

DECISION



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

FILE: B-186017

DATE: September 29, 1976 ⁵⁶⁸

MATTER OF: Western Roofing Service; Rite-Way Contractors, Inc.

DIGEST:

97955

1. Although the Code of Federal Regulations indicate that Affirmative Action requirements should not be applied in a designated area to procurements under \$500,000, it is questionable whether an IFB provision which imposes such requirements on bidders may be ignored even though the procurement is under \$500,000 and the provision was inadvertently included in the IFB. GAO believes that better procedure would be to include notice of exemption in the IFB. However, failure of bidder to submit affirmative action plan with its bid may be waived in any event where bidder is not expected to utilize any of the trades covered in the plan.
2. Agency determination that bid opening date was the "date fixed" for determining individual surety's net worth is incorrect since net worth of individual surety relates to determination of responsibility which is to be made prior to award.
3. Net worth of individual surety on bid bond need only be in the amount of the difference between the price stated in the bid and the price stated in the next higher acceptable bid since the bid bond need only be in that amount.

Western Roofing Service (Western) and Rite-Way Contractors, Inc. (Rite-Way) have protested any award of a contract to Sunset Roofing Company (Sunset) under invitation for bids (IFB) DAKF01-76-B-0034, issued by the Department of the Army, Procurement Division, Presidio, San Francisco, California (Army). Award has been withheld pending our decision.

The subject procurement, a small business set-aside, was issued November 6, 1975, and sought bids for reroofing 54 buildings maintained by the Army. The cover sheet of the solicitation estimated the total cost of this procurement as between \$100,000, and \$500,000. The Army's estimate of the cost involved was \$396,317.64.

At bid opening on January 15, 1976, ten bids were received with the three lowest determined to be as follows:

Rite-Way	\$244,561.30
Sunset	\$247,861.72
Western	\$258,907.00

Following bid opening Western protested to the Army that neither Rite-Way nor Sunset was entitled to award as each had failed to submit with its bid the affirmative action plan required by the IFB. By letter dated March 1, 1976, the contracting officer denied Western's protest. Additionally, on March 12, 1976, the contracting officer informed Rite-Way, the low bidder, that it was not entitled to award due to a finding of inadequate net worth of one of the individual sureties on Rite-Way's bid bond. Thereafter, both Western and Rite-Way filed separate protests that were timely received at our Office. Since Western's protest concerns the eligibility of both Rite-Way and Sunset for award, that protest will be considered first.

Western's Protest

The subject IFB made reference to the "San Francisco Affirmative Action Plan" (SFAAP), contained at pages 8-14 of the solicitation. Commencing at page 13 of the IFB, bidders were advised as follows:

"It has been determined that in the performance of the contract to be awarded under this solicitation an acceptable affirmative action program for the trades specified below will result in manpower utilization within the ranges set forth next to each trade.

<u>Trade</u>	<u>Range of Minority Group Employment</u>
Electricians	15% - 17%
Plumbers, Pipefitters, and Steamfitters	12% - 14%
Structural Metal Workers	17% - 20%
Sheet Metal Workers	17% - 19%
Asbestos Workers	33% - 40%

"The bidder shall submit with his bid an Affirmative Action Plan that includes percentage goals for minority manpower utilization, within the ranges set forth above, for all his construction work in the covered area (whether done under contract with the Federal Government or otherwise) during the term of the contract that may be awarded

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pursuant to this solicitation, and he shall agree to pursue these goals in accordance with; and to comply with, the 'LOCAL AFFIRMATIVE ACTION PLAN' clause of the contract. Each goal is to be expressed as a percentage, representing the ratio of manhours of work of minority persons to the total manhours to be worked on all of the Bidder's construction work in the covered area, including the project to result from this solicitation.

* * * * *

"Goals need be submitted only for covered construction trades that the Bidder expects to use in the performance of the contract, and only for years during which the Bidder expects to perform work or engage in activity under the contract.

