

**DECISION**

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

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**FILE:** B-213518**DATE:** April 6, 1984**MATTER OF:** A. Metz, Inc.**DIGEST:**

1. Where regulations promulgated by the grantor agency require grantees to assure the opportunity for free, open and competitive bidding when soliciting bids on projects supported by federal funds, grantees must follow certain basic or fundamental principles of federal procurement law.
2. The distinction between responsiveness, i.e., whether a bidder unequivocally offers to provide supplies or services in conformity with the material terms of the solicitation, and responsibility, i.e., whether a bidder has the apparent ability and capacity to perform the contract requirements, is not always easy to draw, and the interpretation of the procuring agency must be carefully considered as it is normally in the best position to set forth what was intended.
3. Where the terms of an IFB are such that the bidder's signature on its bid is sufficient to commit it to meeting the minority business enterprise (MBE) requirements of the IFB, the signed bid is responsive, and a further requirement to submit information which concerns how that commitment would be met--which information could be supplemented after bid opening--relates to the bidder's responsibility.

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4. Bidder who secured, prior to bid opening, potential minority business enterprise subcontractors sufficient to meet goal set forth in invitation for bids (IFB) was not prejudiced by any ambiguity in the IFB as to whether attainment of the goal or a demonstration of the bidder's good faith efforts to do so must occur prior to bid opening or between bid opening and award of contract, because it is inherent in provision permitting award on basis of demonstrated good faith efforts that not every bidder may achieve the goal and because record shows that prior to bid opening awardee had made a good faith effort.

A. Metz, Inc., complains of the award of a contract to Rieth-Riley Construction Co., Inc., under solicitation No. R-14142, issued by the Indiana Department of Highways (IDOH) for repairs of and improvements to U.S. Highway 30 in Porter County, Indiana. The project was funded in part by a grant administered by the United States Department of Transportation, Federal Highway Administration (FHWA). Metz contends that either Rieth-Riley's apparent low bid was nonresponsive to the minority business enterprise (MBE) requirements of the solicitation, or that the solicitation was ambiguous and accordingly should have been canceled. We find the complaint to be without merit.

Pursuant to the requirements imposed by 49 C.F.R. Part 23 (1982) on recipients of financial assistance from the Department of Transportation, IDOH informed bidders in the solicitation for bids that it was the policy of IDOH that MBEs have the maximum opportunity to participate in the performance of any contract awarded under the solicitation and that the MBE requirements of Part 23 applied. 49 C.F.R. § 23.45(g)(2)(ii) requires recipients to set:

"Contract goals on each specific prime contract with subcontracting possibilities, which the bidder or proposer must meet or exceed or demonstrate that it could not meet despite its best efforts."

In its solicitation, IDOH established a goal of 15 percent of contract bid price for subcontracting to MBEs. The solicitation required that the contractor "take positive affirmative actions and put forth good faith efforts to solicit bids from and to utilize Minority Business Enterprise subcontractors," and required bidders to sign a certification that "it is the intention of the Bidder to affirmatively seek out and consider certified minority business enterprises to participate in the contract as subcontractors. . . ." The certification included space for the bidder to list the MBEs with which it had made contact and which had tentatively agreed to perform services under the contract, as well as the nature and dollar value of the services. Immediately above the space for listing tentative MBE subcontractors was the instruction: "Complete the following certification prior to submitting bid. Failure to do so may affect award of contract."

Firms were required to either meet the 15 percent MBE goal or satisfy IDOH that they had made a good faith effort to do so. The certification warned that:

"Should the Bidder fail to comply with the MBE contract provision goal set out elsewhere within this contract proposal and not provide written evidence, satisfactory to the Indiana Department of Highways, as to the reasons for the noncompliance; they shall not be eligible for award of this contract."

The solicitation also provided for an MBE Review Committee, the "primary purpose" of which would be to review the actions taken by a bidder to comply with the MBE goals. The solicitation indicated that the committee:

"will only review the affirmative actions when the apparent low bidder has not been successful in complying with the requirement to name the MBE (WBE) that they intend to

utilize to meet or exceed the dollar goal that was established for that contract. If the prime bidder indicates that he/she cannot meet the goal and that he/she has taken all required affirmative actions, the review of those affirmative actions will automatically be given to the 'MBE Review Committee' within two (2) work days. The 'MBE Review Committee' will review and evaluate all pertinent information relative to the solicitation of MBEs (WBEs) including, but not limited to, copies of correspondence, verbal and written, with responses and copies of all submitted bids on the items which MBEs (WBEs) did bid. Documentation shall be received from prime bidder within five (5) days. Inexcusable delay in submission may be cause to consider bidder nonresponsive." (Emphasis added.)

