

Ruth Yudeofriend  
Proc. I

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**DECISION**



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

**FILE: B-189073**

**DATE: October 7, 1977**

**MATTER OF: Regional Construction Company, Inc.**

**DIGEST:**

Failure of low bidder to submit separate sheet listing percentage goals for minority manpower utilization does not render bid nonresponsive since bidder submitted letter attached to bid which expressed commitment to affirmative action plan, which contained such goals, and issue of responsiveness is measured by bidder's commitment to plan and not by bidder's failure to accurately follow instructions of IFB.

Regional Construction Company (Regional) of Elk Grove Village, Illinois, protests the rejection of its bid submitted in response to invitation for bids (IFB) No. DACA45-77-B-0034, issued by the Department of the Army, Corps of Engineers (Army), Omaha, Nebraska, for the construction of a warehouse at Chicago - O'Hare International Airport. Regional's bid was determined to be nonresponsive for its failure to submit minority manpower utilization goals which were required by the IFB in accordance with the Chicago Plan, a mandatory affirmative action plan imposed by the Department of Labor. Regional argues that its bid was responsive and that as the lowest bidder it should have been awarded the contract.

The IFB listed the trades contemplated to be used in the project and the permissible range of percentage goals for the utilization of minority manpower within each of the covered trades. Each bidder was required to select goals from these lists and submit them with its bid. While pages 4 and 5 of the IFB repeated the list of the trades no space was provided in the bid form itself for the bidder to list its goals and thus in order to comply with this requirement, the bidder either had to take apart the IFB or make a photocopy of these pages. When bids were opened on April 6, 1977, six of the 12 bids received were determined to be nonresponsive for failure to meet the affirmative action requirements of the IFB. The lowest bidder was permitted to withdraw due to a mistake in its calculations and when Regional's bid was determined to be nonresponsive, the Army awarded the contract.

to the Frederick Quinn Construction Company (Quinn) of Arlington Heights, Illinois, on May 2, 1977. Regional was not notified that its bid was rejected and that an award had been made until May 4, 1977.

Regional argues that although it did not submit a separate sheet listing its percentage goals for minority manpower utilization it expressed a commitment to the Chicago Plan in a letter which accompanied its bid and, therefore, its bid should not have been rejected. The letter, signed by Grant R. Holmes, the president of Regional, stated:

"We agree to conform to the affirmative Action Plan as outlined in amendment No. 3 dated March 23, 1977. The attached copy is a part of our bid."

Amendment No. 3 contains the statement that, "Bidders are reminded that bids are to be accompanied by Affirmative Action Plan (Chicago Plan)." This amendment, by definition, refers to the Chicago Plan which is included in the IFB beginning on page one. Thus, Regional's letter agrees to conform to the requirements of the IFB. For the reasons stated below, we sustain the protest as Regional's bid was improperly rejected.

We have consistently held that a bidder's failure to commit itself, prior to bid opening, to the minimum affirmative action requirements of the solicitation requires rejection of the bid. 50 Comp. Gen. 844 (1971); Astro Pak Corporation/Diversified Chemical Corporation, B-183556, August 8, 1975, 75-2 CPD 97. The failure to comply with these requirements has been regarded as a material deviation which cannot be waived or corrected as a minor informality. Sachs Electric Company, 55 Comp. Gen. 1259 (1976), 76-2 CPD 32. We have also recognized, however, that a bidder can commit itself to the requirements of an affirmative action plan in a manner other than that specified in the solicitation as long as the bidder manifests a definite commitment to those requirements. B-174932, March 3, 1972; B-176260, August 2, 1972. This is true despite the fact that solicitations, such as the one in the instant case, often contain statements which warn bidders that failure to comply with a particular requirement will result in the rejection of their bid as non-responsive. We have determined that such statements often establish the materiality of that requirement, but that the requirement is not necessarily material solely because it is accompanied by that warning. Barthly Incorporated, 53 Comp. Gen. 451 (1974), 74-1 CPD 1.

Accordingly, the issue to be determined is whether the letter attached to Regional's bid constitutes a definite commitment to the affirmative action requirements of the IFB. If the response to this determination is in the affirmative, then Regional's bid cannot be rejected as non-responsive because responsiveness is measured by Regional's commitment or

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noncommitment to the Chicago Plan and not by its failure to submit a separate sheet with minority manpower utilization goals. See 53 Comp. Gen. 451, supra.

A bidder's commitment to an affirmative action plan must be clear and in accordance with the material requirements of the IFB as of bid opening. B-183556, supra. In determining the intent of a bidder, however, the entire contents of the bid, including all documentation submitted with it, must be taken into account. B-177846, March 27, 1973. Thus, the fact that Regional did not submit the proper form designated for the submission of its goals is of no consequence if Regional's letter indicates a clear intent to be bound to the Chicago Plan which contained such goals.

In 51 Comp. Gen. 329 (1971) we held that a bidder that failed to submit goals and timetables as required by the affirmative action requirements in the IFB was responsive because the bidder submitted the certification included in the IFB which bound the firm to the affirmative action plan. We stated at page 333:

"\* \* \* Since Part II of the Bid Conditions required, as quoted above, that each bidder's goals and timetables be within at least the ranges, and for the time periods, set forth in the bid conditions, it is our opinion that Dick, by its certification, obligated itself to such goals and timetables notwithstanding its failure to include them with its bid. Since Dick did thus obligate itself, the failure to include specific goals and timetables became not a matter of nonresponsiveness, but a minor informality which could be waived or cured prior to award."

Thus, as long as a commitment has been made by a bidder to be bound to the ranges of the affirmative action plan, the fact that specific percentages and goals from within those ranges were not submitted with the bid will not render it nonresponsive.

