

DECISION



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

9344

FILE: B-191498

DATE: March 5, 1979

MATTER OF: The Eagle Construction Company

DLG 01110  
O.C./REQ, Add.

DIGEST:

1. (Unsuccessful bidder's complaint against contract award under Economic Development Administration grant on ground that grantee used State resident vendor preference statute, which displaced low bid by nonresident bidder, in violation of grant requirement to follow OMB circular calling for "free and open competition" is denied because of judicial uncertainty as to constitutionality of similar statutes and ~~OMB circular does not~~ explicitly preclude such award. *failure of authority to* ACC 00371
2. Where unsuccessful bidder's request for review of contract awarded under grant is declined, it is inappropriate to decide whether disappointed bidder on Federal grantee procurement can recover anticipated profits and bid preparation costs and claims are denied. In any event, unsuccessful bidder's claim for loss of anticipated profits on contract under grant is not allowable even if claimant is wrongfully denied contract.

c DLG 01108  
c DLG 01109

The Eagle Construction Company (Eagle) has requested that we review the award of a contract to W. Harley Miller, Inc. (Miller), by the State of West Virginia, Department of Health under a grant from the Economic Development Administration (EDA), Department of Commerce. Our Office entertains such requests pursuant to 40 Fed. Reg. 42,406 (1975), in which we stated that we would consider complaints concerning contracts awarded under Federal grants.

The grantee's request for quotations (RFQ), issued on December 21, 1977, announced that the State Department of Finance and Administration would accept sealed lump-sum bids for labor, material and equipment to construct a regional health center (Jefferson County Public Health Center Project, EDA Project No. 01-51-26135) at Bardane, West Virginia.

State-WV as identifier?

003000

The following bids were received at the bid opening on February 23, 1978:

<u>Bidder</u>	<u>Base Proposal</u>
Norman Early & Son	\$720,000
Eagle	747,200
Blake Construction Co.	749,000
Miller	750,000

Bids submitted by Norman Early & Son and Blake Construction Co. were found nonresponsive for failure to provide minority subcontractor-supplier information.

Miller is a West Virginia corporation and Miller personnel signed the Resident Vendor Preference Request contained in the RFQ. That provision states:

"I hereby certify that the above listed firm qualifies as a resident vendor and further request the 2% preference to be applied to this bid. Signature: \_\_\_\_\_"

Because Eagle is a Pennsylvania company, its bid was surcharged 2 percent for bid comparison purposes. Miller's bid of \$750,000 was lower than Eagles' adjusted bid of \$762,144 and the contract was awarded to Miller.

The grantee states that the award to Miller was made in accordance with the controlling State statute which provides as follows:

"Other provisions of this article notwithstanding, in any instance that a purchase of commodities or printing by the director or by a state department is required under the provisions of this article to be made upon competitive bids, such purchase shall be made from a vendor resident in West Virginia, if such bid does not exceed the lowest qualified bid from a nonresident vendor by more than two percent of the latter bid, and if such resident vendor has made written claim for such preference at the time the bid was submitted.

"A vendor shall be deemed to be a resident of this State if such vendor be an individual, partnership, association or corporation that maintains an active bona fide place of business within the State and maintains therein a representative inventory of the commodities on which the bid is submitted, and, in the case of a corporation, is duly qualified to do business and is in good standing under the law of the State."  
W. Va. Code § 5A-3-44 (Cum. Supp. 1978). ✓  
(Emphasis added.)

Eagle asserts that it should have been awarded the contract as the low responsive bidder, that the above-quoted statute is not properly applicable to construction contracts, and that application of the resident vendor preference represents a form of discrimination based upon geographical location contrary to the free and open competition required by Office of Management and Budget Circular (OMB Circ.) A-102, Revised, Attachment 0, 42 Fed. Reg. 45,889 (1977). Eagle further asserts that there is no precedent for applying the statute to a federally funded building construction project, noting that the Environmental Protection Agency (EPA) regulations, 40 C.F.R. § 35.936-2(b) (1977), expressly prohibit EPA grantees from using State preference statutes in evaluating bids or proposals for contracts under EPA grants. Eagle therefore concludes that the contract was awarded to Miller in violation of the terms of the grant, that the contract should be rescinded and award made to Eagle, or, in the alternative, that Eagle should be compensated in damages for its loss of anticipated profits and bidding expenses.

