

DECISION



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

FILE: B-185911

DATE: August 5, 1976

MATTER OF: The Huffman-Wolfe Company

DIGEST:

1. Where solicitation instructs bidders to insert percentage goals for minority group employment and sign applicable affirmative action plan (Atlanta Plan), signed bid which failed to state required goals was properly rejected as nonresponsive since compliance with terms of Atlanta Plan was made matter of responsiveness, which cannot be waived as minor deviation.
2. Protest filed after bid opening raising contention that instructions pertaining to completion of Atlanta Plan were ambiguous is untimely and not for consideration under our Bid Protest Procedures which require that protest based upon improprieties apparent in invitation prior to bid opening must be filed prior to bid opening.

An invitation for bids (IFB) on project No. 101 was issued by the Veterans Administration (VA) for construction work incident to the boiler plant renovation in the VA hospital in Decatur, Georgia. Bids were opened on January 20, 1976. The three lowest bids received were: The Huffman-Wolfe Company (Huffman-Wolfe) at \$584,000; Pitts Industrial Piping, Inc., at \$589,500; and Paul W. Heard & Co. at \$597,777. Eight higher bids were received.

The IFB contained a Notice to Bidders, which required that appendix "A" of the Atlanta Plan, the applicable affirmative action plan (AAP), must be completed, signed and returned by the bidder by the time set for opening of bids. Failure to comply with this directive was stated to require rejection of the bid as nonresponsive.

The Notice to Bidders also indicated that:

"The Atlanta Plan is currently being revised. The present Atlanta Plan is extended until the proposed Revised Atlanta Plan becomes effective. The goals in appendix A for the final year of the plan (July 1, 1974 until June 30, 1975) will be applicable to this contract."

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Notice of extension of the Atlanta Plan was also published in the Federal Register on July 8, 1975. 40 Fed. Reg. 28609. Seven of the 11 bidders, including the protester, were present at a prebid conference on January 6, 1976. Two representatives of the Atlanta Office, Office of Federal Contract Compliance, Department of Labor (OFCC), were present and discussed appendix "A." The Assistant Regional Administrator, OFCC, states that he informed all attendees at the prebid conference of the extension of the Atlanta Plan and its applicability to the work. He also indicates that he explained the mechanism of appendix "A," stressing the need to provide minority manpower utilization goals within the stated ranges, as well as the requirement to sign appendix "A."

Appendix "A" specified that to be eligible for award of the contract, each bidder must fully comply with its requirements, terms, and conditions, as follows in part:

"The following are hereby submitted by the undersigned bidder as its goals for minority manpower utilization * * * to be achieved on all work of the bidder within the Atlanta, Georgia area, during the terms of his performance of this contract in the trades specified below * * *

* * * * *

"No contracts or subcontracts shall be awarded * * * unless the bidder completes and submits, prior to bid opening, this document designated as Appendix A * * *

"A bidder who fails or refuses to complete or submit such goals shall not be deemed a responsive bidder and may not be awarded the contract * * *"

Ranges constituting acceptable minimum commitments to minority group employment for each trade applicable to the contract were listed. At the end of appendix "A," a signature space was provided with instructions that the "* * * Appendix shall be signed in the space provided below."

Eight bidders, including the two lowest bidders, failed to include minimum goals for minority group employment. Consequently, those eight bids were determined nonresponsive. Thereafter, on

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February 17, 1976, award was made to Paul W. Heard & Co. as the low responsive bidder.

Huffman-Wolfe notes that appendix "A" established the minimum acceptable range of minority employment goals. By signing and submitting appendix "A," Huffman-Wolfe maintains that it was bound to accept them. Protester emphasizes the language contained in the Notice to Bidders which states that "[t]he goals in Appendix A for the final year of the plan * * * will be applicable to this contract." Huffman-Wolfe alternatively argues that the Notice to Bidders, which provides instructions for completing appendix "A," was ambiguous and misleading. Huffman-Wolfe finds support for this contention in the fact that only three of the bidders filled in their goals. In this regard, Huffman-Wolfe disputes the assertion of the Assistant Regional Administrator, OFCC, that bidders were informed of the need to insert minority group employment goals.

It is the position of the VA that protester's failure to submit goals required the rejection of its bid as nonresponsive. Northeast Construction Company v. _____, 485 F.2d 752 (D.C. Cir. 1973); Rossetti Contracting Company, Inc. v. 1 _____, 508 F.2d 1039 (7th Cir. 1975). Further, VA stated that such failure may not be considered a minor informality which could be cured after bid opening. Moreover, protester's past compliance with affirmative action plan requirements may not be considered as a commitment to any specific goals under the present solicitation.

Huffman-Wolfe contends that the cases cited by the VA are not applicable to this situation because: (1) an expired plan was not involved; (2) those cases did not contain amended instructions dealing with an expired plan; and (3) allegations of deficient bid instructions were not raised. Protester also contends that Peter Gordon Co., Inc., B-185300, March 3, 1976, 76-1 CPD 153, which involved the continuation of an affirmative action plan beyond its expiration date, is also distinguishable because the language in that case used to extend this plan was not confusing and misleading.

With regard to the protester's first contention, we have held that the mere signing of an applicable AAP without submitting the required specific percentage goals for minority hiring renders the bid nonresponsive. Further, the failure to furnish the goals has been determined not to be a minor informality that could be

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corrected or waived. We stated in 50 Comp. Gen. 844 (1971), concerning the requirements of the Washington Plan:

"* * * 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 Huffman-Wolfe 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. Peter Gordon Co., Inc., supra. Moreover, both the Northeast Construction and Rossetti Contracting cases hold that where an invitation has made compliance with affirmative action requirements a matter of bid responsiveness, the failure to comply therewith may not be waived as a minor informality. Since responsiveness of a bid is to be established at bid opening, Huffman-Wolfe's failure to complete its minority employment goals renders the bid nonresponsive. See F.P.D. Electric Corp., B-186342, June 30, 1976, 76-1 CPD 427; Starline, Incorporated, B-184683, June 10, 1976, 76-1 CPD 365.

55 Comp. Gen. —

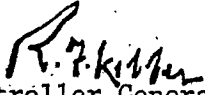
Regarding Huffman-Wolfe's contentions that the IFB provisions are ambiguous, section 20.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. part 20 (1975), requires that "[p]rotests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening * * * shall be filed prior to bid opening * * *." Under this standard, Huffman-Wolfe's protest on this issue is untimely and will not be considered on its merits.

During our review of the administrative record, we noticed that Paul W. Heard & Co. only submitted eight minority manpower utilization goals in response to the 10 trades listed (one trade was inapplicable to the contract work). The contracting officer indicates

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that the error was inadvertent and that precautions will be taken in the future to avoid similar mistakes. Further, he states that "[n]either the Contractor nor the Contracting Officer entered into this contract other than in good faith, with no intent to deprive other bidders of their rights." Moreover, we have been advised that the contract work is 50 percent complete. Further, minority manpower utilization compliance reports indicate that minority manpower utilization for the omitted trade is at 33-1/3 percent while the minimum stated in the AAP is 14.8 percent. In this light, we do not feel it would serve the best interests of the Government at this time to recommend any corrective action concerning this contract.

Deputy


Comptroller General
of the United States