DECISION

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

61318

FILE: B-186278 DATE: August 10, 1976

MATTER OF: Mayfair Construction Company

98707

DIGEST:

1. Protest untimely filed against use by DOD of affirmative action plan different than that prescribed by DOL presents issue of widespread interest to procurement practices of DOD so as to be considered on its merits as significant issue within meaning of Bid Protest Procedures, 4 C.F.R. § 20.2(c) (1976).

2. Approval by DOL of DOD affirmative action clause for imposed Chicago Plan which differs from provision issued by DOL, is accepted since interpretation of regulations by issuer is accorded great deference.

3. In light of DOL approval of DOD affirmative action provision after clause has been used, and prior approval of substance of similar clauses which differed from provisions required to be used by DOL, no legal objection is offered to use of DOD clause notwithstanding omission of specific permission of DOL for agency to use document substantially similar to DOL provision. Assumption is that deviant DOD clause would have been approved if submitted to DOL prior to use.

4. Agency determination that bid was nonresponsive for failing to include applicable affirmative action goals for trades intended to be subcontracted was reasonable in light of reliance on GAO decisions.

5. Position of Navy that oral protest cannot be handled in large and complex Government is contrary to ASPR directing that all protests be considered by contracting officer and views of all parties affected by protest should be solicited.

Mayfair Construction Company (Mayfair) submitted the low bid in response to invitation for bids (IFB) No. 62472-74-B-0102, issued by the Naval Facilities Engineering Command, Philadelphia, Pennsylvania (Navy), for certain construction work at the Great Lakes Naval Base, Illinois. Mayfair's bid was rejected as nonresponsive for failing to indicate minimum minority manpower utilization goals in response to the affirmative action provisions of the IFB. Mayfair protests the rejection of its bid.

When bids were opened on March 18, 1976, Mayfair's bid was $4,974,800 for item 1 and $97,000 for item 2, which was $86,100 lower than the next low bid of Jenkins and Boller Co., Inc. (Jenkins and Boller), at $5,077,000 and $80,900, respectively. The IFB contained the affirmative action requirements of the equal employment opportunity clause entitled the Chicago Plan. The clause is prefaced by the legend cautioning,

> "NOTICE OF REQUIREMENT FOR SUBMISSION OF AFFIRMATIVE ACTION PLAN TO ENSURE EQUAL EMPLOYMENT OPPORTUNITY - TO BE ELIGIBLE FOR AWARD OF A CONTRACT, EACH BIDDER MUST FULLY COMPLY WITH THE REQUIREMENTS, TERMS, AND CONDITIONS OF THIS NOTICE."

Thereafter, trades contemplated to be used in the project are listed with accompanying percentage goals, expressed in ranges of minority manpower utilization for consecutive years through 1978. Commitment to minority utilization within the stipulated ranges is deemed acceptable compliance with the Chicago Plan.

The bid form listed the trades expected to be utilized, and provided space for the bidders to insert minority manpower utilization goals for those trades. The instruction clause immediately preceding the above stated:

> "The Bidder hereby submits the amounts set forth below as his minority manpower utilization goals for all his construction work in the covered area during the term of the contract that may be awarded pursuant to this solicitation, and he agrees to pursue these goals in accordance with, and to comply with, the 'CHICAGO PLAN' clause of the contract. * * *"

Of the 15 listed trades, Mayfair inserted goals for only 2 trades--carpenters and operating engineering. The goals were within the stipulated ranges. Jenkins and Boller and eight of the nine other bidders submitted goals for all listed trades within the acceptable ranges.

Jenkins and Boller protested any award to Mayfair on March 19 due to Mayfair's response to the affirmative action requirements. A letter dated March 25 to the Navy more fully set forth the bases of the protest. On March 29, award was made to Jenkins and Boller. In the interim between the filing of the Jenkins and Boller protest and the award to that firm, Mayfair states that it called the Navy to confirm or deny a rumor that a protest had been filed by Jenkins and Boller against acceptance of Mayfair's bid. The Navy official confirmed the existence of the protest. Mayfair states that it asked if it should "do something" relative to the protest, to which the Navy responded to "sit tight" and wait for Navy's decision. On April 2, Mayfair again called the same Navy official for further information and was then informed of the award. Thereafter, this protest was filed on April 7. Work has been permitted to proceed during the pendency of this protest.

