

116893

20073

REV. 11

LEVER

DECISION



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

FILE: B-199160; B-199496

DATE: November 20, 1981

MATTER OF: Curtiss Development Co. and Shipco, Inc.

DIGEST:

1. Annual contributions contract (ACC) between Department of Housing and Urban Development (HUD) and Indian housing authority pursuant to section 5 of the United States Housing Act of 1937, as amended, 42 U.S.C. § 1437 et seq., is encompassed by GAO Public Notice entitled "Review of Complaints Concerning Contracts Under Federal Grants," 40 Fed. Reg. 42406 (1975), since agreement results in substantial transfer of Federal funds to housing authority and since ACC required housing authority to use competitive bidding in awarding contracts.
2. Housing authority's failure to make award to Indian-owned enterprise whose bid was eight percent higher than low bid from non-Indian owned firm was proper since solicitation required award to low bidder and neither it nor HUD regulations or Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450e(b), required preference be granted to Indian-owned firm in particular procurement.
3. Basic principles of Federal competitive bidding require that all bidders be treated fairly and equally and that bidder be precluded from deciding after bid opening whether to assert that its lump-sum price or its inconsistent individual item prices are correct. Thus, Indian housing authority which was required to adhere to Federal competitive bidding principles acted improperly in accepting bid based on bidder's post-bid opening explanation of intended bid where bid was subject to two reasonable interpretations and was low only under interpretation proffered by bidder.

Curtiss Development Co, and Shipco, Inc. have filed complaints concerning the award of a contract by the Spokane Indian Housing Authority. The contract is for the construction of 27 mutual help single family dwelling units to be financed by the Department of Housing and Urban Development (HUD) pursuant to an annual contributions contract (ACC). Although HUD argues that we should not consider these complaints because the contract awarded by the Housing Authority is neither a direct Federal procurement nor funded under a grant as defined by the Federal Grant and Cooperative Agreement Act of 1977, 41 U.S.C. §§ 501-509 (Supp. III 1979), for the reasons given below, we believe the complaints are properly for our consideration. While we deny the complaint filed by Curtiss, we believe there is merit in Shipco's contention that the awardee was improperly allowed to clarify its bid.

BACKGROUND

On June 14, 1976, HUD and the Housing Authority entered into an ACC pursuant to section 5 of the United States Housing Act of 1937, as amended, 42 U.S.C. § 1437 et seq. (Supp. III 1979). Under the ACC, as amended, the Housing Authority agreed to develop 29 mutual help single family dwelling units to be sold to eligible home buyers in accordance with HUD regulations. See generally 24 C.F.R. Part 805 (1981). In exchange, HUD agreed to provide the Housing Authority financial assistance for the construction of the project in the form of a loan or, at HUD's option, a loan guarantee, and to make annual contributions to reimburse the Housing Authority for indebtedness incurred (both principal and interest) in building the project. Specifically, HUD agreed to loan the Housing Authority the estimated cost of the project and to make periodic advances as needed. The ACC also provided that HUD could, at its option, require the Housing Authority to borrow the balance of funds not yet advanced from another lender and that HUD would guarantee payment under the loan.

In addition to agreeing to loan the Housing Authority the necessary money or guaranteeing any loans obtained by the Housing Authority at HUD's direction, HUD agreed to make annual contributions for 25 years or until the Housing Authority paid off the indebtedness incurred in building the project, whichever came first. The ACC further provided that the Housing Authority would "comply with all HUD regulations and requirements" in developing the project. In this connection, 24 C.F.R. § 805.203(c) provides that award of a contract for the construction of the project "shall be made to the lowest responsible bidder." The ACC further required the Housing Authority to obtain HUD's approval prior to making an award of any contract in connection with the development of the project.

On April 18, 1980, the Housing Authority issued an invitation for bids (IFB) for the construction of 27 mutual help single family dwelling units.¹ Although the IFB required bidders to bid on a lump sum basis and provided that award would be made on that basis, it also provided for the separate listing of the amounts bidders included for general construction, mechanical work and work outside the building line. In addition, Paragraph 9 of the "Instructions to Bidders" indicated that award would be made "to the responsible bidder submitting the lowest proposal complying with the conditions of the Invitation for Bids * * *." Further, the IFB also stated that "Section 7(b) of the Indian Self-Determination and Education Assistance Act * * * provides * * * preferences in the award of contracts and subcontracts be given to Indian organizations and Indian-Owned Economic Enterprises."

¹ As noted above the ACC provided for 29 units. The record does not indicate the reason the IFB was for only 27 units.