The solicitation included guidelines for determining whether a good faith effort had been made.

Shortly before bid opening, IDOH and FHWA officials held a prebid conference for prospective bidders on this and other solicitations. Although Metz received notice of the conference, it apparently did not attend the meeting.<sup>1</sup> An IDOH official informed the prospective bidders present at the conference that failure to include a fully completed MBE certification form with their bids would be considered a "technicality" and that the apparent low bidder would be allowed to present additional information after bid opening to show satisfaction of the MBE goals or good faith efforts toward that end. We note that, except for a brief period

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<sup>1</sup> The record is not entirely clear on this point since the president of Metz at one point declared that another employee of the company had attended and state officials have stated that they are unsure of which firms were represented at the conference. However, in the administrative report submitted in response to this complaint, FHWA indicates that Metz chose not to attend, and Metz now denies that any of its employees was present.

of several months in 1980 when solicitations included a clause providing that failure to submit a completed certification with the bid would result in rejection of the bid, past IDOH practice apparently was consistent with the procedures described at the conference.

Rieth-Riley submitted the apparent low bid of \$3,198,924.21, signed the MBE certification and listed in the certification potential subcontracts with four MBEs. The dollar value of these subcontracts, however, amounted to approximately only 9.9 percent of the amount bid and Rieth-Riley neither indicated in its bid that it had made a good faith effort to meet the goal of 15 percent MBE participation nor otherwise described what efforts it might have undertaken in that regard. Metz submitted the apparent second low bid of \$3,262,938.15 and listed in its certification potential subcontracts with MBEs amounting to 15.5 percent of the amount bid.

After bid opening, Rieth-Riley submitted information to the MBE Review Committee as to the extent of the allegedly good faith efforts it had made before bid opening to satisfy the MBE goals. As Metz concedes, Rieth-Riley also submitted at that time the names of additional potential MBE subcontractors sufficient to satisfy the 15 percent goal. The committee thereupon unanimously voted to recommend award to Rieth-Riley.

The committee did not specify whether its recommendation was made solely on the basis of Rieth-Riley's subsequent satisfaction of the 15 percent goal or whether it was also based upon a finding that Rieth-Riley had made good faith efforts before bid opening to obtain MBE participation. We are inclined to think the latter, in view of the facts that the solicitation provided that the "primary purpose" of the committee was to review the affirmative actions taken by the "apparent low" or "prime" bidder to obtain MBE participation when the bidder was unsuccessful in complying with the MBE requirements; that the chairman of the committee had indicated at the commencement of the committee proceedings that the committee would determine whether Rieth-Riley had made a good faith effort to satisfy the MBE goals; that a major focus of the committee proceedings was on the documentation that Rieth-Riley had

supplied in regards to the extent and good faith of its efforts; and that the committee made the notation "Documentation Submitted" in the space provided on an evaluation sheet for comments in response to the question, "Were all MBE's interested in bidding . . . contacted by the prime in sufficient time to allow the MBE's to participate effectively?"

When Metz objected to the MBE Review Committee's recommendation that the contract be awarded to Rieth-Riley, the matter was referred to a hearing officer appointed by the Director of IDOH. After receiving testimony and considering the parties' written submissions, the hearing officer found that:

"2.22 The Record does not support the fact that Rieth-Riley failed to use good faith in attempting to reach the stated MBE goal of 15% in Contract No. R-14142. On the contrary, there exists ample evidence that Rieth-Riley exerted a good faith effort both prior to and following the opening of the bids on June 21, 1983, to reach the 15% goal."

As recommended by the hearing officer, the director thereupon awarded the contract to Rieth-Riley.

Meanwhile, Metz had filed suit in the Jasper Circuit Court, Rensselaer, Indiana, seeking review of the administrative proceedings within IDOH and appropriate injunctive relief. Although the court refused to enjoin award to Rieth-Riley, it did request an advisory opinion from our Office as an aid in rendering its ultimate decision on the merits of Metz's cause of action.

