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DECISION

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

FILE: B-214954, B-215197 **DATE:** January 18, 1985

MATTER OF: Motorola, Inc.; Fischbach & Moore Communications Division

DIGEST:

1. GAO will review a grant complaint only where the complaint has been filed within a reasonable time so that GAO can consider an issue while it is still practicable to recommend corrective action if warranted. Complaint against grantee's failure to disclose contents of bidders' offers at bid opening filed several months after opening is untimely since it was announced at the opening that the offers would not be made available until they had been evaluated.

2. Bid in the typical formally advertised procurement must publicly disclose at opening the essential nature of the product offered and those elements of the bid relating to price, quantity and delivery. While GAO questions whether the essential nature of the awardee's product in a federal grantee's procurement can be ascertained without looking at proprietary data in the bid, the bid did not have to be rejected, since the grantee specified in its solicitation that only prices, and not the bidders' technical information as to how the solicitation's requirements would be met, would be disclosed.

3. The determination of the relative merits of proposals is the responsibility of the grantee, and GAO will not disturb the grantee's determination unless it is shown to be arbitrary.

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4. GAO finds no prejudice to the other offerors from the grantee's request for clarifications to the awardee's proposal since there is no indication that the grantee had any questions regarding the acceptability of the other firms' proposals and since no technical or price advantage accrued to the awardee as a result of the changes made in response to the request for clarifications.

Motorola, Inc. (Motorola), and Fischbach & Moore Communications Division (Fischbach) complain about the handling of bids--and, in particular, the bid of Wismer & Becker Contracting Engineers (Wismer & Becker)--under a solicitation issued by the City of Seattle, Washington, pursuant to a grant from the Department of Transportation, Urban Mass Transportation Administration (UMTA), for the supply and installation of a voice-data radio communications system to support mobile bus radio units. An award has been made to Wismer & Becker.

Motorola and Fischbach contend that Wismer & Becker's bid was nonresponsive because of proprietary restrictions that Wismer & Becker placed on its offer and because Wismer and Becker's offer as submitted at the time of bid opening did not meet the solicitation's technical requirements. In addition, Motorola contends that the City of Seattle (City) violated the rules pertaining to the public opening of bids by refusing to permit the unrestricted examination of the offers submitted on the day of bid opening. Finally, Motorola contends that the City of Seattle improperly allowed Wismer & Becker's noncompliant offer to become compliant through post-bid-opening clarifications.

We dismiss Motorola's complaint in part and we deny it in part. Fischbach's complaint is denied.

The solicitation, issued as a "request for bids," provided for a public opening and reading of bid prices. The solicitation also called for "sealed proposals" showing that the bidder's offer would be responsive to the technical specifications, especially the design layout of the bidder's radio communications system. The solicitation further provided that award would be made to the lowest responsive and responsible bidder.

The following five bids were received:

Wismer & Becker	$5,057,693
Fischbach	5,064,607
Motorola	6,594,167
General Railway Signal	7,497,000
AVM Systems	9,427,161

The bid prices were read aloud to all parties in attendance at the opening, and written summaries of the announced prices were distributed. In addition, the City of Seattle stated that the technical proposals would be made available for public inspection following their evaluation for technical compliance.

Wismer & Becker submitted its proposal in four volumes. Volumes II, III, and IV were labeled as containing proprietary information that was not to be reproduced or disclosed to others without the prior written permission of Wismer & Becker. Following an inquiry by the City of Seattle shortly after bid opening, Wismer & Becker stated in writing that only volume II of its proposal was proprietary and that it had "inadvertently" failed to remove the proprietary labelings from the other volumes.

While the proposals were being evaluated, the City of Seattle did not permit any of the bidders to inspect or copy the technical proposals. During this period, Motorola sent a letter to the City of Seattle requesting that all bids be rejected and the requirements be resolicited because the bidding process was improper in failing to provide public disclosure of the bidders' proposals.