We believe that the primary reason that the protest was not filed until award had been made is due to the failure of the Navy to follow Armed Services Procurement Regulation (ASPR) § 2-407.8 (1975 ed.). That section concerns the procedures to be followed when a protest is lodged against an award or a proposed award. The Navy states that "* * * [p]rotests must be submitted in writing * * * and oral requests for review simply cannot be credited or handled in a large and complex Government." This is contrary to ASPR § 2-407.8(a)(1), which requires that the:

> "[c]ontracting officer[s] shall consider all protests or objections to the award of a contract, whether submitted before or after award. If the protest is oral and the matter cannot otherwise be resolved, written confirmation of the protest shall be requested. * * *"

More importantly, ASPR § 2-407.8(a)(3) provides:

> "Other persons, including bidders, involved in or affected by the protest shall be given notice of the protest. They shall also be advised that they may submit their views and relevant information to the contracting officer within a specified period of time, normally within one week, and that copies of such submissions should be furnished directly to the General Accounting Office when the protest has been filed with that Office."

Pursuant to this section, when Jenkins and Boller filed a protest with the Navy against any award to Mayfair, the Navy was required to notify Mayfair of the existence of the protest. On the record, this did not transpire. Further, when Mayfair learned of the protest by its own devices and contacted the Navy asking if it should "do something," the Navy improperly informed Mayfair to "sit tight." Having thus implied that Mayfair could expect to hear from the Navy once a decision had been made, but before award, the Navy then proceeded to award the contract before informing Mayfair of the decision. We see no reason to doubt that Mayfair would have protested any proposed award had Navy followed the direction of ASPR.

Mayfair maintains that its bid was responsive because it was bound by the Chicago Plan by the submission of a signed bid, since no separate signature was required by the affirmative action plan (AAP) provisions of the IFB. Furthermore, under the language of the AAP in the IFB, Mayfair contends that for those percentage goals that were not submitted, it was bound to accept the minimum percentage goals stated in the IFB. Mayfair next contends that the AAP only required the submission of goals for the trades with which the contractor intended to perform and not for work to be performed by subcontractors. Mayfair takes this position in light of the specific language of the AAP here being

different than that prescribed by the Department of Labor (DOL) in 41 C.F.R. part 60-11, appendix A, Chicago Plan (1975). Mayfair asserts that the deviant AAP used by the Navy was in excess of its authority, thereby rendering the IFB defective. Mayfair requests that it be permitted to amend its bid to include commitments to the minority manpower utilization goals, as was permitted in other cited instances.

It is the Navy's position that Mayfair's failure to submit percentage goals for minority manpower utilization for all applicable trades is a material defect which renders the bid nonresponsive. Since the matter of inserting goals as required is one of responsiveness, Mayfair cannot be permitted to amend its bid after bid opening. Navy maintains that the AAP used here, although different from the appendix A prescribed by DOL, was a substantially similar document and as such, the use was permissible within the meaning of the DOL regulations. Furthermore, while DOL did not approve the specific Chicago Plan used, DOL did approve the bid conditions inserted therein. Thus, the Navy concludes that specific approval was not necessary, as approval of the substance of the clause had already been obtained. Lastly, the Navy states that the failure to include all applicable goals is not a minor irregularity that can be waived.

Section 20.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. part 20 (1976), requires that protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening must be filed prior to bid opening in order to be considered on the merits. Clearly, the use of a Chicago Plan different from that prescribed by DOL was apparent on the face of the IFB prior to bid opening. Since the protest was not filed until after bid opening, it is untimely. Notwithstanding this, section 20.2(c) of our Procedures provides that the Comptroller General may consider an untimely protest when he determines that it raises an issue significant to pocurement practices or procedures. In our opinion, this issue meets the requisite level for consideration because of widespread application to the procurement practices of the Department of Defense (DOD). Consequently, the protest will be considered on the merits. Cf. 52 Comp. Gen. 20 (1972).

