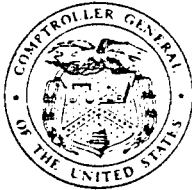


DECISION



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

FILE: B-185572

DATE: August 3, 1976

MATTER OF: Fattore Construction Company

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98757

DIGEST:

1. Bidder's failure to complete appendix A, containing Washington Plan, by signing certificate and inserting goals, renders bid submitted in connection with grant award nonresponsive and may not be corrected or waived as a minor informality or irregularity, even though bid was signed and only applicable trade involved \$4,000 of \$1,298,125 bid.
2. Terms of Washington Plan contemplate commitment of minority hiring by prime contractor and imposition of such commitment upon subcontractors; therefore subcontracting of work for only applicable trade does not permit correction or waiver of prime's failure to make commitment.

Fattore Construction Company (Fattore) has filed a complaint against the rejection of its bid by the Washington Suburban Sanitary Commission (WSSC). The procurement, which involves the construction of a portion of the Anacostia River relief sewer system, is funded in substantial part (75 percent) by a grant from the Environmental Protection Agency (EPA) pursuant to title II of the Federal Water Pollution Control Act Amendment of 1972, Public Law 92-500.

On August 19, 1975, 12 bids were received and opened. The apparent low bidder was Fattore with a bid of \$1,298,125. The second low bid of \$1,336,345 was submitted by Charles F. Smith & Son, Inc. (Smith). Addendum No. 1 to the invitation for bids (IFB) required bidders to fully complete appendix A, which contained the Washington Plan for minority hiring. Fattore failed to enter a minority percentage goal for electricians required for the performance of the contract and also failed to sign appendix A. On October 9, 1975, the WSSC rejected Fattore's bid for failure to properly fill out and execute appendix A.

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Fattore appealed to the EPA Regional Administrator, who on December 4, 1975, sustained the WSSC rejection of Fattore's bid. Fattore thereafter filed a complaint with our Office on December 18, 1975. The contract was awarded by WSSC to Smith on December 31, 1975.

Because this decision is being rendered more than 7 months after the complaint was filed, we believe it is desirable to note the following. By letter dated December 29, 1975, we requested a report on this matter from the EPA. After several months and constant followup, the report had not been received. Our letter of May 6, 1976, asking that the report be expedited, brought the response that the report would be issued in 30 days. The report, without backup material, was finally received on July 2, 1976. The backup material to the file was not received until July 12, 1976.

Initially, in response to the complaint, EPA urges that where, as here, EPA regulations (40 C.F.R. § 8.8(i)) specifically charge it with the responsibility of determining bid responsiveness "insofar as filing of the required equal employment opportunity submissions * * * are concerned * * *" we limit the scope of our review. It is suggested that we should do no more than review whether EPA made the necessary determination as to responsiveness or, in the alternative, confine our review to whether the EPA responsiveness determination was reasonable in relation to other EPA regulations and applicable decisions, and not substitute our judgment for that of EPA.

As EPA recognizes, we issued a Public Notice entitled "Review of Complaints Concerning Contracts Under Federal Grants," 40 Fed. Reg. 42406, September 12, 1975. This notice provides, in pertinent part, as follows:

"* * * consistent with the statutory obligation of the General Accounting Office to investigate the receipt, disbursement, and application of public funds, we will undertake reviews concerning the propriety of contract awards made by grantees in furtherance of grant purposes upon request of prospective contractors.

"It is not the intent of the General Accounting Office to interfere with the functions and responsibilities of grantor agencies in making and administering grants. Prospective contractors

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are urged to seek resolution of their complaints through regular administrative channels prior to making a complaint with GAO. The purpose of our reviews will be to foster compliance with grant terms, agency regulations, and applicable statutory requirements * * *."

Consistent with the foregoing, we have undertaken a review of the subject complaint and our decision follows.

The sole issue for decision is whether the bid of Fattore, as submitted, was responsive to the IFB. Fattore contends that appendix A, in this instance, need not be filled out because:

1. When Fattore signed the bid, it agreed to be bound by all the terms and conditions contained in the bid package including appendix A.
2. Only one skill category under this contract is covered by the Washington Plan (i.e., electricians). Therefore, the theory of de minimus should apply as an estimated \$4,000 out of a total bid of \$1,298,125 is for electrical work.
3. The electrical work will "probably" be subcontracted because of the local licensing requirements.

The arguments presented by Fattore have been previously considered by this Office under our bid protest review authority and will be discussed in the context of those cases. For the reasons that follow, the complaint is denied.

