

J. Notopoulos  
Proc II

**DECISION**



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

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FILE: B-192664

DATE: December 20, 1978

MATTER OF: A. A. Beiro Construction Company, Inc.

*[Protest of Contract Award Based on Alleged Defects in Bid Opening Procedure]*

DIGEST:

1. Failure of contracting officer to read low bid at public opening is a deviation of form rather than substance which does not affect the validity of award to the low bidder.
2. Failure of low bidder under invitation for bids to execute a certificate of compliance with equal opportunity obligations until after bid opening does not require rejection of the bid where the bid form executed by low bidder obligated it to comply with the affirmative action requirements.

A. A. Beiro Construction Company, Inc. (Beiro) protests the award of a contract for elevator and lobby renovations to Technical Construction, Inc. (TCI) under invitation for bids (IFB) DHCD-G20-2398, issued by the District of Columbia (DC).

TCI and Beiro were the low and second low bidders, at \$978,000 and \$987,000, respectively. As its basis for protest, Beiro contends that alleged defects in the bid opening procedure should have precluded consideration of the TCI bid for award. Beiro also asserts that the failure of TCI to submit a signed copy of DC form NCHA 309-5 (Compliance with Equal Opportunity Obligations Certification) and DC form NCHA 309-2 (Non-Collusive Affidavit certifying that prices were independently arrived at) with its bid, renders the bid nonresponsive. (Beiro subsequently has conceded that the failure to submit the

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non-collusive affidavit may be waived as a minor informality.) Finally, Beiro takes exception to the determination that its bid was nonresponsive because the bid bond submitted with its bid failed to include a penal sum for which the surety would be bound.

Bids for the project were opened on July 10, 1978. At the bid opening, the TCI and the third low bid were declared nonresponsive because they were not accompanied by signed copies of the above-mentioned certifications; as a consequence these two bids were not publicly read but were instead placed in the file with responsive bids for post-opening review. The two certifications were executed and furnished by TCI within one hour after bid opening. The contracting officer later determined that the failure to submit the two documents with the bid were minor informalities which could be waived and corrected after bid opening as provided by D. C. Procurement Regulation 2620.14. The contract has been awarded to TCI.

With regard to the bid opening procedures, Beiro objects to the fact that the TCI bid was not publicly read or made available for public examination due to the preliminary determination that it was nonresponsive, but then was subsequently "resurrected" and accepted for award.

The record is somewhat unclear with respect to Beiro's allegation that public examination of the TCI bid was not permitted, since TCI states that its representative at bid opening was permitted to examine all four bids and there is no indication or allegation that Beiro sought or was refused the same opportunity. In any event, it is apparent that Beiro is aware of the content of the TCI bid and was able to file a timely protest based on an allegedly nonresponsive feature of that bid. Thus, we fail to see, on this record, how Beiro has suffered any prejudice as a result of DC's handling of the TCI bid.

Moreover, while the TCI bid may not have been publicly read due to the initial determination that it was nonresponsive, we have held that the failure to publically read a bid is a deviation of form, not of substance, which does not affect the validity of an otherwise proper award. See George C. Martin, Inc., 55 Comp. Gen. 100 (1975), 75-2 CPD 55; Moir Ranch and Construction Company et al., B-191616, June 8, 1978, 78-1 CPD 423; B-178888, October 26, 1973. We therefore find no merit to Beiro's contention in this respect.

With regard to the responsiveness issue, the IFB required bidders to submit with their bids a signed copy of the "Washington Plan" (an "Affirmative Action Plan" to ensure equal employment opportunity [IFB Appendix A]), and a "Compliance with Equal Opportunity Obligations Certification" (DC Form NCHA 309-5). Appendix A includes minority hiring goals and various contract terms and conditions pertaining thereto. TCI submitted an Appendix A, but did not submit the compliance certification which was a part of the bid package. That certification states:

"Commissioner's Order 73-51 dated February 28, 1973, 'Compliance with Equal Opportunity Obligations in Contracts' and the 'Commissioner's Administrative Instruction Dated February 28, 1973, Chapter 2621,' are hereby included as a part of this bid proposal and each bidder shall indicate herein his commitment, in writing, to comply with the Commissioner's Order and Administrative Instruction. Failure to comply with the aforementioned may result in rejection of his bid.