Those contentions relating to the rejection of Mayfair's bid as nonresponsive as a result of the Navy's interpretation of the requirements of the Chicago Plan are timely filed under section 20.2(b)(2) of our Procedures. This provision requires that all protests other than those covered by section 20.2(b)(1) be filed within 10 working days after the basis for protest was known, or should have been known, whichever is earlier. While Mayfair received notice of the Jenkins and Boller protest to the Navy on March 19, Mayfair had no reason to protest until knowledge of the award to Jenkins and Boller was communicated to Mayfair on April 2. Thus, Mayfair's protest, having been filed on April 7, was within the applicable time limits and we will consider its merits.

The Navy has advanced various arguments in support of its use of the DOD Chicago Plan. In a June 18 supplemental report on the protest, the Navy asserts that the substantive provisions of the DOD Chicago Plan were approved by DOL on February 3, 1972, in the latter's review of Defense Procurement Circular (DPC) 93.

The approval granted by the Director, Office of Federal Contract Compliance Programs (OFCCP), stated:

> "* * * These provisions and instructions for their use, should be included in all bid documents used * * * in areas where we have existing 'Hometown' or 'Imposed' plans.
>
> "Additionally, Section A 'List of Local Plans' should be amended by adding thereto those plans omitted therefrom as of this date. Specific reference should be made to the fact that additional plans will be added to the list periodically as they are approved and incorporated into bid conditions issued by the Department of Labor.
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> "Further, note 2 should be changed to read 'The covered trades and percentage ranges are to be taken from the appropriate bid conditions issued by the Department of Labor incorporating the particular "Hometown" plan.'"

DPC 93 was republished unchanged in DPC 100 in May 1972, except for listing new area plans approved by DOL. In October and November 1972, the Director, OFCCP, issued memoranda to the heads of all agencies modifying the implementation mechanism of area AAP's. The memoranda stressed the need that all solicitations subject to the DOL bid conditions insert the prescribed conditions verbatim, except for those deviations specifically authorized by DOL in writing prior to use.

Memoranda outlining parallel deliberations of the ASPR Subcommittee on Construction, and resultant recommendations to the ASPR Committee, have been submitted to our Office. These memoranda discuss the evolution of the present DOD clause in ASPR for use in situations where hometown plans are in effect. The revised clause was published in DPC 108. It is significant that the clause, being patterned after DPC 100 was fashioned after considering our decision B-176328, November 8, 1972. In that case, the authority of DOD to issue DPC 100 was questioned because its language differed from the clause prescribed by DOL. Reporting the views of DOL, we stated:

> "* * * the Department [of Labor] does not object to the use of bid solicitation provisions which differ from those set forth in the Order [of the Secretary of Labor], so long as the substitute provisions comply with the thrust and general intent of the Order. * * *"

After reviewing the specifics of DPC 100, DOL concluded there that it satisfied the requirements of the Order.

In April and July of 1973, DOL again sent memoranda to the heads of all agencies restating its earlier directive that the DOL bid conditions be used verbatim. In January 1974, The Directorate of Procurement Policy, Office of Assistant Secretary of Defense (Installations and Logistics) issued a memorandum making mandatory in imposed plan (then including the Chicago Plan) situations the use of the clause now in question.

To date, the ASPR equal employment opportunity (EEO) provisions have been revised in: DPC 108, March 1973; DPC 120, March 1974; DPC 74-1, August 1974; and DPC 75-1, July 1975. The substance of the local affirmative action plan clause detailed in DPC 108 has not changed throughout the revisions. Rather, the revisions concerned the addition and deletion of local plans to the applicable list. We note that even though the Chicago Plan was first listed in DPC 120, the clause therein was not the one used in the instant IFB.

