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DECISION



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

40358

FILE: B-179950

DATE: January 21, -1974

MATTER OF: Allis-Chalmers Corporation

DIGEST: Under invitation for bids for hydraulic turbines, bidder's failure to complete Equal Opportunity Certification and its insertion of the words "NOT APPLICABLE" under Equal Employment Compliance representation do not render bid nonresponsive, since both provisions relate to bidder responsibility and therefore there is no exception in bid to any material requirement of the IFB. Decisions cited. To extent B-161430, July 25, 1967 is inconsistent with this and the other cited decisions, it will no longer be followed.

Invitation for bids (IFB) No. DACW 67-73-B-0089 was issued by the U.S. Army Corps of Engineers, Seattle, Washington District, for hydraulic turbines and related items for use on a dam project. The IFB contained the standard Equal Opportunity representations provisions and the Equal Employment Compliance provision as required by ASPR 12-806 (b) (3). The low bidder, Hitachi America, Ltd., did not complete the Equal Opportunity representation and inserted the words "NOT APPLICABLE" under the Equal Employment Compliance provision. Allis-Chalmers Corporation, the second low bidder, protested any award to Hitachi on the ground that the low bid was nonresponsive. Award was made to Hitachi during the pendency of this protest on the basis that an existing power crisis in the Pacific Northwest required urgent award of the contract.

The protester first claims that Hitachi's failure to complete the Equal Opportunity provision rendered its bid nonresponsive. That provision states:

"The Offeror represents and certifies as part of his offer that:

* * * * *

"6. EQUAL OPPORTUNITY

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

Hitachi checked the "has" box in the first clause of this provision, but did not check either box in the second part of the provision. Allis-Chalmers claims that Hitachi thereby failed to certify that it had filed all required compliance reports and did not agree to obtain from prospective subcontractors representations regarding submission of compliance reports.

We do not believe that Hitachi's bid can be considered non-responsive because of its failure to complete the Equal Opportunity certification.

The certification is divided into three distinct parts, which are separated from each other by semi-colons. The portion of the certification not completed by Hitachi deals only with previous submissions of compliance reports, and not with what will be required of subcontractors under the contract to be awarded. Thus, Hitachi's failure to submit with its bid a completed Equal Opportunity certification goes not to its obligations under the awarded contract, but to its previous efforts under prior contracts. This is a matter of bidder responsibility rather than bid responsiveness, and therefore the certification may be furnished after bid opening. B-177081 (1), January 9, 1973; B-174307, April 10, 1972; B-174932, March 3, 1972; B-165186, November 7, 1968. In B-161430, July 25, 1967, we held that under the regulations then in effect, which required the equal opportunity information to be furnished "as an initial part of the bid", a bid not containing such information was nonresponsive. Now, however, ASPR 2-405 (vi) specifically provides that failure to execute the Equal Opportunity certification is to be treated as a minor informality. Accordingly, to the extent that B-161430, supra is inconsistent with this and the other cited decisions, it will no longer be followed. Finally, in B-179462, November 16, 1973, which is cited by Allis-Chalmers, the bidder failed to sign the certification which pertained to affirmative action requirements under the contract to be awarded. Therefore, the case is not applicable to the instant situation.

The protester also claims that Hitachi's bid was nonresponsive because it "negated" the Equal Employment Compliance provision, which states:

"3. EQUAL EMPLOYMENT COMPLIANCE (1973 APR) by submission of this offer, the offeror represents that, except as noted below, up to the date of this offer no advice, information, or notice has been received by the offeror from any Federal Government or affiliates or known first-tier subcontractors in violation of any of the provisions of Executive Order No. 11246 of September 24, 1965, Executive Order No. 11375 of October 13, 1967, or rules and regulations of the Secretary of Labor (41 CFR, Chapter 60) and specifically as to not having an acceptable affirmative action program or being in noncompliance with any other aspect of the Equal Employment Opportunity Program. It is further agreed that should there be any change in the status of circumstances between this date and the date of expiration of this offer or any extension thereof, the Contracting Officer will be notified. (ASPR 12-806 (b) (3))"

Hitachi inserted "NOT APPLICABLE" on the line following the text of the provision, and the protester asserts that by doing so, Hitachi excluded the provision from its bid or at least created an ambiguity as to whether the bid included the required representation contained in the provision.

In our opinion, this provision also relates to bidder responsibility and not to bid responsiveness. It is clear that the clause is merely for informational purposes and does not purport to bind the bidder to any course of action or other obligation upon acceptance of the bid. While it does provide that the bidder will notify the contracting officer of any change of circumstances between the date of bid submission and the date of bid expiration, this involves no more than an agreement to furnish information having a bearing on the bidder's responsibility. Accordingly, we do not regard the words "NOT APPLICABLE" in Hitachi's bid as effecting any possible exception to a material requirement of the IFB.

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For the foregoing reasons, the protest is denied.

R. F. Kitten
Deputy Comptroller General
of the United States