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DECISION

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

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FILE:B-193152 DATE: April 11, 1979

MATTER OF: Truland Corporation CNG-01776

[Allegation that Awardee's Bid Did Not Contain Required Affirmative Action Commitment]

DIGEST:

1. In view of: (a) Erroneous inclusion of IDENT. void "bid appendix" of Washington Plan for affirmative action in bid documents; (b) Material differences between void appendix and current affirmative action clauses properly included in IFB; (c) Inconsequential nature of bidder's insertions in void appendix; (d) Equality of bidding opportunity notwithstanding bidders' ignorance of extinct character of bid appendix, protester's argument that void appendix must be given force and effect is rejected.

2. Because of wording of bidding documents bidders were to evidence commitments to proper affirmative action clauses in same way that bidders were to evidence commitments to any other standard bidding provisions--such as "Employment of the Handicapped" provision--by merely signing bids. Since low bidder signed its bid, bidder is committed to affirmative action requirements.

3. Insertions by low bidder of ranges of minority hiring for certain trades in void bid appendix do not contradict bidder's commitment to affirmative action under current requirements arising from signed bid since inserted ranges are the same as those currently required.

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4. Notwithstanding procuring agency's decision not to release to protester documents low bidder submitted in support of mistake claim, propriety of agency's allowance of claim will be reviewed.

5. Although GAO has retained right of review of agency's decision to allow correction of bid mistake claims after bid opening but prior to award, agency's decision as to weight given evidence in support of claim will not be questioned unless unreasonably founded.

6. Whatever uncertainty may exist with regard to additional bond premium and profit in intended bid of low bidder who claims pricing error in omitted costs--exclusive of bond premium and markup--must be viewed as relatively inconsequential in view of dollar difference separating low bid, as corrected, and next low bid.

Protest was denied.

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DLG00019

Truland Corporation (Truland) has protested the award of General Services Administration (GSA) contract GS-03B78079 to Singleton Electric Company, Inc. (Singleton). Truland contends that Singleton's low bid for the work did not contain a required affirmative action commitment and that it was improper for GSA to have allowed Singleton to adjust its bid price upward after bid opening because of an alleged bid mistake. For the reasons set forth below we deny Truland's protest.

Affirmative Action Commitment

According to Department of Labor regulation (published in the Federal Register--Vol. 43, ~~No. 68,~~ April 7, 1978, at pages 64888 - 14900), the July 12, 1978, invitation for bids (IFB) under which the contract was awarded to Singleton contained affirmative action requirements. These requirements were set forth in two

of the IFB's General Provisions (Standard Form (SF) 23-A), namely: clause 35 entitled "Notice of Requirement for Affirmative Action to Ensure Equal Employment Opportunity (Executive Order 11246);" and (2) clause 36, "Standard Federal Equal Employment Opportunity Construction Contract Specifications." These clauses provided, in pertinent part:

Clause 35

"(2) the goals and timetables for minority and female participation, expressed in percentage terms for the contractor's aggregate workforce in each trade on all construction work in the covered area, are as follows: [There followed a list of 'timetables' and numerical hiring goals for female and minority participation for each trade.]

"These goals are applicable to all the Contractor's construction work (whether or not it is Federal or federally assisted) performed in the covered area. * * *"

Clause 36

"[This clause mainly concerned other 'nongoal' affirmative action requirements.]"

Additionally, GSA reports, the IFB erroneously included the "Washington Plan bid appendix" (bid appendix) of the so-called "Washington Plan" for affirmative action which had previously been used for several years. (The April 7, 1978, Federal Register announcement promulgating clauses 35 and 36 specifically deleted all provisions of the "Washington Plan" which appears in 41 C.F.R. § 60-5 (1977). See 43 Fed. Reg. 14890, 14894, and 14897. As stated at 43 Fed. Reg. 14890: "Specifically, [41 C.F.R.] parts 60-5 [the 'Washington D.C. Plan'] * * * are hereby deleted.")

The bid appendix informed bidders of acceptable percentage ranges for minority hiring goals. The erroneously included bid appendix also required bidders to enter minority hiring goals for five trades (electricians, painters and paperhangers, sheetmetal workers, iron workers, and tile and terrazzo workers) which would be used by any contractor. Unlike clause 35, however, the bid appendix contained no hiring goals and timetables for women. Moreover, the bid appendix specifically stated that any "bidder who fails * * * to * * * submit such goals [with its bid] shall not be deemed a responsive bidder and may not be awarded the contract."

Singleton submitted with its low bid the bid appendix on which it had entered its goals for only three of the five trades in question. By contrast, Truland's bid contained a bid appendix showing goals for all trades.

