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DECISION



13258
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-195197

DATE: March 31, 1980

MATTER OF: Hendry Corporation

DLG-04236

[Protest Alleging Awardee's Bid Was Nonresponsive]

DIGEST:

DLG-03832

AGC00305

1. Bid on solicitation for small business set-aside dredging contract which required that small business dredge be used for at least 40 percent of work is responsive even though bid included name of dredge which was later determined to be owned at the time by large business as bidder did not indicate in its bid that it would not meet the 40 percent performance requirement.
2. Bidder submitting responsive bid on small business set-aside does not get prohibited "two bites at the apple" merely because, upon challenge to size status, bidder can influence size status determination since prohibition is on opportunity after bid opening to make bid responsive or non-responsive, rather than on traditional opportunities to provide post-bid opening information on eligibility and bidder responsibility.

Hendry Corporation (Hendry), a small business dredging concern, protests the award of a contract to Eastern Contractors, Inc. (Eastern) for the dredging and removal of debris in the Entrance Channel of Lake Moultrie, South Carolina, under invitation for bids (IFB) DACW6079-B-0010, which was set aside for small business. Hendry contends that Eastern's bid was nonresponsive because it indicated that the firm would not perform at least 40 percent of the advertised yardage with dredging equipment owned by the bidder or obtained from another small business dredging concern as required by the applicable small business size standard. DC 20287

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The IFB, citing the Small Business Administration (SBA) size standard for dredging concerns (13 C.F.R. § 121.3-8(a)(2) (1979)), defined a small business concern as follows:

"A 'small business concern' is a concern, including its affiliates, which is independently owned and operated, is not dominant in the field of operation in which it is bidding on Government contracts, and can further qualify under the criteria set forth in regulations of the Small Business Administration * * *. Also, in order to be eligible for a small business set-aside award on dredging contracts, the firms must perform the dredging of at least 40% of the yardage advertised in the plans and specifications with dredging equipment owned by the bidder or obtained from another small business dredging concern * * *."

Eastern, the low bidder, certified it was a small business and indicated in its bid, in the "Plant and Equipment Schedule" section of the IFB, that it would perform the dredging work with the dredge "Fairfield." At the time of bid opening, June 6, 1979, the "Fairfield" belonged to the South Carolina Electric and Gas Company (SCE&G), a large business concern. Hendry protested on this basis; in response, Eastern claimed to have an option with SCE&G to purchase the "Fairfield" which Eastern intended to exercise in the event it received the award.

Hendry then argued that the option arrangement violated the spirit and intent of the set-aside and improperly gave Eastern "two bites at the apple", that is, the opportunity to take affirmative steps after bid opening to establish its eligibility as a small business if it determined such action would be in its best interest. Hendry also joined the size status protest filed by Atkinson Dredging Company on July 28, with the contracting officer. See 13 C.F.R. § 121.3-5 and Defense Acquisition Regulation (DAR) § 1-703(b)(1).

SBA's Atlanta Regional Office, in ruling on the protests, found that Eastern was a small business. The Regional Office held that Eastern had shown it had an exercisable option to purchase the "Fairfield" and that was all that was needed to meet the size requirements for this procurement. Hendry appealed the Regional Office's decision to the SBA Size Appeals Board, alleging that Eastern did not possess a clear option to purchase the "Fairfield" and that Eastern was required to show that it met all of the size criteria before the bid opening date. The Board ruled on November 26 that the original size status protest was untimely because it was not filed within five working days after bid opening as required by SBA regulations, 13 C.F.R. § 121.5-3(a), and dismissed the protest.

While this protest and the SBA appeal were pending, the Corps determined that it urgently required the dredging and made award to Eastern on August 22. Eastern subsequently purchased the "Fairfield" and is using that dredge in performing the contract.