We requested and received DOL's position as to whether DOD had requested approval to deviate from DOL's bid conditions (appendix A) as well as DOL's view of the DOD version of appendix A. By letter dated June 9, 1976, the Director, OFCCP, stated:

> "This is in response to your request for comments and views from the Department of Labor concerning the authority of other agencies to include affirmative action requirements in invitations for bids on non-exempt Federal and Federally assisted construction contracts and subcontracts other than those prescribed by DOL.
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> "Executive Order 11246, as amended, delegates sole authority and responsibility for establishing rules, regulations and policies of the Federal Government's Contract Compliance Program to the the Secretary of Labor and his designees. Federal contracting agencies are obliged by section 205 of the Order to comply with these requirements and to cooperate with the Secretary in the implementation of the Program.
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> "Accordingly, Federal contracting agencies are not authorized to amend or change the appendices to Federally imposed affirmative action plans or Federal EEO Bid Conditions incorporating Federally approved hometown affirmative action plans without the prior written approval of the Director of the Office of Federal Contract Compliance Programs. A Memorandum to the Heads of All Agencies from the Director, OFCCP stating this policy was issued on April 10, 1973 and restated by the Secretary of Labor in another Memorandum dated July 19, 1973. * * *

"There is no indication that either DOD or the Department of Navy requested written approval of the DOD version of the Chicago Plan included in IFB N62472-74-B-0102, which is now the source of the above captioned bid protest. Thus, the Chicago Plan which appears in 41 CFR § 60-11 et seq. should have been included in the IFB. However, the DOD version of the Chicago Plan does not materially affect a prime contractor's commitment to affirmative action.

* * * * *

"The DOD version of the Chicago Plan also eliminated the signature requirement included in the Department's Chicago Plan. While failure to sign appendices and Bidder's Certifications in the Federal EEO Bid Conditions has been held to render a contractor's bid nonresponsive, elimination of the requirement does not materially effect the competitive posture of any bidders provided all received the same bid documents.

"In view of the foregoing, the affirmative action requirements included in IFB N62472-74-B-0102, although unauthorized by OFCCP, are not contrary to established policy of the Department of Labor and the Office of Federal Contract Compliance. Nevertheless, this matter will be brought to the attention of the Director of Contract Compliance of the Department of Defense."

Our consideration on this matter must accord great deference to the interpretation of DOL which issued the regulations pursuant to valid authority. See Northeast Construction Company v. Romney, 485 F.2d 752, 758 (1973); Rossetti Contracting Company, Inc. v. Brennan, 508 F.2d 1039, 1046 (1975), and cases cited therein. Thus, we believe that DOL's recent statement that the DOD clause complies with the substance of its regulations will be accepted by our Office.

The Navy construes the foregoing events as approval of the DOD Chicago Plan. Certainly, DOL's initial approval of DPC 93 may be interpreted to apply broadly to the substantive provisions therein. The subsequent statement of DOL in B-176328, supra, indicated DOL's position that variant provisions were acceptable to it, assuming that the new provisions comported with the general intent of the Secretary of Labor's Order. We believe that the proponent of such a deviating provision assumes the consequences of not complying with DOL's interpretation of the general intent of the Secretary's Order. However, in the time between the approvals and the use of the instant provisions, DOL issued new forms and changed the implementation mechanism of bidders' commitment to AAP's. Also in that timeframe, DOL iterated that its bid conditions were to be used exactly as issued, with limited exceptions.

The Navy points to 41 C.F.R. § 60-11.21 (1976), as authorization for the departure from the DOL conditions. This provision, in the Navy's opinion, requires only the use of "* * * Appendix A * * * or a substantially similar document * * *." The Navy urges that its clause is substantially similar to appendix A. 41 C.F.R. § 60-11.21 (a)(1) (1975) states:

> "No contracts or subcontracts shall be awarded for Federal or Federally assisted constructions * * * unless the bidder completes and submits, prior to bid opening, the document identified as Appendix A, notice of requirement for submission of affirmative action plan to insure equal employment opportunity or a substantially similar document, * * *."

Construed narrowly, the language extends to the bidder the choice to respond to a covered construction project by utilizing the appendix A in the solicitation, or by fashioning its own response in a substantially similar document. In the sentence structure quoted above, the subject is the "bidder" who "completes and submits" something to evidence its commitment.

