

DECISION



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

60446

FILE: B-184582

DATE: January 28, 1976

MATTER OF: Wilpar Construction Company

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DIGEST:

1. Where invitation for bids requires the submission of affirmative action certification as prerequisite for award, bid of protester must be considered as nonresponsive where portions of invitation containing affirmative action requirements and certification were not submitted with bid at bid opening.
2. Responsiveness of bid must be determined at bid opening: Information submitted after bid opening, present employment practices conforming to the minority hiring requirement of the IFB, and compliance on previous projects do not obviate the need for the submission of the affirmative action certificate as part of the bid.

Invitation for bids, Project RNY 75538, was issued by the General Services Administration (GSA) for various construction work on buildings in New York, New York. Bids were opened on July 9, 1975. The two lowest bids were received from Wilpar Construction Corporation (Wilpar) at \$688,104.00 and Ted Genola Company, Inc., at \$784,923.80.

The IFB contained an attachment entitled "Bid Conditions, Affirmative Action Requirements, Equal Opportunity," that set forth minority group hiring requirements for the project. The invitation stated that a bidder would not be eligible for award of the contract unless it submitted the specified certification adopting the minimum goals and timetables of minority manpower utilization. In addition, the bid form clearly indicated that the failure to submit the certification would render the bid nonresponsive. The low bidder, Wilpar, failed to submit the required certification as part of its bid and was notified on July 10, 1975, that its bid was rejected as nonresponsive.

Wilpar protested the rejection of its bid, alleging that the affirmative action certification was completed and signed, but as a result of an employee's haste in getting the bid submitted, the certification had been inadvertently omitted. Wilpar also argues that since it is a minority firm and its present employment practices conform to the IFB's requirements regarding minority hiring goals, such conformity should also excuse Wilpar's failure to submit the affirmative action certification with its bid. At the time of Wilpar's protest, award of the contract had not been made. Subsequently, the contracting officer determined, pursuant to Federal Procurement Regulations (FPR) § 1-2.407-8(b)(4) (1964 ed. amend. 68), that performance would be unduly delayed by failure to make the award promptly, and accordingly, award was made to Genola, the second low bidder, on August 19, 1975.

It is the position of Wilpar that its failure to deliver the affirmative action certification with its bid was a minor oversight, inasmuch as it has met these same requirements on prior contracts with the contracting activity. Consequently, it is felt that this oversight should be waived and award should be made to Wilpar as the low responsive, responsible bidder. However, the bid alone does not contain a specific commitment to goals of minority hiring which could be enforced as a matter of contractual obligation for the subject project. Despite Wilpar's apparent present and prior compliance with the minority hiring plan, such practices do not obviate the need for Wilpar to submit minority hiring goals as a part of its bid.

Court decisions and decisions of our Office have consistently held that where an invitation has made compliance with affirmative action requirements a matter of bid responsiveness, the failure to comply therewith may not be waived as a minor informality. See Northeast Construction Co. v. Romney, 485 F. 2d 752 (D.C. Cir. 1973); Rossetti Contracting Company, Inc. v. Brennan, 508 F. 2d 1039 (7th Cir. 1975). Although Wilpar points out that its failure to comply with the affirmative action requirements was unintentional, our Office has held that the failure of a bidder to commit itself, prior to bid opening, to the affirmative action requirements of an invitation, as in the instant case, requires rejection of the bid. 52 Comp. Gen. 874 (1973); John E. Northrop Co., B-181674, August 6, 1974, 74-2 CPD 82; Weaver Construction Co., B-183033, March 14, 1975, 75-1 CPD 156. Since the responsiveness of a bid is to be established at bid opening, Wilpar's failure to properly execute and submit the affirmative action certification renders the bid nonresponsive and unacceptable.

B-184592

Accordingly, the protest is denied.


Deputy Comptroller General
of the United States