After the City of Seattle notified the bidders that the evaluation of the proposals was nearly completed and that the proposals would be available for inspection and copying, Wismer & Becker filed for injunctive relief in the Superior Court of the State of Washington for King County to prohibit the City of Seattle from disclosing volume II of the company's proposal to the public and to other bidders. The court subsequently issued an injunction prohibiting disclosure by the City of Seattle.

Copies of the proposals, except for volume II of Wismer & Becker's proposal, were made available to the bidders. The City of Seattle then advised the bidders that the evaluation of proposals had been completed and that Wismer & Becker would be recommended for award, after which Motorola and Fischbach protested to both the City and UMTA.

The City of Seattle responded that a contract could be awarded to Wismer & Becker without apparent violation of local, state and federal laws and regulations; at the same time, the City submitted a report to UMTA on the protests that Motorola and Fischbach had filed with UMTA. Prior to UTMA's resolution of the protests, Motorola filed a complaint with this Office against the proposed award to Wismer & Becker. Following UMTA's denial of the protests, Fischbach filed its complaint with this Office.

Timeliness

Motorola contends that the requirement for a public opening of bids was violated by the City of Seattle's failure to permit the bidders to have unrestricted examination at bid opening of all the submitted documents. In Motorola's view, a public opening of bids loses all effectiveness when it is used as a "mostly ceremonial event" to read bid prices without any disclosure of the essential terms of the offer. According to Motorola, the only way to correct the City of Seattle's violation of the rules pertaining to the public opening of bids is to have a resolicitation of the City's requirements.

We consider grant complaints pursuant to our public notice entitled "Review of Complaints Concerning Contracts Under Federal Grants." 40 Fed. Reg. 42,406 (1975). We do so, however, only where the complaint has been filed within a reasonable time, so that we can consider an issue while it is still practicable to recommend corrective action if warranted. Caravelle Industries, Inc., 60 Comp. Gen. 414 (1981), 81-1 C.P.D. ¶ 317; Reliance Steel Products Co., B-206754, Jan. 24, 1983, 83-1 C.P.D. ¶ 77.

Motorola did not formally object to the City of Seattle about the failure to disclose the proposals at the opening until 2 months later. Under the circumstances, we find that Motorola waited an unreasonable length of time after bid opening to pursue this particular issue. Motorola's complaint therefore is untimely under the cited standard and will not be considered.

Restrictive Legends In Wismer & Becker's Offer

Motorola and Fischbach contend that Wismer & Becker's offer should have been rejected as nonresponsive because it contained proprietary material. Motorola cites our decision in Motorola Inc., B-188813, Dec. 23, 1977, 77-2 C.P.D. ¶ 498, in which we held that the basic principles of federal procurement law pertaining to the public opening of bids apply to competitive procurements by federal grantees. In particular, Motorola points out that we stated in Motorola Inc. that in order to be responsive, and thus eligible for award, a bid must publicly disclose to all competing bidders the essential nature and type of the product offered and those elements of the bid which relate to price, quantity and delivery terms. According to both Motorola and Fischbach, the essential nature of Wismer & Becker's product was not publicly disclosed because of the proprietary restrictions Wismer & Becker placed on its proposal.

UMTA argues that there is no federal law or principle that precludes the consideration of proprietary material with an offer. UMTA further argues that the solicitation's statement that a bidder's proprietary material should be submitted only for the City of Seattle's review under a separate cover meant that such material was not to be made public. In UMTA's view, the real issue is whether Wismer & Becker's offer as constituted at the time of bid opening and as later disclosed to the public contained all of the essential elements necessary for free and open competition among bidders. UMTA concludes that the three volumes of Wismer & Becker's proposal that were not proprietary contained sufficient information for determining the essential nature of the company's product.

Motorola has correctly pointed out that certain basic principles of federal procurement law such as the public opening of bids do apply to competitive, formally advertised procurements by grantees. Motorola Inc., B-188813, supra. The purpose of a public opening of bids is to protect both the public interest and bidders against any form of fraud, favoritism or partiality. Automated Business Systems and Services, Inc., B-207380, June 30, 1982, 82-1 C.P.D. ¶ 639. Consequently, any restriction in the bid on the disclosure of its essential terms generally renders a bid nonresponsive. Computer Network Corp., 55 Comp. Gen. 445 (1975), 75-2 C.P.D. ¶ 297.

