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DECISION

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

FILE: B-215724 **DATE:** December 11, 1984

MATTER OF: Tonka Equipment Company

DIGEST:

1. A grantee's determination that a proposed equipment supplier is nonresponsible is unobjectionable where it was based on past problems with the equipment, the supplier's failure to furnish the names of two installations using its equipment (as required by the solicitation), and inadequate quality control, and the protesting supplier has not established that the grantee's determination was unreasonable.

2. An assertion of bias and collusion on the part of a grantee will not be considered where not supported by substantive evidence.

3. An allegation that a solicitation requirement was unnecessary is untimely and will not be considered by GAO where not raised prior to bid opening.

Tonka Equipment Company (Tonka) has filed a complaint against a contract award made by the city of Whitehall, Wisconsin (City), for water treatment filtration improvements. Because the procurement is funded in large part (80 percent of the total cost or $331,000, whichever is less) by a grant from the Economic Development Administration (EDA), United States Department of Commerce, we will consider this complaint pursuant to our public notice entitled "Review of Complaints Concerning Contracts Under Federal Grants," 40 Fed. Reg. 42,406 (1975). For the reasons discussed below, we deny the complaint in part and dismiss it in part.

The solicitation issued by the City provided that award would be made to the "lowest responsible bidder" and required a bidder to name the manufacturer of the equipment that formed the basis of the bid. Bidders also were permitted to name two alternate equipment manufacturers, with

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related bid price adjustments. For each manufacturer listed, bidders had to state a minimum of two separate users and locations where similar equipment could be seen in operation and use. The solicitation notified prospective bidders that "[t]he City Council shall make investigations as may be necessary regarding equipment to select equipment that in their opinion will give them the best type of operation and maintenance they require" and that "[t]he brand name selected by the lowest responsive bidder may not necessarily be the brand name incorporated into the project."

Twelve bids were received and were opened on June 5, 1984. Lysne Construction, Inc. (Lysne), was the low bidder based on the use of either Tonka ($353,000) or General Filter Company ($4,300 increase) equipment.

The City's consulting engineer, proceeding with his equipment investigation, contacted four installations Tonka had presented to Lysne as references for its equipment and found that in fact only one of the installations used equipment similar to that requested in the solicitation (another could not be contacted). Representatives of the installation contacted indicated they had experienced problems with the equipment (apparently related to operation of chemical handling pumps and motors) even though the equipment was less than 2 years old. The consulting engineer also determined that Tonka does not operate or maintain a manufacturing facility with company personnel for providing quality control for component parts. The engineer concluded that the evidence did not show Tonka capable of furnishing the high quality operation and maintenance required and, thus, recommended that the award to Lysne be based upon the use of General Filter's equipment. On June 25, 1984, award was made to Lysne on that basis.

Tonka essentially argues that the award to Lysne based on General Filter's equipment was improper because the Lysne bid based on Tonka's equipment was lower and because Tonka's equipment was in full compliance with the specifications. Tonka requests that the City be required to award a contract to Lysne with Tonka as supplier.

Our Office will review the propriety of contract awards made by grantees to ensure that grantor agencies have required their grantees to comply with grant terms, agency regulations, and applicable statutory requirements. See Tammermatic Corporation, B-210805, June 24, 1983, 83-2 C.P.D. ¶ 15 1/. The terms of the grant here required the City to conduct this procurement in accordance with attachment "O" to Office of Management and Budget Circular (OMB) No. A-102, which establishes procurement standards and guidelines for federal grantees. Under these guidelines, grantees must use procurement procedures that promote maximum open and free competition. Since none of the parties has cited any state procurement law that would apply in deciding the merits of Tonka's complaint, our review is founded on whether rejection of Tonka's equipment was consistent with the fundamental principles of federal procurement inherent in the concept of competition and reflected in the OMB guidelines. See Rapsco Wholesales Distributors and Arvin Industries, Inc., B-213798, June 12, 1984, 84-1 C.P.D. ¶ 622.

