

Holden

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DECISION



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

FILE: B-202810

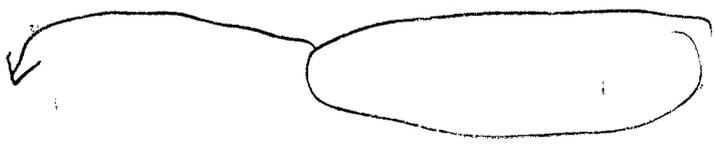
DATE: August 11, 1981

MATTER OF: Whitco Industrial Corp.

DIGEST:

1. Although bidder certified in its bid, as required by IFB, that it was minority business enterprise under District of Columbia Minority Contracting Act agency properly rejected bid, since applicable regulations precluded bidder from competing for procurement in work classification different from that for which it was certified.
2. Solicitation provision which requires bidder to certify that it will perform 50 percent of work with own organization and that 50 percent of subcontracts awarded will be with minority business enterprises, does not establish definitive responsibility criteria, since it specifies performance requirements as contrasted to specific, objective requirements which are preconditions of award.

Whitco Industrial Corporation (Whitco) protests the rejection of its low bid as nonresponsive and the award of a contract to Nutrition, Inc. (Nutrition) under invitation for bids (IFB) 0307-AA-89-0-1-KM issued by the Government of the District of Columbia. Award under the IFB was restricted to certified minority firms. Whitco asserts that the rejection was improper because it is a firm eligible for award under this restricted procurement. Whitco also claims that the contract was improperly awarded to a firm which did not meet the IFB's definitive responsibility criteria. We do not agree with the protester's contentions.



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The solicitation requested bids for frozen fruits and vegetables and was issued by the District under its sheltered market program. The program was established pursuant to the the Minority Contracting Act of 1976 as amended, D.C. Code § 1-851 et seq. (Supp V 1978). Under this law, the District's Minority Business Opportunity Commission (MBOC) certifies qualified, minority firms in advance of solicitation as eligible for participation in the sheltered market program.

The solicitation required a bidder to certify as part of its bid that it was a minority business enterprise, (MBE) and also requested that a bidder enclose a copy of its MBOC certificate. Although Whitco certified that it was a minority business enterprise, the District rejected its bid because the firm was certified only in the "industrial supplies-distributor" work classification and, consequently, could not compete for this food supply contract. The District took this action pursuant to section 300.7 of the MBOC regulations which provide that "MBE's shall be eligible to participate only in those sheltered market program areas for which they are certified."

Whitco contends that it was entitled to the award as the low bidder because the District's action was contrary to its established practice of opening competition to certified MBE's regardless of the work classification for which they are certified as well as being inconsistent with the contracting officer's assurances to Whitco after bid opening that it was eligible for award.

We find no merit to Whitco's position simply because Whitco was not legally entitled to the award. The District's action was consistent with MBOC's regulations which limit MBE participation in the sheltered market program to those work classifications for which such firms are certified. In addition, Whitco's MBOC certificate submitted with its bid warned that "Bidding on Sheltered Market contracts shall be limited to the [indicated] work classification." Consequently, Whitco was on notice of the rule limiting MBE participation in the sheltered market program.

The fact that DGS's action here may have been contrary to DGS' past practices and inconsistent with alleged oral assurances given to Whitco after bid opening is not controlling, since we are not aware of any legal basis to estop an

agency from enforcing regulations which were promulgated pursuant to law. Cf. Klean-Vu-Maintenance, Inc., February 22, 1979, 79-1 CPD 126 (a case concerning oral advice which was inconsistent with the Federal Procurement Regulations).

With respect to Whitco's allegation that the contract was improperly awarded, it is our Office's policy not to review protests against affirmative determinations of responsibility unless either fraud is shown on the part of procuring officials or the solicitation contains definitive responsibility criteria which allegedly have not been applied. See Central Metal Products, Incorporated, 54 Comp. Gen. 66 (1974), 74-2 CPD 64; Yardney Electronics Corporation, 54 Comp. Gen. 509 (1974), 74-2 CPD 376.

In this connection it is Whitco's position that Nutrition doesn't meet the following definitive responsibility criterion set forth in the IFB:

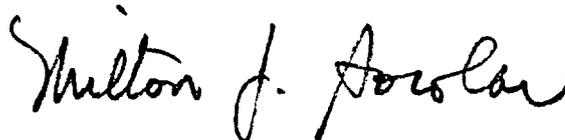
"* * * BIDDER CERTIFIES THAT HE WILL PERFORM AT LEAST 50% OF THE CONTRACTING EFFORT EXCLUDING THE COST OF MATERIALS, GOODS AND SUPPLIES, WITH HIS OWN ORGANIZATION AND RESOURCES, AND IF HE SUBCONTRACTS, 50% OF THE SUBCONTRACTING EFFORT EXCLUDING COST OF MATERIALS, GOODS AND SUPPLIES SHALL BE WITH CERTIFIED MINORITY BUSINESS ENTERPRISES."

It is our view that this clause does not establish a definitive responsibility criterion and therefore we will not review the question of Nutrition's responsibility. Provisions like this one, which state how the work is to be accomplished, are performance requirements which are to be distinguished from requirements which are preconditions of award. Contra Costra Electric, Inc., B-190916, April 5, 1978, 78-1 CPD 268. As we noted in Contra Costra, descriptions of how the work will be accomplished do not become definitive responsibility criteria just because they are stated in detail. In contrast, provisions which establish specific and objective responsibility criteria, compliance with which is a necessary prerequisite to award are definitive responsibility criteria. J. Baranello and Sons, 58 Comp. Gen. 509 (1979), 79-1 CPD 322. For example, a solicitation provision which requires that a bidder or its subcontractor have specific and objective experience in the installation of elevators is a definitive responsibility criterion. George Hyman Construction Company of Georgia; Westinghouse Elevator Company, B-186279, November 11, 1976, 76-2 CPD 401.

Other examples would include a requirement that a contractor's facility be located within a specific distance from the Government facility, Oceanside Mortuary, B-186204, July 23, 1976, 76-2 CPD 74, and that the successful bidder will have a welding certificate and certain symbol stamps, M&M Welding and Fabricators, Inc., B-187573, January 17, 1977, 77-1 CPD 35.

By signing the bid without exception, Nutrition has promised to perform the contract in accordance with its terms. Contra Costra Electric Inc., *supra*. Whether the bidder is capable of performance as it promised is a matter of responsibility. See 41 Comp. Gen. 106 (1961). Further, by making an award to Nutrition, the contracting officer either explicitly or by implication necessarily made an affirmative determination of Nutrition's responsibility. Allison-Hilliard Van & Storage, B-201621, February 9, 1981, 81-1 CPD 82. We will therefore not consider whether Nutrition is capable of performing in accordance with the clause.

The protest is denied in part and dismissed in part.



Acting Comptroller General
of the United States