DECISION

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

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FILE: B-184683 DATE: June 10, 1976

MATTER OF: Starline, Incorporated

DIGEST:

1. Protest filed with GAO also filed before court will be considered on merits despite presence of several untimely issues, since court has expressed interest in GAO decision.

2. Although contractual matters are statutorily exempted from rule making provisions of 5 U.S.C. § 553, Secretary of Labor has waived reliance on that exemption for rule making by his Department, thereby necessitating Department of Labor compliance with statutory provisions.

3. Question of whether Department of Labor order extending Washington Plan (for fostering equal employment opportunity through Federal contractor affirmative action plans) is subject to rule making requirements of 5 U.S.C. § 553 is not appropriate for decision by GAO since (1) it involves legal issue of first impression; (2) courts are not in agreement on effect of noncompliance with such requirements; (3) Washington Plan extension has been regarded as effective; and (4) matter is pending before U.S. District Court. GAO will consider Plan effective as of date of publication in Federal Register.

4. Requirement in solicitation that bidders commit themselves to affirmative action provisions of Washington Plan, even though Plan had expired by bid opening date, was proper since contracting officer had been informed that Plan would be extended and solicitations may provide for specific future needs and contingencies.

5. Where agency issues telegraphic solicitation amendment one day before bid opening and telephonically notifies bidders of that fact who, without objecting, expressly acknowledge receipt of amendment, one bidder's assertion that agency did not issue written amendment and did not provide bidders with sufficient time to consider amendment is without merit.

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6. Where Washington Plan bid appendix requires bidder to insert goals and sign appendix, bid which includes signed appendix without insertion of goals is nonresponsive since noncompliance with appendix requirements is not minor deviation which may be waived. Although appendix mistakenly made one reference to bidder "responsibility" instead of responsiveness, appendix read as a whole indicated that compliance was to be matter of responsiveness, and record indicates that protester, who was on constructive notice of correct terminology, was not prejudiced by error.

7. Protester's assertion that solicitation was confusing and ambiguous because it only provided space for insertion of goals for time periods which had expired is without merit, since solicitation specified that goals for the last period for which space was provided would be applicable to the contract to be awarded.

8. Invitation for bids (IFB) required bidders to commit themselves only to terms and conditions of Washington Plan as spelled out in IFB. Contention that IFB was improper because it required commitment to a revised Plan not yet issued is without merit.

9. Bid which included signed appendix including percentage goals for two trades bidder contemplated utilizing in contract performance was responsive to requirements of IFB. Protester's assertion that bidders were required to submit estimates of manhours required for work in Washington area and of number of employees to be used is based on different appendix used in earlier case and has no applicability to instant matter.

10. Protester's allegation that agency had no need to award contract prior to GAO decision on protest need not be considered since award has been sustained.

Starline, Incorporated, has protested the rejection of its bid by the General Services Administration (GSA) under Bid Package No. 4(B-4) leading to Contract No. GS-00B-03170 for the architectural, metal and glass work at the Federal Home Loan Bank Board Building, Washington, D.C. Starline's bid was rejected because of noncompliance with solicitation provisions dealing with affirmative action requirements.

The invitation for bids (IFB) was issued on May 21, 1975; bids were opened on July 10, 1975. Two bids were received: Starline

at $771,000, and Flour City Architectural Metals at $897,000. On August 1, 1975, GSA notified Starline that its bid was rejected as nonresponsive because it failed to enter its percentage goals for minority manpower utilization in Appendix A to the IFB. Appendix A set forth an affirmative action program to assure compliance with equal employment opportunity requirements, which was known as the Washington Plan. This protest was originally filed on August 7, 1975, and was amended on September 13, 1975, in response to certain facts set out in GSA's report to this Office dated August 29, 1975. We are advised that GSA awarded the contract to Flour City on August 26, 1975.

