

DECISION

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

17-10-83 04581

FILE: B-208924

DATE: March 22, 1983

MATTER OF: Y.T.&T. Corporation

DIGEST:

A contracting officer may not reject a small business firm's responsive bid based on a preaward survey finding that the firm is not a regular dealer or manufacturer as required by the Walsh-Healey Act without first referring the matter to the Small Business Administration.

Y.T.&T. Corporation (Y.T.&T.) protests the award of a contract by the Department of the Army under solicitation No. DAAA09-82-B-5461 to TBR Associates. The solicitation, a total small business set-aside, was for 365 illuminating magnifiers. Y.T.&T.'s lower bid was rejected when the contracting officer determined, based on a preaward survey, that Y.T.&T. was not a manufacturer or regular dealer under the Walsh-Healey Act, 41 U.S.C. §§ 35-45 (1976), despite the firm's certifications in the bid that it was a small business manufacturer of the items offered. We sustain the protest.

In its protest submission, Y.T.&T. admits that it is not a manufacturer of magnifiers and intends, if awarded the contract, to purchase completed magnifiers from a large business, package them, and supply them to the Army without contributing to their manufacture or assembly. Y.T.&T. argues, however, that it was advised by a Government "purchasing administrator" prior to bid opening that such intention would not affect its eligibility for the contract award. Y.T.&T. contends that had it realized it would not be eligible for award by purchasing the magnifiers from a large business concern, it would have elected to do the assembly work in its own plant. Y.T.&T. also argues that TBR Associates, the awardee, also intends to purchase the magnifiers from a large business, and has proposed to supply magnifiers which allegedly do not meet the solicitation specifications.

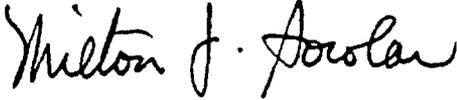
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The Walsh-Healey Act basically requires that a Federal agency's contract for supplies exceeding \$10,000 be awarded to a manufacturer or regular dealer. While a contracting agency is responsible for the initial determination of whether a bidder meets Walsh-Healey Act requirements, that determination is subject to final review by the Small Business Administration, if a small business is involved, and the Secretary of Labor. See 15 U.S.C. § 637(b)(7)(B), (C)(Supp. IV 1980). A small business firm's bid thus may not be rejected based on a determination of ineligibility under the Walsh-Healey Act without referral to the Small Business Administration. See Defense Acquisition Regulation § 12-604 (1976 ed.).

The Army appears simply to have rejected the bid as nonresponsive. Responsiveness, however, involves whether a bid, as submitted, represents an unqualified offer to meet the IFB's material requirements. See NGC Investment and Development Corp., B-209982, January 13, 1983, 83-1 CPD 36. Y.T.&T. certified in its bid that it was a small business, and that it was a manufacturer of the supplies offered, thus taking no exception to those eligibility requirements.

Thus, the Army could not legally reject Y.T.&T.'s bid as ineligible for award pursuant to the Walsh-Healey Act without input from the Small Business Administration. The protest against the rejection of the bid therefore is sustained. No corrective action is possible, however, because all magnifiers have been delivered. Also, the Army informally advises that it will not exercise the contract option for additional quantities. Nonetheless, we are advising the Secretary of the Army of our view by separate letter.

Under the circumstances, we see no need to address Y.T.&T.'s complaints about the awardee's eligibility and the responsiveness of that firm's bid.

for 
Comptroller General
of the United States



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

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March 22, 1983

The Honorable John O. Marsh
The Secretary of the Army

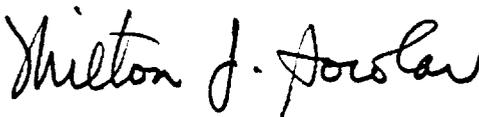
Dear Mr. Secretary:

Enclosed is a copy of our decision of today sustaining the protest by Y.T.&T. Corporation against the Department of the Army's award of a contract to TBR Associates under solicitation DAAA09-82-B-5461, a small business set-aside for illuminating magnifiers.

We have sustained the protest on the basis that Y.T.&T.'s lower bid improperly was rejected. No remedial action is possible, however, because all magnifiers have been delivered. Also, we have been advised that the contract option for additional quantities will not be exercised. We nonetheless recommend that action be taken to preclude recurrence of the procurement deficiency discussed in our decision.

Please advise us of the action taken.

Sincerely yours,

for 
Comptroller General
of the United States

Enclosure