DECISION

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

10,400

FILE: B-194077 DATE: June 7, 1979

MATTER OF: Concrete Construction Company
[Protest of Solicitation Cancellation]

DIGEST:

1. Rejection of bids by grantee because bids received were excessive was proper exercise of administrative discretion, regardless of fact that State's estimate may have been lower than it should have been, since low bid as compared with revised estimate suggested by complainant would still have been considered excessive.

2. Statute requiring conditions precedent to award to be set forth in the advertised specifications does not preclude cancellation of a solicitation for valid reasons.

DLG 01750

Concrete Construction Company (CCC) has filed a complaint concerning the determination that bids received by the Ohio Department of Transportation (ODOT) under Project No. I-75-1(100)04 are too high and the determination to reject all bids. The solicitation was for highway improvement work pursuant to a grant for approximately 90 percent of the cost of the project by the Federal Highway Administration (FHWA). Our review is undertaken pursuant to our notice entitled "Review of Complaints Concerning Contracts under Federal Grants," 40 Fed. Reg. 42406 (1975). Consistent with the statutory obligation of this office to investigate the receipt, disbursement, and application of public funds, we consider complaints concerning contracts awarded under Federal grants.

DLG 01751

AGC 00063

The following four bids were received by the grantee:

Concrete Construction Company	$13,470,696.29
Foley Construction Company	13,625,447.70
John R. Jurgensen Company	13,697,193.22
The Shell Company	15,431,644.91

005519

The grantee's estimate was $11,555,000.

Upon obtaining the concurrence of the FHWA division administrator (required by 23 C.F.R. § 635.111(e) (1978)), the grantee rejected all bids as being excessive on the basis that the low bid (submitted by the complainant) exceeded the State's estimate by 20.759 percent. The complainant contends that the rejection of all bids violates the Federal Aid Highway Act, as amended, 23 U.S.C. § 112(b) (1976), was arbitrary and capricious and contravenes fundamental principles of Federal procurement law.

The complainant argues that the rejection of bids was due to an FHWA notice entitled "Combating Inflation in Highway Construction Costs," which stated that:

> "Where a low bid exceeds the engineer's estimate by more than 7 percent, bids should be rejected unless an award of contract is justified as an exception. Exceptions may be justified * * * where the engineer's estimate is clearly unrealistically low."

The complainant submits evidence that the engineer's estimate was at least $1,000,000 too low, that the grantee knew the estimate was too low, and that canceling the invitation was arbitrary in light of FHWA's notice. The complainant, referring to our decisions holding that where bids substantially exceed the Government estimate, the contracting agency should review the estimate, see, e.g., Leo Journigan Construction Co., Inc., B-192644, January 29, 1979, 79-1 CPD 59, also objects to the grantee's failure to make a formal review of the estimate. Finally, the complainant believes that the grantee's failure to apprise prospective bidders of the 7 percent limitation violated the Federal-Aid Highway Act because it views the limitation as a condition precedent to the award of a contract which condition was required to be set forth in the advertised specifications. In this regard, the Act states:

> "§112. Letting of contracts
>
> * * * * *

> (b) * * * No requirement or obligation shall be imposed as a condition precedent to the award of a contract to [the lowest responsible] bidder for a project, or to the Secretary's concurrence in the award of a contract to such bidder, unless such requirement or obligation is otherwise lawful and is specifically set forth in the advertised specifications."

As explained below, we believe the grantee could have canceled the solicitation because of excessively high bid prices without relying on the FHWA notice and that in any event the above quoted provision of the Act does not preclude cancellation of a solicitation for otherwise lawful reasons.

The provision in 23 U.S.C. 112(b) regarding conditions precedent to the award of contracts would apply where an award is to be made under a solicitation which does not contain a desired requirement or obligation. The provision neither requires the letting of contracts nor precludes cancellation and resolicitation of a procurement in order to include a requirement which was not provided for. Thus, we think the provision does not apply where, under the Federal norm, a solicitation is canceled for valid reasons.

Federal Procurement Regulations (FPR) which apply only to direct procurement by Federal agencies, do not apply per se to procurement by grantees. See Lametti & Sons, Inc., 55 Comp. Gen. 413 (1975), 75-2 CPD 265. We have held, however, that the grantee must comply with those principles of procurement law which go to the essence of the competitive bidding system. Illinois Equal Employment Opportunity Regulations for Public Contracts, 54 Comp. Gen. 6, 9 (1974), 74-2 CPD 1.

We have further explained:

> "Obviously, it is difficult to detail all that is 'fundamental' to the Federal system of competitive bidding. However, basic Federal principles of competitive bidding are

> intended to produce rational decisions and fair treatment. To the extent, therefore, that a grantee's procurement decision (and the concurrence in that decision by the grantor agency) is not rationally founded, it may be considered as conflicting with a fundamental Federal norm. The decision will, in all likelihood, also be considered inconsistent with fundamental concepts inherent in any system of competitive bidding." Copeland Systems, Inc., 55 Comp. Gen. 390 (1975), 75-2 CPD 237.

A principle of the competitive bidding system is that a formally advertised solicitation should not be canceled after bid opening absent a "cogent and compelling reason." The Massman Construction Co. v. United States, 102 Ct. Cl. 699 (1945). This is because the rejection of bids after bids are exposed and manpower and money is expended in preparing bids without the possibility of award tends to discourage competition. 52 Comp. Gen. 285 (1972). Nevertheless, a contracting agency has broad discretion to reject all bids and we do not question this determination unless the decision is unreasonable. Hercules Demolition Corporation, B-186411, August 18, 1976, 76-2 CPD 173.

When the low bid price is greater than what the Government believes it should pay for supplies or services, rejection of all bids is a proper exercise of administrative discretion. This conforms with the duty of administrative officials to act in the best interest of the Government. 36 Comp. Gen. 364 (1956). Thus, we find no abuse of discretion by the grantee in rejecting the bids where it reasonably believes the low responsive bid price is excessive. Furthermore, the record indicates that the grantee did informally review its estimate immediately after bid opening and discovered that several items appeared to be too low. Notwithstanding the errors, however, we observe that the low bid price would still be approximately 10 percent greater than the estimate revised upwards by the minimum amount submitted in evidence by the complainant. We have upheld the rejection of bids

where the lowest eligible bid exceeded the Government estimate by as little as 7.2 percent, Building Maintenance Specialists, Inc., B-186441, September 10, 1976, 76-2 CPD 233, and we see no basis to object to the informal review of the estimate in a less than punctilious manner. C.J. Coakley Company, Inc., B-181057, July 23, 1974, 74-2 CPD 51. Consequently, we believe that while the grantee's estimate may have been somewhat lower than it should have been, the decision to cancel because of the high bid price is rationally founded. See Copeland Systems, Inc., supra.

Finally, the complainant argues that resolicitation in this case would run counter to FHWA's own longstanding policy against readvertisement of Federal-aid projects absent significant changes or additions of contract provisions that would result in changing the competitive nature of the project. The record indicates that the grantee expressed intention to "study the situation in detail and possibly take steps to resolve problems or improve the projects to reduce costs [and] * * * clarify contract provisions." Thus, the policy stated above may in fact be followed in this case. In any event, we believe the new anti-inflation policy announced in the FHWA notice amplifies any prior policy concerning readvertisement of Federal-aid projects.

The complaint is denied.

R.F. Keller

Deputy Comptroller General
of the United States