By letter of August 23, 1978, Truland protested to GSA against award to Singleton on grounds that Singleton's bid was nonresponsive because of its failure to contain minority hiring goals for iron workers and tile and terrazzo workers.

GSA's contracting officer denied Truland's protest by letter of September 28. GSA informs us that the denial was based on the following rationale:

> "* * * Singleton's bid was an offer to comply with the requirements of Standard Form 23-A * * * [T]hese goals were identical with those in the erroneously included bid appendix; as a consequence, Singleton's bid committed Singleton as effectively as if Singleton had fully completed the bid appendix * * *"

In addition to the rationale advanced by the contracting officer in support of the denial of Truland's protest, GSA also argues: (1) The bid appendix--having been voided by the April 7 Federal

Register announcement--is without force and effect; hence, Singleton's failure to comply with the literal terms of a void bid appendix is inconsequential; (2) The failure to comply with the bid appendix requirements may be compared with certain cases involving "subcontractor listing" provisions erroneously included in solicitations: in those cases (see, for example, 47 Comp. Gen. 644 (1968)), it has been held that a "bidder's failure to satisfy an immaterial bidding requirement does not render the bid nonresponsive"; (3) GAO has recognized that a bidder may make the requisite commitment to affirmative action requirements in a manner differing from that specified in the solicitation.

In reply to GSA's arguments Truland argues: (1) All bidders "clearly acknowledged" the bid appendix; hence, to maintain the integrity of the competitive bidding system, all bidders must be treated equally by enforcing the requirements of the bid appendix; (2) The "de minimis" rule applied to subcontractor listing requirements in the cases cited by GSA should not be applied "for reasons of social policy" to affirmative action requirements; (3) Although a bidder may include a commitment for minority manpower utilization elsewhere in its bid than on the appendix form provided, such as by letter, the inclusion by GSA of the new clause 35 in the IFB here cannot reasonably be regarded as a material commitment on the part of the bidder--especially since it is highly doubtful Singleton was aware of clause 35.

Singleton's Affirmative Action Commitment

The bid appendix should not have been in the IFB in view of the specific April 7, 1978, deletion of the "Washington Plan" of which the bid appendix was a part; moreover, the void appendix contained no mention of goals and timetables for female hiring unlike the current clauses 35 and 36 (among other material differences between the clauses and the bid appendix). Further, the mere fact that all bidders were apparently unaware that the bid appendix was void--and thus made insertions in the appendix--is inconsequential if their

bids otherwise indicated commitments to currently applicable affirmative action requirements and the actual insertions in the void appendixes in no way contradicted the current requirements.

In this perspective all bidders were bidding on an equal basis even if that basis was partially founded on ignorance of the extinct character of the bid appendix. Consequently, Singleton's failure to list minority hiring goals for the two trades in the void appendix was, in itself, irrelevant so far as the acceptability of its commitment under the current--and only pertinent--affirmative action requirements. We therefore reject Truland's argument 1, above.

What was required of bidders under the express terms of the April 7, 1978, Federal Register announcement--as evidenced in clauses 35 and 36 of (SF 23-A)--was a commitment to all requirements found in those clauses. Contrary to Truland's argument (3), above, it is clear that bidders were to evidence their commitment to those clauses in the same way that bidders were to evidence commitments to any other standard provisions--such as clause 33 of SF 23-A (Employment of the Handicapped)--that is, by merely signing the face sheet of SF 21 (Bid Form) which stipulates that a bid is submitted in: "* * * strict accordance with the General Provisions (SF23-A) * * *."

All clauses of SF 23-A--including clauses 35 and 36--specify requirements and do not in any way elicit further bidders' signatures or fill-ins as a means of demonstrating bidders' commitments to the requirements, unlike the approach taken in prior affirmative action forms including the void bid appendix. Thus, under the new scheme of evidencing commitments to affirmative action by bid form signatures only, all bidders are specifically charged with notice of the requirements that they are bidding "in strict accordance with" whether they are actually aware of the requirements or not.

By signing its bid on the Bid Form, therefore, Singleton must be viewed as having evidenced its commitment to all affirmative action requirements of clauses 35 and 36. Moreover, the goals for minority hiring (electricians--28-34 percent; painters and paperhangers--35-42 percent; and sheetmetal workers 25-31 percent) inserted in its void bid appendix are the exact same goals for minority hiring set forth for these trades in clause 35. Thus, Singleton's bid evidences a clear and unambiguous commitment to all requirements of clauses 35 and 36.

In view of this conclusion, it is unnecessary for us to consider Truland's argument (2).

