

DECISION



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

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FILE: B-179740

DATE: January 3, 1974

MATTER OF: Bartley, Incorporated

DIGEST: Under Federal competitive bidding principles, a bidder on solicitation issued by Federal grantee for construction of classroom building, which fails to submit affirmative action plan with its bid as required by invitation, but which submits properly completed and signed certification stating that bidder will submit affirmative action plan meeting solicitation requirements, has obligated itself to the material requirements of the invitation and, therefore, bid submitted is responsive.

Pursuant to a grant from the Department of Health, Education, and Welfare (HEW), under the Higher Education Facilities Act, Louisiana State University at New Orleans (LSUNO) solicited bids for construction of a multi-purpose classroom building. The solicitation contained a section entitled "BID CONDITIONS-AFFIRMATIVE ACTION REQUIREMENTS-EQUAL EMPLOYMENT OPPORTUNITY," which required bidders to commit themselves to either part I or part II of the bid conditions for each construction trade proposed to be used on the project. Part I involved a commitment to a local affirmative action plan known as the New Orleans Plan, while part II involved a commitment to various goals and specific steps set forth in the conditions. Bidders were required to complete and sign certificates for both part I and part II to establish the required commitments. In lieu of signing the part II certification bidders could submit their own affirmative action plans. Part IV of the bid conditions stated that "Failure to submit a Part I certification and/or a Part II affirmative action plan (or certification), as applicable, will render the bid nonresponsive."

At bid opening on July 26, 1973, it was found that Bartley, Incorporated, had submitted the lowest bid, but had failed to execute the part II certification or submit an alternative plan. HEW subsequently advised LSUNO that Bartley's bid was nonresponsive under HEW's grant regulations requiring competitive bidding in the awarding of construction contracts. See 45 CFR 170.3. Bartley then protested to the General Accounting Office. No award has been made pending resolution of the protest.

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The part I certification required bidders to list the trades it proposed to use to perform work under the contract, and to indicate which of those trades were covered by the New Orleans Plan and which trades were not signatory to that Plan. Paragraph (e) of the certification stated that the bidder "would comply, and require subcontractors * * * to comply * * * with all of the terms and conditions of the New Orleans Plan" for all trades covered by the Plan and that the bidder would "submit an affirmative action plan in accordance with the requirements of Part II of these 'Bid Conditions' for all other trades as set forth in (but not necessarily limited by) paragraph (c) hereof." Paragraph (c) contained the listing of trades not signatory to the New Orleans Plan.

Bartley alleges that by signing the part I certification it became bound, by virtue of paragraph (e) of the certification, to comply with all material requirements of part II of the bid conditions and that its bid therefore must be regarded as responsive. HEW argues that Bartley's bid is nonresponsive because paragraph (e) merely involves a promise to submit the part II commitment, whereas the bid conditions required not a promise but rather the actual submission of the commitment (such as by properly completing the part II certification) with the bid. For the reasons stated below, we believe that Bartley's bid should be considered responsive.

We have consistently held that a bidder's failure to commit itself, prior to bid opening, to affirmative action requirements of a solicitation requires rejection of the bid. 50 Comp. Gen. 844 (1971); B-176328, November 8, 1972; 52 Comp. Gen. 874 (1973). However, we have recognized that a bidder could commit itself to such requirements in a manner other than that specified in the solicitation. 51 Comp. Gen. 329 (1971); B-176260, August 2, 1972; B-177846, March 27, 1973. Furthermore, while statements in solicitations warning bidders that failure to comply with a particular requirement will result in rejection of the bid as non-responsive often establish the materiality of the requirement, see 50 Comp. Gen. 844, supra, the requirement is not necessarily material solely because it is accompanied by that warning. 39 Comp. Gen. 595 (1960); B-174216, December 27, 1971; B-177509, April 13, 1973. Accordingly, the responsiveness of Bartley's bid must be measured not by that firm's failure to sign the part II certification, but rather by its commitment or noncommitment to the solicitation's affirmative action requirements for proposed trades not signatory to the New Orleans Plan.

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As indicated above, paragraph (e) of the certification that Bartley signed provided that Bartley would "submit an affirmative action plan in accordance with the requirements of Part II of these 'Bid Conditions' * * *." The part I certification that Bartley did not sign provided as follows:

" _____ commits itself and subcontractors under it at any tier to an affirmative action plan meeting the criteria set forth in Part II of these 'Bid Conditions' * * *."

While HEW is technically correct when it states that "A commitment to submit an affirmative action plan is not the same as a commitment to the affirmative action plan which is submitted at the time of bidding," we believe that Bartley, by committing itself to submit an affirmative action plan meeting the requirements of part II bid conditions, became bound to all the material, substantive requirements of part II. We see no significant difference, with respect to the contractual obligations that would be enforceable against a bidder upon acceptance of its bid, between the commitment arising from signing the part I certification and the commitment arising from signing the part II certification. Therefore, we think the time of Bartley's submission of its affirmative action plan is a matter of form rather than substance and is not controlling in determining the responsiveness of its bid. Thus, this case differs from the line of cases starting with 50 Comp. Gen. 844, supra, in which bids were regarded as nonresponsive because in those cases commitments to manpower utilization goals and other affirmative action steps were not included with the bids submitted, while here we think Bartley's bid contained the requisite commitment.

HEW refers to our decision at 52 Comp. Gen. 874, supra, in which we held that a bidder's failure to sign the part II certification of the same bid conditions used in the instant case rendered its bid nonresponsive. In that case, however, the low bidder, while signing the part I certification, not only failed to sign the part II certification, but also failed to provide the information called for in the part I certification. Thus, we could not read the signed certification as being a commitment to comply with part II requirements "for all other trades as set forth in * * * paragraph (c) hereof" because there were no trades

set forth in paragraph (c) or in any other paragraph of the part I certification. Here, of course, Bartley certified as to which trades it would use and, with respect to each of those trades, committed itself either to the New Orleans Plan or to the part II affirmative actions provisions.

We think this case is properly controlled by our decision at 51 Comp. Gen. 329, supra. In that case a bidder failed to sign a part I certification, which contained a provision substantially the same as paragraph (e) of the part I certification in the instant case, and also failed to submit with its bid an affirmative action plan as required by part II of the bid conditions. We recognized that signing the part I certification "would expressly have committed the bidder to comply with the provisions of Part II of the bid conditions * * *," 51 Comp. Gen. 329, 332, but that its failure either to sign the certification or submit an affirmative action plan rendered the bid nonresponsive. We also held that the bid submitted by another bidder was responsive, even though a proper affirmative action plan was not included with the bid, because the bidder signed the part I certification and thereby "obligated itself" to the goals and timetables of the part II bid conditions, and that its failure to comply with the part II requirements was "a minor informality which could be waived or cured prior to award." 51 Comp. Gen. 329, 333.

Accordingly, we believe that Bartley committed itself to all the material affirmative action requirements of the solicitation and that Federal competitive bidding principles do not require rejection of its bid.

Deputy


Comptroller General
of the United States