The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: International Line Builders

File: B-227811

Date: October 8, 1987

DIGEST

1. Bonneville Power Administration is subject to the bid protest jurisdiction of the General Accounting Office under the Competition in Contracting Act of 1984 (CICA), since Bonneville comes within the statutory definition of a federal agency subject to CICA.

2. The Bonneville Acquisition Guide (BAG), a comprehensive set of procurement guidelines, implements the Bonneville Power Administration's special contracting authority under the Bonneville Project Act of 1937, and vests broad discretion in Bonneville contracting officials to limit competition as necessary. Protest of Bonnevile's decision not to include the protester in a limited competition based on a review of the firm's experience and capabilities is denied where the decision is reasonable and within the scope of the contracting officer's authority under the BAG.

DECISION

International Line Builders protests the Bonneville Power Administration's use of allegedly improper prequalification procedures under invitation for bids (IFB) No. DE-FB79-87BP34684 for the construction of two high voltage transmission lines. International contends that Bonneville's prequalification procedures unduly restrict competition by not providing all responsible sources a reasonable opportunity to qualify, and deny International its right to protection as a small business concern, against a negative capability decision by a procuring activity.

Bonneville challenges both our jurisdiction to resolve International's protest under the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3551 et seq. (Supp. III 1985), and the application of the Federal Acquisition Regulation (FAR) competition requirements to its procurements. Bonneville's arguments do not persuade us that we lack authority to decide the protest. We deny the protest on the merits, however.

040202

BID PROTEST JURISDICTION

Bonneville contends that we lack jurisdiction over International's June 3, 1987 protest1/ because Bonneville has plenary statutory authority regarding all aspects of its procurements, including the exclusive, non-judicial resolution of bid protests under the Bonneville Project Act of 1937 (Bonneville Act), §§ 2(f) and 8(a), 16 U.S.C. §§ 832a(f) and 832g (1982).2/ The Bonneville Act contains Bonneville's principal contracting authority. Section 2(f) provides in part:

> "Subject only to the provisions of this chapter, the administrator [of the Bonneville Project] is authorized to enter into such contracts . . . and to make such expenditures, upon such terms and conditions and in such manner as he may deem necessary."

Section 8(a) provides in part:

> "Notwithstanding any other provision of law, all . . . contracts . . . shall be made after advertising, in such manner and at such times, sufficiently in advance of opening bids, as the

---

1/ We note that on June 23 Bonneville advised us of its decision to award the contract notwithstanding International's protest, and later declined to attend a July 16 bid protest conference in our Office on the ground the conference was inappropriate.

2/ Bonneville also cites two other statutes as relevant to its contracting authority: the Federal Columbia River Transmission System Act, section 11(b), 16 U.S.C. § 838i(b); and the Pacific Northwest Electric Power Planning and Conservation Act, sections 9(a) and 9(b), 16 U.S.C. §§ 839f(a) and 839f(b). The former establishes the Bonneville Power Administration fund authorizing the Administrator to make expenditures without further appropriation and without fiscal year limitation for any necessary purpose including construction of the transmission system; the latter basically authorizes the Administrator to contract in accordance with section 2(f) of the Bonneville Act and otherwise to discharge his administrative and executive functions pursuant to the policy stated in the Bonneville Act.

> administrator . . . shall determine to be adequate to insure notice and opportunity for competition [although advertising is not required for emergency contracts, follow-on contracts and small purchases]."

The enactment of CICA has rendered Bonneville's position regarding its exclusive bid protest jurisdiction untenable. Under the provisions of 31 U.S.C. § 3551(3), our bid protest authority extends to federal agencies as that term is defined in section 3 of the Federal Property and Administrative Services Act of 1949 (Property Act), 40 U.S.C. § 472 (1982). The Property Act defines a federal agency as "any executive agency," and, in turn, defines an executive agency as "any executive department or independent establishment in the executive branch of the Government, including any wholly owned Government corporation." 40 U.S.C. § 472(a). The office of the Administrator of the Bonneville project is an office in the Department of Energy, 16 U.S.C. § 832a, and the Department of Energy is an executive department. 42 U.S.C. § 7131 (1982). Therefore, since Bonneville is under the jurisdiction and control of the Secretary of Energy, 16 U.S.C. § 832a, it follows that Bonneville, albeit a separate and distinct organizational entity within the department, 42 U.S.C. § 7152(a)(2), falls within the above definition. Consequently, our Office has jurisdiction to decide bid protests involving Bonneville procurements.