The grant in question is authorized under the Local Public Works Capital Development and Investment Act of 1976, as amended by the Public Works Employment Act of 1977, 42 U.S.C.A. §§ 6702-6710 (1977 & Supp. 1978). EDA asserts that the West Virginia preference statute is consistent with the act's objectives of helping economically distressed

areas and the construction industry, and that it is reasonable for EDA to accede to a State's requirement that preference be given to local contractors because such a requirement allows the State to maximize the local benefits of EDA assistance.

EDA believes that while the EPA regulation cited by Eagle may reflect policy appropriate for EPA grant programs, EDA's grant program objectives require a different policy. In this regard, EDA states that the authorizing legislation, 42 U.S.C.A. § 6705(d), also requires that the grantee assure that onsite labor can begin within 90 days of project approval. Had the grantee been prohibited from applying its preference statute, EDA suggests that State legislative action necessitating more than 90 days' delay would have been required. EDA additionally informed us that on July 20, 1978, it informally ascertained OMB's concurrence in EDA's policy favoring home-state preference statutes.

EDA states that it finds no justification for proscribing the use of a home-state preference on local public works projects because once Federal funds are granted to a State they become State funds and, absent specific grant conditions to the contrary, their expenditure is subject to the laws and regulations controlling expenditure of State funds, citing our decision in 28 Comp. Gen. 54, 56-57 (1948). Nevertheless, EDA concedes that the grant terms require the grantee to abide by Federal Management Circular 74-7, including Attachment 0 (now OMB Circ. A-102, Attachment 0). Paragraph 3 of Attachment 0 provides, in pertinent part, as follows:

- "3. Grantees may use their own procurement regulations which reflect applicable State and local law \* \* \* provided that procurements made with Federal grant funds adhere to the standards set forth as follows:

\* \* \* \* \*

"(b) All procurement transactions \* \* \* shall be conducted in a manner so as to provide maximum open and free competition \* \* \* ."

EDA frames the issue raised by Eagle as whether the "open and free competition" requirement, above, forbids use of a 2-percent home-state preference surcharge and responds that application of the small West Virginia surcharge does not preclude out-of-state bidders from competing for and obtaining contracts.

On December 6, 1978, OMB published proposed revisions to amend Attachment 0, inviting public comment on the proposed revisions. 43 Fed. Reg. 57,201 (1978). Our Office has recently commented to the OMB Administrator for Federal Procurement Policy on the proposed revisions, in pertinent part, as follows:

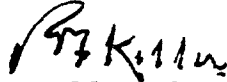
"The proposed revision fails to prohibit 'buy-state' preferences. Such a preference restricts competition and thus arguably is inconsistent with other Federal requirements. Moreover, the recent Supreme Court decision, Hicklin v. Orbeck, U.S. \_\_\_\_\_, 98 S. Ct. 2482, 57 L. Ed. 2d 397 (1978), held the 'Alaska Hire' statute enacted by the Alaska legislature for the purpose of reducing unemployment within Alaska violated the Privileges and Immunities Clause of the Constitution, Art. IV, § 2. A broad 'buy-state' preference is sufficiently analogous to a broad 'hire-state' preference to raise similar doubts about its constitutionality under the Commerce Clause. In this respect, see Salla v. County of Monroe, App. Div. 2d \_\_\_\_\_, 409 N.Y.S.2d 903 (1978). Accordingly, we suggest consideration be given to including a prohibition of such a preference in attachment 0." B-193882, January 31, 1979.

We observe that similar statutes exist in many states and various courts have issued conflicting decisions on the constitutionality of such statutes. Therefore, in light of this judicial uncertainty, and because the OMB circular does not explicitly preclude the award we deny Eagle's complaint against the contract award.

Eagle has, in the alternative, requested compensation for loss of anticipated profits and bid preparation expenses. In the circumstances, we are of the opinion that

it is inappropriate to decide whether a disappointed bidder on a Federal grantee procurement <sup>could</sup> recover bid preparation costs. See Planning Research Corporation Public Management Services, Inc., 55 Comp. Gen. 911, 932 (1976), 76-1 CPD 202. In any event, <sup>addition</sup> there <sup>is</sup> no legal basis for allowing any unsuccessful bidder to recover anticipated profits, even if the claimant <sup>was</sup> wrongfully denied a contract. See, e.g., Robert Swortzel, B-188764, April 22, 1977, 77-1 CPD 280; Intercontinental Construction, Inc., B-188577, May 24, 1978, 78-1 CPD 393; Applied Control Technology, B-190719, September 11, 1978, 78-2 CPD 183.

Eagle's complaint and the firm's claims are denied.

  
Deputy Comptroller General  
of the United States