Appendix A gave notice to the effect that: "TO BE ELIGIBLE FOR AWARD OF THE CONTRACT, EACH BIDDER MUST FULLY COMPLY WITH THE REQUIREMENTS, TERMS AND CONDITIONS OF THIS APPENDIX A." (Emphasis in original.) Section 1 of the Requirements, Terms, and Conditions of appendix A states:

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"A bidder who fails or refused to complete or submit such goals shall not be deemed a responsive bidder and may not be awarded the contract or sub-contract, but such goals need be submitted only for those trades to be used in the performance of the Federally involved contract. In no case shall there be any negotiation over the provisions of the specific goals submitted by the bidder after the opening of bids and prior to the award of the contract."

Further, section 3 thereof states:

"The contractor's or subcontractor's goals established within the above ranges shall express the contractor's or subcontractor's commitment of the percentage of minority personnel who will be working in each specified craft on each of his projects (whether Federally involved or otherwise) within the Washington SMSA during the term of the covered contract." (Emphasis supplied.)

In 52 Comp. Gen. 874 (1973), we stated:

"We have consistently held that the failure of a bidder to commit itself, prior to bid opening, to affirmative action requirements of a solicitation requires rejection of the bid. 50 Comp. Gen. 844 (1971); B-176487, September 28, 1972; B-176328, November 8, 1972. We have also recognized that a bidder could commit itself to such requirements in a manner other than that specified in the solicitation, and that a bidder's failure to meet the literal requirements of an IFB could be waived so long as it was otherwise fully bound to the material affirmative action provisions. B-176260, August 2, 1972; 51 Comp. Gen. 329

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(1971). However, we have not held that a bidder commits itself to affirmative action requirements of a solicitation merely by signing the bid when the IFB requires something more. See B-176328, supra; Northeast Construction Co. v. Romney, Nos. 71-1891 and 71-1893, March 6, 1973 (D.C. Cir. 1973)." (Emphasis supplied.)

Fattore cites Pacific West Construction, B-181608, November 22, 1974, 74-2 CPD 282, for the proposition that a bidder need not sign the Washington Plan in order to indicate its commitment to the affirmative action plan. The case is easily distinguished since in Pacific the IFB did not require that a commitment to the affirmative action plan be manifested by a signature on the form. The commitment had only to be evidenced by listing all covered trades in the certificate, which the bidder had done. Here, the appendix, read as a whole, is quite specific that the bidder must indicate its commitment by signing appendix A and submitting goals. Accordingly, Fattore's failure to sign appendix A and failure to include the specified goal for the electrical trade indicating its commitment, rendered the bid nonresponsive. 52 Comp. Gen. 874, supra.

Fattore argues that its failure to complete appendix A was de minimus as only an estimated \$4,000 of the total bid price of \$1,298,125 related to the only covered trade (electricians). Therefore, Fattore seeks correction or waiver of this deficiency as a minor informality or irregularity. The document submitted by Fattore did not contain the required signature or minority percentage goals and was not therefore properly completed. Appendix A specifically states that the missing data goes to the responsiveness of the bid, which cannot be corrected after bid opening. See 50 Comp. Gen. 844 (1971); Northeast Construction Company v. Romney 485 F.2d 752 (1973); Rossetti Contracting Company Inc. v. Brennan, 508 F.2d 1039 (1974). In Rossetti, a case involving similar circumstances, the court specifically concluded that the omission of such data rendered the bid non-responsive and not subject to correction or waiver as a minor informality or irregularity.

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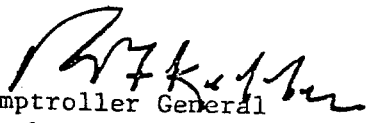
Section 8 of the Requirements, Terms and Conditions of appendix A requires that:

"* * * Whenever a prime contractor or subcontractor subcontracts a portion of the work in any trade designated herein, he shall include in such subcontract his commitment made under this Appendix, as applicable, which shall be adopted by his subcontractor, who shall be bound thereby and by this Appendix to the full extent as if he were the prime contractor. * * *"

We have interpreted this language to require prime contractors to make the commitment initially, and in turn, impose the requirement upon its subcontractors. Peter Gordon Co., Inc., B-185300, March 3, 1976, 76-1 CPD 153. While Fattore states that the electrical work probably would be subcontracted because of the local licensing requirement, this does not provide a basis for correcting or waiving the deficiency.

Under the circumstances stated above, Fattore's failure to complete appendix A rendered its bid nonresponsive and it was properly rejected.

Deputy


Comptroller General
of the United States