FHWA informs us that U.S. Highway 30 is part of the federal-aid primary highway system, 23 U.S.C. § 103(b)(1) (1982), and that the procurement is in furtherance of a federal-aid highway project. Accordingly, IDOH must assure the opportunity for free, open and competitive bidding, and may only award the contract to the lowest responsible bidder. 23 C.F.R. §§ 635.103 and 635.104(a), as amended by 48 Fed. Reg. 22912 (1983). Therefore, IDOH must follow certain basic or fundamental principles of federal procurement

law. See Linde Construction, B-206442, March 17, 1983, 83-1 CPD 271; Thomas Construction Company, Incorporated, et al., 55 Comp. Gen. 139 (1975), 75-2 CPD 101; see also Concrete Construction Company, B-194077, June 7, 1979, 79-1 CPD 405 (FHWA grantees must comply with those principles of procurement law which go to the essence of the competitive bidding system). One basic principle is that a bid which does not conform to solicitation requirements in all material respects must be rejected as nonresponsive.

Metz alleges that the solicitation required bidders to submit with their bids information demonstrating either (1) that the bidder could satisfy the goal of 15 percent MBE participation or (2) that the bidder had made a good faith effort towards satisfying that goal. Metz argues that this requirement could not be orally waived by any statements of IDOH officials at the prebid conference. The complainant therefore concludes that since Rieth-Riley's bid satisfied neither of these requirements--its listed potential MBE subcontracts amounted to less than 15 percent of the bid price and its bid did not include an account of its subcontracting efforts--the bid was nonresponsive to the MBE requirements in the solicitation. Metz contends that to permit changes after bid opening with respect to MBE compliance would in effect allow submission of a conditional, nonresponsive bid.

Critical to the resolution of Metz's complaint are the concepts of responsiveness of a bid and responsibility of a bidder. Responsiveness concerns whether a bidder has unequivocally offered to provide supplies or services in conformity with the material terms and conditions of the solicitation; responsibility refers to a bidder's apparent ability and capacity to perform the contract requirements. While the responsiveness of a bid must be determined on the basis of the bid as submitted, and not on the basis of information provided after bid opening, requirements bearing on the responsibility of a bidder may be met after opening. See Raymond Engineering, Inc., B-211046, July 12, 1983, 83-2 CPD 83; E. H. Hughes Company, Inc., 61 Comp. Gen. 581 (1982), 82-2 CPD 189. The distinction

between the two concepts is not always easy to draw, and the interpretation of the solicitation advanced by the procuring agency must be carefully considered since that agency is normally in the best position to set forth what was intended. See Raymond Engineering, Inc., supra.

In previous decisions, we have drawn a distinction between those requirements which are directed to the manner in which a bidder proposed to satisfy affirmative action goals set forth in the solicitation and requirements that a bidder commit itself to those affirmative action goals, with the former a matter of responsibility and the latter a matter of responsiveness. Thus, where the bidder was required to list proposed subcontractors in order to permit evaluation of the bidder's ability to meet or to make good faith efforts to meet a specified hiring goal for women and minorities, we found that the requirement for listing was directed to the manner in which the bidder proposed to perform and therefore to the responsibility of the bidder.<sup>2</sup> See Linde Construction, supra; Linde Construction - Reconsideration, B-206442.2, July 13, 1983, 83-2 CPD 85. Likewise, where the solicitation required the bidder to submit information showing compliance with a goal of 15 percent MBE participation or a statement of why it believed it should be considered in compliance with MBE requirements in the event that the 15 percent goal was not satisfied, we

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<sup>2</sup> Generally, a requirement that bidders list subcontractors in their bids involves a matter of responsibility because it relates to the agency's need to evaluate the subcontractors' qualifications or the bidders' ability to meet equal employment opportunity and minority business requirements. Normally, the only time a subcontractor listing requirement will be treated as a matter of responsiveness is when the requirement is intended to prevent "bid shopping," that is, the seeking after award by the prime contractor of lower price subcontractors than those originally considered in the prime contractor's bid. See Titan Southern States Construction Corporation, B-189844, November 15, 1977, 77-2 CPD 371.

found that the requirement for the submission of information concerning compliance with the MBE specifications was a question of responsibility rather than of responsiveness. We did so because we found that the bidder had otherwise committed itself to the MBE goal and that the information sought went to how that commitment would be met. See Paul N. Howard Company, B-199145, November 28, 1980, 80-2 CPD 399, affirmed, 60 Comp. Gen. 606 (1981), 81-2 CPD 42.

