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DECISION



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

40351

FILE: B-180324

DATE: January 16, 1974

MATTER OF: Mann Construction Co.; Sargent Construction Co., Inc.

DIGEST: Under solicitation for construction of sanitation facilities in Inyo National Forest which gave notice that bidder must comply with Bid Conditions, Affirmative Action Requirements, Equal Employment, Greater Fresno Area Plan, and that failure to submit Part I certification or Part II affirmative action plan will render bid nonresponsive, bidder who failed to submit Part I certification or affirmative action plan must be regarded as having submitted nonresponsive bid, notwithstanding fact that bidder noted in memorandum attached to bid that it had filed acceptable affirmative action plan for Sequoia National Forest project.

The fact that on Supplement to Standard Form 195 ("Representations and Certifications"), bidder had checked Clause 5, Equal Opportunity, to indicate it had developed and had on file affirmative action programs as required by rules and regulations of Secretary of Labor did not alone make its bid responsive since such action did not commit bidder to Greater Fresno Plan required in performance of subject contract.

On October 10, 1973, invitation for bids No. R5-74-18 was issued by the United States Forest Service, Department of Agriculture, Inyo National Forest, Bishop, California. The invitation solicited bids for the construction of sanitation facilities for Agnew Meadows, Pumice Flat, and Reds Meadow, Inyo National Forest, Madera County, California. By memorandum dated August 30, 1973, all bidders were advised that Bid Conditions--Affirmative Action Requirements--Equal Employment Opportunity, setting forth requirements for affirmative action and equal employment opportunities under the Greater Fresno Area Hometown Plan are included in the solicitation for bids. Also, bidders were advised that to be eligible for award of a contract resulting from this solicitation, a bidder must either (1) complete and submit as part of his bid a certification of

Part I of the aforementioned Bid Conditions or (2) submit as part of his bid a written Affirmative Action Plan as instructed in Part II of the aforementioned Bid Conditions. Standard Form 19B, "Representations and Certifications," was included in the bid package, as was a "Supplement to Representations and Certifications" which, among other things, added the following representation to article 5 of the standard form:

"SUPPLEMENT TO REPRESENTATIONS AND CERTIFICATIONS, SF-19B

"Standard Form 19B, Representations and Certifications, is hereby supplemented as follows:

"Article 5 - Equal Opportunity The following is added and must be completed and submitted in connection with contracts or subcontracts which are not exempt from the Equal Opportunity clause:

"The bidder (or offeror) represents that (1) he has developed and has on file has not developed and does not have on file at each establishment affirmative action programs as required by the rules and regulations of the Secretary of Labor (41 CFR 60-1 and 60-2), or (2) he has not previously had contracts subject to the written affirmative action program requirement of the rules and regulations of the Secretary of Labor."

Six bids were received and opened on October 10, 1973. The lowest bid, including Option 1, in the total amount of \$678,195.50 was received from Sargent Construction Co., Inc. (Sargent). Sargent's bid included the Supplement to Representations and Certifications, SF-19B, 8/73, on which it stated that it had developed, and had on file, affirmative action plans as required. Also, with the bid was a memorandum in which Sargent stated "This company has in effect at this time an affirmative action program on Sherman Pass Road #3 Sequoia National Forest." Sargent did not execute the certificate set out in Part I of the Bid Conditions, and it did not furnish an affirmative action under Part II, at the time it submitted its bid. The next lowest bidder, Mann Construction Company (Mann), submitted a bid, including Option 1, in the amount of \$863,242.15.

Mann protests the making of any award to Sargent on the ground that the corporation was not responsive to the terms of the invitation for bids. Mann points out that Sargent did not include as part of its bid

those documents entitled Bid Conditions--Affirmative Action Requirements--Equal Employment Opportunity. It is the position of the contracting officer that since Sargent had previously submitted an acceptable Affirmative Action Plan on the Sequoia National Forest project which is in effect and operating, the corporation's response to the subject solicitation by referring in a memorandum to the Affirmative Action Plan on the Sequoia National Forest project was adequate, responsive, and in compliance with the Affirmative Action Requirements of the solicitation.

Executive Order 11246, as amended, is the controlling law which empowered the U. S. Department of Labor to formulate and apply the rules and regulations to ensure equal employment opportunity. The Secretary of Labor delegated the implementation of the rules and regulations to the Office of Federal Contract Compliance (OFCC). The implementing regulations established require each Federal agency to include in each construction contract "Bid Conditions" setting forth Affirmative Action Requirements to the particular "City Plan" (in this case, the Greater Fresno Area Hometown Plan) which have the approval of OFCC. The purpose of this requirement is to obtain a firm contractual commitment, between the agency and the contractor, that the provisions of the "City Plan" will be adhered to.

