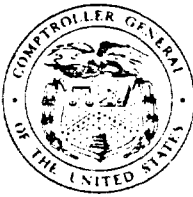


DECISION



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

FILE: B-185212

DATE: July 12, 1976

MATTER OF: Sachs Electric Company

DIGEST:

Bidder which signed Part I certificate as member of Topeka Plan and inserted "Does not apply." under Part II which sets forth requirements for non-members of Topeka Plan is not responsive to affirmative action requirements of solicitation where bidder is not member of Topeka Plan at time of bid opening. Bidder's certification to Part I is not commitment to be bound to affirmative action requirements of solicitation where bid conditions require current membership in Topeka Plan as prerequisite to Government's acceptance of Part I certification.

Sachs Electric Company (Sachs) has protested the rejection of its low bid as nonresponsive to the affirmative action requirements of invitation for bids (IFB) No. GS-06B-13625, issued by the General Services Administration, and the award of a contract to the second low bidder for the construction of an integrated ceiling background system for the new Federal building, courthouse, and parking facility, Topeka, Kansas.

The bid conditions defined the bidder's obligation for performance of all construction work (both federal and non-federal) in the metropolitan Topeka area in that each trade to be utilized was required to be covered by the requirements of the "Topeka Plan" (an affirmative action program for minority manpower utilization in the construction industry in the metropolitan Topeka area), or by the minimum requirements of a detailed affirmative action plan as described in the bid conditions.

In a section of the IFB entitled "Bid Conditions--Affirmative Action Requirements--Equal Employment Opportunity", bidders were required to commit themselves to either Part I or Part II of the bid conditions for each construction trade proposed to be used on the project. Part I involved a commitment to the Topeka Plan, while Part II involved a commitment to the various goals and specific steps set forth in the conditions. In Part III captioned, "Certifications", bidders were to indicate their specific commitment to either Part I or Part II for each trade intended to be used.

The following specific provisions of the bid conditions are relevant:

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"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 organizations have agreed to the Metropolitan Topeka Area Construction Program for equal opportunity (but only as to those trades as to which there are commitments by labor organizations to specific goals of minority manpower utilization)* * *.

* * *

"To be eligible for award of a contract under Part I of this invitation, a bidder * * * must execute the certification required by Part III hereof.

"Part II

"A. Coverage. The provisions of this Part II shall be applicable to those bidders, contractors and subcontractors, who, in regard to those construction trades to be utilized on the project to which these bid conditions pertain:

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

* * *

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

"B. Requirements--An Affirmative Action Plan. The bidders, contractors and subcontractors described * * * above will not be eligible for award of a contract under this invitation for bids, unless it certifies as prescribed in paragraph 2b of the certification specified in Part III hereof that it adopts the minimum goals and timetables of minority manpower utilization * * *.

* * *

"3. Contractors and Subcontractors Deemed to be Bound by Part II. In the event a contractor or subcontractor, who is at the time of bidding eligible under Part I of these Bid Conditions, is no longer participating in an affirmative action plan acceptable to the Director of the Office of Federal Contract Compliance, including the Topeka Plan, he shall be deemed to be committed to Part II of these Bid Conditions.
* * *

"4. Subsequent Signatory to the Topeka Plan. Any contractor or subcontractor subject to the requirements of this Part II for any trade at the time of the submission of his bid who together with the labor organization with whom it has a collective bargaining agreement subsequently becomes a signatory to the Topeka Plan, either individually or through an association may meet its requirements under these Bid Conditions for such trade, if such contractor or subcontractor executes and submits a new certification committing himself to Part I of these Bid Conditions. * * *

"Part III
Certifications

"A. Bidders Certifications. A bidder will not be eligible for award of a contract under this Invitation for Bids unless such bidder has submitted as a part of its bid the following certification, which will be deemed a part of the resulting contract:

BIDDERS' CERTIFICATION

_____ (Name of Bidder) certifies that:

1. it intends to use the following listed construction trades in the work under the contract _____; and

2. (a) as to those trades set forth in the preceding paragraph one hereof for which it is eligible under Part I of these Bid Conditions

for participation in the Topeka Plan, it will comply with the Topeka Plan on all construction work (both federal and non-federal) in the Metropolitan Topeka area within the scope of coverage of that Plan, those trades being: _____, and/or

(b) as to those trades for which it is required by these Bid Conditions to comply with Part II of these Bid Conditions, it adopts the minimum minority manpower utilization goals and the specific affirmative action steps contained in said Part II, for all construction work (both federal and non-federal) in the Metropolitan Topeka area subject to these Bid Conditions, those trades being: _____; and

3. it will obtain from each of its subcontractors and submit to the contracting or administering agency prior to the award of any subcontract under this contract the subcontractor certification required by these Bid Conditions.