By contrast, in a whole series of cases involving procurements of both federal agencies and federal grantees, we found that a bidder's failure to commit itself in its bid to meeting any minority manpower utilization goals, as required by the solicitation, rendered the bid nonresponsive. See, e.g., Sachs Electric Company, 55 Comp. Gen. 1259 (1976), 76-2 CPD 32; 53 Comp. Gen. 874 (1973); 50 Comp. Gen. 844 (1971). The courts have reached a similar result. See Rossetti Contracting Co., Inc. v. Brennan, 508 F.2d 1039 (7th Cir. 1975); Northeast Construction Co. v. Romney, 485 F.2d 752 (D.C. Cir. 1973).

We believe that here the required listing of sufficient potential MBE subcontractors to satisfy the goal of 15 percent MBE participation or a documentation of a good faith effort to achieve that goal relate to how a bidder proposed to fulfill its MBE commitment, i.e., the bidder's responsibility. We reach this conclusion because we find that a bidder, by signing the bid form and the certification, had already effectively committed itself to the affirmative action requirements of the solicitation.

The solicitation, in its special provisions for minority business enterprises, required the contractor to "take positive affirmative actions and put forth good faith efforts to solicit bids from and to utilize Minority Business Enterprise subcontractors" and to "take all necessary and reasonable steps, in accordance with 49 C.F.R., Part 23, to ensure that minority business enterprises have the maximum opportunity to compete for . . . contracts." As indicated above, 49 C.F.R. § 23.45 required the establishment of a percentage goal for MBE participation, here 15 percent, which a firm must either meet or make a good faith effort to meet. In addition, by signing the certification,

a bidder certified its intention "to affirmatively seek out and consider certified minority business enterprises to participate . . . as subcontractors" and agreed that all subcontracting would be in accordance with the MBE certification and that no subcontract could be approved without IDOH review and approval of the contractor's affirmative actions in this regard. We think these provisions clearly committed a bidder to the MBE goal/good faith efforts requirement of the solicitation as well as to the other MBE affirmative action requirements.

Moreover, the solicitation's provision for the submission by the "apparent low" or "prime" bidder to the MBE Review Committee, after bid opening, of information relative to potential MBE subcontractors or to the bidder's good faith efforts to secure MBE participation indicates that these matters must concern bidder responsibility since only information bearing on responsibility may be furnished after bid opening. Information regarding a bidder's commitment to a material contract requirement, *i.e.*, the responsiveness of its bid, cannot be submitted after bid opening. See Raymond Engineering, Inc., supra; Brady Mechanical, Inc., B-206803, June 7, 1983, 83-1 CPD 613. Further, we also note that this interpretation is apparently consistent with IDOH's past and present interpretation of the MBE requirements in its solicitations.

We recognize that under certain solicitations a bidder may be required to evidence at bid opening its commitment to minority participation by means other than a promise to seek out and consider minority participation. Thus, in E. H. Hughes, Inc., supra, which Metz argues supports its position, bidders which failed to commit themselves to 10 percent minority participation were required to submit with their bids a narrative documenting either the "positive efforts" they had taken to encourage MBE participation or an explanation of why they were unable to achieve 10 percent minority participation. We held that the procuring agency could reject as nonresponsive a bid offering only 4 percent minority participation and lacking the requisite explanations. However, the solicitation in Hughes, unlike the solicitation here, specifically provided that the relevant information must be submitted with the bid and that

failure to do so would render the bid "nonresponsive." In addition, in Hughes the solicitation did not provide for the post-bid opening submission of information by the apparently successful bidder to a committee which was to review the adequacy of the firm's efforts to subcontract with MBEs.

Metz also argues that our decision in Guarantee Electrical Company, B-201697, March 18, 1983, 83-1 CPD 276, requires that we consider the satisfaction of the goal of 15 percent MBE participation or the documentation of a good faith effort to achieve that goal to be matters of responsiveness. We disagree. In Guarantee Electrical Company, supra, where the solicitation gave a preference to bids offering at least 33 percent MBE participation and required that each bid include information on MBE participation, we held that a firm which submitted a bid specifically indicating that it did not include any MBE participation could not improve its position by proposing a MBE subcontractor after bid opening. We believe that this holding is consistent with the distinction between a commitment to certain goals and the manner in which a bidder proposes to perform, with only the commitment raising a question of responsiveness. In effect, we found in Guarantee Electrical Company that the bidder had failed to commit itself in its bid to any MBE participation. However, we cautioned that there was nothing improper in allowing a bidder which had proposed MBE participation, i.e., which had committed itself, to complete or correct its supporting information, i.e., to elaborate on the manner in which it proposed to perform, after opening.