* * * * *

"If the Bidder fails or refuses to complete and submit an Affirmative Action Plan with his bid, or if any percentage goals fall below the ranges of minority manpower utilization set forth above, the bid or proposal shall be considered nonresponsive and will be rejected."

The Army contends that the requirement for submission of an affirmative action plan was inapplicable in view of the estimated cost of the subject procurement. In this regard the Army points out that the "San Francisco Plan" (SFP), because of its publication in the Code of Federal Regulations, (41 C.F.R. § 60-6 et. seq. (1975)) placed all bidders on constructive notice that the requirement for submission of an affirmative action plan had application only to Federal construction projects in excess of \$500,000. The Army asserts that since the instant procurement was estimated at less than that amount the requirement for submission of an affirmative action plan was not in fact applicable.

The Army also argues that, in any event, the plan applies only to the five covered trades set out in the IFB. The Army asserts that since Rite-Way and Sunset did not expect to utilize any of these covered trades they are not nonresponsive.

Western disagrees. It contends that the affirmative action plan is required to be submitted by the terms of the IFB whether or not covered trades are expected to be used. It is Western's

position that the signing and submission of a plan with the bid is the material requirement, not the listing of goals for trades not expected to be used. Thus "the bidder is bound by the provisions of the submitted plan for the trades with listed goals, and for trades not expected to be used but which are actually utilized in performance of the contract."

Moreover, in response to the Army's claim that all bidders were on constructive notice of the inapplicability of the subject affirmative action plan, Western asserts that there is no prohibition against use of the plan in procurements of less than \$500,000. It cites 41 C.F.R. § 60-6.21(1)(1975) which provides as follows:

"(i) Nothing in these rules shall be interpreted to diminish the responsibilities of the contracting and administering agencies nor the obligations of contractors pursuant to Executive Order 11246 for those trades and those contracts not covered by these regulations."

Executive Order 11246, September 28, 1965, as amended, empowered the U.S. Department of Labor to formulate and apply the rules and regulations to ensure equal employment opportunity. The Secretary of Labor delegated the implementation of rules and regulations to the Office of Federal Contract Compliance Programs (OFCC). In response to our inquiry OFCC has indicated that the Army acted without the necessary OFCC approval in utilizing the subject affirmative action requirement in the instant case. We have been formally advised by OFCC that approval had not been sought or given for the Army's use of the SFP, or a variation thereof where the jurisdictional amount in question was under \$500,000.

In this regard we note that the record contains information indicating that the Army acted erroneously in placing the subject affirmative action requirements in the IFB. Moreover, the Army, in contending that all bidders were on constructive notice that the subject affirmative action requirements were not applicable, has in effect called into question the legitimacy of its own actions in placing these requirements in the subject IFB. In any case, we question whether a provision in a solicitation may be ignored on the basis of a C.F.R. provision. Certainly the better approach would be to insure that the solicitation conforms to the regulatory requirements.

Nevertheless, it is our view that in the instant case the requirement for submission of an affirmative action plan was not to be regarded as material and could be waived. As Army points

out, B-177509, April 12, 1973, states that affirmative action requirements are not to be regarded as material if they relate to covered trades which clearly will not be used by a bidder in the performance of work called for by an IFB. 52 Comp. Gen. 874, 877 (1973). Western argues on the other hand, that while B-177509, concerned the failure of a bidder to submit goals for covered trades not expected to be used, the bidder in that case signed and submitted an accompanying Appendix (which was the affirmative action plan) with his bid. However, we think that the requirement for submission of an affirmative action plan in this situation, like the requirement for submission of goals, should not be regarded as material when affirmative action requirements are not applicable to the trades to be used in performing the contract work. Here the contracting officer has indicated that it is "highly improbable" that any of the covered trades will be used by a bidder. We also note here that while sheet metal installation is included under this contract it is anticipated that any such installation will be undertaken by roofers.