Starline's principal contention is that rejection of its low bid for failure to comply with the provisions of Appendix A was improper because the Washington Plan had expired and had not been extended in accordance with law. Alternatively, Starline claims that even if the Appendix A provisions were applicable, its failure to completely fill out Appendix A did not render its bid nonresponsive, particularly since the Washington Plan provisions of the IFB were ambiguous. Starline further argues that if its bid was nonresponsive, then Flour City's bid must also be regarded as nonresponsive. Finally, Starline contends that GSA's determination to make an award prior to our resolution of this protest was arbitrary and capricious.

On August 29, 1975, Starline instituted Civil Action No. 75-1426 in the United States District Court for the District of Columbia (Starline, Inc. v. Arthur F. Sampson, et al.), and subsequently amended its complaint twice. As amended, the complaint requested a preliminary injunction enjoining GSA and Flour City (and its parent corporation, The Seagrave Corporation) from incurring costs, preparing for performance, or in any way performing Contract No. GS-00B-03170 pending the resolution of Starline's bid protest by this Office. On October 10, 1975, Starline's Motion For Preliminary Injunction was denied. On January 5, 1976, the District Court filed a Memorandum and Order granting Starline's Motion For Continuance and denying Starline's Motion For Leave To File Third Amended Complaint without prejudice to refile subsequent to our decision.

At the outset, we point out that Starline's contentions regarding the inclusion of Washington Plan provisions in the IFB and the sufficiency and clarity of those provisions appear to be untimely under section 20.2(b)(1) of our Bid Protest Procedures. That section requires protests based on alleged solicitation defects to be filed prior to bid opening. Ordinarily, issues which are untimely raised would not be for consideration on the merits. However, it is clear from the court's Memorandum and Order of January 5, 1976, that it expects a decision on the merits of Starline's protest to be issued by this Office. We therefore will consider the matter.

Dynalectron Corporation, et al., 54 Comp. Gen. 1009, 1011-12 (1975), 75-1 CPD 341; Control Data Corporation, B-184927, April 23, 1976, 55 Comp. Gen. ___, 76-1 CPD 276.

Validity of Washington Plan Requirement

Starline first contends that the IFB's Appendix A, the Washington Plan, had expired prior to bid opening and that its bid therefore could not properly be rejected for failure to comply with it. The IFB required each bidder to sign Appendix A and to submit percentage goals for minority manpower utilization in specified trades during performance of the contract. The goals had to be at least within the ranges specified in the appendix. Different ranges for the specified trades were listed for each of several annual periods. The most recent period for which ranges of goals were listed was from May 31, 1973, until May 31, 1974. However, the appendix also provided that the goals and ranges for the year ending May 31, 1974 "will be applicable to invitations * * * until July 9, 1975."

The question regarding the validity of the Washington Plan arose because GSA found it necessary to extend the original April 22, 1975, date for opening of bids to July 10, 1975, one day after the stated expiration date of the Washington Plan goal ranges. After being advised orally by the Department of Labor (the agency responsible, under Executive Order 11246, September 28, 1965, for promulgating the Washington Plan bid appendix) that the Washington Plan was to be extended, GSA, on July 9, 1975, issued a telegraphic solicitation amendment deleting from Appendix A the July 9, 1975, cut-off date and telephonically advised the firms on the bidders' list of that fact. The Labor order addressed to the "HEADS OF ALL AGENCIES" formally extending the Plan indefinitely was issued on July 18, 1975. The order was published in the Federal Register on July 24, 1975. See 40 Fed. Reg. 30963.

Starline argues that these actions did not extend the Washington Plan but were only attempts by GSA and Labor to do so illegally. According to Starline, the Washington Plan bid appendix was a "rule" under 5 U.S.C. § 551 (1970), and that any attempt to extend it must be deemed rule making under 5 U.S.C. § 553 (Supp. IV, 1974). Therefore, Starline contends, pursuant to 5 U.S.C. §§ 552, 553 (Supp. IV, 1974) and 44 U.S.C. § 1505 (1970), any extension of the Washington Plan would be valid and binding upon a contracting party only after notification of the proposed extension had been published in the Federal Register by Labor and a period of 30 days had been allowed for comment. Starline further argues that GSA's attempt to apply Labor's proposed extension to the IFB was not effective because it did not comply with the requirements of Federal Procurement Regulations (FPR) § 1-2.207 (1964 ed.) dealing with solicitation amendments. Starline claims that the amendment deleting the July 9th cut-off date was not issued in

writing prior to the date on which the change was to become effective and that bidders were not permitted sufficient time to consider the amendment before submitting bids.

