

DOCUMENT RESUME

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[Unduly Restrictive Specifications]. B-184562. April 12, 1977. 5 pp.

Decision re: Aspex Corp.; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).

Contact: Office of the General Counsel: Procurement Law II.

Budget Function: General Government: General Property and Records Management (804).

Organization Concerned: Oklahoma Educational Television

Authority; Oklahoma State Board of Public Affairs;

Department of Health, Education, and Welfare.

Authority: Communications Act of 1934 (47 U.S.C. 390 et seq.).

45 C.F.R. 100a.103(b). 45 C.F.R. 100a.103. 45 C.F.R.

100a.105(a). B-184562 (1976). Woolsey v. City of Tulsa, 216

P. 126 (Okla. 1923). Hannon v. Board of Education, 107 P.

646 (Okla. 1909).

Protester alleged that the specifications set forth in the invitation for bids were unduly restrictive. Funds used for the procurement were provided under a grant from HEW. Where Federal grant terms and regulations state that the grantee may use its own procurement policies, the grant complaint is reviewed against State law bearing on the issue. By reserving the right to waive any technical specification to some undefined extent and by providing no definitive criteria for evaluating bids which deviated from the stated specifications, the grantee operated improperly under Oklahoma law. (Author/SC)

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Richard Kleman
Proc. II

DECISION



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

FILE: B-184562

DATE: April 12, 1977

MATTER OF: Ampex Corporation

DIGEST:

1. Where HEW grant terms and regulations reference and include provisions which state that grantee (Oklahoma Educational Television Authority) may use own procurement policies, grant complaint is reviewed against State law bearing on issue.
2. By reserving right to waive any technical specification (written "around" and, in some measure, proprietary to firm awarded contract under grant) to some undefined extent and by providing no definitive criteria for evaluating bids which deviated from stated specifications, grantee operated improperly under Oklahoma law.

The Oklahoma State Board of Public Affairs (State Board) issued an invitation to bid for, among other things, a video tape recorder, to 30 vendors, including the complainant, Ampex Corporation (Ampex). In issuing the invitation, the State Board was acting as the purchasing agent for the Oklahoma Educational Television Authority (OETA), the recipient of the funds used for the procurement which were provided under a grant from the Department of Health, Education, and Welfare (HEW), Office of Education, pursuant to the Communications Act of 1934, 47 U.S.C. § 390, et seq. (1970).

Ampex alleges, inter alia, that the specifications set forth in the invitation to bid were unduly restrictive. The record appears to support the proposition that only a recorder of RCA Corporation, which received the award under the invitation, could have completely met the specifications. Further, OETA informally reserved the right to waive any technical specification for purposes of approving a recorder "equal" in materials, function, and purpose of the specified items. (This right was not contained in the invitation.) This strongly suggests that particular RCA features specified in the invitation to bid were not essential and, consequently, the specifications might very well have been unduly restrictive. Further, by reserving the right to waive any technical specification to some undefined extent and by providing no definitive criteria for evaluating bids which deviated from the stated specifications, OETA, in conducting this procurement, violated principles basic to the concept of meaningful competitive bidding as reflected in Oklahoma law.

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The Director of OETA stated that prior to bid opening, he and the Chief Engineer of OETA spent many hours going over the proposed specifications for the video recorder with the Ampex sales representative from Dallas, Texas. Moreover, the Director and the Chief Engineer encouraged Ampex to submit a bid. They stressed that the price of the machine was very important, and OETA reserved the right to waive any technical specification. According to OETA's Director, the Ampex sales representative expressed no negative comments about the specifications, but instead indicated that Ampex was enthusiastic about the opportunity to bid.

Ampex claims to have received the invitation to bid about 3 weeks before opening. Ampex made no response until 6 days before the scheduled bid opening, when it informed OETA that some of the specifications were either ambiguous or impossible to perform. Moreover, Ampex contended that only RCA could meet all the specifications and, consequently, the specifications were unduly restrictive. Ampex requested a delay in bid opening and an amendment to the specifications which would permit competition.

The Director of OETA claims that, immediately after receiving the complaint, he called Ampex to stress that the invitation specified that "all alternate bids would be considered" and bids which were "or equal" to the specifications would also be considered. He stressed that price was a very important factor, and OETA reserved the right to waive any technical specification. He again urged Ampex to submit a bid.

By letter dated 5 days prior to opening, Ampex stated that it would submit a bid if OETA would approve two of Ampex's recorders as equal to the specifications. The Friday before the Monday opening, OETA responded to Ampex by telephone and telegraph stating that two of Ampex's video recorders would be accepted as equal machines "if equal equipment, materials, function and purpose of the specifications are included * * *." Ampex subsequently stated that it could not meet these conditions, and any bid it might submit would be considered nonresponsive.

Ampex's National Sales Manager also allegedly stated that Ampex did not have time to prepare a bid for the scheduled opening. According to OETA's Director, he informed Ampex's National Sales Manager that the Ampex sales representative in Dallas indicated that he would fly to Ampex headquarters in Redwood City, California, work all weekend to prepare a bid, and fly the bid to Oklahoma City in time for bid opening. The Director of OETA allegedly urged Ampex again to submit a bid.

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Bids were opened and Ampex did not bid.

The Director of OETA stated that:

"In view of the above information, the Authority ruled Ampex's complaint as being invalid and stated that it could not be responsible for the internal problems of a commercial vendor. The OETA recommended that the bid for the video tape recorder be awarded to the lowest and best bidder - RCA."