Bids were opened on May 27. Webb Construction and LKM General Contractors, Inc., a joint venture, submitted the lowest lump-sum bid totaling \$1,162,200; however, the individually priced items listed on the bid did not add up to the lump sum but instead totaled \$1,308,394. Shipco submitted a lump-sum bid of \$1,195,200 and Curtiss submitted a lump sum bid of \$1,264,959. The total of the individually priced items in the Shipco and Curtiss bids equaled their respective lump-sum bid prices.

Following bid opening, a Housing Authority official contacted a representative of Webb-LKM to discuss the discrepancy between its lump-sum bid and the total of the individually priced items contained in Webb-LKM's bid. Webb-LKM confirmed that the lump-sum bid price was its intended bid and explained that the total of the prices for the individual items exceeded the lump-sum bid price because the work called for under some of the items overlapped with work called for under other items.

By letters dated June 4 and June 5, Curtiss filed protests with the Housing Authority and our Office, respectively. Curtiss objected to an award to any firm other than itself due to its understanding that an award would be made to an Indian-owned enterprise provided that the bid of such an enterprise was no more than ten percent higher than the lowest bid received. Curtiss argued that since it was an Indian-owned enterprise and since its bid was only eight percent higher than Webb-LKM's bid, it was entitled to the award.

On June 5, the Housing Authority passed a resolution accepting Webb-LKM's lump-sum bid of \$1,162,200 subject to approval by HUD. Approval of the proposed award was made by HUD on June 19.

Subsequently, by letter of June 18, Shipco filed a protest with HUD objecting to an award to Webb-LKM. Shipco contended that Webb-LKM's bid was ambiguous on its face due to the discrepancy between its lump-sum bid and the total of the individually priced items and should not be accepted.

On July 1, the Housing Authority passed a resolution waiving the discrepancy in Webb-LKM's bid as a minor informality. Thereafter, on July 8, Shipco filed a protest with our Office objecting to an award to Webb-LKM due to the apparent error in its bid. The Housing Authority decided on July 10 to make an award to Webb-LKM notwithstanding the protests of Curtiss and Shipco and made award to Webb-LKM on July 14.

JURISDICTION

HUD maintains that we do not have jurisdiction over Curtiss' and Shipco's complaints. First, HUD argues that since procurements made by Indian housing authorities under an ACC clearly are not procurements made "by or for" a Federal agency, they are not subject to review under our Bid Protest Procedures, 4 C.F.R. Part 21 (1981). HUD also argues that procurements conducted by housing authorities under ACCs are not subject to review under our Public Notice entitled "Review of Complaints Concerning Contracts Under Federal Grants," 40 Fed. Reg. 42406 (1975), because they are not funded by grants as defined by the Federal Grant and Cooperative Agreement Act of 1977. HUD asserts that the Federal Grant and Cooperative Agreement Act defines the term "grant" as not including any agreement under which " * * * a subsidy, a loan [or] a loan guarantee * * * is provided." HUD contends that since the assistance under an ACC takes place in the form of a loan or a loan guarantee and also a subsidy over a long period, we do not have jurisdiction under our Public Notice. The agency further argues that the Office of Management and Budget (OMB) has held that an ACC is not a "grant" and that Attachment O to OMB Circular A-102, which is applicable to procurements conducted by local and state governments receiving Federal grant funds, does not apply to procurements conducted by a housing authority under an ACC. Consequently, HUD concludes that we do not have jurisdiction over complaints concerning procurements conducted by housing authorities under an ACC.

We agree with HUD that the procurement is not a direct Federal procurement and thus not reviewable under our Bid Protest Procedures. However, we do not agree that the complaints are not otherwise subject to our review.

The General Accounting Office has the responsibility to "investigate * * * all matters relating to the receipt, disbursement, and application of public funds," 31 U.S.C. § 53 (1976). Pursuant to this authority, we announced in our Public Notice that we would review complaints concerning procurements made by recipients of Federal grant funds. The purpose of that review is to insure recipients of Federal assistance comply with all requirements imposed upon them by the terms of the grant agreement and Federal law or regulation when contracting for goods or services. International Business Machines Corp., B-194365, July 7, 1980, 80-2 CPD 12.

