

# DECISION



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

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FILE: B-183361

DATE: June 9, 1975

MATTER OF: Burnham Construction Company

## DIGEST:

1. Allegation that solicitation did not give adequate notice to bidders that submission of certification of compliance with affirmative action provisions was condition precedent to award consideration is not supported where part III of "Bid Conditions" clearly required that to be eligible for award under solicitation bidders commit themselves to affirmative action requirements prior to bid opening and that bids not containing executed certification manifesting such commitment would be rejected as nonresponsive. Moreover, contracting officer's announcement at bid opening that protester's bid was low was not tantamount to award and did not indicate insufficiency of notice regarding materiality of submission of certification as condition of bid responsiveness.
2. Low bidder who failed to execute certification to affirmative action requirements was properly rejected as nonresponsive even though protester was signatory to one of designated plans because being signatory to plan does not create legally enforceable obligation to abide by provisions of plan and does not overcome defect in failing to submit required certification.
3. Fact that on Standard Form 19B ("Representations and Certifications") bidder checked clause to indicate that it had developed and had on file affirmative action programs as required by rules and regulations of Secretary of Labor does not make its bid responsive to IFB's certification requirement since such information relates to bidder's qualifications as responsible prospective contractor and does not constitute commitment by bidder to be bound by specific affirmative action plan in performing contract to be awarded under present solicitation.
4. Procuring activity's determination not to waive as minor informality protester's failure to submit certification with bid was not abuse of discretion, notwithstanding monetary savings to be incurred by acceptance of low bid, since prebid opening commitment to affirmative action provisions of solicitation is material requirement which may not be waived.

Burnham Construction Company (Burnham), protests against the rejection of its bid under invitation for bids (IFB) SCS-2-WA-75, issued on December 26, 1974, by the Department of Agriculture, Soil Conservation Service State Office, Spokane, Washington. The IFB solicited bids for the construction of a pump plant station at the West Side Green River Watershed, King County, Washington.

The solicitation contained a section entitled "BID CONDITIONS-AFFIRMATIVE ACTION REQUIREMENTS - EQUAL EMPLOYMENT OPPORTUNITY" which required bidders to commit themselves to part I and/or part II of the bid conditions for each construction trade proposed to be used on the project. Part I involved a commitment to one of three affirmative action plans, including the "Seattle-King County Affirmative Action Plan" (Plan), while part II involved a commitment to various goals and specific action steps for trades not covered by part I. Bidders were advised that to be eligible for award of a contract under this solicitation, a bidder must execute and submit as part of its bid the required certification set forth in part III relative to the solicitation's affirmative action requirements. It was further provided in part III that:

"c. Materiality and Responsiveness

"The certification required to be made by the bidders pursuant to these Bid Conditions is material, and will govern the bidders' performance on the project and will be made a part of its bid. Failure to submit the certification will render the bid nonresponsive."

Of the bids opened on February 19, 1975, Burnham's bid of \$540,078.20 was low. However, a review of the bid disclosed that it did not include the required affirmative action certification, and the bid was rejected as nonresponsive. Burnham's protest to the procuring activity was denied by the contracting officer on February 26, 1975, and was forwarded that same day to our Office.

Counsel for Burnham contends: (1) that the invitation and bid documents did not give adequate notice that the execution of the certification of compliance with the affirmative action plan(s) was a condition precedent to award of a contract; and (2) that Burnham's failure to execute the certification was a mere formality since it was already a signatory to the Seattle-King County Affirmative Action Plan and, furthermore, the bidder's execution of certain other bid documents disclosed similar information required by the solicitation.

For the reasons indicated below, the protest is denied.

In regard to its first point of contention, counsel states that while the invitation and several of the accompanying bid documents mentioned the need for compliance with the affirmative action plan, the only notification given to prospective bidders that failure to execute and submit the certification would result in the bid being considered nonresponsive was contained in a letter from the U. S. Department of Labor (DOL) preceding the aforementioned "Bid Conditions". It is counsel's contention that this method of notification was insufficient to put bidders on notice that execution of the certification in part III of the "Bid Conditions" was a condition precedent to a responsive bid.

