

DECISION

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

FILE: B-184233
MATTER OF: O. C. Holmes Corporation

DATE: September 23, 1975

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DIGEST:

1. Bidder, who fails to submit, prior to bid opening, affirmative action plan under Part II of Bid Conditions, but who has properly executed and submitted Part I certification wherein bidder "will be bound by the provisions of Part II" for listed appropriate trades to be used in the work, has submitted responsive bid; that pages of Part II were not submitted with bid is of no consequence. Bids containing no Part I or Part II documentation were nonresponsive. Recommendation made that grantor agency, which concluded that all bids were nonresponsive, advise grantee to award contract to bidder who submitted Part I certification.
2. There is no basis to conclude that bidders were unreasonably misled as to affirmative action requirements clearly set forth which were included in IFB containing bidders' schedules, provisions, conditions, drawings and specifications rather than with separate bid packet. Requirements clearly advised that, unless proper documentation was submitted, bid would be considered nonresponsive.
3. That bidder has affirmative action plan filed elsewhere or has agreed to accept standard equal opportunity clause of an invitation does not create the required binding obligation to the affirmative action requirements of present invitation.

Invitation for bids No. 1-7018/002-7 CSWP was issued on May 20, 1975, by the Sonoma County (California) Water Agency for channel improvement of a portion of the Central Sonoma Watershed Project. Substantial financial assistance utilizing grant funds is being provided by the Soil Conservation Service, United States Department of Agriculture, under the Watershed Protection and Flood Prevention Act, 16 U.S.C. § 1001, et seq. (1970).

PUBLISHED DECISION

55 Comp. Gen.

Five bids were received and opened. The O. C. Holmes Corporation (Holmes) objects to any award to the low bidder, the Piombo Corporation, inasmuch as the latter did not include with its bid the pertinent documentation required by the bid conditions containing the affirmative action requirements of the invitation. Part III of those requirements states that "Failure to submit a Part I certification or a Part II affirmative action plan, as applicable, will render the bid nonresponsive." Holmes, the only bidder to submit any documentation under the requirements, a Part I certification, believes that, as second low bidder, it should receive the contract award.

The Soil Conservation Service believes that all bidders who did not submit the proper affirmative action documentation with their bids prior to bid opening--the Piombo Corporation submitted a Part I certification after bid opening--submitted nonresponsive bids. The Service believes the Holmes bid is also nonresponsive since the unions Holmes proposes to employ are not signatory to the Hometown Plan with which the affirmative action requirements call for compliance, and no affirmative action plan was submitted by Holmes under Part II. In view of this, the Soil Conservation Service concludes that all bids should be considered nonresponsive and the requirement readvertised. The contracting officer believes that the low bidder's failure to submit the necessary documentation until after bid opening may be waived as a minor informality, and has asked concurrence of the Soil Conservation Service to award the contract to Piombo.

We have recognized that under contracts made by grantees of Federal funds, the Federal Government is not a party to the resulting contract. However, the cognizant Federal agency has the responsibility to determine whether there has been compliance with the applicable statutory requirements, agency regulations, and grant terms, including a requirement for competitive bidding. In such cases we have assumed jurisdiction in order to advise the agency whether the requirements for competitive bidding have been met. Thomas Construction Company, Incorporated, et al., B-183497, August 11, 1975, 55 Comp. Gen. ____, 75-2 CPD 101; 52 Comp. Gen. 874 (1973).

In the case of Illinois Equal Employment Opportunity regulations for public contracts, 54 Comp. Gen. 6 (1974) 74-2 CPD 1, we made the following statement with respect to the applicability of basic principles of Federal procurement law to awards by grantees:

* * * * *

"We believe that, where open and competitive bidding or some similar requirement is required as a condition to receipt of a Federal grant, certain basic principles of Federal procurement law must be followed by the grantee in solicitations which it issues pursuant to the grant. 37 Comp. Gen. 251 (1957); 48 Comp. Gen., supra. In this regard, it is to be noted that the rules and regulations of the vast majority of Federal departments and agencies specify generally that grantees shall award contracts using grant funds on the basis of open and competitive bidding. This is not to say that all of the intricacies and conditions of Federal procurement law are incorporated into a grant by virtue of this condition of open and competitive bidding. See B-168434, April 1, 1970; B-168215, September 15, 1970; B-173126, October 21, 1971; B-178582, July 27, 1973. However, we do believe that the grantee must comply with those principles of procurement law which go to the essence of the competitive bidding system. See 37 Comp. Gen., supra. * * *"

In our view, these principles apply to this situation. The Project Agreement (containing the terms and conditions of the grant) provided that the invitation shall include Soil Conservation Service requirements and that the Sonoma County Water Agency shall receive, protect and open bids and make award to the lowest qualified bidder, with written concurrence from the Service.