We note that, in other imposed plans, DOL clearly permits the use by the agency of a document substantially similar to

appendix A. For example, the Washington Plan, 41 C.F.R. § 60-5.21 (a)(1) (1975), contains language identical to the DOL Chicago Plan quoted above. But that Plan additionally provides that:

> "* * * Each agency shall include * * * in the invitation for bids * * * for a federally involved * * * construction contract * * * a notice stating that to be eligible for award, each bidder will be required to comply with these rules * * *. The form of such notice shall be substantially similar to the one attached as Appendix A to these rules."

Also, all of the other imposed Plans in the C.F.R. contain this language. See the San Francisco Plan, 41 C.F.R. § 60-6.21(b); the St. Louis Plan, 41 C.F.R. § 60-7.21(b); and the Atlanta Plan, 41 C.F.R. § 60-8.21(b); and the Camden Plan, 41 C.F.R. § 60-10.21(c).

We are unable to discern any basis upon which DOL would permit the use of a substantially similar appendix A document by the agency in the other listed imposed plans and deny permission in the Chicago Plan. Indeed, in light of DOL's position as stated in its June 9 letter from the Director, OFCCP, had DOD submitted its Chicago Plan, we believe that it is reasonable to assume that DOL would have approved the deviation if, in fact, the DOD deviation was of such a significant nature as to have required prior written approval.

The authority of DOL to approve the deviant clause, or even permit deviations from its prescribed forms, has been questioned by Mayfair. In this regard, section 201 of Executive Order (E.O.) 11246 provides:

> "The Secretary of Labor shall be responsible for the administration of Parts II and III of this Order and shall adopt such rules and regulations and issue such orders as he deems necessary and appropriate to achieve the purposes thereof."

As indicated in 41 Comp. Gen. 124 (1961), an agency's exercise of duly delegated authority by issuing regulations within the parameters of that authority is valid, unless in conflict

with express statutory provisions. There has been no dispute that the Secretary of Labor has been delegated authority to regulate the Government's steps to insure equal employment opportunities. Likewise, there has been no dispute that this delegation of authority from the President is valid. Rather, the contention is based upon the language of section 205 of E.O. 11246 requiring:

> "* * *[A]11 contracting agencies * * * [to] comply with the rules of the Secretary of Labor in discharging their primary responsibility for securing compliance with the provisions of contracts and otherwise with the terms of this Order and of the rules, regulations, and orders of the Secretary of Labor issued pursuant to this Order. * * *"

Mayfair maintains that because all agencies are required to comply with the rules and regulations of the Secretary of Labor, the Secretary is not authorized to permit agencies to deviate therefrom. In support of this argument Mayfair cites Accardi v. Shaughnessy, 347 U.S. 260 (1954), for the proposition that it is illegal for Government officials to disregard regulations, notwithstanding that the ultimate result of such nonobservance would be no different than if the regulations had been followed.

We find the cited case inapplicable to the instant situation. Simply stated, this is not a case where a Government official is disregarding the applicable regulations. As discussed above, the regulations contemplate the use of documents substantially similar to appendix A by both the procuring agency and the bidder. 41 C.F.R. § 60-11 (1975) cites in part as authority sections 201 and 205 of E.O. 11246. Alternatively, the memoranda of the Director, OFCC, and Secretary of Labor, while stressing the need to utilize the DOL bid conditions, provided for an avenue by which deviations from the specified format could be obtained. In view of our discussion above on whether DOL had approved the substance of the DOD Chicago Plan and the use of substantially similar documents, we perceive no disregard of DOL's regulations.

Considering all of the above, we can offer no legal objection to the use of the clause in the IFB. We cannot say that the Navy's use of the clause, particularly with reference to the various DOL positions mentioned above served to undermine in any way the

purposes sought to be achieved by inserting AAP's in Government solicitations.

