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Stolzenberg
Proc. II

DECISION

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

FILE: B-189370 DATE: January 31, 1978

MATTER OF: Mainline Carpet Specialists, Inc.--
Reconsideration

DIGEST:

> Intended subcontractor's lack of acceptable affirmative action/equal employment opportunity program does not bar award of prime contract unless contracting officer is aware that subcontractor has previously been formally notified of noncompliance with equal opportunity requirements, since applicable regulations provide that subcontractor has 120 days after award to develop an acceptable program.

Mainline Carpet Specialists, Inc. (Mainline) has requested reconsideration of our decision Mainline Carpet Specialists, Inc., B-189370, November 28, 1977, 77-2 CPD 415, which denied its protest of the award of a contract for the furnishing and installation of carpeting at the Fort Meade Officer's Club to Sears, Roebuck and Company (Sears).

Although the protest raised several issues, the sole issue involved here is Mainline's allegation that the award to Sears was improper because Alexander Smith Carpet, Sears' intended supplier, was not in compliance with the equal opportunity and affirmative action requirements emanating from Executive Order No. 11246, 30 Fed. Reg. 12,319 (1965), as amended. The issue was not explicitly discussed in the prior decision.

Pursuant to that Executive Order, the solicitation contained the Equal Opportunity clause (incorporated by reference) set forth at Armed Services Procurement Regulation (ASPR) 7-103.18 (1976 ed.) and the representation required by ASPR 7-2003.14(b)(3). By virtue of the Equal Opportunity clause, the offeror agrees to several equal employment opportunity and affirmative action provisions and in accordance with the following, to include the same requirements in its subcontracts or purchase orders:

> "The Contractor will include the provisions of paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The Contractor will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions including sanctions for noncompliance * * *." (Emphasis added.)

The representation states the following:

> "By submission of this offer, the offeror represents that, to the best of his knowledge and belief, except as noted below, up to the date of this offer no written notice such as a show cause letter, a letter indicating probable cause, or any other formal written notification citing specific deficiencies, has been received by the offeror from any Federal Government agency or representative thereof that the offeror or any of its divisions or affiliates or known first-tier subcontractors is in violation of any of the provisions of Executive Order 11246 of September 24, 1965, Executive Order 11375 of October 13, 1967, or rules and regulations of the Secretary of Labor (41 C.F.R., Chapter 60) and specifically as to not having an acceptable affirmative action program or being in noncompliance with any other aspect of the Equal Employment Opportunity Program. It is further agreed that should there be any change in the status or circumstances between this date and the date of expiration of this offer or any extension thereof, the Contracting Officer will be notified promptly."

Neither of these provisions requires intended subcontractors to have acceptable equal opportunity/ affirmative action programs as a condition of award of the prime contract. With respect to subcontractors, these provisions merely require that the offeror not be aware of the receipt by its first-tier subcontractors of a Federal Government notice regarding noncompliance with the Executive Order and implementing regulations and that, if awarded a contract, the offeror will include the Equal Opportunity clause provisions in its non-exempt subcontracts. Thus Sears, by submission of its offer, committed itself to include the Equal Opportunity provisions in its order to Alexander Smith Carpets unless that company is exempt, and certified that it was not aware of any noncompliance notice being received by Alexander Smith. With regard to the latter, there is no evidence of record that the Sears certification was not accurate. With respect to the former, the applicable regulations exempt subcontracts under $50,000 from the affirmative action program requirements, 41 C.F.R. 60-1.40(a), and while the offer from Sears was in the amount of $54,674.26, there is no indication of record that the order to Alexander Smith was in the amount of $50,000 or more. However, even if the purchase order/subcontract was not exempt, the regulations require only that the subcontractor develop an acceptable affirmative action compliance plan within 120 days from the commencement of a contract. 41 C.F.R. 60-2.1(a). Accordingly, the fact that Alexander Smith might not have had such a plan or program prior to award of the contract to Sears would not, by itself, provide a basis for not awarding the contract to Sears.

We also note that the contracting officer states that upon receipt of the protester's pre-award allegation that Alexander Smith was not in compliance with Executive Order 11246, a check was made with the Defense Contract Administration Services offices in New York and Boston, and that both offices reported that they had no record of noncompliance.

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The prior decision is affirmed.

R. F. Keller

Deputy Comptroller General
of the United States