

**DECISION**



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

**FILE:** B-215883

**DATE:** August 13, 1984

**MATTER OF:** Public Development Corporation

**DIGEST:**

1. An Indian Housing Authority, which receives funds from the Department of Housing and Urban Development to fund construction, is tantamount to a grantee for purposes of GAO review of the Authority's contract awards.
2. A bid that does not offer to conform to the essential requirements of the invitation must be rejected as nonresponsive. Moreover, the bid may not be corrected after bid opening in order to make it responsive, since permitting correction would be tantamount to allowing the submission of a new bid.
3. A complainant who alleges that contracting officials acted in bad faith must submit virtually irrefutable proof that the officials had a malicious and specific intent to harm the complainant.

Public Development Corporation (PDC) complains about the award by the Hoopa Valley Indian Housing Authority of a contract for the construction of 39 single family units to the second lowest bidder under project No. 90-4. PDC complains that the Authority improperly rejected its low bid as nonresponsive. The firm further alleges the Authority acted in bad faith in awarding the contract. We deny the complaint.

Initially, we point out that an inter-tribal housing authority, receiving funds from the Department of Housing and Urban Development for housing construction, is tantamount to a grantee for the purpose of our review. See Union City Plumbing, B-210959, B-211208, April 25, 1983, 83-1 CPD ¶ 455. Therefore, in reviewing the propriety of a competition conducted by an inter-tribal housing authority, we consider whether the

authority complied with the fundamental principles of federal procurement inherent in the concept of competition. See Edison Chemical Systems, Inc., B-212048, March 27, 1984, 84-1 CPD ¶ 353. One of those principles is that a bid must be responsive in order to be acceptable. See Bus Industries of America, Inc., B-208366, March 7, 1983, 83-1 CPD ¶ 222.

The contract specifications required that the type of lumber to be used in construction be No. 1 kiln dried. PDC's low bid offered to use No. 2 kiln dried lumber instead because, PDC advises, the specified type was not readily available. A week later, after officials notified PDC that this variation would be considered improper, the firm telegraphed the Authority that No. 1 kiln dried lumber would be used at the submitted bid price. The Authority nevertheless rejected the bid.

PDC complains that at the time of bid opening it was assured that the bid variation would not pose a problem. PDC contends that the Authority should have waived the deviation as a mere technicality or, in the alternative, accepted the post-bid opening telegram and determined the bid to be responsive. PDC further alleges that the Authority acted in bad faith by misleading PDC as to the responsiveness of the bid.

Bid responsiveness, which is determined based on the offer as submitted at bid opening, concerns whether the bid represents an offer to perform, without exception, the exact thing called for in the invitation, and not whether the bidder has the capability or inclination to so perform. See Peabody Myers Corporation, B-213176, March 13, 1984, 84-1 CPD ¶ 295. A bid that does not offer to conform to the essential requirements of the invitation must be rejected as nonresponsive, and such nonconformance cannot be waived as a "minor informality." See Railway Specialities Corporation, B-212535, Oct. 31, 1983, 83-2 CPD ¶ 519.

There is no reason to view the specification for No. 1 kiln dried lumber as other than an essential requirement. Consequently, PDC's offer to furnish No. 2 kiln dried lumber instead clearly made the bid nonresponsive, and waiver would have been improper. Further, a nonresponsive bid may not be corrected after bid opening in order to make it responsive, since permitting a bidder to do so would be tantamount to allowing the submission of a new bid. See J. T. Systems, Inc., B-213308, March 7, 1984, 84-1 CPD ¶ 277. Thus, the

B-215883

Authority could not accept PDC's telegram offer, made after bids were opened, to substitute No. 1 kiln dried lumber at the same bid price.

Finally, to prevail on the allegation of bad faith, PDC must submit virtually irrefutable proof that the contracting officials had a malicious and specific intent to harm the firm. See CSR, Incorporated, B-213058, March 28, 1984, 84-1 CPD ¶ 364. The fact that officials may have incorrectly assured PDC that the bid the firm had already submitted was acceptable, and later discovered their error and properly rejected the bid as nonresponsive, does not establish bad faith on their part.

The complaint is denied.

for   
Comptroller General  
of the United States