

GAO

United States General Accounting Office
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Office of
General Counsel

In Reply
Refer to: B-199899

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DLG05398

Preston A. Davis, Director
Office of Small and Disadvantaged
Business Utilization
Department of Agriculture
Washington, D.C. 20250

Dear Mr. Davis:

Your letter of August 6, 1980, requests our guidance as to whether a contracting officer may negotiate, either before or after award, the terms of a small and disadvantaged business subcontracting plan submitted by the low bidder in a formally advertised procurement pursuant to section 211 of Public Law 95-507, October 24, 1978, 92 Stat. 1757, which amends section 8(d) of the Small Business Act, 15 U.S.C. § 637(d) (1976). You point out that the implementation of the statute by the Office of Federal Procurement Policy (OFPP) in Policy Letter 80-2, 44 Fed. Reg. 31028 (May 9, 1980) only instructs contracting officers to refer to the Small Business Administration (SBA) for review any plan received from a low bidder which, in the opinion of the contracting officer, does not reflect the bidder's best efforts to award subcontracts to small and disadvantaged firms to the greatest extent practicable.

While section 211 of Public Law 95-507 does not address the matter, its legislative history indicates that Congress intended that contracting officers not negotiate to acceptability before award unsatisfactory subcontracting plans submitted by low bidders. S. Rep. No. 95-1140, 95th Cong. 2d Sess. 5-7 (1978). OFPP Policy Letter 80-2 reflects that intention by providing that the referral to the SBA, a process designed to allow the SBA to monitor the number of those occurrences and later report them to Congress, "should not delay award of the contract." Thus, there is also no necessity



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for the type of negotiation you mention since a low bidder may not be deprived of award even if it submits an unsatisfactory plan.

That is not to say, however, that a bidder who submits a "plan" that does not contain the information required by section 211 may not have his bid rejected. We think the clear intent of Congress was that the bidder, as a pre-condition of award, furnish a plan that contains the information specified in the statute, and that a document that does not contain the required information is not a "subcontracting plan" within the meaning of the statute. Thus, while a bid may not be rejected because the agency is not persuaded that the goals included in the plan are sufficiently high, the bid must be rejected if the purported plan submitted "within the time limit prescribed" by agency regulations contains no goals. In this regard, if a bidder submits a "plan" well before the expiration of the time allowed for doing so, we perceive nothing improper with a contracting officer's permitting the bidder to cure such an omission if it can be done within the time allowed by agency regulations for submission of the plan.

We find no discussion in the statute, its legislative history, or the OFPP Policy Letter as to whether either an unsatisfactory plan that has been referred to the SBA or a satisfactory plan may be improved after award. In our view, the matter essentially is one for consideration by the contracting parties.

OFPP informally concurs with these views. We trust this information is responsive to your request.

Sincerely yours,

MILTON J. SOCOLAR

Milton J. Socolar
General Counsel