Metz also contends that whatever the provisions of the solicitation, the rules of the Indiana Highway Commission, in particular, 120 Indiana Administrative Code § 3-3-12, prohibit Rieth-Riley from satisfying the MBE requirements of the solicitation by submitting relevant information after bid opening. Section 3-3-12 allows a bidder to withdraw or revise a previously submitted proposal if the request for withdrawal or revision is received before bid opening. However, since Rieth-Riley's provision after bid opening of information necessary to a determination of its responsibility did not alter the obligations and commitments

undertaken in the bid it had submitted and therefore cannot be considered to have revised or withdrawn its bid, we fail to see how section 3-3-12 rendered IDOH's actions here improper.

Metz further alleges that FHWA failed to require IDOH to meet the requirements of 49 C.F.R. § 23.45 for requesting MBE information. However, section 23.45 (h)(1)(ii) allows grantees to select the time at which to require submission of MBE information so long as the time for submission is before award, and Metz has neither alleged, nor does the record show, that IDOH permitted Rieth-Riley to submit the required MBE information after award.

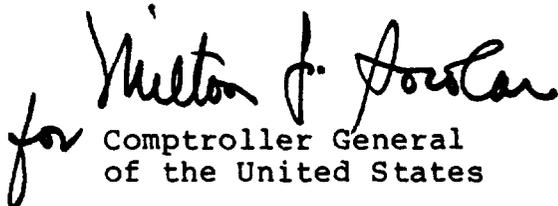
Metz argues that if the solicitation in fact did not require submission of the MBE information before bid opening, then the solicitation was at best ambiguous because it was susceptible of being interpreted as requiring submission before opening. Metz contends that this ambiguity penalized those firms, such as Metz, which submitted with their bids a certification listing potential subcontracts with MBEs amounting to 15 percent or more of the total bid vis-a-vis those firms which did not, because a firm which waits until it becomes the apparent low bidder to secure participation by MBE subcontractors has a better bargaining position with the MBEs, can therefore obtain lower quotations from them, and accordingly, in expectation of this advantage, can initially submit a lower bid. Rieth-Riley's bid was only \$64,013.94 less than that submitted by Metz and Metz estimates that meeting the 15 percent MBE goal in its bid forced Metz to add at least \$125,000 to its bid. Metz therefore contends that, given this prejudice, IDOH should have canceled the initial solicitation and resolicited.

It is a basic principle of federal procurement law that specifications must be sufficiently definitive so as to permit competition on a common basis. Accordingly, specifications must be free from ambiguity. An ambiguity exists if the specifications are susceptible of more than one reasonable interpretation. See EMS Development Corporation, B-207786, June 28, 1982, 82-1 CPD 63. However, the mere existence of an ambiguity, or other deficiency in

the specifications, does not, absent a showing of prejudice, provide sufficient reason to cancel a solicitation and readvertise after bid opening. See Hydro Power Equipment Co., Inc., B-205263, May 17, 1982, 82-1 CPD 466. Metz contends that FHWA failed to require IDOH to evaluate Rieth-Riley's good faith on the basis of Appendix A of 49 C.F.R. part 23 which sets forth guidelines that a recipient "may consider" in determining good faith. Given Metz' challenge in the prior proceedings to the good faith of Rieth-Riley's efforts before bid opening to secure MBE participation, we understand Metz to be arguing that Rieth-Riley did not make a good faith effort before bid opening. Metz is in effect arguing that its bid was higher than that submitted by Rieth-Riley only because an ambiguity as to the MBE requirements led Metz, unlike Rieth-Riley, first to believe that a bidder must before bid opening either secure potential subcontracts with MBEs amounting to 15 percent of the bid or make a good faith effort to do so, and then to act upon that belief to its competitive disadvantage.

We do not believe that Metz has shown the prejudice necessary to justify cancellation. While a bidder which meets the goal of 15 percent MBE participation prior to bid opening may indeed suffer a competitive disadvantage vis-a-vis a bidder only attaining 9 percent MBE participation prior to opening, the possibility of a cost advantage accruing to the latter is inherent in the provisions of the solicitation allowing consideration of a bidder which, while not meeting the 15 percent goal, nevertheless made a good faith effort to do so. Moreover, the hearing officer, in reviewing the actions of the MBE Review Committee, specifically found that the record contained ample evidence that Rieth-Riley had undertaken prior to bid opening the good faith effort which Metz claims it believed was required by the solicitation as an alternative to actually meeting the 15 percent goal and nothing in the record before us leads us to dispute the hearing officer's finding of fact in this regard.

In conclusion, we believe the complaint to be without merit.

  
for Comptroller General  
of the United States