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DECISION

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

FILE: B-190191 DATE: July 18, 1978

MATTER OF: Park Construction Company

DIGEST:

1. Where complainant alleges reliance on procuring activity's oral advice to submit bid on basis of using topsoil existing at site and to leave blank the alternate bid for indicating the bid reduction for use of such topsoil, complainant was not prejudiced because all bids were evaluated on basis of same work ever though different bidding methods were used by bidders.

2. Where IFB stated that no reliance was to be placed on oral advice, complainant assumed the risk and consequences of its bid by relying on oral advice it allegedly received from a procuring activity employee.

3. Bidder's failure to bid on alternative item which was not selected for award by procuring activity does not render bid nonresponsive.

4. Awardee's bid was properly corrected downward because its bid, either as submitted or as corrected, was low and responsive. It is legally permissible to reduce a low responsive bid after bid opening and prior to award.

5. GAO prefers the disclosure of the order of selection priority for additive and deductive items and recommends that grantor agencies may wish to provide that their grantees follow this preferred approach to avoid possible claims of favoritism.

6. Validity of grantor agency's contention that GAO should not review instant complaint against procurement partially funded by Community Development Block Grant need not be decided because Federal grant funds also were provided in a significant amount by another agency which brings matter within the scope of our review.

## I. Background

Park Construction Company (Park) has requested that we review the award of a contract to Dawn Construction Company (Dawn) by the City of Portland, Oregon (Portland), under grants from the U. S. Department of the Interior (Interior) and the U. S. Department of Housing and Urban Development (HUD). We stated at 40 Fed. Reg. 42406 (1975) that we will undertake such reviews concerning the propriety of contract awards made by grantees in furtherance of grant purposes upon the request of prospective contractors.

The grantee Portland's invitation for bids (IFB) called for submission of bids for general construction work at Cathedral Park in Portland. The IFB requested "Basic Bid Amounts" and "Alternate Proposals" for nine items. Alternates Nos. 1 through 5 added work and Nos. 6 through 9 removed items of work otherwise specified. If Portland decided to accept certain alternates, the prices stated for those alternates would be added to or deducted from, as appropriate, the basic bid. Paragraph 2 of "Page 1 - Proposal" section of the IFB stated that "[i]ndividual alternatives may be added to the basic bid amount." Paragraph 6 of Division A of the IFB also provided that "the Commissioner or Superintendent of Parks reserves the right to adjust the scope of this project and all bids may be adjusted based upon reductions or additions of alternative bid amounts from the base bid amount furnished."

Park submitted the low basic bid amount of $368,304 and indicated prices for each of the nine alternative items. Dawn's basic bid amount was next low at $376,412.

For alternate No. 4 Dawn inserted "Not applicable," and it bid prices for the other eight alternative items. Subsequent to bid opening, Portland chose to award the basic bid and alternates 5, 7 and 8. As a result, Dawn was the low bidder and was awarded a contract for the project.

In its complaint, Park urges the rejection of all bids and readvertisement maintaining that the instant procurement was deficient in several respects, all of which we will discuss in the analysis to follow.

## II. Analysis

Although complaints of this nature are not for consideration under our Bid Protest Procedures, because there is no direct contractual relationship between the Federal Government and the party engaged in contracting with the grantee, our analysis of this complaint will, in some instances, draw upon Federal Government procurement case law, regulations and decisions of this Office in order to develop a Federal principle to apply to the instant fact situation. We will apply the basic principles of Federal procurement policy. Copeland Systems, Inc., 55 Comp. Gen. 390 (1975), 75-2 CPD 237.

Park's initial allegation concerns the ability afforded all contractors to bid on an equal basis with regard to alternate No. 7.

The IFB bidding schedule listed the following ALTERNATE PROPOSAL NO. 7:

> "Delete labor and materials for providing topsoil fill described in Section 2C-Z and for the areas indicated on Sheet L3 of the Drawings. Topsoil may be provided to the Contractor, stockpiled at the site in grid quadrant W4+00/ N4+00. Deduct the following lump sum amount."

Park offered to reduce its basic bid amount by $100 for alternate No. 7, as compared to Dawn's reduction of $25,975. (It should be noted that the final difference in the Dawn and Park bids, computed as a result of adding and deducting alternative items, was less than $20,000. Thus, alternate No. with its bid difference of an amount in excess of $25,000, had a significant impact on the outcome of the competition.)

Park asserts that it relied on the oral advice of a city employee with regard to alternate No. 7. As stated by Park in its comments:

> "At the time of the pre-bidding site review a large stockpile of topsoil was present on the site. It was apparent that the furnishing of topsoil would not be required. Park Construction Co. inquired through one of its principals, Mr. Robert Davis, whether alternate Item No. 7 was not made immaterial. In response to his telephone inquiry the engineer in the Park Bureau who had been representing the City in answering questions about the bid concurred that Item 7 was taken care of and indicated 'why don't you go ahead and leave it blank.' Park Construction Co. bid $100 for that deductive alternate."

Assuming arguendo that Park's statement of fact is correct, it appears that the Basic Bid Amount it submitted was based on the use of topsoil existing at the site and had been reduced by an appropriate amount. Thus, its basic bid amount would have been bid as its price for the work as modified by deductive alternate No. 7. Even though Dawn followed the written IFB instructions and placed the figure for potential base bid reduction in the space provided in alternate No. 7, it is apparent that Park and Dawn bid and were evaluated on the basis of using topsoil existing at the site. Thus, we can find no actual prejudice to Park.