Based on our review of the record, it is questionable whether the essential nature of the product being offered by Wismer & Becker can be ascertained without looking at volume II of the company's proposal. Volume II contained the information pertaining to Wismer & Becker's technical descriptions of its equipment and Wismer & Becker's technical approach to installing the voice-data radio communications system. Volume I of Wismer & Becker's proposal primarily contained information relating to the background and experience of the company's personnel, management planning, quality assurance, and warranties. Volume III essentially contained information relating to the background and experience of the company's personnel, management planning, quality assurance, and warranties, and Volume IV essentially contained only detailed lists of equipment.

Furthermore, at the time of bid opening, volumes III and IV of Wismer & Becker's proposal also contained restrictions on disclosure. While Wismer & Becker stated in writing after bid opening that only volume II of its proposal was proprietary and that the placement of restrictive legends on the other volumes had been done "inadvertently," the basis upon which a bid is submitted is determined as of the bid opening. To allow a bidder to remove a restrictive legend in its bid after bid opening would be tantamount to affording the bidder a chance to submit a second bid. Computer Network Corp., supra. Consequently, in the normal formally advertised procurement, only volume I of Wismer & Becker's proposal could be considered in determining whether the company publicly disclosed the essential nature of its offered product.

Nevertheless, while Wismer & Becker's bid may have been nonresponsive in the normal formally advertised procurement, to find acceptance of the bid improper here would ignore the ground rules under which the competition was conducted. The City of Seattle's solicitation did not simply invite proposals under a typical formally advertised framework, but instead incorporated features of both advertised and negotiated procurements. While the City's solicitation stated that "Sealed proposals . . . will be publicly opened and read" at or shortly after bid opening, the solicitation also required a firm to submit for evaluation a detailed description of the proposed system and how the job could be accomplished; a complete technical discussion of the system's operation capabilities and limitations; and a list of the detailed technical and operating characteristics of all equipment to be supplied. Furthermore, the solicitation clearly indicated that an extensive evaluation process for determining offer acceptability was contemplated, and that proprietary material submitted separately from the bidder's bid documents nevertheless would be used for the City's "review."

In sum, we think that competitors here reasonably could expect little more at bid opening than the public recording of bid prices, a characteristic of formal advertising; it should have been evident that the technical aspects of an offer were invited for the type of evaluation that characterizes a negotiated procurement, and that, at least to some degree, the principle of nondisclosure of proposal information that applies in negotiated procurements applied here. See Enviro Control, Inc., B-205722, Apr. 12, 1982, 82-1 C.P.D. ¶ 333.

In contrast, in Motorola Inc., B-188813, supra, cited by Motorola here, the solicitation specifically stated bidders had to identify trade secrets in their bid documents, and that all other submitted material would be treated as public record, subject to disclosure upon request. In addition, the solicitation provided that all bids would be opened in public at the bid opening, with any person present having the right to have any part of the bids read aloud. We found nothing in the record to indicate that the public opening contemplated by the solicitation had a legal meaning different from the federal norm, or that a

bidder's restriction of a material part of its bid from public disclosure did not affect the responsiveness of its bid.

We do not, however, condone the City of Seattle's mixture of negotiation and formally advertised procedures. If the City wanted to keep proposal information confidential, it should not have had a public opening of bid prices. Under federal standards, no offeror in a negotiated procurement can be advised of his relative standing with other offerors as to price or be furnished information as to the prices offered by other offerors. See Panafax Corp., B-201176, June 22, 1981, 81-1 C.P.D. ¶ 515. In any event, UMTA has advised us that it has counseled the grantee regarding the procurement methods for accommodating its minimum needs so that proper use of negotiation procedures and formal advertisement procedures will be insured in future grant procurements.