The June 9 letter from the Director, OFCCP, commented on Mayfair's contention that the AAP of the IFB only required the inclusion of percentage goals for those trades the contractor intended to directly use as follows:

> "* * * Section 8 of Appendix A of the Chicago Plan, 41 CFR § 60-11.23 requires the prime contractor to make a commitment to goals for those trades expected to be employed on the project by the prime contractor. The DOD version of the Chicago Plan states as follows:
>
> > "'Goals need be submitted only for covered construction trades that the Bidder expects to use in the performance of the contract * * * IFB page 00101-8 IP 3.'
>
> "I am aware of the Comptroller General's opinion in bid protest B-185300 (March 3, 1976) which states that section 8 requires the prime contractor to commit itself to goals for all trades expected to be employed on the project whether directly or through subcontracts. I do not, however, agree with the Comptroller General's interpretation of our regulation. The Chicago Plan does not create vicarious liability upon a prime contractor for the failure of its subcontractors to comply with its requirements. Therefore, it is unnecessary for a prime contractor to make a commitment to goals for minority utilization in trades which it does not intend to directly employ. Rather, each prime contractor and subcontractor must make a commitment in Appendix A only for those trades which it intends to directly employ. See 41 CFR § 60-11.23, sections 1 and 8."

The decision of our Office referred to above is Peter Gordon Co. Inc., B-185300, March 3, 1976, 76-1 CPD 153. That case concerned the low bidder's failure to insert a minority manpower utilization goal for the only trade covered by the applicable plan (Washington Plan) for the project. One of the arguments considered was that the low bidder was not required to insert

a percentage goal because it intended to subcontract the work for that single trade. In denying this contention, we interpreted section 8 of appendix A as requiring the prime contractor to make the initial commitment to the applicable goals and, in turn, impose that commitment upon its subcontractor.

That decision turned upon the specific language of section 8 of appendix A of the Washington Plan, which states:

> "Whenever a prime Contractor * * * subcontracts a portion of the work in any trade designated 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." (Underscoring added.)

Compare the DOD version, which states:

> "Goals need be submitted only for covered construction trades that the Bidder expects to use in performance of the contract, and only for years during which the Bidder expects to perform work or engage in activity under the contract.
>
> * * * * *
>
> "Whenever the Contractor, or any subcontractor at any tier, subcontracts a portion of the work in any covered construction trade, he shall include in such subcontract the provisions of this clause and any applicable minority manpower utilization goals under this contract, which shall be adopted by his subcontract, who shall with regard to his own employees and subcontractors be bound thereby to the full extent as if he were the Contractor." (Underscoring added.)

Both Jenkins and Boller and the Navy oppose the proposition that prime contractors are not required to submit goals for trades intended to be subcontracted. Jenkins and Boller believes that the foregoing proposition denies all meaning to the DOD version of the Chicago Plan, quoted above.

In addition, Jenkins and Boller points to the language of paragraphs h(vi), h(xvi) and (k) of the AAP used in the IFB. Paragraph h(xvi) directs a prime contractor to "[s]olicit bids for subcontracts from available minority subcontractors engaged in the trades covered by his commitment * * *." Paragraph h(vi) places a duty on the prime contractors to "[d]isseminate his EEO policy * * *", while paragraph (k), in part, requires the prime to notify the Director of OFCC of any "* * * failure of any subcontractor to fulfill his obligations * * *."

While the language in the two clauses is not identical, we believe both clauses reasonably construed call for the prime contractor to provide goals for all applicable trades whether they are to be employed directly by him or through subcontractors. Note that in the Washington Plan clause the subcontractor must adopt the commitment made by the prime contractor, which clearly is a reference to goals included by the prime. The DOD clause makes reference to the application to subcontractors of goals under the prime contract. Goals are consistently identified as the prime contractor's specific commitment; the acceptable limits prescribed in the IFB provisions are identified as ranges.

We believe that the foregoing reflects the fact that this is a close question. In this regard, we believe that since the Navy's determination that Mayfair's bid was nonresponsive was based on reliance upon decisions of this Office, particularly Peter Gordon, it was reasonable. Furthermore, we note that DOL has now promulgated new Model Federal EEO Bid Conditions, effective September 1, 1976, which clarify the matter in controversy and render our resolution of the dispute unnecessary as far as future procurements are concerned. In view thereof, and since award was made and performance has proceeded to a substantial degree, we do not believe the award should be disturbed.

However, by separate letter of today, we are advising the Secretary of the Navy of the agency's failure to follow the pertinent ASPR provision in handling Jenkins and Boller's protest, which may have contributed to the award being made and work proceeding despite Mayfair's protest.

R. F. Kelly

Deputy Comptroller General
of the United States