GSA takes the position that the Washington Plan involves contractual matters only and therefore is exempted by 5 U.S.C. § 553(a)(2) from statutory rule making requirements. GSA further argues that even if the Washington Plan extension order was required to be published in the Federal Register, Starline cannot assert the invalidity of the extension because that firm was on actual notice of the extension.

Under 5 U.S.C. §§ 551 (4), (5) (1970), a "rule" means, inter alia, an agency statement designed to implement, interpret, or prescribe law or policy of an agency, or any practices bearing thereon, and "rule making" is defined as the agency process for formulating, amending, or repealing a rule. 5 U.S.C. § 553 provides for general notice of proposed rule making to be published in the Federal Register unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law, for public participation in rule making procedures, and for publication of final substantive rules. 5 U.S.C. § 553(d) states that "required publication * * * of a substantive rule shall be made not less than 30 days before its effective date * * *."

Ordinarily these rule making provisions would not be applicable to this situation since, as GSA points out, the Washington Plan is implemented solely through the award of contracts and contracts matters are excepted from statutory rule making requirements by 5 U.S.C. § 553(a). However, the Secretary of Labor has provided in 29 CFR § 2.7 (1975) that:

> "It is the policy of the Secretary of Labor, that in applying the rule making provisions of the Administrative Procedure Act (5 U.S.C. section 553), the exemption therein for rules relating to public property, loans, grants, benefits or contracts shall not be relied upon as a reason for not complying with the notice and public participation requirements thereof. The policy is intended to carry out Recommendation No. 16 of the Administrative Conference of the United States."

It has been held that this provision precludes Labor from relying on the statutory exception. City of New York v. Diamond, 379 F. Supp. 503 (S.D.N.Y. 1974).

We also do not believe that Starline was on "actual notice" of the extension of the Washington Plan as that term is used in 5 U.S.C. § 553(b). Starline was informed, by a telephone call on July 9 and by Amendment No. 6 to the IFB, only that the July 9, 1975, date specified in Appendix A was being deleted. Starline had no actual notice of the Washington Plan extension order and could not have since the order itself was not signed until July 18.

Nevertheless, the question of whether the rule making requirements of 5 U.S.C. § 553 are applicable to this case appears to raise a novel issue which has yet to be judicially determined. On the one hand, "rule" and "rule making" are broadly defined in the statute and could be read as encompassing the order extending the Washington Plan, particularly if the order is viewed as imposing "rights or obligations on some party." Carpenters 46 County Conference Board v. Construction Industry Stabilization Committee, 393 F. Supp. 480, 493 (N.D. Cal. 1975). On the other hand, it is not clear that the statute envisions compliance with the full panoply of rule making requirements when a "rule" is merely extended without any change in its substantive provisions. Cf., Detroit Edison Company v. U.S. Environmental Protection Agency, 496 F. 2d 244 (6th Cir. 1974). We are unaware of any judicial decision which has expressly considered this point.

Furthermore, if an extension order is to be regarded as a rule subject to the 30 day notice requirement, there is also some question as to whether noncompliance with that requirement would result in the total invalidity of the extension. It has been held that regulations which are promulgated without regard to the 30-day publication requirement are void and of no effect. City of New York v. Diamond, supra, and cases cited therein. However, it has also been held that a directive promulgated under such circumstances is "invalid until 30 days after it was actually published * * * but valid thereafter." Lewis-Mota v. Secretary of Labor, 469 F. 2d 478, 482 (2nd Cir. 1972). In addition, the Washington Plan as extended has been regarded as "effective," at least with respect to procurements initiated after the extension order appeared in the Federal Register, by both this Office and the U.S. District Court. See Peter Gordon Co., Inc., B-185300, March 3, 1976, 76-1 CPD 153; Peter Gordon Company, Inc. v. Bokow, Civil Action No. 76-0545 (D. D.C., April 28, 1976). In fact, even Starline, in its second amended complaint, states at one point that "the Labor Department reinstituted the Washington Plan by publishing a notice in the Federal Register * * *." Under these circumstances, and in view of the fact that this case is pending in U.S. District Court, we think it would be inappropriate for this Office to decide the purely legal question of first impression regarding the effect of Labor's failure to comply with the 30-day notice provision of 5 U.S.C. § 553 when it extended the Washington Plan. Rather, in accordance with the approach taken in Peter Gordon