Although the Public Notice was couched in terms of "grants," our statutory authority obviously goes well beyond what is denominated a grant and cannot be circumscribed by a Public Notice which delineated one area in which we would exercise that authority and how we would do so. Thus, even if we read the Public Notice narrowly to apply only to what is called a "grant," we would not be precluded from considering other forms of financial assistance. In issuing our Public Notice, however, we did not intend to limit our review solely to those procurements conducted under agreements designated by the parties as "grants" or to those agreements made pursuant to statutory provisions authorizing Federal agencies to make "grants." Rather, our Notice was intended to cover all agreements, other than contracts resulting from a Federal agency's direct procurement action, which (1) provide for Federal funding and (2) impose upon the recipients certain conditions of payment. Xcavators, Inc., 59 Comp. Gen. (1980), 80-2 CPD 229. Thus, under our Public Notice we have reviewed procurements made by recipients of Federal assistance through a subsidy, see E.P. Reid, Inc., B-189944, May 9, 1978, 78-1 CPD 346, as well as under a cooperative agreement. See Xcavators, Inc., supra. We have, however, generally declined to consider under our Public Notice complaints concerning procurements made under loans since the Federal funds involved are repaid. See Neal & Company, Inc., B-199022, June 19, 1980, 80-1 CPD 434.

The ACC under consideration provided for Federal funding and imposed upon the Housing Authority conditions for the funding. Although HUD is obligated under the ACC to lend the Housing Authority funds covering the cost of project construction or, at its option, to guarantee loans obtained by the Housing Authority from private sources at HUD's direction, HUD's involvement goes well beyond that of a lender or a guarantor. HUD is also obligated under the ACC to make annual contributions to the Housing Authority to reimburse it for the indebtedness incurred (both principal and interest) in building the project. In other words, HUD not only lends the Housing Authority the money necessary to construct the project, but also gives the Housing Authority the money to pay back the loan. The net effect of ACC is that of a substantial outright transfer of Federal funds to the Housing Authority in order to build the project. Thus, unlike a typical loan agreement, the ACC clearly satisfies the first element of what constitutes a reviewable agreement for the purposes of our Public Notice. See Niedermeyer-Martini Co., 59 Comp. Gen. 73, 76 (1979), 79-2 CPD 314. Moreover, under the ACC the Housing Authority is required to comply with all HUD regulations and requirements in developing the project. In particular, the Housing Authority is required both by HUD regulations and the ACC provisions to award the contract for the construction of the project to the "lowest, responsible bidder." 24 C.F.R. § 805.203(c). Thus, the ACC clearly is the type of agreement which is covered by our Public Notice.

Moreover, the fact that Attachment O to OMB Circular A-102, which contains the general guidelines to be followed by grantees in conducting their procurements, does not apply to the type of agreement involved here is irrelevant to the question of our own role in reviewing procurements conducted by recipients of Federal funds pursuant to such an agreement. What is controlling is that the agreement imposes upon the recipient requirements, such as one for competitive bidding, which must be followed in the award of contracts. See International Business Machines Corp., supra. As we have already noted, the Housing Authority is required by the ACC and HUD regulations to use competitive bidding. Consequently, we think our review is appropriate regardless of whether Attachment O applies.

INDIAN-OWNED FIRM AWARD PREFERENCE

Curtiss maintains that it was entitled to the award because it is an Indian-owned firm and its bid was only eight percent higher than the lowest responsive bid received from Webb-LKM. Curtiss states that it was its understanding that an award would be made to an Indian-owned enterprise so long as the bid of such enterprise was no more than ten percent higher than the lowest responsive bid from a non-Indian-owned firm such as Webb-LKM. In support of this understanding, Curtiss points out that the IFB stated:

"Attention is called to the fact that Section 7(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. § 450e(b)) provides preferences and opportunities for training and employment to be given to Indians, and that preferences in the award of contracts and subcontracts be given to Indian organizations and Indian-Owned Economic Enterprises."

The IFB did not specifically provide for a ten-percent preference for Indian-owned enterprises. It merely called attention to the existence of the Act which does not require preferences in all cases but only to the "greatest extent possible." Thus, there is no requirement that preferences for Indian-owned firms be incorporated in every project. In fact, the IFB stated that award would be made "to the responsible bidder submitting the lowest proposal" and made no mention of preferences for Indian-owned firms other than in the quoted general notice. HUD's regulations implementing the preferences set forth in the Indian Self-Determination and Education Assistance Act, do not provide for the use of a ten-percent preference, although they authorize restricting procurements to Indian-owned firms. See 24 C.F.R. § 805.204(a). Since the IFB did not provide for a ten-percent preference and HUD's regulations do not otherwise require such a preference, we see no basis upon which to conclude that Curtiss was entitled to the award.

DISCREPANCY BETWEEN LUMP-SUM PRICE AND TOTAL OF INDIVIDUALLY PRICED ITEMS

Webb-LKM's lump-sum price of \$1,162,200 included \$914,564 for general building construction, \$74,645 for mechanical, \$75,030 for electrical and \$244,155 for off-site work. These sub-items totaled \$1,308,394. On the other hand, Shipco's lump-sum price of \$1,195,200 was the total of the \$866,520 for general building construction, \$179,280 for mechanical, \$77,688 for electrical and \$71,712 for off-site work figures included in Shipco's bid.