Accordingly, we believe that Regional, by supplying its own certification attached to its bid, committed itself to be bound to the ranges of minority group employment listed on pages 1 and 2 of the IFB and headed by the caption "Chicago Plan." The list of ranges are prefaced by the following statement:

"It has been determined that in the performance of the contract to be awarded under this solicitation an acceptable affirmative action program for the trades specified below will result in manpower utilization within the ranges set forth next to each trade."

It becomes clear from this statement and from reading the remainder of the IFB that the Chicago Plan is entirely dependent upon these ranges and that one could not conceivably be committed to the Chicago Plan without also being committed to the ranges of goals it promotes for the time periods involved. Thus, the point made by the District Engineer in his report to the effect that the protester's letter "at best" agrees to comply with the Chicago Plan but fails to comply with the IFB instructions to present an affirmative action plan with percentage goals is of no significance because the two requirements are identical.

In reaching this conclusion, we have considered the cases relied upon by the Army. These cases, however, are distinguishable from the instant case. In 50 Comp. Gen. 844, supra, and Peter Gordon Company, Inc., B-185300, March 3, 1976, 76-1 CPD 153, the bidders merely signed Appendix A of the Washington Plan which listed the ranges for minority manpower utilization, but did not submit separate goals as required by the IFB or commit themselves to the Plan in any other manner. We determined that a signature on a Plan is not sufficient, itself, to commit a bidder to the affirmative action plan when the solicitation requires something more. In the instant case, Regional did more than sign an appendix to acknowledge having read it. Regional's bid contained the requisite commitment to the Chicago Plan in the form of the letter attached to its bid, thereby binding it to at least the prescribed minimum goals specified therein.

The protest is sustained. However, since there was a colorable basis for the contracting officer's decision, and we have been advised by the Army that 30 percent of the contract has been completed and award of a new contract would delay the project for approximately 9 to 12 months, corrective action is not feasible. We have brought the noted deficiency to the attention of the Secretary of the Army.

Deputy

  
Comptroller General  
of the United States



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

*Keith Gordon*  
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October 7, 1977

The Honorable  
The Secretary of the Army

Dear Mr. Secretary:

Enclosed is a copy of our decision of today regarding the protest of Regional Construction Company, Inc., under invitation for bids DACA45-77-B-0034 issued by the Department of the Army, Corps of Engineers. The protest has been sustained on the basis that Regional's bid was responsive and improperly rejected.

While we did not feel that it was in the best interest of the Government to recommend a termination in this case, the noted deficiencies are brought to your attention for corrective action.

We would also appreciate your advice as to the action taken with regard to our recommendation.

Sincerely yours,

Deputy

*Robert K. ...*  
Comptroller General  
of the United States

Enclosure



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

*Keith G. Gundersen*  
*P.H.D.*

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October 7, 1977

The Honorable  
The Secretary of Labor

Dear Mr. Secretary:

We have reviewed the Proposed Rules promulgated by your Department which appeared in the Federal Register on August 16, 1977. These Proposed Rules provide specific affirmative action standards for women in construction and consolidate and standardize the affirmative action requirements for construction contractors and subcontractors by deleting certain parts in 41 C.F.R., Chapter 60, discontinuing certain practices and formats and promulgating a new 41 C.F.R. 60-4.

In our letters to you of February 28, 1974, and April 26, 1976 (B-179100), we stressed the need for the revision of your Department's affirmative action and equal employment opportunity requirements for Federal or federally funded construction contracts resulting from the massive financial losses to the Government through the inadvertent failures of low bidders to comply with the fill-in and signature requirements of the old bid conditions. We note that this need has been partially met by your 1976 revision of the requirements for hometown area affirmative action plans applicable to construction contracts so that bidders are bound to the plans by merely submitting signed bids. Otherwise responsive low bidders under hometown plans are no longer rejected for failing to sufficiently complete fill-in and signature requirements present in past bid conditions.

As can be seen from the enclosed copy of our decision of today, there is as great a need for the revision of the requirements of imposed affirmative action plans such as the Chicago Plan. Contracting officers as well as contractors remain confused in the application of these plans and funds are continuing to be lost because of the failure of the low bidders to properly complete the fill-in and/or signature requirements of these imposed plans.

In our view, contractors can be bound to the affirmative action provisions of the imposed plans also by submitting signed bids, while, at the same time, be made aware of the importance of the affirmative action plans. Since your Proposed Rules accomplish this purpose, we recommend that they be implemented, with the revision noted below, as soon as possible.

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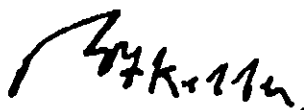
With regard to the bid conditions in the Proposed Rules, we make the following observation regarding paragraph numbered 9. This paragraph provides:

"9. A single goal for minorities and a separate single goal for women is acceptable unless a particular group is employed in a substantially disparate manner in which case separate goals shall be established for such group. Such separate goals would be required, for example, if a specific minority group of women were underutilized even though the Contractor had achieved its standards for women generally."

This provision would require, in effect, the renegotiation of goals after the contract has been awarded rather than specifying separate goals and timetables which must be met by contractors in categories determined to be employing "particular groups" in a "substantially disparate manner." Such categories and the respective goals and timetables should be specified in a solicitation so bidders can compete on an equal basis. This is consistent with Illinois Equal Employment Opportunity regulations for public contracts, 54 Comp. Gen. 6 (1974), 74-2 CPD 1, and cases cited therein. These cases held that all bidders must be advised in advance as to the basis upon which their bids will be evaluated.

We therefore recommend that the regulations be revised accordingly. We would appreciate being advised of the action taken on our recommendation.

Sincerely yours,



deputy Comptroller General  
of the United States