Co., Inc., supra, we will regard the Plan as effective at least as of the July 24, 1975 Federal Register publication date and consider whether the Washington Plan requirements were otherwise validly included in the IFB and whether Starline's bid was responsive to those requirements.

On that basis, we do not agree with Starline's contentions that GSA improperly continued to include the Washington Plan commitment requirement in the IFB after July 9, 1975, and that this procedure "constituted an ex post facto application of the Washington Plan." Even if the Plan did expire on that date, GSA had been informed by Labor that the Plan was being extended. It was thus reasonable for GSA to believe that the Plan would be in effect during part, if not all, of the performance term of the contract to be awarded. It has long been recognized that solicitations need not be limited to precise requirements existing at the time of bid opening, but may also require bidders to commit themselves to furnishing future Government needs or to meeting other contingent requirements. Requirements and indefinite delivery type contracts are prime examples of where bidders commit themselves to supplying future Government needs. Solicitations containing provisions giving the Government the option to increase the quantity of supplies to be furnished under the contract or to extend the term of performance also are in this category. Perhaps even more on point are the solicitations which require bidders who commit themselves to certain "Part I" affirmative action requirements to also commit themselves to other "Part II" requirements in the event they cease being eligible for "Part I" coverage during contract performance. See, e.g., O. C. Holmes Corporation, 55 Comp. Gen. 262 (1975), 75-2 CPD 174; 52 Comp. Gen. 874 (1973); 51 id. 329 (1971); B-174932, March 3, 1972. See also A.C.E.S., Inc., B-181926, January 2, 1975, 75-1 CPD 1, in which a solicitation provision required the contractor to comply with the Service Contract Act in the event it was determined, after award, that the Act was applicable to the procurement. Accordingly, we believe that GSA, on the basis of the information it received from Labor, could properly include the Appendix A provisions in the instant solicitation for application after July 9, 1975.

With regard to Starline's contention that GSA failed to comply with FPR § 1-2.207, the record indicates that on July 9, 1975, Starline was telephonically notified of Amendment No. 6, that on the same date the amendment was telegraphically sent to Starline (although Starline contends it did not receive it until one week after bid opening), and that Starline's bid acknowledged the amendment in writing by number and date. Under these circumstances, we find no basis for concluding that GSA did not issue a written amendment as contemplated by the regulation. The fact that Starline might not have received the amendment in the precise form

indicated by the regulation, in the absence of a showing of prejudice, cannot operate to invalidate the procurement.

With respect to Starline's argument that it was not given proper time to consider the substance of the amendment, we have held that FPR § 1-2.207(d) (1964 ed.), requires "that sufficient time elapse between issuance of the amendment and bid opening to enable all bidders to consider and timely acknowledge the amendment." See 50 Comp. Gen. 648, 653-54 (1971). Although one day between amendment issuance and bid opening would be insufficient in many instances, see, e.g., 45 Comp. Gen. 651 (1966), here the amendment was simple and precise (the deletion of a date), and its effect, as recognized by the District Court, was merely "to maintain a requirement that Starline * * * knew * * * all along * * *." Furthermore, Starline did not object prior to bid opening that it did not have sufficient time to consider the amendment, but instead acknowledged the amendment and attempted to comply with the Appendix A provisions. Accordingly, we find no merit to this aspect of the protest. See 45 Comp. Gen. 651, supra.

