

DIGEST

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

B-177081

JAN 9 1973

Jess Howard Electric Company
c/o Kincaid, Palmer and Randall
Attorneys at Law
33 North High Street
Columbus, Ohio 43215

Attention: Dean W. Palmer, Esq.

Gentlemen:

We refer to your letter of September 18, 1972, and subsequent correspondence, concerning your protest under Invitation for Bids (IFB) No. DACA31-72-B-0102, issued by the Army Corps of Engineers, Baltimore, Maryland, on May 25, 1972, for the installation of two emergency generators at Gentile Air Force Base in Montgomery County, near Dayton, Ohio.

Paragraph 25, Dayton Plan, of the supplemental Instructions to Bidders of the IFB provided that the requirements of the Dayton Plan (an affirmative action plan for minority manpower utilization in the construction industry in Greene, Miami, Montgomery and Preble Counties, Ohio) applied to the project; that the bidder should therefore submit with his bid, his plan to comply with those requirements; and that failure to submit a plan would render his bid nonresponsive.

The first part of paragraph 26 of the supplemental Instructions also required bidders to submit, within 5 days after a request therefor by the contracting officer, (a) additional information about the construction trades the bidder intended to use on the project; (b) a list of the labor organizations with which the bidder has collective bargaining agreements and which are signatories to the Plan with respect to trades for which specific commitments to goals of minority manpower utilization are set forth in the Plan; (c) a list of labor organizations with which he has collective bargaining agreements and which are not signatories to the Plan or which are signatories thereto but with respect to trades for which no specific commitments to goals of minority manpower utilization are set forth in the Plan; and (d) a list of all current construction work or contracts to which the bidder is a party in the covered area. Paragraph 26 then provided that a bidder should evidence his intention to comply with the requirements for minority hiring in his bid either by certifying that

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he was a signatory to the Plan, or by submitting percentage goals for minority manpower utilization within the following prescribed ranges:

"All Trades

Until 12/31/72	-	5.8%-7%
From 1/1/73 until 12/31/73	-	7 %-8.2%
From 1/1/74 until 12/31/74	-	8.2%-9.4%"

To this end, the IFB contained an "Affirmative Action Plan" form. The form is headed with the following instructions:

"THE BIDDER MUST SUBMIT THIS FORM WITH HIS BID, AND INDICATE HEREON THAT EITHER (a) OR (b) BELOW IS APPLICABLE, THE BIDDER MUST ALSO INSERT HIS MINORITY MANPOWER UTILIZATION GOALS."

By checking block (a), the bidder could certify that he was signatory to the Dayton Plan and that he would comply with the requirements of the contract clause entitled "Local Affirmative Action Plan" during performance of the contract. By checking block (b), a bidder could choose to submit his own minority manpower utilization goals, in which case he was required to insert the percentages of his intended minority manpower utilization in the spaces provided on the form. The IFB further provided that if the bidder's percentage goals were below the prescribed ranges of minority manpower utilization, the bid would be considered nonresponsive and would be rejected.

When bids were opened on June 22, 1972, it was noted that you had submitted the lowest offer for the requirement, and that ABCO Construction Corporation had submitted the second lowest bid. You checked block (b) on the Affirmative Action Plan form of your bid and attached a policy statement dated May 24, 1972, concerning your minority hiring practices. You did not, however, set forth your manpower utilization goals for the project. In view thereof, the contracting officer reports that he considered your bid nonresponsive to the requirement for a statement of percentages for minority utilization goals from bidders who checked block (b) and that he made an award on June 30, 1972, to ABCO, who certified, under block (a) of the Affirmative Action Plan form of its bid, that it was signatory to the Dayton Plan.

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On July 5, 1972, you protested the award to ABCO and sent additional information to the contracting officer concerning the minority hiring practices of your concern, including a chart which gave a breakdown of the number of minority employees of your firm. The record shows that the submission of this data did not change the Department's initial determination that your bid was nonresponsive, and that on September 6, 1972, the General Counsel, Corps of Engineers, denied your protest.

You maintain that the failure of your concern to submit minority hiring goals with your bid should have been waived as a minor irregularity under Armed Services Procurement Regulation (ASPR) 2-405(v1), 12-806(b)(1)(B) and 12-806(b)(2), which are quoted as follows:

"2.405 Minor Informalities or Irregularities in Bids.

A minor informality or irregularity is one which is merely a matter of form or is some immaterial variation from the exact requirements of the invitation for bids, having no effect or merely a trivial or negligible effect on price, quality, quantity, or delivery of the supplies or performance of the services being procured, and the correction or waiver of which would not affect the relative standing of, or be otherwise prejudicial to, bidders. The contracting officer shall either give to the bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid, or, waive any such deficiency where it is to the advantage of the Government. Examples of minor informalities or irregularities include:

* * * * *

"(vi) failure to execute the certifications with respect to Equal Opportunity and Affirmative Action Program, as set forth in 12-806(b)(1)(B) and (2).

