

withhold
30252

DECISION



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

FILE: B-216308

DATE: January 23, 1985

MATTER OF: Richard Hoffman Corporation

DIGEST:

1. Where grantor requires grantee to assure open and free competition when soliciting bids, grantee must follow basic principles of federal procurement law.
2. Where signed bid including provision in standard bid form submitted by bidder constitutes a commitment to meet minority business enterprise requirements of the solicitation, bid is responsive, and a further requirement to submit information concerning how that commitment will be met, relates to bidder's responsibility.

Richard Hoffman Corporation complains of the award of a contract to Alton United, Inc., under invitation for bids (IFB) No. 3037, issued by the Regional Transit Authority (RTA) of Chicago, Illinois, for construction and building renovation work. The project was funded in part by a grant administered by the United States Department of Transportation, Urban Mass Transportation Administration (UMTA). Hoffman contends that Alton United's low bid was nonresponsive because it failed to meet the minority business enterprise (MBE) requirements of the IFB. We find the complaint to be without merit.

The IFB required that bids be made on forms provided by RTA. Article 4.6 of the standard bid form provided:

"As a condition of Award, Contractor agrees to comply with the Minority Business Enterprise* requirements contained in Exhibit I of this Agreement."

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The footnote to Article 4.6 stated:

"Firm(s) claiming to be minority owned and controlled must be certified by RTA or provide evidence of certification by other agency(ies) acceptable to RTA's MBE Section."

Exhibit I of the bid documents established a requirement that 25 percent of the total value of the prime contract be awarded to MBE subcontractors. Exhibit I also required bidders "as a condition of responsiveness" to submit a list of MBE subcontractors proposed to be used to fulfill the 25 percent requirement, showing their names, addresses, and tasks to be performed, as well as a summary sheet showing the amount of the projects to be subcontracted, both in dollars and as a percentage of the total bid price. The list was to be submitted to RTA no later than 5 days before bid opening and the summary sheet was to be submitted with the bid.

Alton United's bid was submitted on the forms provided by RTA and therefore included Article 4.6 and Exhibit I. Prior to submitting its bid, Alton United submitted a list of proposed MBE subcontractors. The bid also included a summary sheet showing a total of 25 percent MBE subcontractor participation. The summary sheet, however, did not have complete names and addresses, and when the percentage of MBE subcontractor participation was recalculated to 2 decimal places, the total was 24.54 percent, rather than 25 percent, of the total bid amount. After bid opening, Alton United furnished complete names and addresses of its proposed MBE subcontractors, at RTA's request, and increased the degree of MBE participation to 25.6 percent of the total bid amount.

Hoffman contends that by originally submitting a summary sheet showing only 24.54 percent MBE participation, Alton United failed to comply with the MBE requirements of the IFR and thus its bid should have been rejected as nonresponsive. We do not agree with Hoffman's assertion that the contents of Alton United's summary sheet related to the responsiveness of its bid.

As a condition of the grant from UMTA, RTA is required to conduct its procurements in a manner that provides maximum open and free competition. Therefore, RTA must follow certain basic principles of federal

procurement law, including the principle that a bid which does not conform to the solicitation requirements in all material respects must be rejected as nonresponsive. See Thomas Construction Company, Inc., 55 Comp. Gen. 139 (1975), 75-2 CPD ¶ 101.