Responsiveness of Starline's Bid

Starline alternatively contends that if the Washington Plan appendix is applicable to this procurement, then GSA erred in rejecting Starline's bid as nonresponsive despite the absence from the bid of percentage goals for any of the listed trades. Starline's contention is based on four grounds. First, Starline claims that its bid was responsive because it was contractually bound by its signature at the end of Appendix A. In this respect, Starline states at the time of bid opening it was impossible to list all the trades it would use on this project and that it therefore signed Appendix A without including either the specific trades to be employed or the applicable minority manhour percentages to demonstrate its willingness to be bound by all the hiring requirements for all the trades listed in the Plan. Second, Starline asserts that the omission of goals is a minor deviation which can be corrected after bid opening. Third, Starline argues that Appendix A was ambiguous and confusing and should be strictly construed against the Government. Fourth, Starline suggests it could properly submit its goals after bid opening because the IFB made goal submission a matter of responsibility (to be determined at time of award) rather than responsiveness.

As additional support for its contention that its bid should not be rejected, Starline also points to its voluntary compliance with EEO Plan hiring goals, its assurances to GSA that it would be bound by Appendix A, its aid to GSA in effecting cost-saving changes to the specification prior to bid opening, and the fact that its bid was low by $126,000. Starline also notes that Labor has proposed modifying

a similar Appendix A by providing that a signature alone would be adequate to evidence the required commitment. See 40 Fed. Reg. 28472-80 (1975).

We think Starline's bid was clearly nonresponsive. The invitation, on page three of Standard Form 20 (IFB for a construction contract), contained the following caveat:

"NOTICE

"TO BE ELIGIBLE FOR AWARD OF THE CONTRACT EACH BIDDER MUST FULLY COMPLY WITH THE REQUIREMENTS, TERMS AND CONDITIONS OF ATTACHED APPENDIX TO Standard Form 21, BID FORM, AFFIRMATIVE ACTION PLAN

"EACH BIDDER MUST SIGN AND SUBMIT AS PART OF HIS BID THE AFFIRMATIVE ACTION PLAN. FAILURE TO DO SO WILL BE GROUNDS FOR REJECTION OF THE BID."

Page one of Appendix A again advised bidders that full compliance with the requirements, terms and conditions of the appendix was a prerequisite to award of the contract. The first paragraph of the Appendix A requirements, terms and conditions stated:

"No contracts shall be awarded * * * unless the bidder completes and submits, prior to bid opening, this document designated as Appendix A * * * which shall include specific goals of minority manpower utilization for each trade designated below * * * such goals to be * * * within the ranges established by this Appendix * * *.

* * * * *

"A bidder who fails to complete or submit such goals shall not be deemed a responsible bidder and may not be awarded the 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." (emphasis added)

It has been uniformly held, in cases involving a nearly identical Washington Plan appendix and a similar Chicago Plan appendix, that the absence from a bid of goals within the prescribed ranges renders the bid nonresponsive. Northeast Construction Company v. Romney, 485 F. 2d 752 (D.C. Cir. 1973); Rossetti Contracting Co., Inc. v. Brennan, 508 F. 2d 1039 (7th Cir. 1975); 50 Comp. Gen. 844 (1971).

In both Northeast and Rossetti the bidder signed and dated the appendix. However, in Northeast, the bid was considered nonresponsive because the bidder's failure to list any utilization goal whatsoever in Appendix A cast doubt on the nature of the bidder's commitment, while in Rossetti, there was similar doubt because the bidder placed brackets around the trades required and listed a utilization percentage not within the prescribed ranges.

In 50 Comp. Gen. 844, supra, we considered Northeast's arguments that its bid was responsive, even though it lacked percentage goals, because the appendix was signed in several places, thus evidencing the bidder's commitment to the goals as set forth in the Washington Plan, and that its failure to insert goals in the blank spaces provided was at the most a waivable minor informality. We held that Northeast's failure to submit specific goals for minority manpower utilization was a material deviation which could not be waived or corrected under FPR § 1-2.405. We stated as follows (50 Comp. Gen. at 846-47):