"12-806(b)(1)(B) Equal Opportunity (1971 APR)

He has, has not, participated in a previous contract or subcontract subject either to the Equal Opportunity clause herein or the clause originally

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contained in Section 301 of Executive Order No. 10925, or the clause contained in Section 201 of Executive Order No. 11114; that he has, has not, filed all required compliance reports; and that representations indicating submission of required compliance reports, signed by proposed subcontractors, will be obtained prior to subcontract awards. * * *

"12-806(b)(2)

When the contract is for other than construction and is not exempt from the Equal Opportunity clause, the following:

Affirmative Action Program (1970 Aug)

* * * The Offeror certifies that he has, has not, developed and maintained at each of his establishments Equal Opportunity Affirmative Action Programs, pursuant to 41 CFR 60.2."

In this regard, we have held that the information which is required in the certifications set forth in ASPR 12-806(b)(1)(B) and (2), concerning a prospective bidder's previous "equal opportunity" and "affirmative action program" efforts, relates to the bidder's qualifications as a responsible prospective contractor and may therefore be furnished up to the time of award. See B-174307, April 10, 1972; B-174932, March 3, 1972. This holding is clearly consistent with the statement in ASPR 2-405(vi) that the failure to execute the certifications should be regarded as a minor informality.

By contrast, the information required of a bidder who has checked block (b) in the Affirmative Action Plan form of the subject IFB relates to the bidder's agreement to pursue minority hiring goals during contract performance. It is therefore our opinion that such agreement would become a material requirement of the contract against which the contractor's performance would be judged. In view thereof, we believe that the submission of minority hiring goals conforming to the prescribed percentages by such a bidder must be considered a matter of bid responsiveness which is determined at bid opening and, therefore, the bidder's failure to submit acceptable minority hiring goals with his bid cannot be regarded as a minor irregularity under ASPR 2-405(vi), as you contend. See B-176171, August 29, 1972; B-174307, February 8, 1972.

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In this connection, you also maintain that the first part of paragraph 26 of the IFB, outlined above, concerning the right of the contracting officer to request additional information of the bidder, should allow you to submit your minority hiring goals for the project after bid opening. With respect to your argument, we note that the four categories of information listed in the cited provision do not include minority hiring goals as information which could be subsequently requested by the contracting officer. We think the omission (of minority hiring goals from such categories) was clearly in line with the instructions on the Affirmative Action Plan form that a bidder must submit the form with his bid and show thereon (when block (b) is checked) his minority hiring goals. In addition, block (b) specifically states that the bidder "hereby submits the amounts set forth below" as his minority manpower utilization goals. In view thereof, we cannot conclude that paragraph 26 can be reasonably construed as granting such a bidder the right to submit minority hiring goals after bid opening.

You also allege that the IFB was defective because it did not set forth the provisions of the "Local Affirmative Action Plan" clause, nor indicate where a copy of the Dayton Plan could be obtained. The record does not indicate that you made any inquiry of the issuing office in this respect prior to submitting your bid. In any event, Section 20.2 of our Interim Bid Protest Procedures and Standards, as set forth in Title 4 of the Code of Federal Regulations, requires that protests against alleged improprieties in an invitation for bids which are apparent prior to bid opening must be filed prior to bid opening for consideration by this Office. Since these alleged defects were apparent at the time of issuance of the IFB and you did not file your protest until after bid opening, this aspect of your protest is untimely and may not be considered.

You also argue that your present employment practices conform to the IFB's requirements regarding minority hiring goals, and that such conformity should also excuse your failure to submit goals with your bid. At the outset, we note that your bid, while containing a policy statement on your equal employment practices, does not contain a specific commitment to goals of minority hiring which could be enforced as a matter of contractual obligation for the subject project. In view thereof, even if we assume that your present employment practices conform to the minority hiring requirements of the IFB, we cannot conclude that such practices obviated the need for you to submit minority hiring goals as a part of your bid.

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You also maintain that you should have been advised in writing of the contracting officer's determination to reject your bid at the same time the letter of award was sent to ABCO, so that you could have protested the determination prior to the formal signing of the contract. We do not find any merit in this objection since the application of the protest procedures pertaining to the protests filed prior to award, as distinguished from the procedures pertaining to protests filed after award, is not dependent upon the formal signing of the contract. Standard Form 21, on which the bids were submitted, provides that upon written acceptance of the bid, "mailed" or otherwise furnished, the successful bidder will execute the contract forms. Under such circumstances the award to ABCO became effective at the time the award notice was deposited in the mail (45 Comp. Gen. 700 (1966); 49 Comp. Gen. 43 (1970)), and the postaward protest procedures were applicable to any protests filed after that time.

For the reasons set forth above, your protest must be denied.

Very truly yours,

R. F. KELLEY

Deputy Comptroller General
of the United States