Upward Adjustment of Singleton's Bid

By letter dated August 22, 1978, 5 days after bid opening, Singleton requested permission to correct its bid from $4,927,000 to $5,447,000. The letter further stated that the "$520,000 error in bid price stemmed from inadvertent clerical error." To support its claim of error--which allegedly resulted in the omission of direct costs for general construction work and associated sales tax--Singleton submitted bid estimate documents and affidavits which GSA found sufficient to permit upward adjustment of Singleton's bid for the direct costs and taxes exclusive of additional bond premium and markup. GSA allowed this adjustment under authority of Federal Procurement Regulations (FPR) § 1-2.406-3 (1964 ed., circ.1), which provides:

> "(a) Heads of executive agencies are authorized, in order to minimize delay in contract awards to make the administrative determinations described below in connection with mistakes in bids alleged after opening of bids and before award. * * *
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> "(e) Nothing contained in this § 1-2.-406-3 shall deprive the Comptroller General of his statutory right to question the correctness of any administrative determination made hereunder * * *."

Singleton has asserted that all documents submitted to GSA in support of its correction request are confidential and should not be disclosed to Truland which has requested the documents from GSA under the Freedom of Information Act. Whether these documents should be released to Singleton is a decision for GSA, not GAO, to make. Nevertheless, it is our practice to decide the merits of a bid protest against a bid correction even though the protester has not been given access to the worksheets upon which allowance of the correction was based. RCI Microfilm, B-182169, April 10, 1975, 75-1 CPD 220. GSA has informed Truland of the general scheme of its rationale for allowing correction along with some of the facts relating to the mistake. In reply to this GSA-supplied information, Truland has replied that "it is not possible to independently determine whether Singleton would still remain low if the bond premium and markup, waived by Singleton, were added to the revised bid." Notwithstanding Truland's position, it is our understanding that Truland wants our Office to review the propriety of the correction.

Although our Office has retained the right of review, the authority to correct mistakes alleged after bid opening but prior to award is vested in the procuring agency. The procuring agency's decision as to the weight to be given the evidence in support of an alleged mistake will not be questioned by our Office unless the decision is unreasonably founded. 53 Comp. Gen. 232, 235 (1973).

The principles for application in reviewing the correction here were set forth at length in Western States Construction Company, Inc., B-191209, August 29, 1978, 78-2 CPD 149, which reads:

> "The general rule is that bid correction may be allowed when a bidder demonstrates, by clear and convincing evidence, that a mistake was made, the nature of the mistake, and the bid price actually intended, provided the bid both as corrected and uncorrected would be low * * *. A bidder requesting correction is required to clearly and convincingly establish the actual bid intended because it would obviously

be unfair to other bidders and detrimental to the integrity of the competitive bidding system to allow the bidder, after bid opening, to first determine what bid price it should have submitted.

"However, a bidder is not always required to clearly and convincingly establish exactly what each element of his bid would have been had the alleged mistake not been made, since correction may be allowed even though there is a narrow range of uncertainty regarding some aspect of the bid actually intended. See Fortec Constructors, B-189949, November 15, 1977, 77-2 CPD 372 and cases cited therein. The uncertainty may arise because the bidder 'rounded off' his work sheet figures in entering a bid price, see George C. Martin, Inc., B-187638, January 19, 1977, 71-1 CPD 39, or because the bidder does not or cannot establish what particular bid element, such as mark-up, would have been. See Fortec Constructors, supra.

"In Fortec, we allowed correction, despite an agency determination to the contrary, even though the bidder chose not to seek correction on the basis of all factors used in its original bid price computation. In allowing correction in such a case, we are mindful of the danger that the low bidder, upon discovering an error after opening, will request correction only on the basis of those cost factors that will permit the bidder to remain low. Accordingly, a bidder may be permitted to correct a bid so as to reflect only the omission of direct costs, without a corresponding increase for profit and overhead, only where correction is requested in that form and where it is clear that the value of the correction with or without the omitted costs would not alter the relative standing of the bidders. * * *"

GSA's own analysis of Singleton's request for correction shows that the inclusion of reasonable estimates for additional bond premium and markup would still leave Singleton as low bidder by a significant margin. We cannot question the reasonableness of these estimates which are based on percentages calculated from the gross dollar amounts for bond premium and markup in Singleton's worksheets. Thus, whatever uncertainty may exist with regard to additional bond premium and profit must be viewed as relatively inconsequential in view of the dollar difference separating Singleton's bid, as corrected, and the next low bid. Consequently, we do not object to the correction.

Protest denied.

Deputy Comptroller General
of the United States