

DECISION

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

FILE: B-208205.2

DATE: December 13, 1982

MATTER OF: Action Manufacturing Company

DIGEST:

1. Protest alleging bid is nonresponsive because it did not, as required by invitation for bids, designate which of two equally acceptable designs would be used in producing end item is denied since bidder took no exception to solicitation and failure to make such designation could be waived as it had no effect or merely trivial effect on price, quality, quantity or delivery of end items and could be corrected without affecting relative standings of, or otherwise be prejudicial to, other bidders. Purpose of designation requirement was to enable agency to determine under which of two approved value engineering change proposals royalties would be paid.
2. Requirement for bidders to designate which of two acceptable designs would be used in producing end item raises issue of responsibility rather than of responsiveness since it concerns how bidder would perform rather than whether bidder would perform in accordance with specifications. As such, information regarding which design would be used could be furnished after bid opening in spite of imperative language in invitation for bids requesting it.
3. Protest alleging it is impossible to fabricate end item in accordance with one of two specified permissible designs is untimely under Bid Protest Procedures since it was not filed prior to bid opening and solicitation clearly permitted bidder to produce item under either one of two approved designs.

4. Protest based on contention bidder's plan to subcontract major portion of work to large business concerns indicates intended violation of small business provisions of invitation for bids is denied since such bidder qualifies as small business so long as it will make significant contribution to manufacture or production of end items.

Action Manufacturing Company protests the proposed award of a contract to Maryland Assemblies, Incorporated under invitation for bids No. DAAA09-82-B-7235 which was issued by the Department of the Army and called for bids to supply practice cartridges. Action maintains that the low bid of Maryland Assemblies was nonresponsive because it failed to comply with instructions contained in Amendment No. 3 to the solicitation which required each bidder to designate which of two approved Value Engineering Change Proposals (VECPs) it intended to use in the manufacture of the cartridges. Action further contends Maryland Assemblies intends to subcontract a substantial portion of the work to a large business, thereby frustrating the intent of the procurement, which was set aside for small business concerns. For the reasons discussed below, this protest is denied.

The Army states that the purpose for having bidders indicate which design they intended to use was to determine under which VECP royalties would be paid and that it made no difference which configuration the contractor would use. As the purpose of the request could be met by obtaining such information during a preaward survey, the Army asserts it properly waived the failure to designate a configuration in the bid as a minor informality and that Maryland A bid was otherwise fully responsive.

Action emphasizes that the instruction in Amendment No. 3, by use of the word "must," required that a configuration be designated and without such a designation, Maryland Assemblies had not indicated an intent to conform to either configuration. Therefore, Action contends, Maryland Assemblies left itself the option of claiming its failure to designate a configuration resulted from a mistake or determining, after bid opening, which configuration would place it in line for award and choosing which method would be most cost effective after award. Although Action concedes the

royalties to be paid were not to be taken into account in evaluating the lowest price, it contends the Army could not calculate the total costs of the procurement until Maryland Assemblies decided which configuration it would use because the total amount of such royalties would be substantially affected by such choice. Action further contends that Maryland Assemblies' failure to designate its configuration until after bid opening is tantamount to a change in its offer and that at best, the failure created an ambiguity which constituted a material deficiency in the bid which could not properly be waived.

The question which the parties have argued here is whether Maryland Assemblies' low bid, which was otherwise responsive, was rendered nonresponsive by its failure to designate which of two acceptable configurations it intended to use. This determination must be made from the face of the bid as submitted. Peter Gordon Company, Inc., B-196370, July 18, 1980, 80-2 CPD 45. We think Maryland Assemblies' bid was responsive.

Responsiveness concerns whether a bidder has unequivocally offered to provide the supplies in conformity with the material terms and conditions of the solicitation. J. Baranello and Sons, 58 Comp. Gen. 509 (1979), 79-1 CPD 322. Although as a general rule, a bid must be rejected as nonresponsive when it does not strictly comply with the solicitation's requirements, this rule does not apply to deviations which are immaterial or matters of form rather than of substance. Roarba, Inc., B-199443, November 22, 1978, 78-2 CPD 359. Such a deviation is one having no effect or merely trivial effect on price, quality, quantity or delivery of the supplies being procured and can be corrected or waived without affecting the relative standings of, or otherwise be prejudicial to the other bidders. Defense Acquisition Regulation § 2-405 (1976 ed.).

It was clear from the face of the solicitation that bidders were free to use either configuration and that it made no difference to the Army which one was selected. Although its bid did not indicate which configuration it would use, Maryland Assemblies' bid took no exception and was unequivocal in every respect. Therefore, it was obligated to perform in accordance with one of the alternatives and to comply with the specifications for the one selected.