APPLICABLE LAW

Bonneville contends that it is not subject to the FAR competition requirements because it is bound instead by its own organic legislation as interpreted in the Bonneville Acquisition Guide (BAG). The BAG relies on two decisions of our Office, 46 Comp. Gen. 349 (1966) (opportunity for competition can be limited as deemed necessary by the Administrator) and Bonneville Power Administration, B-114858, July 13, 1976, 76-2 C.P.D. ¶ 36 (discontinuing General Accounting Office review of Bonneville bid protests)3/, as authority for the proposition that Bonneville's procurements are not subject to procurement rules and regulations normally applicable to federal agencies because Congress intended that Bonneville operate like a business and not like a government regulatory body.

3/ This decision was issued when our bid protest jurisdiction, now founded in CICA, was based on our authority to take exception to items in the accounts of certifying and disbursing officers, and recognized that BPA has authority to settle its own claims with finality.

BAG § 1.170. Specifically, Bonneville claims exemption from the competition requirements of the FAR on two grounds: (1) the FAR only applies to acquisitions that use appropriated funds, and (2) FAR competition requirements have their basis in CICA amendments to the Property Act; Bonneville, however, is exempt from the Property Act's coverage because of a pre-CICA amendment to the Property Act, 40 U.S.C. § 474(20).

We find no merit in Bonneville's argument that it is not using appropriated funds to finance its construction program. While Bonneville's funds appear to be generated by rate-payers rather than the result of an annual appropriation by Congress, we do not consider them to be nonappropriated. Where Congress has authorized the collection or receipt of certain funds by an agency and has specified or limited the purposes of those funds, the authorization is a "continuing appropriation" regardless of the fund's private origin. Monarch Water Systems, Inc., 64 Comp. Gen. 756 (1985), 85-2 C.P.D. ¶ 146. Since the Bonneville Act both authorizes the collection and specifies the application of such funds, we find there are enough parameters limiting Bonneville's collection and use of construction funds so that the act constitutes a continuing appropriation.

As to Bonneville's other point, we agree the CICA competition requirements of the Property Act are not applicable to Bonneville's program operation procurements. The Bonneville Act provides that the Administrator's contracting authority is subject only to the provisions of that statute, 16 U.S.C. § 832a(f), and the Property Act defers to the Bonneville Act by providing that nothing in the Property Act shall impair or affect Bonneville's authority with respect to procurement for program operations under the Bonneville Act. 40 U.S.C. § 474(20).

We also agree with Bonneville that it otherwise is not constrained by the FAR's own competition requirements and instead can use its own BAG. The FAR was issued pursuant to the Office of Federal Procurement Policy Act (OFPP Act), 41 U.S.C. § 401 et seq. (Supp. III 1985), which authorizes the Office of Federal Procurement Policy to prescribe government-wide policies to be implemented in a single system of federal procurement regulations. 41 U.S.C. § 405. We find nothing in the OFPP Act, its legislative history, or the FAR, to suggest that the statute and regulations were intended to deny the pre-existing exemption in the Property Act for Bonneville's purchases for its program operations.

In sum, we think that Bonneville can continue to exercise its broad authority through the BAG.

PREQUALIFICATION

International contends that Bonneville's prequalification procedures (1) unduly restrict competition by not providing all responsible sources a reasonable opportunity to qualify, and (2) deny International its right to protection as a small business concern.

The protested procurement involves a project for the exchange of electric power between two regions of the United States in order to take advantage of the regions' differing seasonal peak loads (i.e., when one region has high demand the other region has low demand). Bonneville advises that any delay in the construction could result in revenue losses of about $1 million per day, and that the proposed design involves extraordinary technical difficulties.4/ Bonneville reports that the construction calls for a mix of specialized equipment and skills not widely available in the marketplace.

Bonneville decided that it could best protect its interest by limiting competition pursuant to BAG § 6.270. That provision permits restricting a procurement to specific sources with appropriate capabilities if needed to ensure timely delivery of essential materials or equipment. Bonneville selected potential contractors from a pool of contractors known to Bonneville to have the necessary capabilities. The written determination to limit competition states that use of a limited bidders list will minimize the risk of obtaining "a possibly noncapable contractor."