Acceptability of Wismer & Becker's Proposal

Motorola asserts that Wismer & Becker's offer was noncompliant with several of the solicitation's material requirements. In specific, Motorola alleges that Wismer & Becker's 800-MHz radio receivers failed to meet the solicitation requirement for a frequency separation of 5 MHz with up to 3dB degradation. According to Motorola, the receiver offered by Wismer & Becker had only a frequency separation of 3 MHz at 3dB degradation. Motorola also alleges that Wismer & Becker's proposal was nonresponsive to solicitation requirements concerning a desktop printer for the radio communications system's computer, remote consoles with audio level meter and selective call encoder, 40 track audio recorder/playback unit, and wattage output of the system's audio receiver.

Fischbach also asserts that the radio receivers offered by Wismer & Becker failed to meet the solicitation requirements for frequency separation. In support of this assertion, Fischbach has furnished us with an affidavit from its advance design engineer avering that prior to bid opening, Fischbach investigated the possibility of using the type of radio receiver offered by Wismer & Becker and was advised by the manufacturer that the radio receiver would not meet the

solicitation's frequency separation requirements. Fischbach's advance design engineer further avers that Fischbach therefore proposed another type of receiver costing $60,000 more than the model offered by Wismer & Becker. In Fischbach's opinion, the radio receiver it proposed was the most economical unit capable of meeting the solicitation's requirements.

The determination of the relative merits of proposals is the responsibility of the grantee, and we therefore will not disturb the grantee's determination unless it is shown to be arbitrary. Price Waterhouse & Co., B-203642, Feb. 8, 1982, 82-1 C.P.D. ¶ 103. Further, it is a complainant's burden to prove its allegations. Engineering Service Systems, Inc., B-208553, Sept. 27, 1982, 82-2 C.P.D. ¶ 284. The record shows that both Fischbach and Wismer & Becker submitted to the grantee letters from the manufacturer of the radio receiver offered by Wismer & Becker regarding its compliance with the solicitation's requirements. The City of Seattle determined that Wismer & Becker's radio receiver could meet the solicitation's frequency separation requirement with only "routine modifications" at no additional cost to the City. Nothing in the record establishes that the technical judgment of the City of Seattle regarding the performance capabilities of Wismer & Becker's radio receiver was unreasonable.

With regard to Motorola's objections to the other aspects of Wismer & Becker's proposal, the record shows that whatever difficulties the City of Seattle had in these areas were resolved after requests for clarifications. For example, Wismer & Becker's proposal offered a desktop printer instead of a freestanding, floor-mounted unit as required by the solicitation. After requests for clarification by the City of Seattle, Wismer & Becker changed the equipment list in its proposal and added a stand for the desktop printer. As another example, Wismer & Becker initially offered remote consoles that did not have an audio level meter or selective call encoder as required by the solicitation. After this was brought to Wismer & Becker's attention, the company amended its equipment list and changed to a different model remote console that met the solicitation's requirements.

The record reveals that approximatley 140 clarifications were made to Wismer & Becker's proposal in response to specific requests from the City of Seattle. The record does not indicate whether Motorola and Fischbach were also afforded an opportunity to revise their proposals through requests for clarifications--it is not proper in federal procurements for an agency to have discussions with only one offeror. See The Management and Technical Services Co., a subsidiary of General Electric Co., B-209513, Dec. 23, 1982, 82-2 C.P.D. ¶ 571. Nevertheless, there is no indication in the record that the City of Seattle had any questions regarding the responsiveness of Motorola's and Fischbach's proposals. Further, all the changes to Wismer & Becker's proposal following the City of Seattle's request for clarifications were made at no additional cost to the City, so that Wismer & Becker's bid price at opening was not changed. Finally, there was no technical advantage to Wismer & Becker over other bidders as a result of the changes to its proposal since award under the solicitation was to be made to the lowest responsive, responsible bidder. Thus, while the City of Seattle should not have limited discussions to Wismer & Becker, we find no prejudice to the other bidders from its doing so.

Accordingly, we dismiss Motorola's complaint in part and deny it in part. We deny Fischbach's complaint.

Milton J. Socolar

Comptroller General
of the United States