18848 Boyle

DECISION

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

FILE: B-199145.2 DATE: July 17, 1981

MATTER OF: Paul N. Howard Company--Reconsideration

DIGEST:

1. GAO affirms decision in Paul N. Howard Company, B-199145, November 28, 1980, 80-2 CPD 399, in which GAO concluded that grantees cannot require bidders to submit with bids names of firms planned to be utilized in performing work as a condition of responsiveness. Therefore, grantor's current regulation requiring only certification with bid is consistent with that decision.

2. Bid is responsive where bidder certifies in its bid intention to perform work by utilizing percentage goal of minority subcontractors. Substitution of one subcontractor for another (whether or not listed in bid), before award, concerns bidder's ability to comply with terms of bid or bidder's responsibility; substitution after award concerns contract administration. Therefore, GAO's decision in Paul N. Howard Company, B-199145, November 28, 1980, 80-2 CPD 399, correctly concluded that after bid opening grantee should permit reasonable substitution of one minority subcontractor for one listed in responsive low bid.

The Department of Transportation, Urban Mass Transportation Administration (UMTA), requests reconsideration of our decision in the matter of Paul N. Howard Company, B-199145, November 28, 1980, 80-2 CPD 399. That decision concluded that the low bidder on a grantee solicitation should have been allowed to substitute a new minority subcontractor after bid opening. In the Howard decision, we reasoned that documentation bearing on a bidder's compliance

[Request for Reconsideration]

~~017612~~ 115854

with the solicitation's minority business specifications concerned the bidder's responsibility and could be provided after bid opening even though the solicitation stated that it could not.

UMTA believes that the decision is too sweeping and would unreasonably restrict participation of minority subcontractors. The Paul N. Howard Company (Howard) suggests that the matter is moot because UMTA changed its regulations to eliminate the problem.

Howard presents sound argument that the earlier decision should not be reconsidered; however, in view of the significant impact of a possible misunderstanding of the earlier decision, we have reconsidered the matter. See Environmental Protection Agency--request for modification of GAO recommendation, 55 Comp. Gen. 1281 (1976), 76-2 CPD 50. We conclude that the Howard decision was correct.

The Howard decision considered Howard's complaint that the grantee, Metropolitan Dade County, Florida, with the concurrence of UMTA, improperly rejected its low bid for the construction of two line sections of stage 1 of the Metro-Dade Mass Transit System. The grantee's solicitation established a goal that a certain percentage of the total value of the contract be awarded to minority subcontractors. The solicitation required each bidder "as a condition of responsiveness" to submit information showing compliance with the goal. The grantee concluded that one of the listed subcontractors in Howard's bid did not qualify as a minority business--a fact not known by Howard until after bid opening. The grantee refused to permit Howard to submit the name of another subcontractor to replace the nonminority business.

The Howard decision concluded, in essence, that the Howard bid unequivocally bound Howard to perform the contract by utilizing the goal of minority subcontractors. Whether the goal was met by using the subcontractors named in its bid or a substitute acceptable to the grantee was a precondition to performance, i.e., information concerning the bidder's responsibility or ability to perform as required by its bid, which could be furnished after bid opening.

First, UMTA is concerned that under the Howard decision, grantees cannot treat compliance with minority business requirements as a matter of bid responsiveness. UMTA argues that it is not improper under Federal law to require bidders to identify qualified firms in their bids sufficient to meet a solicitation's minority and female subcontracting goals, as a condition of bid responsiveness. UMTA notes that current regulations require only written assurance or certification of meeting the goals to be submitted with the bid; after bid opening, the names of the minority firms may be submitted. UMTA contends that the Howard decision implies that the minority subcontracting certification requirement may never be made a matter of responsiveness.

We believe that UMTA's concern is unwarranted. We have no legal objection if grantee solicitations require that bidders submit with bids a written assurance or certification of meeting the minority subcontracting goals. Failure to submit an unambiguous certification can properly be a basis to exclude the bidder from consideration for award. See RGK, Inc., B-201849, May 19, 1981, 81-1 CPD 384, where the low bidder submitted the required certification but its bid prices of the items to be subcontracted to minority firms was less than the required goal, we concluded that the bid was ambiguous and, thus nonresponsive, and it could not be corrected after bid opening. Further, in Northern Virginia Chapter, Associated Builders and Contractors, Inc., et al., B-202510, April 24, 1981, 81-1 CPD 318, we rejected the argument that affirmative action requirements involve only the bidder's responsibility, not the bid's responsiveness.

In our view, the Howard decision does not imply that grantees cannot require that bidders submit with bids a written assurance or certification of meeting the subcontracting goals. Further, we find that UMTA's current regulation requiring certification with the bid as a matter of responsiveness is reasonable and consistent with the Howard decision.

In rare instances, our Office has not objected to procuring agencies making matters of responsibility matters of responsiveness for particular procurements.

See 43 Comp. Gen. 206 (1963), where procuring agency presented clear evidence that listing proposed subcontractors was necessary to prevent bid shopping. Here, there is no evidence that listing proposed minority subcontractors in the bid will promote the cause of affirmative action. Instead, the evidence seems to indicate that well-intentioned bidders are being trapped by unnecessary regulatory requirements. The result is higher costs for the same work.

In sum, the bidder's unconditional certification or written assurance to comply with the solicitation's minority subcontractor requirements makes the bid responsive on that point. The manner in which the bidder carries out its obligation is a matter of contract and grant administration within the purview of the grantee and grantor, respectively.

Second, UMTA is concerned that a grantee must permit substitution of subcontractors after bid opening as in the Howard decision. Again, we believe that UMTA's concern is unwarranted. Where a grantee's solicitation requires certification, the low bidder's agreement to perform the work utilizing the goal of minority subcontractors would satisfy the conditions of responsiveness. If after bid opening an intended subcontractor (whether or not listed in the bid) refuses to perform the work or is not acceptable to the grantee or the grantor agency, there is no legal reason to prohibit the low bidder from substituting another subcontractor acceptable to the grantee and the grantor. The low bidder's compliance with the terms of its bid after award is a matter of contract administration and the grantee's determination of the low bidder's ability to comply with the terms of its bid before award is a matter of the bidder's responsibility.

Accordingly, since there has been no showing of errors of law or fact in the Howard decision, it is affirmed.

Milton J. Socolar

Acting Comptroller General
of the United States