

DECISION**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**P.L. -
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28002**FILE:** B-212539**DATE:** April 17, 1984**MATTER OF:** D. R. Allen & Son, Inc.**DIGEST:**

Where a grantee's solicitation imposes a minority business enterprise (MBE) subcontracting goal on bidders and requires with the bid either a commitment statement or an explanation as to why the goal cannot be met, a bidder's failure to comply with the requirement renders the bid nonresponsive in circumstance where the bidder would not otherwise be committed to the goal or other MBE requirements.

D. R. Allen & Son, Inc. has filed a complaint against the award of a contract for the construction of two parking garages to Ruscon Construction Company by a Department of Housing and Urban Development (HUD) grantee, the City of Charleston, South Carolina. Essentially, Allen claims that the decision by the City, concurred in by HUD, to reject its bid for failure to comply with the minority business enterprise (MBE) requirements of the solicitation was improper. We deny the complaint in part and dismiss it in part.

The City, a grantee under Title I of the Housing and Community Development Act of 1974, as amended, 42 U.S.C. § 5301 et seq. (Supp. IV 1980), advertised for bids on May 23, 1983. The solicitation established a goal that 5 percent of the total value of the prime contract be awarded to minority business subcontractors. The solicitation stated that award would be made to the lowest priced bidder that met or demonstrated "good faith efforts" in meeting the MBE goal. In this connection, the solicitation required each bidder to submit an MBE Assurance Statement in which it was either to demonstrate the ability to meet the prescribed minority subcontracting goal or to provide a narrative explaining why it was unable to comply with the

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goal. The solicitation specifically stated that failure to submit the MBE Assurance Statement would cause rejection of a bid as nonresponsive.

At opening on June 30, 1983, Noonan-Kellos, Inc. was the apparent low bidder at \$5,238,000, but was subsequently determined by the City to be ineligible for award for reasons not relevant here. Allen was second low at \$5,658,000, with Ruscon third low at \$5,733,000. Allen, however, did not submit an MBE Assurance Statement with its bid. After bid opening, Allen advised the City that this omission in its bid was inadvertent and that Allen would meet the prescribed minority subcontracting goal. On July 20, the City nevertheless rejected Allen's bid as nonresponsive, and this complaint to our Office followed. Award was made to Ruscon in October 1983.

The protester argues that compliance with the MBE requirements should be considered a matter of the bidder's responsibility, and therefore a bidder should be permitted to demonstrate compliance with information furnished after bid opening. In this regard, Allen points to a solicitation provision in which the City reserves the right to award the contract to a reasonably priced bidder offering the highest percentage of MBE participation in the event that no reasonably priced bids are received which fully meet the prescribed goal. According to Allen, since the solicitation permits the City to make certain determinations relevant to MBE compliance after bid opening, the MBE requirement should not be regarded as pertaining to the responsiveness of a bid. Allen argues that the failure to certify in its bid the intent to comply with the MBE requirements thus should be waived by the City.

In many cases, a requirement that bidders submit information with their bids bearing on how they will comply with MBE utilization goals and other requirements properly is treated as a matter of bidder responsibility. See Paul N. Howard Company, B-199145, November 28, 1980, 80-2 CPD 399, affirmed, 60 Comp. Gen. 606 (1981), 81-2 CPD 42. In some cases, however, compliance with such a requirement will involve bid responsiveness when a non-complying bidder would not otherwise be bound to the MBE provisions. See E. H. Hughes Company, Inc., 61 Comp. Gen. 581 (1982), 82-2 CPD 189. Our decision in Hughes follows a series of our cases involving procurements by both federal agencies and federal grantees, where we found that a bidder's failure to commit itself in its bid to meeting a

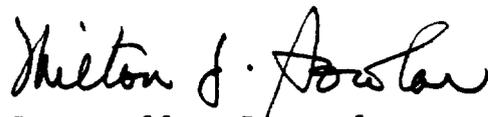
solicitation's affirmative action requirements rendered the bid nonresponsive. See, e.g., Sachs Electric Company, 55 Comp. Gen. 1259 (1976), 76-2 CPD 32; 52 Comp. Gen. 874 (1973); 50 Comp. Gen. 844 (1971). The courts have reached a similar result. See Rossetti Contracting Co., Inc. v. Brennan, 508 F.2d 1039 (7th Cir. 1975); Northeast Construction Co. v. Romney, 485 F.2d 752 (D.C. Cir. 1973).

In this case, the solicitation required each bidder, by submission of an MBE Assurance Statement and as a condition of responsiveness, to express in some fashion its intended compliance with the minority business subcontracting goal or to submit a narrative explaining why the goal could not be met. We find no other applicable solicitation provision--and the complainant does not suggest there is one--by which a bidder would have been committed, simply by signing the bid, to the minority subcontracting goal. That is, the submission of the MBE Assurance Statement was the only way for a bidder to express the necessary commitment. Under these circumstances, acceptance of Allen's bid as submitted would not have bound Allen to make any efforts to comply with the MBE goal in performing the contract. Accordingly, the bid was properly rejected.

Allen argues that the City failed to provide bidders with a solicitation form for the purpose of certifying MBE compliance. However, since the requirement for an MBE Assurance Statement was clearly stated in the solicitation, we fail to see the significance of the solicitation's lack of a separate standard form for this purpose.

Finally, Allen argues that the MBE provision violates its constitutional rights and constitutes discrimination based on race. Allen also questions the authority of the City to prescribe such minority subcontracting goals in that local competitive statutes allegedly are compromised by the use of this provision. We will not consider these arguments. Any challenge to the validity of the solicitation's MBE provisions should have been raised before bid opening, since the matter involves an alleged deficiency apparent on the face of the solicitation. See ABC Demolition Corporation, 60 Comp. Gen. 535 (1981), 82-1 CPD 498.

The complaint is denied in part and dismissed in part.

for 
Comptroller General
of the United States