

DECISION



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

FILE:

DATE: August 31, 1932

B-205556

MATTER OF:

E. H. Hughes Company, Inc.

DIGEST:

1. When affirmative action requirements are imposed on a bidder as a matter of contract performance, and a specific commitment to them must be reflected in the bid, such requirements may be treated as involving responsiveness, rather than responsibility.
2. When grantee solicitation provides that bidders may seek to qualify for a waiver of minority business enterprise utilization goal by providing with the bid a narrative of positive efforts and an explanation of why the goal cannot be met, and low bidder neither commits itself to the goal nor provides a narrative, while second-low bidder unequivocally offers to meet the goal at a reasonable price, grantee may presume that low bidder has not made sufficient effort and properly may reject the bid.

E. H. Hughes Company, Inc. requests review of an Environmental Protection Agency decision regarding award of a contract for a wastewater treatment project by an EPA grantee, the town of Marengo, Indiana. Hughes contends that, contrary to the determination of the grantee and EPA's regional administrator, it submitted a responsive bid. We deny the complaint.

Background:

Marengo, a grantee under Title II of the Clean Water Act of 1977, 33 U.S.C. §§ 1281 - 1297 (Supp. III 1979), on May 21, 1981, advertised for bids on Division B of its wastewater treatment project. The solicitation incorporated EPA's Policy for Increased Use of Minority Consultants and Construction Contractors, 43 Fed. Reg. 60220 (1978) and EPA Region V's guidance on use of minority business enterprise. The grantee stated that its goal for minority participation was 10 percent of the eligible cost of the project, and it required bidders who did not commit themselves to this goal to provide with their bids a narrative describing any "positive efforts" they had taken to encourage utilization of minority business enterprise or explaining why they were unable to achieve 10 percent minority participation. The solicitation specifically stated that failure to submit this information would cause rejection of a bid as nonresponsive.

At opening on July 28, Hughes was the apparent low bidder at \$1,077,700, with Mitchell and Stark Construction Company, Inc. second low at \$1,073,459. Hughes proposed a 4 percent level of minority participation and admittedly did not submit the required narrative; Mitchell and Stark proposed 10 percent minority participation. On August 6, Marengo's Board of Trustees rejected Hughes' bid as nonresponsive. Hughes protested this to the grantee by letter dated August 10 and received August 13; this protest was denied on September 1, and Hughes then appealed to EPA. On November 3, the regional administrator dismissed Hughes' protest, and its complaint to our Office followed.

EPA's Decision:

EPA dismissed Hughes' protest in part on grounds that it was untimely under the agency's regulation concerning grantee procurements, 40 C.F.R. § 35.939(b)(1) (1981), which requires bidders to file protests within one week after the basis for them is known or should have been known. According to the administrator, the basis of Hughes' protest was that the grantee improperly had made the minority business enterprise requirements a matter of bid responsiveness, rather than bidder responsibility. Since Hughes had notice of

these requirements upon receipt of the May 21 solicitation, the administrator concluded, its failure to protest to the grantee until August 13, some 16 days after bid opening, rendered the protest untimely.

The administrator, however, also considered the substance of Hughes' protest. He found it without merit. Hughes had argued, among other things, that EPA's national policy on minority business enterprise related only to bidder responsibility. The administrator disagreed, stating that this policy described only minimum requirements and duties of grantees and bidders, and that rather than prohibiting imposition of additional responsiveness requirements, expressly permitted grantees to identify further more "positive efforts" which bidders might be required to take in order to meet goals for minority participation.

The administrator also based his decision on Federal court cases holding that requirements which are traditionally matters of responsibility may be made matters of responsiveness by the owner of a project, citing Rossetti Contracting Company, Inc. v. Brennan, 508 F.2d 1039 (7th Cir. 1975), and Northeast Construction Company v. Romney, 485 F.2d 752 (D.C. Cir. 1973).

In addition, the administrator rejected Hughes' argument that its failure to submit the required narrative was excused, either because the Indiana Office of Minority Business Enterprise had advised bidders that it was not aware of any firms who were interested in this particular project or because the town of Marengo had issued an addendum to the solicitation, reporting this lack of interest and thereby allegedly modifying the 10 percent goal. Nor did the administrator agree that the grantee should have waived Hughes' failure to provide the narrative as a minor informality; he found that minority business enterprise requirements were material because they had the potential to affect price, quality, quantity, and delivery of services; that they substantially affected the relationship between the grantee and bidders; and that they were essential to the achievement of EPA's objectives for use of minority business enterprise.