A requirement that bidders submit information with their bids on how they will comply with MBE utilization goals properly may be regarded as a matter of bid responsiveness when a non-complying bidder would not otherwise be found to comply with the MBE provisions. See E. H. Hughes Company, Inc., 61 Comp. Gen. 581 (1982), 82-2 CPD ¶ 189. In contrast, when such a requirement is directed to the manner of compliance with MBE goals to which the bidder has otherwise committed itself in its bid, the requirement is related to the bidder's responsibility. See A. Metz, Inc., B-213518, Apr. 6, 1984, 84-1 CPD ¶ 386. In this case, by signing its bid which included Article 4.6, Alton United committed itself to the MBE utilization requirements in the IFB, wholly independent of the list and summary sheet of MBE subcontractors also required to be submitted either with its bid or prior to submission of the bid. As a result, the summary sheet submission was properly treated as a matter of bidder responsibility, not bid responsiveness. It is well-settled that documents bearing on a bidder's responsibility may be furnished after bid opening. 52 Comp. Gen. 389 (1972); Elco Elevator Corp., B-213519, et al., Feb. 14, 1984, 84-1 CPD ¶ 197. Consequently, RTA acted properly in permitting Alton United to submit after bid opening a summary sheet which included complete addresses and an increased percentage of MBE participation.

We recognize that in RGK, Inc., B-201849, May 19, 1981, 81-1 CPD ¶ 384, concerning a discrepancy in a bid between the solicitation's 4 percent MBE goal and a bidder's MBE summary sheet which showed 3.73 percent MBE participation, our Office did not object to the grantee's rejection of the bid as nonresponsive. In that case, while we noted that in most instances information on such summary sheets is a matter of responsibility, we held that the inconsistent figure on the summary sheet made the bidder's commitment to meet the MBE goal ambiguous and the bid nonresponsive. Here, although Alton United did provide for a lower percentage than required by the solicitation, the difference was much less--24.54 percent out of a 25 percent goal--and we think this is too negligible a difference to cast doubt on that firm's commitment to the MBE goal.

The IFB characterizes submission of the list and the summary sheet as a "condition of responsiveness," and Hoffman maintains that, at a prebid conference, an RTA official indicated that the submissions would be treated as a matter of bid responsiveness. The characterization of the requirement in the IFB and by the agency is not conclusive, however, since the contracting agency cannot make a matter of responsibility into a question of responsiveness by the terms of the solicitation. Paul N. Howard Company, B-199145, Nov. 28, 1980, 80-2 CPD ¶ 399, aff'd, 60 Comp. Gen. 606 (1981), 81-2 CPD ¶ 42. Moreover, by requesting that Alton United supplement its summary sheet after bid opening and allowing Alton United to increase the percentage of MBE participation as well, RTA appears to have treated the submissions as a matter of bidder responsibility which properly could be modified after bid opening.^{1/}

Hoffman also contends that Alton United's bid was nonresponsive because not all the subcontractors it listed were certified as MBEs as required by the IFB. We disagree. Like the other details of MBE participation, use of certified MBEs relates to the prime contractor's compliance with its commitment to the MBE requirements, and thus is a matter of bidder responsibility which may be determined after bid opening. See Paul N. Howard Company, supra. Consistent with this view, the IFB does not require that MBE subcontractors be certified at the time of bid opening; similarly, the Department of Transportation regulations on which the MBE requirement is based, 49 C.F.R. § 23.45(h)(1)(ii) (1983), allow grantees like RTA to select the time at which to require submission of MBE participation information, as long as the time for submission is before award.

Hoffman also argues that Alton United failed to submit the MBE list within 5 days before bid opening as required by the IFB. According to RTA, Alton United's bid was stamped as received by the RTA MBE section on Monday, April 23 at 9:30 a.m., 1 day before bid opening. Since we have decided that the information contained in the MBE

^{1/} Information bearing on a bidder's responsibility may be furnished after bid opening even though the solicitation states that the information must be submitted with the bid. See 52 Comp. Gen. 389, supra.

list related to the bidder's responsibility, it is not relevant whether the list was received before bid opening or even with the bid. As indicated earlier, such information may be accepted any time before the award is made.

Finally, Hoffman contends that the RTA contracting officer acted in bad faith by proceeding with award of the contract to Alton United without prior notice to Hoffman and while Hoffman's protest was pending before RTA. Since we have decided that the award was properly made to Alton United, this contention is moot.

Hoffman's complaint is denied.

Milton J. Fowler
for Comptroller General
of the United States