

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

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FILE: B-183556

DATE: August 8, 1975

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MATTER OF: Astro Pak Corporation/Diversified Chemical  
Corporation**DIGEST:**

1. Bidder's submission of own affirmative action plan containing estimate of minority employees below minimum goal stated in Part II requirements of IFB created ambiguity with respect to bidder's affirmative action commitment and rendered bid nonresponsive to material requirement of IFB.
2. Affirmative action plan, which contained minimum minority utilization goals less than those required by IFB, may not be disregarded because its submission may have been gratuitous since all bid documents are accorded equal weight in determining bid responsiveness.

On January 6, 1975, Reynolds Electrical & Engineering Co., Inc. (REECo), under prime contract AT(26-1)-410 with the Energy Research and Development Administration (ERDA), issued revised invitation for bids (IFB) No. 137-MM-75-RB for the furnishing of vacuum truck services at ERDA's Nevada Test Site. This action was necessitated by the cancellation of a previous IFB due to a substantial increase in requirements.

At bid opening on January 31, 1975, Astro Pak Corporation/Diversified Chemical Corporation (Astro Pak) was low with a bid of \$994,235. However, REECo found Astro Pak's bid, as well as the two other bids submitted, to be nonresponsive to the Affirmative Action/EEO Certification requirements of the solicitation and submitted that finding to ERDA for concurrence. On February 18, 1974, ERDA approved REECo's finding of nonresponsiveness, and all three bids were rejected.

Because of the imminent expiration of the existing subcontract, REECo canceled the IFB and solicited proposals from all firms that had competed for the canceled solicitation. Chancellor and Ogden, Incorporated (Chancellor) submitted the low proposal of \$917,882, and consequently was awarded the contract on April 1, 1975.

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Notified that Astro Pak intended to protest the rejection of its earlier bid to the GAO, the contracting officer under the REECO contract made the award to Chancellor on a month-to-month basis, pursuant to an option Chancellor had offered in its low proposal. It was felt that award under these conditions would permit uninterrupted service while the protest was being resolved and a minimum of termination costs and disruption in the event Astro Pak's protest was determined meritorious.

Astro Pak's protest concerns the section of the solicitation entitled "Construction Subcontract Bid Condition Affirmative Action Requirements Equal Employment Opportunity" (Conditions). Part I of the Conditions concerned a commitment to the local affirmative action plan known as the Greater Las Vegas Plan. Part II concerned a commitment to specified minimum goals and affirmative action steps for bidders in connection with construction trades not covered by Part I. Part III required a bidder to certify its compliance with either Part I or Part II.

The solicitation cautioned bidders at three separate references that failure to submit the Part III certificate would render the bid nonresponsive. One such reference, paragraph XIV on page 8 of the solicitation, clearly stated that "THE CERTIFICATE PART III MUST BE COMPLETED, SIGNED, AND RETURNED WITH YOUR BID." Notwithstanding this express directive, Astro Pak failed to sign the Part III certificate. Astro Pak did submit as part of its bid a separate, signed affirmative action plan (AAP) entitled "Written Affirmative Action Phase."

This Office has consistently held that the failure of a bidder to commit itself, prior to bid opening, to the minimum affirmative action requirements of the solicitation requires rejection of the bid as nonresponsive. 50 Comp. Gen. 844 (1971); 52 Comp. Gen. 874 (1973); Burnham Construction Company, B-183361, June 9, 1975. A contractual obligation must be obtained to enable the Government to enforce good faith compliance with the minimum requirements. However, it has been recognized that a bidder can commit itself to affirmative action requirements in a manner other than that specified in the solicitation, so long as the bid submitted demonstrates the bidder's clear intent to be bound by the requirements. 51 Comp. Gen. 329 (1971); 53 Comp. Gen. 451 (1974).

The fact that the solicitation in the instant protest expressly directed the bidder to sign the Part III certificate is not decisive on the issue of responsiveness. A requirement is not necessarily material solely because accompanied by a warning in the solicitation that failure to comply with the requirement will result in rejection of the bid. 53 Comp. Gen. 451, supra. Accordingly, the responsiveness of Astro Pak's bid must be measured not by its admitted failure to sign the Part III certificate, but rather by its commitment or noncommitment to the solicitation's affirmative action requirements.

Because Astro Pak is not a signatory to the Greater Las Vegas Plan, its bid had to evidence a commitment to comply with the affirmative action requirements of Part II of the Conditions. Astro Pak's AAP states, in part: "We estimate we will use 13 employees average and that 10 to 15 % will be from minority groups." These percentages fall below the 16.5-18 percent (expressed in terms of manhours worked) minimum requirements specified in Part II of the Conditions. ERDA contends the submitted Plan raised serious doubt concerning Astro Pak's commitment to the affirmative action goals.

Astro Pak urges that the submission of the erroneous percentages was inadvertent and should be waived as inconsequential because Astro Pak has evidenced its commitment to affirmative action apart from the AAP by completing the Part III certificate. Alternatively, Astro Pak maintains that it was not required to submit an AAP and any defect should therefore be waived. Assuming arguendo that Astro Pak's failure to sign the Part III certificate did not render the bid non-responsive, the bid is nevertheless nonresponsive for the following reasons. Our Office had occasion to consider a similar allegation in B-176260, August 2, 1972 (affirmed on reconsideration October 4, 1972). In that case, the bidder signed an agreement binding itself to the affirmative action requirements of the IFB. It also included in the bid a letter setting out a goal of minority employment for a specific trade of 100 out of 800 total employees, or 12.5 percent. The acceptable range specified in the IFB was from 22 to 26 percent. We concluded that, at best, the letter created an ambiguity with respect to the bidder's commitment to the affirmative action requirement upon award. Since the bidder's commitment must be clear and in accordance with the material requirements of the IFB as of bid opening, the bid was properly rejected as nonresponsive.


It is our conclusion that Astro Pak's submission of its signed AAP containing an estimate of minority employees that was below the

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Part II requirements created an ambiguity with respect to Astro Pak's commitment to the affirmative action goals. The AAP was included as part of the bid and as such may not be disregarded, even if its submission was gratuitous. B-176260, supra. Equal weight is accorded each document submitted as a part of a bid in determining the responsiveness of the bid. The fact that the Part II percentage requirements were expressed in terms of manhours worked, while the AAP estimate indicated percentage of minority employees, is not persuasive. There was nothing in the bid package to indicate that the actual percentage of minority manpower utilization in terms of manhours worked would exceed the percentage of minority employees.

Under these circumstances, the Astro Pak bid failed to demonstrate the bidder's clear, unequivocal intent to bind itself to the affirmative action requirements, and consequently was nonresponsive. In view of our conclusion on the foregoing matter, it is unnecessary to discuss any other issues raised.

The protest is denied.

  
Deputy Comptroller General  
of the United States