> "In the event that the contractor fails to meet the specific goals which he establishes, a determination of whether or not he exercised 'good faith' in attempting to meet said goals is based and correlative upon his specific commitment thereon. Sanctions such as contract cancellation can be imposed if it is determined that the contractor did not employ the requisite 'good faith.' It is our view that the submission of goals by the successful bidder would operate to make the requirement for 'every good faith effort' to attain such goals a material part of his contractual obligation upon award of a contract. Therefore, the obligations imposed by appendix 'A' would become a part of the contract specifications against which a contractor's performance will be judged in the event he fails to attain his stated goals, just as much as his stated goals become a part of the contract specifications against which his performance will be judged in the event he does attain his stated goals.
>
> "With the foregoing in mind, we cannot agree that, because it signed appendix 'A' in two places, Northeast was committed to the prescribed minimum percentage ranges for minority group employment set forth in the Requirements, Terms and Conditions of the appendix. Upon examination of the Northeast bid and the attached appendix 'A,' we find no basis to conclude that Northeast was legally bound to at

> least the minimum prescribed percentage ranges. The appendix, read as a whole, is quite specific that the bidder must submit his goals, since his compliance is measured by his goals and not by the prescribed minimums. Accordingly, it is our opinion that a failure by a bidder to submit specific individual goals for minority manpower utilization constitutes such a material deviation from the stated requirements of appendix 'A' that such a deficient bid cannot be regarded as eligible for award under the subject invitation."

This view has been affirmed by this Office, see, e.g., B-176937, March 7, 1973, was also adopted by the court in Northeast Construction Company v. Romney, supra, and obtains regardless of voluntary past compliance, good faith intentions, or the difference in cost between first and second low bids.

Although Starline attempts to distinguish Northeast and Rossetti on several bases, we think the holdings in those cases are clearly applicable to this situation. In our view, the only possible material difference between the Appendix A in this case and that used in the other cases that could warrant distinguishing those cases concerns the use of the term "responsible bidder" rather than "responsive bidder". The distinction is important because requirements bearing on the responsibility of a bidder may be met after bid opening while matters of bid responsiveness must be complied with at bid opening. See, e.g., 52 Comp. Gen. 389 (1972); 39 id. 247 (1959).

GSA reports that the term "responsible" was used as a result of an "inadvertent error in copying the appendix as issued by the Department of Labor." GSA contends, however, that it was clear from the text of the appendix that goals were to be submitted with the bid and that Starline was not misled by and cannot rely on the "typographical error." We agree.

Obviously the use of the word "responsibility" made this solicitation somewhat ambiguous. However, the existence of an ambiguity is not necessarily fatal to a solicitation since the mere use of an ambiguous specification is not, absent a showing of prejudice, a "compelling reason" to cancel an IFB and readvertise. 52 Comp. Gen. 285, 288 (1972). In such circumstances, therefore, what must be determined is whether the ambiguity adversely affected the competition or prejudiced bidders or offerors. See Maintenance Incorporated, et al., B-182268, June 25, 1975, 75-1 CPD 383; Santa Fe Engineers, Inc., B-184284, September 26, 1975, 75-2 CPD 198.

Here, we believe a reading of the solicitation reasonably indicates that the completion of Appendix A was a matter of responsiveness. In two places, the IFB specified that the Appendix A affirmative action plan had to be submitted prior to bid opening or as part of the bid, and that a failure to do so would result in bid rejection. The IFB further provided that there would be no negotiation over submitted goals in the period between bid opening and award. Thus, we think the only fair reading of the IFB is that bidders had to comply with the Appendix A requirements prior to bid opening. Furthermore, we think it is questionable whether Starline, as a matter of law, could claim that it was misled by GSA's error since the Washington Plan, as promulgated by Labor, specifies "responsive" rather than "responsible" bidder and was published in the Federal Register, 35 Fed. Reg. 19352, 19357 (1970), see 41 CFR 60-5.30, thereby placing all bidders, including Starline, on constructive notice of the actual terms of the Plan. See Winston Bros. Company v. United States, 458 F. 2d 49 (Ct. Cl. 1972). In addition, it does not appear that Starline was in fact misled by the error, since the record indicates that Starline did attempt to comply with the Appendix A requirements prior to bid opening.

