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**DECISION**



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

FILE: B-190572

DATE: March 30, 1978

**MATTER OF:**

Armor Elevator Company, Inc.

**DIGEST:**

1. Protest filed more than 10 days after bid opening is not untimely where protester knew of grounds for protest only after it learned of award to competing bidder.
2. Failure of bidder to complete bid appendix by listing minority manpower utilization goals does not make bid nonresponsive where bidder signed appendix and placed notation on cover of appendix that it planned "to fully comply" with Affirmative Action Plan provisions, which under circumstances is viewed as constituting commitment to such provisions.

Armor Elevator Company, Inc. (Armor) of Louisville, Kentucky, through its counsel, protests the award of a contract by the Public Buildings Service, General Services Administration, Region 3 (GSA), to Warfield & Sanford, Inc. (Warfield) to replace elevators and do associated work at the Home Owners Loan Corporation building in Washington, D.C., under invitation for bids (IFB) number GS-00B-02722. Warfield was the low bidder at \$623,975 and Armor was next low at \$645,885.

The IFB required each bidder to complete an appendix to Standard Form 21, Bid Form (Construction Contract), containing an Affirmative Action Plan (AAP). The AAP set forth in the appendix was the Washington Plan, a mandatory plan imposed by the Department of Labor (41 C.F.R. Part 60-5 (1977)). The appendix listed the various trades which were covered by the Washington plan and required a bidder to indicate on the appendix its goals for minority manpower utilization in the

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trades to be used in the performance of the contract. For each trade covered by the Plan, goals were to fall within percentage ranges set forth in the appendix. A bidder was required to sign the appendix.

The bid submitted by Warfield contained the required appendix to the Bid Form (SF21) properly dated and signed but without the bidder's separately stated goals for minority manpower utilization as required. However, Warfield did place the following notation in the cover sheet of the appendix:

"We plan to fully comply with the requirements, terms and conditions of attached appendix to Standard Form 21, Bid Form, Affirmative Action Plan."

GSA, after reviewing applicable case law, determined that the bid was responsive and made award to Warfield. Armor's protest followed.

At the outset, we must consider GSA's assertion that the protest is untimely because 55 days elapsed between bid opening and the date the protest was filed. Our Bid Protest Procedures provide that "bid protests shall be filed [received by our Office] not later than 10 [working] days after the protest is known or should have been known, whichever is earlier." 4 C.F.R. 20.2(b)(2) (1977).

Bids were opened on September 6, 1977, at which time all bids received were subject to examination by interested parties. Federal Procurement Regulation (FPR) 1-2.402(c) (1964 ed.). However, Armor was not required to protest until 10 days after it knew or should have known that GSA did not regard the Warfield bid as nonresponsive. It appears from the record that Armor was not aware of GSA's position until it learned of the award to Warfield, and therefore it had 10 days subsequent to that time to file its protest. Watts Manufacturing Corporation, B-182811,

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April 18, 1975, 75-1 CPD 237; Beta Systems, Inc., Brown-Minneapolis MTM Tank & Fabricating Co., B-134413, February 18, 1976, 76-1 CPD 109. Although Warfield's bid was accepted on October 7, 1977 and the notice to proceed was given on October 24, 1977, the record indicates only that Armor knew of the award to Warfield by October 14, 1977, when it asked for and received a copy of Warfield's bid. Thus, Armor had 10 working days thereafter to file its protest. The protest was received on October 31, 1977, which was within the 10 day period as October 24, 1977, was a Federal holiday (Veterans Day). Therefore, we view the protest as timely and will consider it on the merits.

The bid appendix warned that "Bidder must insert on this document his goals within the applicable range for each trade he and his subcontractors will utilize in performing the contract." The bid appendix also gave the bidders notice, in capital letters, that "TO BE ELIGIBLE FOR AWARD OF THE CONTRACT, EACH BIDDER MUST FULLY COMPLY WITH THE REQUIREMENTS, TERMS AND CONDITIONS OF THIS APPENDIX A." Paragraph 1 of the Requirements, Terms and Conditions provided that "no contracts shall be awarded\*\*\*unless the bidder completes and submits prior to bid opening, this document designated as appendix A or a substantially similar document, which shall include specific goals of manpower utilization\* \* \*." The spaces provided for entry of a bidder's goals were preceded by the following introductory text:

"The following are hereby submitted by the undersigned bidder as its goals for minority manpower utilization\* \* \*."