The pertinent portions of the affirmative action requirements in the bid conditions read, as follows:

"For all Federal and Federally-Assisted Construction Contracts to be Awarded in Solano, Napa, Lake, Marin, Mendocino and Sonoma Counties, California.

"Part I: The provisions of this Part I apply to bidders, contractors and subcontractors with respect to those construction trades for which they are parties to collective bargaining agreements with a labor organization or organizations and who together with such labor organization(s) have agreed to the Tripartite Agreement for Equal Employment of Minorities in the Construction Industry for Solano, Napa, Lake, Marin, Mendocino and

Sonoma Counties, California (but only as to those trades for which there are commitments by labor organizations to specific goals of minority manpower utilization) together with all implementing agreements that have been and may hereafter be developed pursuant thereto, all of which documents are incorporated herein by reference and are hereinafter cumulatively referred to as The North Bay Plan or The Plan.

"Any bidder, contractor or subcontractor using one or more trades of construction employees must comply with either Part I or Part II of these Bid Conditions as to each such trade. Thus, a bidder, contractor or subcontractor may be in compliance with these conditions by its inclusion, and participation, together with its union, in the Plan, as to trade 'A,' thereby meeting the provisions of this Part I, and by its commitment to Part II in regard to trade 'B' in the instance in which it is not included in the Plan and, therefore, cannot meet the provisions of this Part I.

"To be eligible for award of a contract under this Invitation for Bids, a bidder who, together with the labor organizations with whom it has collective bargaining agreements, is signatory, either individually or through an association, to the Plan must execute and submit as part of its bid the following certification, which will be deemed a part of the resulting contract:

_____, certifies that:

(Name of Bidder)

(a) it intends to use the following listed construction trades in the work under the contract, either itself or through subcontractors at any tier _____

_____;
(b) the labor organizations with whom it has collective bargaining agreements who are signatories to the Tripartite Agreement for Solano, Napa, Lake, Marin, Mendocino and Sonoma Counties, California (hereinafter the Plan) are as follows: _____

(c) the labor organizations with whom it has collective bargaining agreements who are not signatories to the Plan are as follows: _____

(d) the following is a full list of all present construction work or contracts to which it is a party in any capacity in the counties, to which the Plan is applicable: _____

(e) it will comply, and require its subcontractors to comply, with all of the terms of the Plan on all work (both federal and non-federal) in the counties indicated in the preceding paragraph (d) above, with respect to any trade as set forth in paragraph (b) hereof for which it or its subcontractors are committed to the Plan and will be bound by the provisions of Part II of these Bid Conditions on all work in such counties for all other trades as set forth in paragraph (c) hereof; and (f) in the event the bidder is no longer participating in an affirmative action plan acceptable to the Director of the Office of Federal Contract Compliance, including the Plan, the bidder will comply with Part II of these Bid Conditions.

(Signature of authorized representative of bidder.)'''

* * * * *

The corporate name of Holmes was inserted under "Name of Bidder," names of the various trades it would use under "(a)," the word "None" under "(b) and "(d)," the same trades as in "(a)" under "(c)," and the president of Holmes (who signed the bid) signed in the place designated "Signature of authorized representative of bidder."

Part II of the affirmative action requirements provides:

"Part II: A. Coverage. The provisions of this Part II shall be applicable to those bidders, contractors and subcontractors who in regard to such construction trades:

"1. Are not or hereafter cease to be signatories to the Plan referred to in Part I hereof;

"2. Are signatories to the Plan but are not parties to collective bargaining agreements covering that trade;

"3. Are signatories to the Plan but are parties to collective bargaining agreements with labor organizations who are not or hereafter cease to be signatories to the Plan;

"4. Are signatories to the Plan but as to which no specific commitment to goals of minority manpower utilization by labor organization have been executed pursuant to the Plan; or

"5. Are no longer participating in an affirmative action plan acceptable to the Director, OFCC, including the Plan.

"B. Requirement -- An Affirmative Action Plan. The bidders, contractors and subcontractors described in paragraphs 1 through 5 above will not be eligible for award of a contract under this Invitation for Bids, unless such bidder has submitted as part of its bid, and has had approved by the SONOMA COUNTY WATER AGENCY a written affirmative action plan, embodying both (1) goals and timetables of minority manpower utilization^{1/} and (2) specific affirmative action steps directed at increasing minority manpower utilization by means of applying good faith efforts to carrying out such steps or is deemed to have submitted such a program pursuant to Section 3 of this Part II. Both the goals and timetables, and the affirmative action steps must meet the requirements of this Part II as set forth below for all trades which are to be utilized on the project, whether subcontracted or not."