Starline also argues that the solicitation was ambiguous and confusing because the "operative portion of Appendix A * * * is addressed to specific time periods, all of which would have expired prior to the time when this contract was to be performed," and that this also distinguishes this case from Northeast. We find no merit to this contention. Appendix A stated that "The following are hereby submitted by the undersigned bidder as its goals for minority manpower utilization * * *." Although specific spaces for insertion of goals were provided for various periods up to the year ending May 31, 1974, the appendix explicitly provided that the goals and ranges for that year would be applicable to the contract to be awarded. Thus, we think it was clear that goals were to be submitted and that they could be listed either in the space provided for the year ending May 31, 1974 or in any other way that would manifest the bidder's intention to be bound.

Finally, Starline contends that the IFB was defective because it required bidders to commit themselves to unknown requirements. According to Starline, Labor intends to issue a revised Washington Plan and that it "is likely that this new Plan will also change certain of the guidelines for various trades." Starline asserts that bidders on this procurement therefore were being asked to commit themselves to these changes.

This is manifestly not so. Bidders were asked to commit themselves only to the terms and conditions contained in the IFB. Nothing in the IFB required bidders to commit themselves to any

future changes in the Washington Plan. To the contrary, Appendix A specifically provided that while aspects of the Plan would be reviewed and possibly modified from time to time, the trades and ranges would not be increased "after bids have been received." Thus, any subsequent revisions to the Washington Plan would have no effect on the contractor's obligation under this contract.

Accordingly, we conclude that this case is controlled by Northeast and Rossetti, and that under the rationale of those cases Starline's bid was nonresponsive and properly rejected by GSA.

Responsiveness of Flour City's Bid

Starline's final argument is that Flour City's bid was also nonresponsive to the Appendix A requirements. Starline contends that to be responsive, a bidder must furnish not only percentage goals, but also list each trade to be used along with an estimate of the total number of manhours required for performance and, for all work to be performed in the Washington area, the number of employees to be used both in total and for each trade utilized. Because Flour City submitted only two percentage goals, Starline claims that the same strict reading of Appendix A which resulted in rejection of Starline's bid also compels rejection of Flour City's bid.

Starline's contention here is based primarily on the court's statement in Northeast that:

> "Under Appendix A the bidder is required to submit, for each of the various trades, and for all work done in the Washington area (not merely the work on the contract) the total number of employees to be used and the number to be included in that total." 485 F. 2d at 762.

The court's statement, however, merely reflected the specific requirements of the invitation that was utilized in the Northeast case. Here, the IFB's Appendix A asked only for the total number of manhours to be worked by minority persons on all bidder's projects within the Washington Metropolitan Statistical Area (WMSA), including on this contract, expressed in terms of a percentage of the total number of manhours to be worked during the term of performance of the contract. The appendix further provided that percentage goals "need be submitted only for those trades to be used in the performance of the * * * contract [to be awarded]." Flour City listed percentages for the two trades (iron workers [40 percent] and glaziers [30 percent]) it contemplated using to perform the contract, connecting each percentage figure to the applicable trade by means of a typewritten line. This

was sufficient to commit Flour City to all Appendix A requirements. Accordingly, we find no basis for viewing Flour City's bid as non-responsive.

Starline has also objected to GSA's decision to award the contract prior to resolution of this protest. FPR § 1-2.407(8)(b)(4)(iii) (1964 ed.) provides that an award may not be made prior to resolution of a written protest unless the contracting officer determines that a prompt award will be advantageous to the Government. GSA made such a determination on August 22, 1975, notice of which was provided this Office pursuant to section 20.4 of our Bid Protest Procedures. Essentially, GSA decided that an award had to be made so that this contract could be coordinated with others for the overall construction of the building. Starline, however, believes that there was no need compelling such a prompt award especially when a decision of this Office favorable to Starline would result in a savings to GSA of $126,000. In view of our conclusions herein sustaining the award, we do not find it necessary to consider whether it was proper to make the award while the protest was pending. B-178303, June 26, 1973. However, we point out that even if the award action was contrary to this FPR provision, the legality of an award would not be affected. B-178303, supra; B-168753, March 25, 1970.

The protest is denied.

Deputy Comptroller General
of the United States