The City's rejection of Lysne's bid based on use of Tonka's equipment was, in effect, a negative determination of Tonka's responsibility. See Howard Electric Company, 58 Comp. Gen. 303 (1979), 79-1 C.P.D. ¶ 137. We have recognized that the determination of what constitutes a clear indication of responsibility--here, the prospective ability of a firm to supply the prime contractor with equipment capable of the high level of operation and maintenance specified in the solicitation--is essentially a business judgment. See Bradley Construction, Inc., 62 Comp. Gen. 138 (1983), 83-1 C.P.D. ¶ 76. Such judgment, obviously, should be based on fact and reached in good

1/ Toward this end, while we will not review all subcontractor complaints under a prime contract funded by a federal grant, we will review such complaints where, as here, the grantee has participated directly in the subcontractor selection process. See generally, Hydro-Clear Corporation, B-189486, Feb. 7, 1978, 78-1 C.P.D. ¶ 103.

faith, but ultimately must be left to the broad discretion of the contracting agency. The agency not only is in the best position to assess responsibility, but also must bear the consequences of any difficulties encountered in obtaining the required performance and must maintain day-to-day relations with the contractor. We thus will not disturb a nonresponsibility determination unless it is shown to lack a reasonable basis. Id.

In our view, Tonka has not established that the City did not have a reasonable basis for finding Tonka unable to perform satisfactorily. Tonka claims it, in fact, can provide a second acceptable installation reference, but to date the firm has not done so. (Tonka does not explain why it never furnished this reference to Lysne--we note Tonka does not allege that this reference is one of the four provided initially.)

Tonka also claims that the installation contacted by the engineer during his investigation in fact was satisfied with Tonka's equipment; Tonka has submitted a letter, purportedly from the head of the installation, expressing this satisfaction, although nevertheless recognizing that there were problems at the outset. The engineer's conclusions, however, were based on the fact that the installation reported it had experienced problems with Tonka's equipment. Whether or not these problems affected the installation's ultimate satisfaction with Tonka's equipment, it remains that those problems were reported. We cannot find that the engineer was unreasonable in considering these problems in evaluating Tonka's ability to furnish satisfactory equipment. Finally, while Tonka claims it adequately oversees the manufacturing process and the quality of the end product, it concedes that in most instances it does subcontract out the fabrication of certain manufactured components. We cannot conclude, based on Tonka's mere disagreement, that the engineer unreasonably determined that Tonka's out-of-house fabrication of system components would have a negative impact on its quality assurance capability.

As stated above, due to the contracting entity's broad discretion in determining a firm's ability to perform satisfactorily, we will disturb such a determination only if clearly shown to be unreasonable. Since Tonka has

not made such a showing here, we must conclude that rejection of Tonka's equipment was not contrary to the applicable OMB guidelines or other federal procurement principles.

We further note Tonka's belief that its performance bond constitutes satisfactory assurance that it will perform as required. While a performance bond may afford the grantee some recourse in the event of default or unsatisfactory performance, it is not intended to be and does not operate as a substitute for a preaward evaluation of a firm's capability to perform. See generally, Federal Acquisition Regulation, § 28.103, 48 Fed. Reg. 42,102 (1983) (to be codified at 48 C.F.R. § 28.103).

Tonka also argues that the decision to reject its equipment may have resulted from collusion by the engineer with General Filter and his strong bias in favor of that supplier's equipment. This assertion, however, is purely speculative and unsupported by any substantive evidence; moreover, we have found that the record, in fact, supports the nonresponsibility determination. We therefore dismiss this argument. See Lion Brothers Company, Inc., B-212960, Dec. 20, 1983, 84-1 C.P.D. ¶ 7.

Finally, Tonka questions whether the solicitation requirement for two installation references was necessary. Tonka should have raised this concern in a complaint prior to bid opening, however. Because Tonka did not do so, this aspect of its complaint is untimely and will not be considered. Reliance Steel Products Company, B-206754, Jan. 24, 1983, 83-1 C.P.D. ¶ 77.

The claim is denied in part and dismissed in part.

for Milton J. Socolar
Comptroller General
of the United States