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DECISION



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

[Protest Alleging Improper Rejection of Bid]

FILE: B-199145

DATE: November 28, 1980

MATTER OF: Paul N. Howard Company

CNG 01999

DIGEST:

Low bidder on grantee solicitation should have been allowed to substitute new minority subcontractor in bid after bid opening, since compliance with Minority Business Enterprises requirements in solicitation is matter of responsibility notwithstanding statement in solicitation that it is matter of responsiveness.

Paul N. Howard Company (Howard) filed a complaint against the award of contract S205/S305 to Edward B. Fitzpatrick, Jr. Construction Corporation (Fitzpatrick) by Metropolitan Dade County (MDC), Florida, the recipient of grants from the Urban Mass Transit Authority (UMTA). This contract is for the construction of two line sections of stage 1 of the Metro-Dade Mass Transit System. *DLB05599*
DLG0405
AGC0002?

Essentially, Howard claims that the decision by MDC, concurred in by UMTA, to reject its low bid for failure to comply with the Minority Business Enterprises (MBE) requirements of the solicitation was improper.

The contract specifications established a goal that at least 15 percent of the total value of the prime contract should be awarded to minority business subcontractors. The solicitation required each bidder "as a condition of responsiveness" to submit information showing compliance with the goal or a statement of why it believes it is in compliance with MBE requirements in the event the goal is not fulfilled. The latter statement is required to include a demonstration that:

- "a. it has made every reasonable effort to contact and negotiate with Minority Contractors in an attempt to subcontract

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work, including every reasonable effort to select the portions of the work proposed to be subcontracted, in order to achieve the stated goal;

"b. it was unable, notwithstanding such efforts, to achieve the stated goal because Minority Contractors were not Qualified or were Unavailable; and

"c. it included in its Schedule such proposed agreements as could be made with such efforts."

UMTA approved the provision making the requirement "a condition of responsiveness." This was in accordance with UMTA's regulations which at the time considered MBE requirements to be matters of responsiveness.

In accordance with the terms of the solicitation, before MDC rendered its decision concerning Howard's compliance with the MBE requirements, two preliminary factfinding reviews were conducted. First, a compliance monitor conducted a hearing at which Howard was afforded the opportunity to present evidence establishing its compliance with the requirements. Second, the contracting officer, after considering the compliance monitor's conclusions and after receiving additional information from Howard, submitted a recommendation to the county supervisors, the body having the authority to award the contract.

Viewing compliance with the MBE requirements as a matter of bid responsiveness, MDC adhered to the conclusions of the compliance monitor and the contracting officer and thus determined that Howard was nonresponsive to this requirement. In reaching its conclusion, MDC basically followed the reasoning of the contracting officer. [Howard was found not to have met the 15-percent goal of minority participation.] One of the subcontractors listed by Howard as a participating subcontractor was not committed to perform and this firm only qualified as a minority

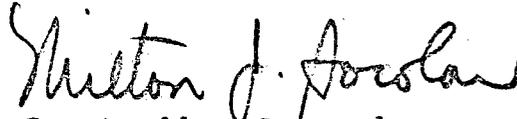
enterprise (when it participated in a joint venture with a minority enterprise)--a fact not known by Howard until well after bid opening. Moreover, MDC concluded that the efforts undertaken by Howard to meet this goal, namely, the mailing of 41 letters to prospective minority subcontractors, which, contrary to the purposes of the solicitation, placed a burden on potential subcontractors to seek participation in the contract for themselves, and the failure of Howard to incorporate into its offer a bid of a responding minority subcontractor received 2 hours prior to bid opening did not constitute a reasonable effort to obtain minority participation. Finally, MDC, knowing that in making a responsiveness determination it is only proper to consider the evidence as presented on the face of the bid, see Werner-Herbison-Padgett, B-195956, January 23, 1980, 80-1 CPD 66, denied Howard's request to substitute a new minority subcontractor for one it previously listed, in order to meet the 15-percent goal of minority participation.

{ We disagree with MDC's assertion that the determination of whether Howard complied with the MBE requirements was a matter of responsiveness. We have previously held that compliance with MBE requirements similar to the requirements in the instant case concerns the issue of responsibility, Mayfair Construction Company, 58 Comp. Gen. 105 (1978), 78-2 CPD 372--an issue which is applicable to grantee procurements. }
Westinghouse Air Brake Company, B-191537, February 15, 1979, 79-1 CPD 109. Moreover, this is so regardless of solicitation language requiring submission of information concerning compliance with the MBE specifications with the bid, because a contracting agency cannot make a matter of responsibility into a question of responsiveness by the terms of the solicitation. Science Applications, Inc., B-193479, March 8, 1979, 79-1 CPD 167; Reliable Building Maintenance Co., B-190167, February 17, 1978, 78-1 CPD 139.

It is well settled that documentation bearing on a bidder's responsibility may be furnished after bid opening. Fischer Berkeley Corporation; International Medical Industries, B-196432; B-196432.2, January 9, 1980, 80-1 CPD 26. Here, however, after

bid opening Howard was not permitted to substitute a new minority subcontractor for one previously submitted to show that it had met the 15-percent goal of minority subcontractor participation. Therefore, since it is our view that compliance with MBE requirements concerns a precondition for performance, see Mayfair Construction Company, supra, and thus pertains to responsibility, MDC should have permitted Howard to substitute a new minority subcontractor in its bid and should have evaluated Howard's proposal accordingly.

However, in view of our limited review of grant procurements, see Zimpro, Inc., B-192388, March 3, 1980, 80-1 CPD 166; Sanders Company Plumbing and Heating, B-196075, February 6, 1980, 80-1 CPD 99, and the fact that MDC's action was made in good faith in reliance upon UMTA's approval of MBE requirements on a responsiveness basis, we will not take any further action other than to alert UMTA and MDC of our view of the matter by copies of this decision for future guidance.



For the Comptroller General
of the United States