In the first case to consider a bidder's failure to comply with the Washington Plan bid appendix, it was held that a bidder's failure to insert minority manpower utilization goals rendered the bid nonresponsive, even though the appendix had been signed by the bidder. 50 Comp. Gen. 844 (1971 : Northeast Construction Company v. Romney, 485 . 2d 752 (D.C. Cir. 1973)). That holding was affirmed and applied

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in subsequent cases, Starline, Incorporated, 55 Comp. Gen. 1160 (1976), 76-1 CPD 365; Peter Gordon Co., Inc., B-185300, March 3, 1976, 76-1 CPD 153, and a similar result was reached where, in procurements involving other imposed plans similar to the Washington Plan, the bidder furnished unacceptable goals. Rossetti Contracting Company, Inc. v. Brenner, 508 F. 2d 1039 (7th Cir. 1975); Armor Elevator Company, Inc., B-190193, December 12, 1977, 77-2 CPD 457; B-176260, August 2, 1972; B-174307, February 8, 1972. The rationale for each decision was that the required specific bidder commitment to minimum affirmative action hiring goals, separate and apart from whatever general commitments arose from signatures on the bid form and the appendix, was not present in the bid as submitted.

However, we have also recognized that a bidder may make the requisite commitment to affirmative action plan requirements in ways other than that specified in the solicitation. Veterans Administration re Welch Construction, Inc., B-183173, March 11, 1975, 75-1 CPD 146; Bartley, Incorporated, 53 Comp. Gen. 451 (1974), 74-1 CPD 1; 51 Comp. Gen. 329 (1971). For example, in Massachusetts College of Pharmacy - Grant, B-186552, August 26, 1970, 76-2 CPD 191, a bidder did not comply with the bid condition requirements concerning its affirmative action plan, but did sign a form stating that it "agrees to comply with the affirmative action requirements \* \* \*." We agreed with the Executive agency that the bid manifested a sufficient commitment to the affirmative action provisions of the solicitation. More to the point, in Regional Construction Company, Inc., B-189073, October 7, 1977, 77-2 CPD 277, a bidder failed to list its percentage goals for minority manpower utilization but submitted a letter in its bid which stated that:

"We agree to conform to the Affirmative Action Plan as outlined in amendment No. 3, March 23, 1977. The attached copy is part of our bid."

In ruling that the bid was responsive, we said:

"\* \* \* the issue to be determined is whether the letter attached to Regional's bid constitutes a definite commitment to the affirmative action requirements of the IFB. If the response to this determination is in the affirmative, then Regional's bid cannot be rejected as nonresponsive because responsiveness is measured by Regional's commitment or noncommitment to the Chicago Plan and not by its failure to submit a separate sheet with minority manpower utilization goals. See 53 Comp. Gen. 451, supra.

"A bidder's commitment to an affirmative action plan must be clear and in accordance with the material requirements of the IFB as of bid opening. B-183556, supra, [August 8, 1975, 75-2 CPD 97]. In determining the intent of a bidder, however, the entire contents of the bid including all documentation submitted with it, must be taken into account. B-177946, March 27, 1973. Thus, the fact that Regional did not submit the proper form designated for the submission of its goals is of no consequence if Regional's letter indicates a clear intent to be bound to the Chicago Plan which contained such goals. \* \* \*

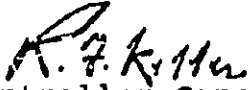
"Thus, as long as a commitment has been made by a bidder to be bound to the ranges of the affirmative action plan, the fact that specific percentages and goals from within those ranges were not submitted with the bid will not render it non-responsive.

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"Accordingly, we believe that Regional, by supplying its own certification attached to its bid, committed itself to be bound to the ranges of minority group employment listed \* \* \*."

We believe that just as there was a commitment by the bidder to be bound by the affirmative action plan provisions in Regional, there is also the same commitment in this case. Although Warfield's terminology, "plan to fully comply", is not identical to the "we agree" language used in Regional, we have recognized that less definite language such as "intends to comply" can be a sufficient commitment under the circumstances of a particular case. Hawaiian Telephone Company, B-187871, May 2, 1977, 77-1 CPD 298. Under these circumstances, where the bidder's statement accompanied a signed appendix, we think the requisite commitment is present. Therefore, the bid of Warfield properly was regarded as responsive.

Accordingly, the protest is denied.

  
Deputy Comptroller General  
of the United States