We do not agree that the waiver of this requirement was prejudicial to the other bidders by permitting Maryland Assemblies to choose after award which alternative would be most cost effective. There is no indication in the record that either configuration would be more cost effective to produce than the other. It appears to us that this would vary with each bidder depending upon its available tooling, capabilities, experience and commitments to suppliers. Moreover, there is nothing in the solicitation to prevent the low bidder, after bid opening and before award, from changing from one configuration to the other. In either case, his low bid would prevail. There is also no indication in the record that the royalties to be paid with respect to one configuration would be substantially different from those required by the other configuration. In any event, the Army could calculate such payments before award and Action concedes that this factor was not an appropriate consideration in the determination of the low bid.

We think the requirement that bidders designate which of the two acceptable configurations would be used is more a matter of responsibility than of responsiveness since its purpose was to determine how the bidder would perform its contract instead of whether the bidder offered to perform exactly in accordance with the specifications. By checking the box next to the alternative chosen, the bidder would necessarily describe how the end product would be produced since full specifications were supplied in the solicitation for each configuration. This requirement was informational in nature and did not affect the obligations of the bidder to fully comply with the contract.

We have held that while an agency may properly require bidders to provide with their bids, descriptions as to how they propose to perform the contract for the purpose of determining responsibility, we are aware of no regulation or decision of our Office permitting an agency to determine responsiveness from such descriptions. Hub Testing Laboratories, B-199368, September 18, 1980, 80-2 CPD 204. As the information desired related to responsibility, Maryland Assemblies was free to provide the data after bid opening regardless of the imperative language used in the solicitation to request it. Seacoast Trucking & Moving, B-200315, September 30, 1980, 80-2 CPD 235.

Action states that it was the proponent of one of the VECPs and that the other is the design of a competitor, Martin Electronics, Incorporated. Action maintains that it is impossible to fabricate the end item in accordance with Martin's VECP. This allegation, with which the Army and Maryland Assemblies disagree, was not made until after bid opening. Since it implies that the specifications were defective, it should have been submitted prior to bid opening because our Bid Protest Procedures, 4 C.F.R. §21.2(b)(1) (1982), require that protests based on alleged improprieties in an invitation for bids which are apparent prior to bid opening must be filed prior to opening. It was clear from the solicitation that bidders were permitted to produce the cartridges in compliance with the Martin VECP and if Action believed it to be defective, it was incumbent upon it to submit its protest prior to bid opening. This aspect of Action's protest is therefore untimely and will not be considered on its merits.

We find no legal merit in Action's contention that Maryland Assemblies' intention to subcontract a major portion of the work to Martin Electronics and another large business concern indicates that it will not comply with the small business provisions of the solicitation. Action points out that Maryland Assemblies will buy the projectile, the 38 calibre case and the box from Martin Electronics and the cartridge case from another large business thereby leaving for Maryland Assemblies the gluing of the projectile to the case, drilling a hole in the case and putting the 38 calibre case into the cartridge. Action estimates these activities to constitute approximately 20 percent of the total work and it contends this is not a significant contribution to the production of the end item. Action cites our decision which reported at 49 Comp. Gen. 41 (1969) to support its additional contention that sealing, marking, packaging and shipping cannot be considered in the determination as to whether Maryland Assemblies will make a significant contribution to the total production.

The applicable regulations require that when a procurement is set aside for small business firms, the end item must be manufactured or produced by small business firms. DAR §§ 1-706.5(c) and 7-2003.2 (1976 ed.). In this connection, we have stated that even though a small business concern subcontracts a major portion of the work to a large business,

B-208205.2

it meets the contractual requirement that the end item be manufactured or produced by small businesses if it makes a significant contribution to the manufacture or production of the end item. 49 Comp. Gen. 41 (1969); Jazco Corporation, B-193993, June 12, 1979, 79-1 CPD 411; Fire & Technical Equipment Corp., B-191766, June 6, 1978, 78-1 CPD 415. In Chem-Tech Rubber, Inc., 60 Comp. Gen. 694 (1981), 81-2 CPD 232, we held that a small business firm which directly incurred more than 33 percent of the contract costs made a significant contribution to the production of the end items.

In the 49 Comp. Gen., supra, which Action cites, we held that "there can be no dispute that painting, dipping and packaging" constitute a significant contribution to the production of the end item. We believe that the sealing, marking, packaging and shipping activities of Maryland Assemblies are comparable and, when added to the drilling, gluing and assembly of the end items, indicate that Maryland Assemblies' contribution will be significant. Moreover, the pre-award survey report states that Maryland Assemblies intends to initiate a two-shift operation and to hire an additional 22 production employees to meet the required production schedule. This is consistent, in our view, with the conclusion that Maryland Assemblies' contribution would be significant.

Milton J. Fowler
for Comptroller General
of the United States