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DECISION



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

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FILE:

B-213329

DATE: June 1, 1984

MATTER OF:

Atlantic Hardware & Supply Corp.

DIGEST:

1. IFB required bidder to establish its intention to furnish small business end products and to identify small business source to be used. Protester, small business bidder, complied with both requirements by promising to supply only small business end product and by expressly listing itself as source of end product. In view of bidder's firm commitment to small business requirements, bidder's contrary certifications in bid that it was a nonmanufacturer and a "regular dealer" of end product should have been waived as minor informalities.
2. Small business bidder's statement in labor surplus area provision of its bid that its supplier would incur manufacturing costs equal to 50 percent of bid does not necessarily contradict bidder's representation that it is manufacturer since a small business may subcontract work even with a large business as long as small business contributes significantly to manufacture of end item. In any event, whether a concern is a small business manufacturer for a procurement is for the Small Business Administration, not the procuring agency, to decide.

Atlantic Hardware & Supply Corp. (Atlantic) protests the rejection of its bid as nonresponsive to small business requirements under Defense Construction Supply Center, Defense Logistics Agency (DLA), invitation for bids (IFB) No. DLA700-83-B-0914, a total small business set-aside for the purchase of tube-pipe fitting kits.

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We sustain the protest.

Atlantic certified in the IFB provision entitled "Small Business" (paragraph 1 of the "Representations" section of the IFB) that it was a small business and that, as a nonmanufacturer, it would furnish supplies manufactured by a small business concern. DLA notes that Atlantic also certified itself (in paragraph 3 of the "Representations" section) as a "dealer" rather than as a "manufacturer" for purposes of the Walsh-Healey Act. Nevertheless, DLA considered that other insertions which Atlantic made in its bid effectively contradicted the company's representation about the supplies to be furnished.

Specifically, DLA noted that in paragraph (a) of the IFB provision (K01) entitled "Production Facilities," Atlantic had inserted its own name and address as the only "manufacturing plant" to be used in performing the contract. Atlantic's insertion was in response to another IFB provision (K31)--"Small Business Sources"--which required that the:

"b. . . . name and address of the small business manufacturer . . . and shipping points must be listed in Provision K01, Production Facilities. Failure to identify the small business manufacturer . . . will render such offers nonresponsive. Further offers will be nonresponsive where a large business manufacturer . . . or where a nonmanufacturing or non-producing source, or where no source, is named in Provision K01.

"c. After bid opening offerors may not substitute suppliers or name a source of supply where none was named in the offer.

"d. After award, sources of supply cannot be changed without the written approval of the contracting officer."

And, finally, DLA noted that in provision K22--"ELIGIBILITY FOR PREFERENCE AS A LABOR SURPLUS CONCERN"--Atlantic asserted that it qualified as a labor surplus concern because "Pluribus Mfg. Co., 77 Washington Ave., Brooklyn, N.Y."--a small business labor surplus area concern--would, as Atlantic's first-tier subcontractor, be incurring manufacturing or production costs which ~~would~~ represent 50 percent of the contract price bid by Atlantic.

Given that Atlantic had certified that it was not a manufacturer in paragraphs 1 and 3 of the IFB's "Representations" section but that Atlantic had certified it would be the manufacturer in provision K01, DLA considered that the "bid was ambiguous regarding who the manufacturer would be"--especially since Atlantic had stated that another concern would incur manufacturing costs equal to 50 percent of Atlantic's bid for the purpose of the IFB's labor surplus concern provision. DLA also determined that the bid "did not satisfy the requirements of IFB provision K31 [above]" and that the bid was nonresponsive.

A bid on a total small business set-aside must establish the bidder's intention to furnish only products manufactured or produced by a small business for the bid to be responsive. See Culligan, Inc., 58 Comp. Gen. 307, 309 (1979), 79-1 CPD 149. Further, where a solicitation requires the naming of the small business source in the bid, a bidder's failure to list the source requires the rejection of the bid as nonresponsive. See Wyatt Lumber Company, B-201445, May 22, 1981, 81-1 CPD 406. Atlantic's listing of itself as a small business in paragraph 1 of the IFB's "Representations" section, its promise in paragraph 1 that it would supply a small business product, and its listing of itself as the small business source for the procurement constituted explicit compliance with both these requirements.

As to Atlantic's representations in paragraphs 1 and 3, above, that it was a nonmanufacturer, we consider these to be, at most, a minor informality. Cf. Amalgamet, Inc., B-213552, December 23, 1983, 84-1 CPD 20, where we held that a bidder's certification that its product was not from a "designated" country should be disregarded as the bid otherwise contained a firm commitment to supply a product from such a country. Moreover, this case is also distinguishable from Prestex, Inc., 59 Comp. Gen. 140 (1979), 79-2 CPD 411, where we rejected the contention that a bidder's listing of a small business source in its bid should overcome its representation that the supplies would not come from a small business concern. In this case, however, Atlantic did represent that its supplies would come from a small business.

Finally, Atlantic's statement in the labor surplus area provision of its bid that another concern would incur manufacturing costs equal to 50 percent of Atlantic's bid does not, in itself, contradict Atlantic's representation that it would be the manufacturer for small business

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purposes since a small business may subcontract work even with a large business concern as long as the small business "makes a significant contribution to the manufacture or production of the contract end item." See Culligan, Inc., above.

In any event, if DLA considered that this particular insertion raised a question about Atlantic's actual status as a small business manufacturer, it would have been appropriate for the contracting officer to have referred the question of Atlantic's size status to the Small Business Administration for decision. See Waterfront Rope and Canvas Corporation, B-201856, April 17, 1981, 81-1 CPD 298.

We sustain the protest. Nevertheless, since the contract is apparently completed, we cannot recommend corrective action.

for Harry R. Van Cleave
Comptroller General
of the United States