At the outset, we point out that we are not deciding whether Eastern is a small business. That determination, of course, is within the exclusive authority of SBA, see 15 U.S.C. § 637(b)(6) (1976), and we neither review SBA's determinations in such matters nor consider such questions in situations where SBA does not rule because, inter alia, a timely size status protest is not filed. Anderson-Cottonwood Disposal, 58 Comp. Gen. 713 (1979), 79-2 CPD 98. The question before us, rather is whether the bid was responsive to the small business requirement of the IFB. See Anderson Cottonwood Disposal, supra; American Amplifier and Television Corporation, 53 Comp. Gen. 463 (1974), 74-1 CPD 10.

The general rule is that a bid on a small business set-aside which indicates that the bidder is not a small business is nonresponsive and may not be accepted. DAR 1-706.5(b) (1976 ed.). Thus, if a bidder, in completing the standard IFB size status certification, indicates that it is not a small business, the bid will normally be rejected. 40 Comp. Gen. 550 (1961); see also 49 Comp. Gen. 740 (1970). Similarly, if a non-manufacturer certifies that it is a small business but that it will furnish goods manufactured

by a large business, that bid will also be rejected. American Amplifier and Television Corporation, supra; Prestex, Inc., B-195251.2, December 17, 1979, 79-2 CPD 411; see also Culligan, Inc., 58 Comp. Gen. 307 (1979), 79-1 CPD 149.

In this case, we fail to see anything in Eastern's bid which indicated that Eastern was not responsive to the small business requirements of the procurement. Eastern certified that it was a small business; the IFB required no further certification. Although Eastern did indicate its intention to use the dredge "Fairfield," that alone did not negate the small business certification on which the contracting officer was entitled to rely. See DAR 1-703; Atkinson Dredging Company, 53 Comp. Gen. 904 (1974), 74-1 CPD 299.

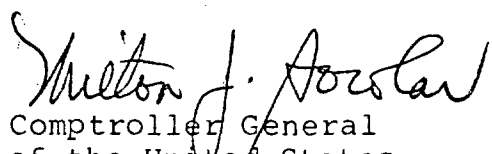
In this regard, we point out that not everything in a bid which indicates the possibility that the bidder is not in compliance with the applicable size standard renders the bid nonresponsive. For example, a bid which indicates that the supplies to be furnished will be of foreign origin where the size standard requires goods to be manufactured in the United States does not automatically negate the bidder's self-certification that it is a small business. Ammark Corporation, B-192052, December 21, 1978, 78-2 CPD 428, and cases cited therein. Neither does a bid which indicates that a large portion of the work may be performed by another firm, even though an affiliation between the bidder and that other firm could result in the bidder's loss of small business size status. Chipman Van & Storage, Inc., B-188917, October 18, 1977, 77-2 CPD 299.

When such bids are received, they are not to be rejected as nonresponsive; rather, the contracting officer appropriately should refer the question of the bidder's size status to the SBA. That is precisely what occurred in Atkinson Dredging Company, supra, when the low bidder, responding to an IFB with provisions nearly identical to the ones in this case, indicated its intention to use a dredge which the next low bidder asserted was owned by a large business.

Here, the matter was referred to the SBA, and SBA, after considering Eastern's explanation that it intended to purchase the dredge upon award of the contract, initially ruled that Eastern was a small business before its Size Appeals Board dismissed the matter. As indicated above, we are without authority to independently determine Eastern's size status.

With respect to the protester's concern that Eastern had "two bites at the apple", we point out that the "two bites at the apple" concept refers to a situation in which a bidder, after bid opening, has an opportunity to make its bid either responsive or nonresponsive. See, e.g., Veterans Administration re Welch Construction, Inc., B-183713, March 11, 1975, 75-1 CPD 146. Here, however, Eastern's bid was responsive on its face, and there was nothing Eastern could do to make the bid itself nonresponsive. While Eastern, after its size status was challenged, could have controlled its response to the SBA so as to bring about a determination that the firm was not a small business, that possibility is always present whenever a firm's eligibility or responsibility is in question. Moreover, while upon receipt of award Eastern could have decided not to purchase the "Fairfield," that decision, assuming the firm otherwise was not in compliance with the performance requirements of the contract, would have subjected Eastern to default.

The protest is denied.


For the Comptroller General
of the United States