a 30 watt radio and one a 40 watt radio. Tri-Met concluded that the reference to 40 watts was a typographical error. It says, moreover, that the discrepancy between 30 and 25 watts had no effect on how the maps were drawn, or consequently, on the acceptability of Motorola's bid.

This is because at the ultra high frequencies to be used, radio propagation is largely effective only along a line-of-sight. The majority of Tri-Met's operating area, it explains:

"is terrain limited and not power limited. This means that the coverage is restricted due to terrain factors and not * * * [the] power output of the radio. In effect a 50 or 100 watt radio would not gain any significant difference in coverage from the 25 or 30 watt radio because the radio signal cannot penetrate mountains or other rough terrain.

"In those areas not terrain limited the 1 dB difference between a 25 watt and a 30 watt radio is more than compensated for by [a 2 dB safety margin Motorola] used in the maps calculation.

* . * * *

"[Moreover] the scale of the map is such that the drawing of the drawing lines would not vary by more than 1/10" to account for a 1 dB difference and therefore, would not have been drawn any differently for a 25 watt calculation, considering the accuracy [with] which the maps were drawn."

We conclude that Tri-Met reasonably found that the defects complained of were at most minor deviations which had no material effect on Motorola's bid. In a direct federal procurement an agency may waive a defect in descriptive data which has no material impact on the bidder's contractual obligations. Sulzer Bros., Inc., and Allis-Chalmers Corporation, B-188148, August 11, 1977, 77-2 CPD 112. Therefore, Tri-Met's decision to disregard the apparent discrepancy in power between the maps and equipment bid offends no federal norm.

Finally, we consider W&B's assertion that in view of its lower price (by \$340,000) Motorola's \$2,525,007 price was unreasonable. In direct federal procurements, agencies must reject a bid which is unreasonably high. However, we have recognized that such determinations are largely matters of judgment, involving the exercise of broad discretion which should not be questioned unless the determination is shown to be unreasonable or is the product of bad faith or fraud. Honolulu Disposal Service, Inc., 60 Comp. Gen. 316 (1981), 81-1 CPD 193, and Honolulu Disposal Service, Inc.--Rec. Consideration, 60 Comp. Gen. 642 (1981), 81-2 CPD 126. Although it is well settled that nonresponsive bids may be compared, for what they may be worth, in making such a determination, we cannot accept W&B's contention that a bid is unreasonable simply because it is 16 percent more expensive than a nonresponsive bid which, insofar as the record shows, omitted essential equipment. W&B has submitted no evidence apart from its bid that Tri-Met is paying the

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"highest price known" for this equipment. Absent evidence, we have no basis to conclude that Tri-Met acted improperly in making award to Motorola.

The complaint is denied.

Milton J. Dowd
for Comptroller General
of the United States