(Signature of authorized representative of bidder)

Sachs' bid contained a signed certification with "Electricians, Sheetmetal workers, Teamsters, Carpenters" inserted in paragraphs 1 and 2a. In paragraph 2b of the certification, Sachs inserted "Does not apply." Subsequent to bid opening, the contracting officer learned that Sachs was not a signatory to the Topeka Plan at the time of submission of its bid. The contracting officer, therefore, concluded that the bid was nonresponsive since Sachs was ineligible to certify as a signatory to the Topeka Plan and had not committed itself to Part II.

Sachs contends that its bid was responsive because (1) under the wording of the bid conditions, it was eligible to commit itself to Part I, and (2) in any event, its bid should be read as evidencing a commitment to Part II. We disagree.

Sachs' first contention is based on its prior status (in 1973) as signatory to the Topeka Plan through membership in a trade association. Sachs claims that this prior signatory status is encompassed by the Part I bid conditions which refer to bidders which "have agreed" to the Topeka Plan because, in Sachs' opinion, the term "have agreed" refers to what occurred in the past. However, the verb form "have agreed" is not in the past tense as asserted by Sachs, but rather is in the present perfect tense, which refers to "past action extending to the present." Harbrace College Handbook 74 (5th ed. 1968). Furthermore, we think it is clear from a reading of the bid conditions as a whole that the Part I conditions referred only to bidders which were currently (at time of bid submission) committed to the Topeka Plan. Since Sachs was not so committed, we cannot agree that it could satisfy the requirements of the solicitation merely by committing itself to Part I of the bid conditions.

We have consistently held that a bidder's failure to commit itself, prior to bid opening, to applicable affirmative action requirements of a solicitation requires rejection of the bid. 50 Comp. Gen. 844 (1971); B-176328, November 8, 1972; 52 Comp. Gen. 874 (1973). Because the failure to comply with such requirements is a material deviation, it cannot be regarded as a minor informality which can be waived or corrected. See Veterans Administration re Welch Construction, Inc., B-183173, March 11, 1975, 75-1 CPD 146 and cases cited therein. However, we have recognized that a bidder may commit itself to such requirements in a manner other than that specified in the solicitation. 51 Comp. Gen. 329 (1971); B-176260, August 2, 1972, B-177846, March 27, 1973. Accordingly, what must be determined is whether Sachs' bid can be read as a commitment to Part II since Sachs was not signatory to the Topeka Plan.

We have held that under certain circumstances a commitment to Part II of affirmative action requirements may exist notwithstanding a bidder's failure to complete the certification(s) in accordance with solicitation instructions. For example, in Bartley, Inc., 53 Comp. Gen. 451 (1974), 74-1 CPD 1, the low bidder properly completed a Part I certification (which included a listing of trades covered by the local plan and those not signatory to the plan), but did not execute the separately required Part II certification or otherwise submit an acceptable Part II affirmative action plan. We held that the bid was responsive because the low bidder, by virtue of language in the Part I certification which provided that the bidder would "submit an affirmative action plan in accordance with the requirements of Part II of these 'Bid Conditions' * * *," had committed itself to all material requirements of Part II. We reached a similar result in O. C. Holmes Corporation, 55 Comp. Gen. 262 (1975), 75-2 CPD 174, where the completed Part I

certification provided that "the bidder" will be bound by the provisions of Part II * * * for all other trades as set forth in paragraph (c) * * *" (in which the bidder had listed proposed trades not covered by the local plan). In other cases, involving the same certification as that used in the instant case, we found the requisite commitment to Part II to exist (1) where the bidder listed the trades it intended to use in paragraph 1 of a signed certification, but did not list any trades in either paragraph 2(a) or 2(b), Chicago Bridge and Iron Company, B-179100, February 28, 1974, 74-1 CPD 100, and (2) where the bidder listed trades in paragraphs 1 and 2(b) but did not sign the certification. Pacific West Constructors, B-181608, November 22, 1974, 74-2 CPD 282.