In addition, we note that the IFB clearly stated a procedure for written clarification of perceived ambiguities, and specifically stated that oral explanations were not binding. Accordingly, we believe that Park assumed the risks and consequences of its $100 bid for alternate No. 7 by relying on the oral advice it allegedly received. See Austin-Campbell Co.--Reconsideration, B-188659, October 5, 1977, 77-2 CPD 269; Deere & Company, B-189136(1), June 28, 1977, 77-1 CPD 480 and decisions cited therein.

Park also maintains that Dawn's bid was nonresponsive to the terms of the IFB for its failure to quote a price for alternate item No. 4.

Our holding in Edsall Construction Company, B-190722, March 29, 1978, 78-1 CPD 242, a decision involving our review of a complaint concerning a contract under a Federal grant, is dispositive of this issue when it states:

> "[O]ur Office has held that in Federal procurements the failure of a bid to respond to an invitation requirement for prices on alternate items is not a sufficient basis to reject the bid, where the bid as made offers to perform the entire work called for. See 51 Comp. Gen. 792 (1972). In such circumstances, the failure to bid the alternates does not prejudice the Government's interests, nor does the bidder gain any unfair advantage over other bidders; rather, by failing to respond to the alternates the bidder runs the risk that its bid will be eliminated from consideration if the Government elects to accept alternate items. See 42 Comp. Gen. 61 (1962)."

Had Portland decided to award alternate No. 4 then Dawn would have been nonresponsive, but in the instant procurement alternate No. 4 was not selected and Dawn remained responsive.

Subsequent to bid opening and prior to award, Dawn volunteered the fact that it had erred in stating "Not applicable" under alternate No. 4 and that it had mistakenly included the cost of the alternate No. 4 work, $880, in its basic bid. Therefore, Dawn indicated that Portland could reduce the total contract amount by that figure if it so desired. Considering it to be in the best interest of the City, Portland reduced the award amount by $880, an action to which Park objects.

In taking issue with this action, Park presumes the nonresponsiveness of the Dawn bid as originally submitted. As we discussed above, Dawn's failure to bid alternate No. 4 did not require rejection of the bid as nonresponsive because Portland did not choose to obtain the work described therein. Further, the Dawn bid was low in both its originally submitted and corrected forms. Consequently, we find that Dawn's bid was properly corrected downward because its bid, either as submitted or as corrected, was low and responsive. It is legally permissible to reduce a low responsive bid after opening. Condec Corp. v. U.S., 369 F. 2d 753 (Ct. Cl. 1966); Leitman v. U.S., 60 F. Supp. 218 (Ct. Cl. 1945); P&N Construction Company, Inc., 56 Comp. Gen. 328, 77-1 CPD 88.

In alleging that the instant IFB's structure (Base Bid/additive or deductive alternates) has the appearance of impropriety, Park submitted the following statement:

> "This is not to accuse the City of deliberate and improper activity in its bidding. However, alternate items are justified only when there are items of work within a proposal that the market value is very difficult to ascertain. If a priority of items is established and the alternatives exercised in a pre-stated sequence it is obvious that the plain arithmetic of the funds and bids will determine who is successful. When no sequence is pre-set the

> bid can often be manipulated to select that bidder preferred by the particular Bureau. In this particular case it is a good example of how, as various alternatives are selected, different bidders may become low. There is no technical requirement to avoid this situation, but it is easily avoided, and it should be in the interest of maintaining the public bidding system integrity."

Our review of the record indicates no evidence of impropriety on the part of the grantee or grantors, and, in fact, Park is careful to avoid allegations of actual impropriety. In such circumstances, we could not object to the grantee's award action. However, we share Park's concern that the potential for impropriety through post-bid opening manipulation existed in the instant situation.

This problem is not a novel one. See Sterling Engineering and Construction Company, Inc., 55 Comp. Gen. 443 (1975), 75-2 CPD 293, and H. M. Byars Construction Company, 54 Comp. Gen. 320 (1974), 74-2 CPD 233, both bid protests. These cases illustrate that even in Federal procurements similar objections have been made.

The Federal Procurement Regulations (FPR), applicable to the majority of civilian contracting agencies, unlike the Armed Services Procurement Regulation (ASPR), § 2-201(b)(xli) and § 7-2003.28 (1976 ed.), followed, for the most part, by military agencies, impose no requirement on the part of a procuring activity to disclose the order of selection priority of additive or deductive items. Furthermore, unlike ASPR, the FPR places no requirement on the contracting officer to record the amount of funds available for base and additive bid items when the amount of funding is in doubt.

As indicated in the above-cited cases, we prefer the disclosure of the order of selection priority for

additive and deductive items. Accordingly, we recommend that the grantor agencies may wish to provide that their grantees follow this preferred approach toward additive and deductive items to avoid possible claims of favoritism.

Finally, we note that the agency report from HUD concerned itself solely with the issue of GAO's review authority in the instant procurement as it relates to the HUD funded portion of the procurement. In noting that its portion of the Federal funding was provided through a Community Development Block Grant to Portland, HUD argues that insofar as its "funds are concerned, GAO should not review the instant complaint because to do so would be in conflict with the program's authorizing legislation." However, we need not determine whether HUD's contention has merit because the existence of a significant amount of Federal grant funds from Interior clearly brings this procurement within the scope of our review.

## III. Conclusion

Our analysis and the record support the legality of the actions taken by the City of Portland in its role as procuring activity and grantee of Federal funds in the instant procurement.

Paul G. Dembling

For The Comptroller General
of the United States