This Office cannot agree with the contracting officer's argument that simply because Sargent was presently working on a Sequoia National Forest construction project under an acceptable Affirmative Action Plan which covered the Greater Fresno area, it was contractually committed, as required by the OFCC regulations and the solicitation, to abide by the Greater Fresno Area Affirmative Action Plan in constructing the projects covered by the subject solicitation. Also, there is nothing in the wording of the memorandum submitted by Sargent with its bid which could constitute a commitment by the corporation to be bound to the Greater Fresno Area Plan in performing the contract to be awarded under the present solicitation.

On the supplement to Standard Form 19B, Sargent had checked Clause 5, Equal Opportunity, to indicate that it had developed and had on file at each establishment affirmative action programs as required by the rules and regulations of the Secretary of Labor.

In 51 Comp. Gen. 329 (1971) and B-174259, January 5, 1972, we considered procurement solicitations which included Affirmative Action Requirements worded similar to the Requirements which are set forth in IFB R5-74-18. In the cited cases, we held that such Requirements are material, and we construed the language used in the solicitations as

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requiring a bidder to commit itself, prior to bid opening, to the Affirmative Action Requirements either in the manner specified in the solicitations or by a separate statement constituting a definite commitment to the Requirements. We therefore further hold that a bidder who fails to make such a prebid opening commitment may not have the deviation waived, nor may the bidder be permitted to correct the deficiency after bid opening so as to render the bid eligible for consideration for award.

In this case, Sargent did not include in its bid, or submit prior to bid opening, the Part I certification required in the Bid Conditions applicable to Sargent. There remains for consideration whether the information which Sargent supplied in the Standard Form 195 representation with respect to Equal Opportunity may be regarded as a commitment to the Greater Fresno Plan which will satisfy the certification requirement in the Bid Conditions.

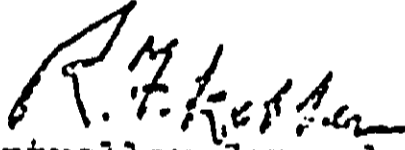
The information which a bidder is requested to furnish with respect to affirmative action programs in the equal opportunity clause on Standard Form 195, as amended by Supplement 8/73, relates to the bidder's past participation on contracts subject to OFCC affirmative action program requirements and to the bidder's compliance with such requirements. Such information, similar to the information requested in the first paragraph of the clause concerning the bidder's participation in previous contracts or subcontracts subject to the equal opportunity clause and the bidder's filing of required compliance reports, relates, in our opinion, to the bidder's qualifications as a responsible, prospective contractor and may therefore be furnished up to the time of award. B-165186, November 7, 1968. There is nothing in the wording of the Standard Form 195 representation, however, which would constitute a commitment by a bidder to be bound to a specific affirmative action plan in performing the contract to be awarded under the present solicitation. Without addition to the representation of language identifying the Greater Fresno Area Plan as a plan to which the bidder is already committed and to which he will continue to be committed in performing the proposed contract, execution of the representation cannot be viewed as compliance with the affirmative action requirements of the solicitation. No such language was incorporated in the representation by Sargent.

In Part III--Materiality and Responsiveness--of the Bid Conditions bidders were advised that "Failure to submit a Part I certification or a Part II affirmative action plan, as applicable, will render the bid nonresponsive." The language used in the Part III provision has been construed in our prior decisions, 50 Comp. Gen. 844 (1971) and B-174932, March 3, 1972, as requiring that when Affirmative Action Requirements

are contained in an IFB they are material and require a bidder to commit itself, prior to bid opening, to the requirements, and in the manner specified in the solicitation. We also held that a bidder who fails to make such a commitment in its bid may not have the deviation waived, nor may the bidder be allowed to correct the deficiency after bid opening in an effort to render the bid eligible for award. B-177509, April 13, 1972.

The contracting officer's second argument, that since Sargent had submitted an acceptable affirmative action plan for the Sequoia National Forest project which was presently being constructed by the corporation for the Forest Service, the agency was aware that Sargent intended to comply with the Greater Fresno Area Plan, is also without merit. As previously stated, the CFCC regulations require Federal agencies to include in each solicitation bid conditions setting forth affirmative action requirements. The fact that Sargent was contractually bound to the Greater Fresno Plan on prior contracts with an agency has no effect on its legal obligations as to future contracts with the same, or other Government agencies. Knowledge by the soliciting agency of bidder compliance with affirmative action requirements is not a substitute for the contractual commitment required of a bidder before it can be considered for award of a contract. B-178339, October 10, 1973.

For the reasons stated, this Office must conclude that Sargent's bid was nonresponsive to a material requirement of the IFB, and it therefore may not be considered for award.


Deputy Comptroller General
of the United States