The administrator summarily dismissed Hughes' argument that the requirements were ambiguous, and found the contention that there were technical defects in Mitchell and Stark's bid "frivolous and without

merit." The administrator concluded that the determination of the town of Marengo to reject Hughes' bid complied with EPA procurement regulations and had a rational basis, and that it therefore must be upheld.

GAO Analysis:

There is a definite distinction between matters related to bid responsiveness and those concerned with bidder responsibility. "Responsibility," as used in direct Federal procurement, refers to a bidder's ability or capacity to perform all of the contract requirements within the limits prescribed by the solicitation. "Responsiveness" concerns whether a bidder has unequivocally offered to provide a product or services in total conformance with the material terms and specifications of the solicitation. While requirements bearing on responsibility may be met after opening, the determination of responsiveness--a concept generally limited to formally advertised procurements--must be made from bid documents at the time of opening. See Devcon Systems Corporation, 59 Comp. Gen. 514, 617 (1980), 80-2 CPD 46, in which we held that failure to include a small business subcontracting plan did not render a bid nonresponsive. Moreover, a matter relating to bidder responsibility cannot be treated as one of responsiveness merely because of a statement to that effect in a solicitation. Id. at 618.

Contrary to Hughes' arguments, however, not all matters relating to minority business enterprise requirements concern responsibility. As pointed out in Northern Virginia Chapter, Associated Builders and Contractors, Inc., B-202510, April 24, 1981, 81-1 CPD 318, in cases where affirmative action requirements are imposed on a bidder as a matter of contract performance, and a specific commitment to them must be reflected in the bid, such requirements are treated as involving responsiveness. See also RGK, Inc., B-201849, May 19, 1981, 81-1 CPD 384, also treating minority business enterprise requirements as a matter of responsiveness by holding that an ambiguous commitment to meet stated goals could not be corrected after bid opening; cf. Paul N. Howard Company--Reconsideration, 60 Comp. Gen. 606 (1981), 81-2 CPD 42, defining commitment to a stated goal as a matter of responsiveness and how the goal was to be met as a matter of responsibility.

Here, the town of Marengo required bidders to commit themselves to a goal of 10 percent minority participation for performance of the contract. Alternatively, Marengo offered bidders who were unable to meet the 10 percent goal an opportunity to propose a lesser percentage if they also submitted, with their bids, a narrative documenting "positive efforts" they had taken to encourage utilization of minority business enterprise and explaining why the goal still could not be met. This, in effect, would permit Marengo to waive the 10 percent requirement if a bidder demonstrated that--despite these efforts--it could not commit itself to the stated goal.

We have recognized a grantee's authority to reject a low bidder which did not qualify for a waiver of minority business enterprise requirements. In English Electric Corporation, B-203098.2, January 4, 1982, 82-1 CPD 3, involving a procurement by an Urban Mass Transportation Administration grantee, the low bidder requested a waiver from requirements to subcontract at least 10 percent of the work to minority-owned firms and at least .1 percent of the work to woman-owned firms; the second-low bidder agreed to meet these goals. The grantee denied the request for the waiver under an evaluation scheme in which it was "conclusively presumed" that if a reasonably priced bidder met its goals, another bidder who failed to meet them would be deemed not to have exerted sufficient efforts, as required by UMTA's regulations. We upheld award to the second-low bidder.

In this case, Hughes, which made no objection to the 10 percent goal or the solicitation provision relating it to responsiveness before bid opening, offered only 4 percent minority participation, but did not, with its bid, offer any explanation as to why it should qualify for a waiver of the goal. The price of the second-low bidder, which unequivocally offered to meet the goal, was only \$759 higher than Hughes' price on a contract of well over \$1 million. Under these circumstances, we think the town of Marengo could have reasonably presumed that Hughes had not made sufficient "positive efforts" to utilize minority business enterprise in performance of the contract and, in accordance with the express terms of its solicitation, could properly reject the bid.

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The complaint is denied.

Milton J. Aroska
Acting Comptroller General
of the United States