

Mr. Martin
PJL 118775

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20540**

FILE: B-205179 **DATE:** June 21, 1982
MATTER OF: Timberland Paving & Construction Co.

DIGEST:

Question regarding bidder's status as small business under total small business set-aside for road construction is not matter of bid responsiveness since question does not relate to bidder's commitment or obligation to provide required services in conformance with material terms of solicitation but rather to bidder's status and eligibility for award. Thus, when bidder asserts that it erroneously represented itself as large, agency should permit correction; refer matter to the SBA for size status determination; and make award to the protester if the SBA's determination is favorable.

Timberland Paving & Construction Co. protests the rejection of its low bid under invitation for bids (IFB) No. R6-81-307C issued by the Forest Service, Department of Agriculture and calling for bids for road construction. The procurement was set aside for small business firms and Timberland contends the Forest Service improperly refused to permit correction of Timberland's erroneous certification that it was a large business. Timberland maintains that the contracting officer should have permitted it to correct this error. For the reasons discussed below, we sustain this protest.

Included as part of Timberland's bid was a Standard Form 19-B, June 1976 Edition, which contained the following representation completed as shown by Timberland:

"1. SMALL BUSINESS

He is, is not, a small business concern. (A small business concern for the purpose of Government procurement is a concern, including its affiliates, which is independently owned and operated, is not dominant in the field of operations in which it is bidding on Government contracts, and can further qualify under the criteria concerning number of employees, average annual receipts, or other criteria as prescribed by the Small Business Administration. For additional information, see governing regulations of the Small Business Administration (13 C.F.R. Part 121))."

The agency contends that the bid was nonresponsive because the Federal Procurement Regulations (FPR) provide that no bidder can be eligible for award under a procurement set aside for small business firms unless it has in good faith represented itself as small prior to opening of bids, FPR § 1-1.703(c)(3). It further contends this self-certification requirement is material and a mistaken representation as to small business size cannot be corrected whether such representation was due to inadvertence, mistake or otherwise.

Timberland's failure to correctly certify its status as a small business did not render its bid nonresponsive. To be considered responsive, a bid must constitute an unequivocal offer to provide the required product or service in conformance with the material terms and conditions of the solicitation. J. Baranello and Sons, 58 Comp. Gen. 509, 514 (1979), 79-1 CPD 322. Here, there is no question concerning Timberland's obligation to provide the required road construction services and supplies in accordance with the material terms and conditions of the solicitation. Rather the only question which exists is whether Timberland is a small business under the size standards established by the Small Business Administration (SBA). See 13 C.F.R. § 121.3 et seq. (1981). This question relates solely to Timberland's status and its eligibility for award under the set-aside, and does not reflect upon Timberland's commitment to provide the required construction services.

Once the award has been made under the IFB clause set out above, the small business representation imposes no contractual requirement which the Government would have

the right to enforce during contract performance. Any question concerning the accuracy of the representation which affects the bidder's eligibility for award may be decided by the SBA on the basis of information outside the bid. Therefore, the representation, by itself, should not be viewed as involving a matter of responsiveness. Jimmy's Appliance, B-205611, June 7, 1982, 82-1 CPD ____.

Consequently, Timberland's bid was responsive and the Forest Service erred in not permitting Timberland to correct its certification.

Although we conclude that Timberland's bid should not have been rejected as nonresponsive, we do not believe the contracting officer merely should have allowed correction and made award to Timberland. As we stated in Jimmy's Appliance, supra:

"* * * when a bidder asserts that it erroneously certified itself as a large business on a small business set-aside there is enough doubt as to the bidder's actual status to warrant referral of the matter to the SBA, which is empowered to make conclusive determinations regarding the size status of bidders under 15 U.S.C. 637(b) (6) (1976). See Cabrillo Food Service, Inc., B-185172, August 6, 1976, 76-2 CPD 107."

Accordingly, Timberland should be permitted to correct its representation; the question of its size status should be referred to the SBA; and an award should be made to Timberland at the prices bid if the SBA's size status determination is favorable.

for *William J. Rowland*
Comptroller General
of the United States