International objects to Bonneville's determination of contractors' qualifications without affording potential contractors any opportunity to qualify against an announced competitive standard, without any notice to contractors other than those with experience on Bonneville 500 kilovolt projects within the past 5 years, and without any consideration of work done for organizations other than Bonneville. International notes that the record is devoid of any indication that Bonneville tried to determine whether the selected contractors retained the same capabilities that they had when they previously worked for Bonneville.

4/ The difficulties include a crowded corridor, 180 foot "dead-end" towers requiring aerial dead-ending and crossing over existing high voltage lines, danger from induced voltages and high winds, and a complex series of outages which are scheduled with other utilities 2 years in advance.

The record shows that Bonneville evaluated ten contractors, not including International, that had a specified type of experience, and found that three met all of Bonneville's qualification requirements. After the solicitation was issued to the three selected firms, however, International contacted the contracting officer to assert that it also had the desired capability. The contracting officer then had the same panel that had performed the other review evaluate International, but the panel recommended against adding the firm to the list of competitors. The panel decided that neither International nor its predecessor corporation, Power City Construction, had the necessary design experience, or certain other specified experience, and noted that Bonneville had experienced a performance problem in connection with the one contract International held as a prime contractor with Bonneville.

Following International's protest, Bonneville evaluated International again, but refused to impute whatever acceptable experience Power City had to International. Also, after International's July 23, 1987, submission of comments on the bid protest conference, Bonneville sent a letter dated July 28 to International stating in part that Bonneville's pre-protest review of Power City's qualifications had found Power City deficient in three areas of 500 kilovolt experience:

> "(1) work in close proximity to adjacent or crossed lines in excess of 230-kv, (2) aerial deadending of bundled conductors (there are no records or recollections to support your claim of experience during the Townsend-Garrison Schedule II project), and (3) crossing of an energized transmission line of 115-kv or greater."

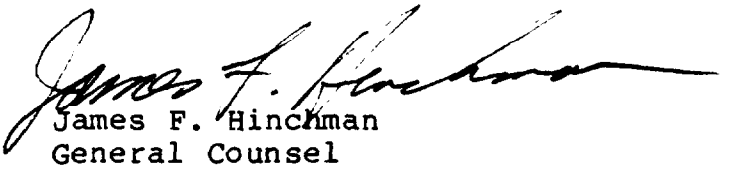
Our review of the record thus shows that Bonneville has reviewed International's qualifications and found them unacceptable and properly has followed the procedures set out in the BAG Subpart 6.2, expressly authorizing the limiting of competition by exclusion of sources. Since we find nothing arbitrary or unreasonable in Bonneville's actions, our Office will not object to the rejection of International as a source. International's disagreement with Bonneville's judgment as to the firm's capabilities does not invalidate it.

We also find no merit in International's contention that Bonneville's procedures improperly deny International its rights to protection under the Small Business Act against negative capability decisions by contracting activities. The BAG only requires referral to the Small Business Administration of the matter of a small business offeror's

responsibility if the offeror otherwise would be in line for the contract award. The BAG authority to limit competition is not directed at precluding any particular firm from an award for responsibility related matters, but is a special method of defining, at the outset of a planned procurement, what the field of competition ought to be.

While we have held that some prequalification approaches do touch on responsibility, and thus necessitate referral to the SBA, see, e.g., Office of Federal Procurement Policy's films production contracting system; John Bransby Productions, Ltd., 60 Comp. Gen. 104 (1980), 80-2 C.P.D. ¶ 419, we find the current situation distinguishable as it involves an agency specifically authorized to conduct commercial-type transactions under a broad statutory grant of authority. Consistent with this authority, BAG § 19.602-70 permits Bonneville's contracting officers, with the concurrence of the Contracts Manager, to forego referring even the usual nonresponsibility determination to the SBA where the critical nature of the acquisition is such that Bonneville cannot relinquish its authority to make responsibility determinations under the Bonneville Act. Since Bonneville has determined this to be a critical procurement, and the protester has not established that Bonneville has acted improperly in doing so, we have no reason to question Bonneville's decision not to refer its determination to exclude International from the procurement to the SBA.

The protest is denied.



James F. Hinchman
General Counsel