Our Office has consistently held that where, as here, an invitation for bids makes compliance with affirmative action requirements a matter of bid responsiveness, the failure of a bidder to demonstrate compliance prior to bid opening requires

the rejection of that bid as nonresponsive. 50 Comp. Gen. 844 (1971); 52 Comp. Gen., supra. Piombo's submission of the Part I certification after bid opening is not for consideration since the affirmative action requirements are matters of responsiveness. Weaver Construction Company, B-183033, March 14, 1975, 75-1 CPD 156. Accordingly, we agree with the Soil Conservation Service that the bids of all bidders (except Holmes) who failed to submit Part I or Part II documentation prior to bid opening were non-responsive.

As regards the bid of Holmes, however, we note that the executed Part I certification submitted with its bid stated that "[the bidder] will be bound by the provisions of Part II of these Bid Conditions on all work in such counties [to which the Plan was applicable] for all other trades as set forth in paragraph (c) [completed by Holmes] hereof; * * *." We have recognized that a bidder can commit itself to affirmative action requirements in a manner other than that specified in the invitation. 51 Comp. Gen. 329 (1971); B-176260, August 2, 1972; B-177846, March 27, 1973. Consequently, the responsiveness of the Holmes bid need not be measured by the failure of that firm to submit an affirmative action plan consistent with the goals and timetables of minority manpower utilization and specific affirmative action steps directed at increasing such utilization as outlined in Part II. Rather, the bid is responsive or not as evidenced by the commitment or noncommitment to the Part II plan for proposed trades not signatory to the Part I plan. There can be no question that, under the last quoted provision of the affirmative action requirements, Holmes promised to be bound by the Part II provisions for all trades not subject to the Part I Plan. We do not see how such an obligation to comply with Part II is any less binding than if Holmes had submitted a plan conforming to the Part II provisions. Therefore, notwithstanding the provisions of Part II or Part III that submission of a plan with the bid, where applicable, was a necessary prerequisite to the submission of a responsive bid, we conclude that the Holmes bid should be considered responsive. See Bartley, Incorporated, 53 Comp. Gen. 451 (1974), 74-1 CPD 1 and 51 Comp. Gen., supra, where we reached the same conclusion based on similar affirmative action requirements as were involved here.

The record is unclear as to whether the pages of Part II of the affirmative action requirements were also submitted with the Holmes bid. Whether they were or not is irrelevant to our conclusion.

See 51 Comp. Gen., supra. The decisions cited by the Soil Conservation Service are distinguishable. In John E. Northrop Co., B-181674, August 6, 1974, 74-2 CPD 82, the bidder did not fill out the trades it would use and, consequently, could not be bound to apply any affirmative action plan to any trade. To the same effect, our decision 52 Comp. Gen., supra, is distinguished in Bartley, Incorporated, supra.

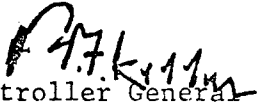
The Soil Conservation Service believes that bidders may have been misled as to what was to be submitted with their bids insofar as the affirmative action requirements are concerned. The bid packets given to interested bidders did not include the affirmative action requirements. These requirements were instead included in the invitation for bids containing schedules, conditions, provisions, drawings and specifications simultaneously given to bidders. In this connection, the Soil Conservation Service notes that after bid opening Piombo stated it believed submission of the bid packet alone was required by the time for bid opening.

While it is unfortunate that all bidders but Holmes failed to submit affirmative action requirement documents, our review of the bid packet and invitation for bids discloses no basis to conclude that bidders were unreasonably misled by the inclusion of the affirmative action requirements only in the invitation. The requirements are clearly set out as a 16-page bid condition following a sample bid schedule and a direction to bidders stating the time of bid opening. In view of the clear pronouncement in Part III of the requirements that a failure to submit documentation showing compliance with Part I or Part II would "render the bid nonresponsive," we can not see how the failure to submit such with the bid may be excused.

Further, the fact that the low bidder may have been a member of the Plan or may have filed affirmative action programs elsewhere does not constitute a commitment that places a binding obligation on it under the present invitation. See B-176328, November 8, 1972. Also, the mere fact that the low bidder or any other bidder has in the past or in the present invitation accepted the basic equal opportunity clause set forth therein is not sufficient evidence to constitute the necessary commitment to the affirmative action requirements. 52 Comp. Gen., supra.

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Accordingly, we recommend that the Soil Conservation Service advise the Sonoma County Water Agency to award the contract to Holmes if that bidder is otherwise responsive and responsible.


Deputy Comptroller General
of the United States