



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

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B-178839

October 10, 1973

Premier Roofing Company, Inc.
178 Front Avenue
West Haven, Connecticut 06516

Attention: Mr. Michael L. Feinberg
Secretary-General Counsel

Gentlemen:

This is in reference to the June 6, 1973, telegram from your firm (Premier), and subsequent correspondence, protesting against the rejection of your bid as nonresponsive pursuant to construction project No. NA-104-73-50, issued on May 7, 1973, by the Veterans Administration (VA) Hospital, West Haven, Connecticut.

Bids were solicited for two items--Alternate No. 1 called for labor, equipment, and material necessary for replacing approximately 29,200 sq. ft. of built-up roofing, and Alternate No. 2 called for labor, equipment, and material necessary for replacing approximately 4,109 sq. ft. of built-up roofing. Premier submitted the low bid for both items at \$65,560, but was considered nonresponsive by the Contracting Officer for its failure to fill out and return with its bid the enclosed Bid Conditions portion of the New Haven Plan, Standard Bid Form 21, (Construction Contract), on which the bid was submitted, carried the printed notation:

"THE ATTACHED NEW HAVEN PLAN IS MADE A PART OF THIS INVITATION AND FAILURE TO RETURN SIGNED COPIES OF NEW HAVEN PLAN WITH THE BID WILL RESULT IN THE BIDDER BEING DECLARED NON-RESPONSIVE."

The New Haven Plan has been approved by the Department of Labor's Office of Federal Contract Compliance (OFCC) as an appropriate program to implement the training of minorities in the construction industry. The Plan incorporates a scheme whereby signatories thereto progressively increase minority representation in their respective construction companies.

It is Premier's position that its failure to complete and return the Bid Condition-Affirmative Action Requirements provision incorporated in the IFB was a mere technical oversight and should not be a fatal error. As a basis for this position, Premier points out that it has been a member of the New Haven Plan since its inception and, therefore, was bound by all rules and requirements of the Plan

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"* * * Failure to submit a Part I certification or a Part II affirmative action plan, as applicable, will render the bid nonresponsive."

The language used in the part III provision has been construed in our prior decisions, 50 Comp. Gen. 644 (1971) and B-174932, March 3, 1972, as requiring that when Affirmative Action Requirements are contained in an IFB they are material and require a bidder to commit itself, prior to bid opening, to the requirements, and in the manner specified in the solicitation. We also held that a bidder who fails to make such a commitment in its bid may not have the deviation waived, nor may the bidder be allowed to correct the deficiency after bid opening in an effort to render the bid eligible for award. B-177509, April 13, 1972.

Premier's second argument, that since it had previously bid on contracts solicited by the VA hospital in New Haven and had on these occasions submitted the Bid Conditions agreement with its bid, the agency was aware that Premier intended to comply with the New Haven Plan, is also without merit. As previously stated, the OFCC regulations require Federal agencies to include in each solicitation Bid Conditions setting forth Affirmative Action Requirements. The fact that Premier was contractually bound to the New Haven Plan on prior contracts with an agency has no effect on its legal obligations as to future contracts with the same, or other Government agencies. Knowledge by the soliciting agency of bidder compliance with Affirmative Action Requirements is not a substitute for the contractual commitment required of a bidder before it can be considered for award of a contract.

For the above reasons, Premier's failure to submit with its bid the Bid Conditions provisions of the New Haven Plan rendered its bid nonresponsive and, therefore, its protest must be denied.

Sincerely yours,

Paul G. Dembling

For the Comptroller General
of the United States