"I hereby certify that I am fully aware of the contents of the Commissioner's Order 73-51 and the Commissioner's Administrative Instruction Chapter 2621 and agree to comply with them in the performance of this contract.

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Contractor"

Commissioner's Order 73-51 sets forth the DC Government policies with regard to equal opportunity employment contract terms and conditions and certain duties of the contracting agency and the contractor. The Administrative Instruction generally sets forth affirmative action program requirements and ranges of percentage goals for utilization of minorities for designated construction trades. Beiro argues that because the Commissioner's Order and the Administrative Instruction contain policy statements and impose contract terms and conditions which differ from what is included in Appendix A, TCI's failure to execute the certification rendered its bid nonresponsive. We disagree.

Generally, a bidder's failure to commit itself, prior to bid opening, to a solicitation's affirmative action requirements will render the bid nonresponsive. See, e.g., Sachs Electric Company, 55 Comp. Gen. 1259 (1976), 76-2 CPD 32; Veterans Administration re Welch Construction, Inc., B-183173, March 11, 1975, 75-1 CPD 146 and cases cited therein. However, the required commitment need not be made in the manner specified by the solicitation; all that is necessary is that the bidder, in some fashion, commit itself to the solicitation's material requirements. Regional Construction Company, Inc., B-189073, October 7, 1977, 77-2 CPD 277; Sachs Electric Company, supra.

Here, TCI's completion and submission of Appendix A, which contains goal requirements that are more stringent than those in the Commissioner's Order and the Administrative Instruction, satisfies the IFB's commitment requirement with respect to minority utilization goals. B-177846, March 27, 1973. Moreover, we believe that TCI committed itself to the various contractor obligations set forth in the Commissioner's Order and the Administrative Instruction but not included in Appendix A (such as requirements to permit DC's Office of Human Rights access to contractor records and to furnish required information to that office) even though the certification

was not signed, by virtue of signing its bid. By signing the bid form, TCI agreed "to construct the project in strict accordance with the Contract Documents, including the Standard Contract Provisions Booklet 1973 for District of Columbia Government Contracts, including amendments \* \* \*." A "Modifications and Supplements" document dated August 1974 includes a provision which states:

"The contractor shall comply with the [Commissioner's Order and Administrative Instruction] which are hereby included as part of this bid proposal. Each bidder shall indicate on a form provided by [DC] his commitment in writing to comply."

In light of that provision, we believe TCI, by signing the bid, agreed to perform in accordance with the Commissioner's Order and the Administrative Instruction, which were incorporated by reference into the bid and which do not contain any requirement for a separate certification of compliance. See Massachusetts College of Pharmacy-Grant, B-186552, August 26, 1976, 76-2 CPD 191, where we viewed a bid as responsive because the bidder, by signing the bid form, agreed to comply with the solicitation's affirmative action requirements by virtue of somewhat similar language in the bid form. Cf. 53 Comp. Gen. 431 (1973), also involving this same Commissioner's Order and Instruction.

We recognize that the August 1974 provision quoted above refers to a separate form on which bidders are to indicate their commitment to the Commissioner's Order and the Administrative Instruction. However, we believe that the language in the bid form itself has the legal effect of committing a bidder to comply with the Order and Instruction, so that the requirement (if indeed it is one) for a separate commitment form is redundant and of no legal consequence. See, e.g., B-174216, December 27, 1971, where we held that a bidder's failure to execute a certificate was waivable because the bidder's signature on the bid constituted the requisite commitment to comply with solicitation requirements without regard to the separate certification.

Consequently, we find the TCI bid to be responsive and therefore we need not consider whether Beiro's bid was itself nonresponsive.

The protest is denied.

  
Deputy Comptroller General  
of the United States