In view of the foregoing, Western's protest is denied.

Rite-Way's Protest

Rite-Way, the low bidder, protests the contracting officer's determination that it was not entitled to award under the subject procurement based on a finding of inadequate net worth of one of the individual sureties on Rite-Way's bid bond.

The IFB required a bid guarantee in the amount of 20 percent of the bid. Rite-Way submitted Standard Form (SF) 24 containing a bid bond in the proper amount. Also accompanying the bid bond was SF 28 "Affidavit of Individual Surety", showing the assets of each of the two individual sureties listed by Rite-Way.

The Army reports that one of Rite-Way's individual sureties had failed to complete Block 10 of SF 28 which required a listing of all other bonds on which that person was acting as surety. In a letter dated March 10, 1976, that individual advised the Army that he was acting as surety for performance and payment bonds under an Air Force contract in the amount of \$68,553.12 and which, he claimed, was 98 percent complete. The Army reports that subsequent thereto the contracting officer examined the surety's obligation under the performance and payment bonds for the Air Force contract. In doing so, however, the contracting officer recalculated the surety's obligation under the Air Force contract as of January 15, 1976, the bid opening date for the subject IFB.

By using this procedure the contracting officer determined that the surety had a negative net worth for purposes of the instant procurement. In light of this the contracting officer determined that Rite-Way was nonresponsive.

The Army, citing 52 Comp. Gen. 184, 187 (1972), now states that the contracting officer erred in his determination not to make award to Rite-Way on the basis of nonresponsiveness instead of responsibility. However, the Army indicates that its determination not to make award to Rite-Way was nevertheless correct since it had been established that Huebner, the surety in question, did not possess sufficient net worth as of the bid opening date of January 15, 1976. The Army indicates that the contracting officer's finding was proper if January 15, 1976 is the "date fixed" for determining the adequacy of an individual surety's net worth. The Army also asserts, citing 52 Comp. Gen. 184, 187 supra, that determinations of responsibility are to be made after bid opening subject to the "time restraints of the procurement."

The Army is correct when it states that the net worth of an individual surety on a bid bond properly relates to responsibility of the surety and does not concern the responsiveness of a bid. 52 Comp. Gen. 184, 187 supra. Therefore, we disagree with the contracting officer's conclusion that the bid opening date of January 15, 1976, was the "date fixed" for determining the adequacy of Huebner's net worth. Determinations of responsibility are required to be made by the contracting officer prior to award. See ASPR § 1-902 (1975). Here the contracting officer was not required to recalculate Huebner's net worth as of the bid opening date of January 15, 1976. In this connection we note that ASPR § 10-201.2 (1975 ed) recognizes the possibility that a surety may fail to fully complete SF 28 and thus specifically allows for completion at a later date.

ASPR 2-407.1 (1975 ed.) provides, in part, that:

"* * * award shall be made by the contracting officer, within the time for acceptance specified in the bid or extension thereof, to that responsible bidder whose bid, conforming to the invitation for bids; will be most advantageous to the Government, price and other factors considered. * * *"

Accordingly, we think it would be both appropriate and advantageous for the Army to make a determination as to Rite-Way's responsibility as of the present time. (In this connection, we note that the


B-186017

Air Force has advised the Army that by March 1976, the Air Force contract in question was 93 percent complete.) Moreover, we agree with Rite-Way that the net worth of an individual surety on a bid bond need only be in the amount of the difference between the price stated in the bid and the price stated in the next higher acceptable bid, since under ASPR 10-102.5(ii) the bid bond need only be in that amount.

In view thereof we think the Army acted incorrectly in making its determination that Huebner did not possess sufficient net worth. If it is determined by the contracting officer that Rite-Way, in all other respects, is responsible, we recommend that award be made to Rite-Way.

In view of the foregoing we find it unnecessary to consider those arguments raised by Rite-Way in support of its protest.

Rite-Way's protest is sustained.


Acting Comptroller General
of the United States