



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

November 12, 1973

B-179462

40179

Preston-Brady Company, Incorporated  
95 West Hills Road  
Huntington Station, New York 11746

Attention: Mr. Frank J. Hildebrand  
President

Gentlemen:

Reference is made to your letters of August 14 and September 10, 1973, protesting the rejection of your bid as non-responsive under Solicitation No. 313079C, issued by the Brookhaven National Laboratory, Associated Universities, Upton, Long Island, New York, for the Atomic Energy Commission (AEC).

The subject solicitation contemplated a fixed-price contract for the construction of an addition to AEC's East Experimental Building 912 AG3 in accordance with the specifications set forth therein. In effecting the procurement it appears that Brookhaven was acting under its prime cost-type contract with AEC to operate the laboratory. Accordingly, the procurement was effected for the AEC pursuant to a regulation requiring the use of competitive bidding procedures (AEC Procurement Regulation 9-59.0003) and the matter is properly for our consideration as a bid protest of an award made "for" an agency of the Federal Government. 4 CFR 20.1(a).

Included in the specifications was Attachment C, identified as "Bid Conditions, Affirmative Action Requirements, Equal Employment Opportunity." It was stipulated therein at page 7 that a bidder would not be eligible for award of a contract under the invitation unless the required certification relative to affirmative action requirements was submitted as part of the bid. At page 9 bidders were admonished that the referenced certification was material and that failure to submit the certification would render the bid nonresponsive. Since you failed to submit the certification with your bid, Brookhaven rejected your low bid as nonresponsive.

You argue that it was not necessary to provide the affirmative action certification prior to bid opening because the letter which accompanied the invitation for bids did not specifically so require.

*[Protest<sup>of</sup> Rejection of Bid as Nonresponsive]*

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B-179462

Moreover, since this letter stated that a meeting to review equal employment opportunity requirements would be held after bid opening with the apparent low bidder you construed this as permitting the submission of the certification at the time of such meeting. In this connection, you note that in a recent procurement at Brookhaven you were permitted to submit the required certification at the pre-award meeting.

We do not find your arguments persuasive. It is clear from the invitation that the certification was considered material and was to be submitted as a part of the bid. (See page 7, paragraph A of attachment C to the invitation.) We have construed similar language in invitations as requiring a bidder to commit itself to such affirmative action requirements prior to bid opening, and a failure to do so has required rejection of the bid as nonresponsive. See B-174932, March 3, 1972, and cases cited therein, copy enclosed. It is a fundamental rule of competitive bidding that a bid may not be modified after the bid opening. See Federal Procurement Regulations (FPR) 1-2.301(a) and 40 Comp. Gen. 432 (1961).

With regard to the recent procurement at Brookhaven in which you were permitted to comply with the certification requirement after bid opening, it is reported that since all bids received in that case were nonresponsive it became necessary to negotiate acceptable terms prior to the contract award. In such circumstances it is not improper to negotiate for acceptable offers. See FPR 1-3.210(2).

In your rebuttal to AEC's report to this Office you have raised two additional arguments. You contend that an earlier "blanket" certification given to Brookhaven should have been sufficient for purposes of this procurement and you cite 41 CFR 60-2.2, as authority for permitting you to furnish the certification after bid opening.

We note, however, that the provisions of 41 CFR 60-2.2 deal with the adequacy of a prospective contractor's affirmative action program and not with the responsiveness of a contractor's bid to the certification requirement. Even assuming that the "blanket" certification constitutes an unqualified and binding commitment on your part to Brookhaven, there is no way of insuring that it covers all of the trades which you propose to use on this project. Therefore, we cannot conclude that it may be substituted for the certification called for in the instant solicitation.

W-179462

For the reasons stated above, your protest must be denied.

Sincerely yours,

Paul G. Dembling

For the Comptroller General  
of the United States