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DECISION



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

FILE: B-18734b

DATE: November 17, 1976

MATTER OF: Ed-Mor Electric Co., Inc.

DIGEST:

1. Where invitation for bids' affirmative action requirements included Bidders' Certification of compliance with such requirements, failure to submit certification at time of bid opening rendered bid nonresponsive.
2. Late bid modification lowering price of low bid and correcting nonresponsiveness of that bid may not be accepted as late modification lowering price is acceptable only where low bid is responsive as submitted.
3. Nonresponsive bid may not be accepted even though it would result in monetary savings to Government as acceptance would be contrary to maintenance of integrity of competitive bidding system.

Ed-Mor Electric Co., Inc. (Ed-Mor), the apparent low bidder on the General Services Administration invitation for bids for the award of contract No. GS-01B-01590, was determined to have submitted a non-responsive bid because it failed to complete and submit with its bid the "Bidders' Certification" for the affirmative action requirements of the invitation. Award of the contract was made to the second low bidder notwithstanding the protest filed with our Office.

Ed-Mor protests the finding of nonresponsiveness on the bases that its failure to submit the certification with its bid was merely a "minor mechanical inadvertent omission" which could have been corrected prior to contract award and that it submitted after bid opening a bid modification which reduced its bid by \$5,000 and included the certification, and which should have been accepted by the Government pursuant to the invitation provisions.

Bidders were advised by several provisions in the invitation, including that quoted below, that any bid not accompanied by the aforementioned certification at the time of bid opening would be rejected as nonresponsive. To meet this requirement a bidder had simply to complete the following certification:

"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

_____ certifies that:
(Bidder)

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 New Haven Plan, it will comply with the New Haven Plan on all construction work (Both federal and non-federal) in the Greater New Haven area with the scope of coverage of that Plan, those trades being:

DO NOT COMPLETE THIS ITEM 2(a). BIDDERS MUST CERTIFY UNDER ITEM 1 ABOVE AND ITEM 2(b) BELOW, ONLY.

(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 Greater New Haven Area subject to these Bid Conditions, those trades being: _____

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

(Signature of authorized representative of Bidder)

* * * * *

C. Materiality and Responsiveness. The certifications required to be made by the bidder pursuant to these Bid Conditions is material, and will govern the bidder's performance on the project and will be made part of his bid. Failure to submit the certification will render the bid nonresponsive."

Membership in the New Haven Plan was not acceptable alone as the Department of Labor had withdrawn recognition of that plan.

Our Office has consistently held that where, as here, an invitation for bids makes compliance prior to bid opening with affirmative action requirements a matter of bid responsiveness, even the inadvertent failure of a bidder to demonstrate compliance prior to bid opening requires the rejection of that bid as nonresponsive. 50 Comp. Gen. 864 (1971); 52 Comp. Gen. 874 (1973); John E. Northrop Co., B-181674, August 6, 1974, 74-2 CPD 82; O. C. Holmes Corporation, B-184233, September 23, 1975, 75-2 CPD 174. The submission of the certification after bid opening is not for consideration since the affirmative action requirements are matters of responsiveness to be determined at bid opening. Weaver Construction Company, B-183033, March 14, 1975, 75-1 CPD 156.

However, Ed-Mor contends that submission of the certification after bid opening is permissible under clause 7 of the invitation Instructions to Bidders, which reads:

"7. Late Bids, Modifications of Bids, or Withdrawal of Bids

* * * * *

"(d) * * * a late modification of an otherwise successful bid which makes its terms more favorable to the Government will be considered at any time it is received and may be accepted."

The contention of Ed-Mor is based upon an erroneous reading of this provision. In order that a late modification may be accepted, the bidder must have submitted an "otherwise successful bid." The bid of Ed-Mor as submitted was nonresponsive, and thus not "otherwise successful." To permit Ed-Mor to modify its bid so as to make it responsive would compromise the integrity of the competitive bidding system by making it possible for Ed-Mor to decide after bid opening whether or not to make its bid acceptable. B-166482, May 5, 1969; B-170290, September 2, 1970.

As regards the contention that the Government should accept the Ed-Mor bid, as modified, because the savings in price make such acceptance in the best interest of the Government, the maintenance of the integrity of the competitive bidding system is more in the best interest of the Government than any monetary savings that might be had in any particular case. A. D. Roe Company, Inc., 54 Comp. Gen. 271 (1974), 74-2 CPD 194.

Finally, Ed-Mor notes that the copy of the bid of the second low bidder, which it received with its copy of the administrative report to our Office, did not disclose that the second low bidder submitted a bid bond. Consequently, Ed-Mor believes that the award made was improper. We have been advised that a proper bid bond was submitted prior to bid opening and that a copy of it was not forwarded to our Office with the administrative report because that issue was not involved in the protest.

Accordingly, the protest is denied.

Deputy


Comptroller General
of the United States