

DECISION



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

60602

FILE: B-185300

DATE: March 3, 1976

MATTER OF: Peter Gordon Co., Inc.

98522

DIGEST:

1. While solicitation as issued contained outdated minority percentage ranges, subsequent amendments cured this deficiency and, therefore, bidder's failure to enter minority percentage goal for sheetmetal workers as required rendered bid non-responsive even though bidder signed applicable Washington Plan.
2. Bidder's failure to enter minority percentage goal for sheet-metal workers may not be waived where work will be subcontracted as solicitation terms contemplate commitment by prime contractor and imposition of such commitment upon subcontractors, if any.

Peter Gordon Co., Inc. (Gordon), has protested against the determination by the General Services Administration (GSA) that its bid was nonresponsive on contract No. GS-00B-03233 for roofing and waterproofing on the Federal Home Loan Bank Board Building, Washington, D.C.

The solicitation required bidders to fully complete Appendix A, which contained the Washington Plan for minority hiring. Gordon signed and submitted Appendix A but failed to enter a minority percentage goal for the sheetmetal workers required for performance of the contract. On October 21, 1975, Gordon (the low bidder) was advised that its bid was nonresponsive and that award would be made to the second low bidder, Warren-Ehret-Linck Company. A meeting was held between GSA and Gordon on October 24, 1975, concerning the rejection of Gordon's bid for failure to enter minority hiring percentage goals in the Washington Plan. On November 6, 1975, Gordon protested to this Office.

The issue for decision is whether the bid of Gordon, as submitted, was responsive to the solicitation. Gordon challenges the determination of nonresponsiveness by GSA by advancing three major contentions.

1. The Washington Plan, Appendix A, could not meaningfully be completed as the range of minority percentage goals stated in the solicitation was outdated and the amendments to the solicitation did not correct this situation.
2. By signing Appendix A Gordon committed itself to the plan and therefore should be allowed to supplement its bid (after bid opening) with the necessary information.
3. The work involving the skill category under this contract covered by the Washington Plan (i.e., sheetmetal workers) will be subcontracted by Gordon. Since no skill category covered by the plan will be employed by the prime contractor, the obligation to meet hiring goals falls upon the subcontractor.

The record before this Office indicates that Appendix A, as originally issued, did contain outdated minority percentage ranges since the stated ranges were applicable until May 31, 1974. However, amendment Nos. 2 and 4 to the solicitation, which were received and acknowledged by Gordon, corrected such deficiency. Amendment No. 4 advised bidders that ranges established for the period from May 31, 1973, to May 31, 1974, were to be applicable to contracts after that time. It reads:

"(d) in the event that under a contract subject to this Appendix any work by a trade covered by this Appendix is performed after May 31, 1974, the determined ranges of minority group employment for the year ending May 31, 1974, shall be applicable to such work."

Additionally, the amendment made the failure to complete or submit goals a matter of responsiveness. For the above-stated reasons, we find that Appendix A made the percentage hiring goals for the year ending May 31, 1974, applicable to contracts to be performed after that time. As amended, Appendix A was not ambiguous and

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required as a condition of responsiveness that bidders submit percentage goals within the range set out in the plan.

Alternatively, Gordon contends that by signing Appendix A, it became committed to the Washington Plan, even though it failed to fill in minority hiring goal.

Copies of the Washington Plan were included in the invitation when issued. Appendix A gave notice to the effect that:

"TO BE ELIGIBLE FOR AWARD OF THE CONTRACT,
EACH BIDDER MUST FULLY COMPLY WITH THE REQUIRE-
MENTS, TERMS AND CONDITIONS OF THIS APPENDIX A."
(Emphasis in original.)

Section 1 of the Requirements, Terms and Conditions of Appendix A, as amended, states:

"A bidder who fails or refused to complete or submit such goals shall not be deemed a responsive bidder and may not be awarded the contract or subcontract, but such goals need be submitted only for those trades to be used in the performance of the Federally-Involved 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."

Further, section 3 thereof states that:

"The Contractor's or subcontractor's goals
established within the above ranges shall express

the Contractor's or subcontractor's commitment of the percentage of minority personnel who will be working in each specified craft on each of his projects (whether Federally involved or otherwise) within the Washington SMSA during the term of the covered contract." (Emphasis added.)

In 50 Comp. Gen. 844 (1971), we held that the mere signing of the Washington Plan without submitting the required specific percentage goals for minority hiring rendered the bid there under consideration nonresponsive. Further, the failure to furnish the goals was determined not to be a minor informality that could be corrected or waived. We stated:

"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."

The document submitted by Gordon did not contain the required percentage goals and was therefore not properly completed. Appendix A specifically states that the missing data goes to the responsiveness of the bid, which cannot be corrected after bid opening. See 50 Comp. Gen. 844, supra; Northeast Construction Company v. Romney, 485 F.2d 752 (1973); Rossetti Contracting Company, Inc. v. Brennan, 508 F.2d 1039 (1974).

While Gordon argues that it had no obligation to complete the plan because it had not employed sheetmetal workers in the

past, and thereby also attempts to distinguish the Northeast and Rossetti cases, supra, we do not think such distinction is valid. It is clear from a reading of the subject solicitation and the cited cases that a bidder's obligation is not dependent upon past employment practices, but that he must make an affirmative commitment in connection with the subject contract to hire minorities within the specified goals.

We are not persuaded by the argument that since Gordon will subcontract the only skill (sheetmetal workers) covered by the plan for this project that it does not have to commit itself to the Washington Plan. Appendix A relieves the prime contractor from accountability if a subcontractor fails to fulfill the requirements. However, section 8 of the Requirements, Terms and Conditions of Appendix A requires that:

"Whenever a prime Contractor * * * subcontracts a portion of the work in any trade designed herein, he shall include in such subcontract his commitment made under this Appendix, as applicable, which will be adopted by his subcontractor who shall be bound thereby and by this Appendix to the full extent as if he were the prime Contractor."
(Emphasis added.)

We think this requires the prime contractor to make the commitment initially, and in turn, impose the requirement upon its subcontractors. If this were not the case, a prime contractor, where he has failed to commit himself to the plan, would be able to circumvent the requirement by subcontracting the work for the particular trades covered by the plan.

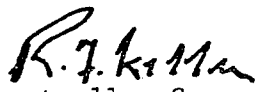
Finally, it is argued that since the Washington Plan lapsed on several occasions from its inception, no valid plan existed at the time of this procurement.

The most recent extension of the Washington Plan by the Department of Labor occurred on July 18, 1975, pursuant to Executive Order 11246, which has at all pertinent times been

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effective. 40 Fed. Reg. 30963 (1975). Whether there was a gap in time during which the plan did not exist is not germane. The solicitation in question was issued on August 20, 1975, with bid opening on October 9, 1975. Therefore, the subject procurement was subject to the Washington Plan as extended.

The protest of Gordon is accordingly denied.


Deputy Comptroller General
of the United States