Shipco maintains that Webb-LKM's bid was ambiguous on its face due to the discrepancy between the lump-sum bid price and the total of the individually priced items. Shipco contends that where a bid is low under one interpretation but not under another, the bid may not be accepted if the intended bid can only be established by resort to information outside the bid. As the total of the individually priced items contained in Webb-LKM's bid exceeded Shipco's lump-sum bid price and as Webb-LKM's intended bid price could not be ascertained without resort to information outside the bid, Shipco argues that Webb-LKM's bid should not have been accepted.

HUD disputes Shipco's contention that the Housing Authority acted improperly in permitting Webb-LKM to clarify its intended bid. HUD states that "[c]onsistent with the practice in Federal procurement of ascertaining mistakes in bid * * * the contracting officer called [Webb-LKM] to determine whether a mistake has been made because of [the] disparity and to confirm [Webb-LKM's] lump sum bid." HUD contends that we have held that a bidder may confirm a bid "provided that the confirmation is not inconsistent with a reasonable interpretation of the bid submitted * * *." The agency argues that Webb-LKM's explanation that the discrepancy was due to an overlap of work in the various categories listed in the IFB was consistent with the bid as submitted and that therefore Webb-LKM's bid was properly accepted. We believe the Housing Authority erred in accepting Webb-LKM's bid.

The ACC required the Housing Authority to follow all HUD regulations in developing the project. HUD regulations specifically required it to award the contract to the "lowest, responsible bidder." Where competitive bidding is required as a condition to receipt of Federal assistance, certain basic principles of Federal procurement law must be followed by the recipient in award contracts. Copeland Systems, Inc., 55 Comp. Gen. 390, 393 (1975), 75-2 CPD 237. Basic principles of Federal procurement law require that procurement officials treat all bidders fairly and equally. RAJ Construction, Inc., B-191708, March 1, 1979, 79-1 CPD 140. One fundamental aspect of these principles which we have applied to recipients of Federal assistance is that a bidder should not be permitted to decide after bid opening whether its bid is, in fact, the low bid. RAJ Construction, Inc., supra; Likewise, a bid which is subject to two reasonable interpretations may not be accepted if under one interpretation the bid is low and the other it is not. Broken Lance Enterprises, Inc., 57 Comp. Gen. 410 (1978), 78-1 CPD 279. On the other hand, however, where an alleged ambiguity in a bid admits of only one reasonable interpretation substantially ascertainable from the face of the bid, the bid may be accepted. Ideker, Inc., B-194293, May 25, 1979, 79-1 CPD 379, affirmed August 21, 1979, 79-2 CPD 140.

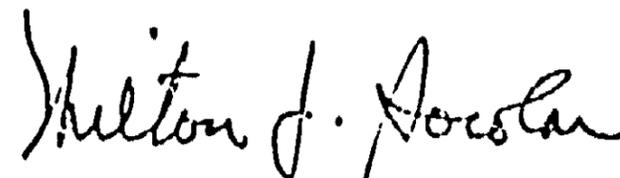
We believe that Webb-LKM's bid is subject to two reasonable interpretations and should not have been accepted because it is the low bid under only one of those interpretations. Although the discrepancy between the lump-sum price and the individually priced items may have resulted for the reason proffered by Webb-LKM, an equally reasonable explanation is that Webb-LKM made a mistake in adding the total of the individual items comprising the lump sum and that the total of individually priced items was the intended bid price. The fact that the individual item prices were not the basis for award does not negate the existence of ambiguity and possible error in the bid. See Broken Lance Enterprises, Inc., supra. Since the ambiguity could not be resolved from the bid itself, but only through a communication with Webb-LKM, Webb-LKM's bid should not have been accepted.

NOTIFICATION OF AWARD

Shipco complains that it was not notified prior to the award as required by Federal Procurement Regulations § 1-2.407-3(b)(4). These regulations are only applicable to direct procurements by Federal agencies. In addition, even if these regulations were applicable to this procurement, the Housing Authority's and HUD's failure to notify Shipco of its plans to proceed with an award notwithstanding the protest would constitute a procedural, not a substantive, defect and would not affect the validity of the award. New Haven Ambulance Service, Inc., 57 Comp. Gen. 361 (1978), 78-1 CPD 225.

CONCLUSION

The complaint of Curtiss is denied; the complaint of Shipco is sustained in part and denied in part. In sustaining the complaint, however, we cannot recommend corrective action for the procurement involved because of the substantial time that has elapsed since contract award. We are, however, advising the Secretary of Housing and Urban Development of the need to inform appropriate personnel of the basic Federal principles which must be followed in HUD-assisted procurements.

for 
Comptroller General
of the United States