We have construed similar or identical language to that quoted above from part III in other solicitations as requiring that bidders commit themselves to affirmative action requirements prior to bid opening, and that bids not containing such a commitment be rejected as nonresponsive. 52 Comp. Gen. 874 (1973); 50 id. 844 (1971); Locascio Electric Company, B-181746, December 13, 1974. We do not agree with the protester that the only notice of the necessity to execute the certification was the letter from DOL addressed to the heads of agencies, since the requirement for submission of the certification was clearly spelled out on page 12 of part III of the IFB's "Bid Conditions" as follows:

"A. Bidders' Certification. A bidder will not be eligible for award of a contract \* \* \* unless such bidder has submitted as part of its bid the following certification \* \* \*"

In this connection, counsel asserts that its position is buttressed by the fact that the contracting officer was himself not aware that the certification was contained in the IFB since he considered Burnham's bid and initially awarded the contract to the firm and it was not until Burnham was ordered by the Soil Conservation Service to order the pump that it was notified that its bid was nonresponsive. The agency reports that while Burnham was identified at bid opening as the apparent low bidder, no award was made and no order was given for Burnham to order the pump. In this regard, the opening of all bids at the designated time and the announcement that Burnham's bid was low was in accordance with Federal Procurement Regulations (FPR) 1-2.402 (1964 ed.), and not tantamount to an award of the contract.

Counsel also contends that execution of the certification was a mere formality and of no legal effect since Burnham, as a prior signatory, was already obligated to implement the plan. As stated

previously, the purpose of the part III certification is to obtain a prebid commitment to comply with the affirmative action requirements in the solicitation. While Burnham may have been a signatory to the plan, we have held that being a signatory to a particular plan does not create a legally enforceable obligation to the Government to abide by the provisions of the plan and does not suffice to constitute the commitment required by the bid conditions. Art Penner Construction Company, Inc., B-180216, April 12, 1974; Mann Construction Co.; Sargent Construction Co., Inc., B-180324, January 16, 1974; B-178839, October 10, 1973. Consequently, the fact that Burnham was a signatory to the plan did not overcome its failure to submit the required certification.

Next, counsel contends that Burnham's completion of Standard Form 19B, "Representations and Certifications," made the execution of the certification contained in the "Bid Conditions" unnecessary. Standard Form 19B included the following representation:

" ' The bidder (or offeror) represents that (1) he [ ] has developed and has on file [ ] has not developed and does not have on file at each establishment affirmative action programs as required by the rules and regulations of the Secretary of Labor (41 C. F. R. 60-1 and 60-2), or (2) he [ ] has not previously had contracts subject to the written affirmative action program requirement of the rules and regulations of the Secretary of Labor. '"

Burnham checked the above to indicate that it had developed and had on file at each establishment affirmative action plans as required by the rules and regulations of the Secretary of Labor.


The information which a bidder is requested to furnish with respect to affirmative action programs on Standard Form 19B, relates to the bidder's past participation on contracts subject to affirmative action program requirements and to the bidder's compliance with such requirements. Such information relates to the bidder's qualifications as a responsible prospective contractor. Mann Construction Co., et al, B-180324, supra. There is nothing in the wording of the Standard Form 19B representation, however, which would constitute a commitment by a bidder to be bound to a specific affirmative action plan in performing the contract to be awarded under the present solicitation. Without addition to the representation of language identifying the plan as one to which the bidder is already committed and to which he will continue to be committed in performing the proposed contract, execution of the representation cannot be viewed as compliance

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with the affirmative action requirements of the solicitation. Mann Construction Co., et al., B-180324, supra. No such language was incorporated in the representation by Burnham.

Therefore, we do not agree with counsel's contention that the Soil Conservation Service, through its contracting officer, abused its discretion in failing to waive Burnham's failure to submit the certification as a minor informality (in accordance with paragraph 10(b) of Standard Form 22). Our Office has consistently held that affirmative action requirements are material and a bidder who fails to make the requisite prebid opening commitment in its bid may not have the deviation waived, nor may the bidder be permitted to correct the deficiency after bid opening so as to render the bid eligible for consideration for award. 51 Comp. Gen. 329 (1971); Mann Construction Co., et al., B-180324, supra.; Art Penner Construction Co., B-180216, supra. Since Burnham did not comply with a material requirement of the IFB, its bid may not be accepted.

Accordingly, we find that Burnham's bid did not comply with a material requirement of the solicitation and that the bid was properly rejected as nonresponsive.

  
Deputy Comptroller General  
of the United States