We have also held that where a bidder commits itself to Part I requirements for a trade that is not eligible for a Part I commitment, the bid need not be considered nonresponsive if it also evidences the bidder's commitment to Part II for that trade. Locascio Electric Co., Inc., B-181746, December 13, 1974, 74-2 CPD 338; B-177846, March 27, 1973. In the latter case, the low bidder listed certain trades in paragraph 2(a) of its signed certification and one other trade in paragraph 2(b). None of the trades, however, was eligible for Part I. We found the requisite commitment to Part II to exist for all trades because the bidder submitted its own affirmative action plan which was applicable to all trades and which satisfied all requirements of the Part II bid conditions. In Locascio, which involved the type of certification used in 53 Comp. Gen. 451, supra, rather than the one used here, we stated the following:

"A review of Budin's bid shows that Budin signed the part I certification, and indicated in paragraph (b) thereof that the trades it intended to use--electrical workers, laborers, carpenters, and lathers--were covered by the Nassau-Suffolk Plan. Paragraph (c) of the certification, dealing with trade unions not signatory to the Plan, was left blank. However, we understand from the Department of Commerce that Locascio is correct in asserting that the electrical workers union is not signatory to the Plan. Nevertheless, we believe Budin's bid should be regarded as responsive. Paragraph (e) of the part I certification provides that the bidder will comply with the Nassau-Suffolk Plan 'in any trade as set forth in paragraph (b) hereof for which it or its subcontractors are

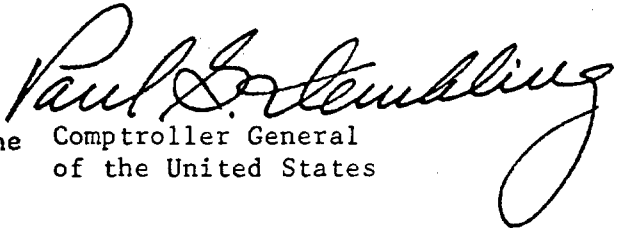
committed to the Nassau-Suffolk Plan and will be bound by the provisions of part II of these Bid Conditions * * * for all other trades as set forth in paragraph (c) * * *.' We have held that a bidder submitting a substantially similar certification is bound to the material provisions of part II notwithstanding the bidder's failure to submit a part II plan with its bid. / citation omitted/ Thus, with respect to electrical workers, Budin's bid would be considered responsive unless the listing of that trade in paragraph (b) rather than paragraph (c) creates doubt as to Budin's intention to be bound to the required affirmative action provision for that trade. In our opinion, it is clear from the bid itself that Budin intended to be bound to either the Nassau-Suffolk Plan or to the part II conditions, as might be applicable, to each trade it would use in performing the contract. This is indicated by paragraph (f) of the signed certification by which Budin agreed to comply with the part II provisions in the event it or its union 'ceases to be a participating signatory to the Nassau-Suffolk Plan.' Since Budin committed itself to part II in the event of subsequent nonparticipation in the Plan by one of its trade unions, and since Budin's completed certification itself reflects an intent to be bound to the solicitation's affirmative action requirements, we think it is clear that Budin is bound to the affirmative action requirements of the solicitation."

Here, Sachs' bid reflects a commitment to the Part I requirements. However, Sachs did not submit a separate Part II affirmative action plan. Neither, because of the certification form used, did it certify its commitment to Part II in the event of "subsequent nonparticipation" in the Topeka Plan. Although the Part II bid conditions did state that a contractor "who is at the time of bidding eligible under Part I" would be deemed to be bound to Part II in the event the contractor "is no longer participating in * * * the Topeka Plan," the record shows that Sachs was not eligible under Part I at the time of bidding and that in any event Sachs specified that Part II "Does not apply." Although the record further shows that Sachs believed, in good faith, that it was eligible for Part I coverage and it may well be that it was only for that reason that Sachs inserted "Does not apply." in paragraph 2(b), we believe that the insertion of those words, at the very least, created doubt as to

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Sachs' commitment to Part II for this procurement. Under these circumstances, therefore, we must conclude that GSA properly rejected the Sachs bid. See 51 Comp. Gen. 329 (1971).

Accordingly, the protest is denied.


For The Comptroller General
of the United States