HEW's notification of grant award in the present case stipulated that 45 C.F.R. Parts 100, 100a, and 153 (1975) governed the performance of the grant. Grantees may use their own procurement policies provided that procurements made in whole or in part with Federal grant funds adhere to certain prescribed Federal standards. See 45 C.F.R. § 100a.101 (1975). For example, the standards require that all procurement transactions be conducted in a manner which will provide for maximum open and free competition, 45 C.F.R. § 100a.103 (1975), and descriptions of technical requirements contained in invitations for bids shall not contain features which unduly restrict competition. See 45 C.F.R. § 100a.104(b) (1975). Under standards similar to these, we reviewed a complaint involving a contract awarded under a grant by HEW against applicable State law bearing on the issue. See Ampex Corporation, B-184562, October 6, 1976, 76-2 CPD 311.

After carefully reviewing the record and based upon our own investigation, we have concluded that, as a practical matter, only an RCA video recorder could have completely met the specifications set forth in the invitation to bid. For example, the headwheel panel assembly specified in the invitation is a proprietary RCA feature. Moreover, the recorder is not available through RCA dealerships or distributorships. It can be purchased only directly from RCA. This conclusion is supported by the failure of OETA or HEW to deny that the specifications were drafted "around" the RCA recorder.

The first issue we face is whether under Oklahoma law, OETA could have properly advertised for a video recorder using specifications which only an RCA recorder could have met.

In Woolsey v. City of Tulsa, 216 P. 126 (Okla. 1923), the City of Tulsa prepared specifications for a new incinerator plant, solicited and evaluated bids on the basis of the specifications, and subsequently awarded a contract to one of the bidders for the construction and installation of the new plant. The plaintiff contended that the City was not authorized to enter into a contract for the purchase and installation of an incinerator plant without first having adopted in advance definite plans and specifications for the type of plant desired.

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The Supreme Court of Oklahoma, in rejecting plaintiff's argument, held that:

"It being the object of the law to secure competition, the board of commissioners must determine in each case what competition the nature of the case will admit, and in good faith the public officials intrusted with the performance of this duty must pursue the best method to secure it. Therefore, if they invite bids for a particular thing or process, they must endeavor to secure the best competition possible in the circumstances of each individual case, and if the thing desired happens to be controlled by one person, or concern, it is obvious to exclude everything else which might be substituted for such exclusively controlled article would be to corruptly destroy the essential purposes for which all statutes providing for competitive bidding were enacted." (Emphasis added.)

Based upon a reading of Wcolsey, supra, we conclude that if other than an RCA recorder could have satisfied OETA's needs, then the invitation to bid, which contained, in some measure, proprietary RCA specifications, would have been improper under Oklahoma law. Unfortunately, the record does not reflect why OETA considered all of the RCA features to be essential to its needs. However, OETA's offer to waive any technical specification strongly suggests that the proprietary and other RCA features were not essential and, consequently, the specifications in the invitation to bid could be considered to have been unduly restrictive.

If the RCA features were essential and considering the fact that the video recorder could be procured only from RCA, OETA should have considered applying to HEW for approval to purchase the video recorder on a negotiated sole-source basis. In this regard, we note that 45 C.F.R. § 100a.105(a)(2) (1975) provides that:

"(a) Procurements may be negotiated by State or local government recipients if it is not practicable or feasible to use formal advertising. Generally, procurements may be negotiated if one or more of the following conditions prevail:

* * * * *

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"(2) The material or service to be procured is available from only one person or firm; all contemplated sole source procurements where the aggregate expenditure is expected to exceed \$5,000 shall be referred to the Commissioner for prior approval;"

The next issue we face is whether under Oklahoma law, OETA could have reserved the right to waive any technical specification.

Oklahoma law requires that solicitations for public contracts contain definite specifications which will permit the evaluation of bids on a common basis. Hannon v. Board of Education, 107 P. 646 (Okla. 1909); Woolsey, supra; Flynn Const. Co. v. Leininger, 257 P. 374 (Okla. 1927). As the Supreme Court of Oklahoma stated in Flynn Const. Co., supra, "* * * all the courts are agreed that competitive bidding means bidding upon the same thing, upon the identical undertaking, upon the same material items in the subject-matter." The purpose of this requirement is to obtain the benefits which flow from competition, to protect the public against collusive contracts, and to prevent favoritism. Hannon, supra; Woolsey, supra.

There seems to be no doubt that the detailed specifications set forth in the invitation to bid under consideration here would have permitted the evaluation of bids on a common basis. However, had Ampex or another bidder submitted a bid which deviated from the specifications, OETA could not have possibly evaluated the bids on a common basis, as required by Oklahoma law.

We note here that the record reflects a concerted effort on the part of OETA to encourage the submission of a bid by Ampex with a reasonable prospect of acceptance for equality purposes. Although OETA may have felt that it was encouraging competition by reserving the right to waive any technical specification, we find that OETA by authorizing deviations from specifications to some undefined extent and by providing no definitive criteria for evaluating the deviations operated improperly under Oklahoma law.

However, since the video recorder has been procured, no meaningful remedial action can be recommended. By letter of today, we are calling the conclusion reached here to the attention of the Secretary of Health, Education, and Welfare to possibly prevent a recurrence.


Deputy Comptroller General
of the United States