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DECISION



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

FILE: B-218130 **DATE:** March 22, 1985

MATTER OF: Surgical Instrument Company of
America

DIGEST:

1. A protest is dismissed as academic where the contracting agency agrees with the protester's position and initiates corrective action.
2. The furnishing of a foreign product by a small business does not automatically negate its status as a small business concern. A firm may qualify as small even though an offered item is not completely of domestic origin if the firm makes a significant contribution to its manufacture or production, which in turn is a question to be resolved by the contracting agency and, if appropriate, by the Small Business Administration, not GAO.

Surgical Instrument Company of America (SICOA) protests the rejection of its low bid for scissors as nonresponsive under invitation for bids (IFB) No. M1-11-85, issued by the Veterans Administration (VA) as a 100 percent small business set-aside. Because the VA has stated in its administrative report on the protest that the rejection was improper, and has initiated corrective action, we dismiss the protest as academic.^{1/}

^{1/} Under our Bid Protest Regulations, when the propriety of a dismissal becomes clear only after information is provided by the contracting agency or is otherwise obtained by GAO, we will dismiss the protest at that time. See § 21.3(f), 49 Fed. Reg. 49,417, 49,421 (1984) (to be codified at 4 C.F.R. § 21.3(f)).

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The contracting officer had asked SICOA to indicate the point of origin of the scissors that the firm proposed to furnish. According to the record, the contracting officer was concerned that if the items were not domestic in origin, then SICOA might not be eligible for the contract award as a small business concern under the set-aside. Although SICOA orally advised the contracting officer that the forgings, which SICOA terms "only a raw material component," were made in Germany, the contracting officer then informed SICOA that it would be necessary to confirm in writing the point of origin by a certain date or its bid would not be considered.

SICOA accordingly sent a letter to the contracting officer confirming the German origin of the forgings, but when this communication had not been received by the specified date, the contracting officer rejected the firm's bid as nonresponsive and made an award to the next low bidder. In response to SICOA's immediate protest to the agency, the contracting officer affirmed her action and also denied SICOA's protest on the ground that SICOA was not eligible for the award as a small business concern because it was offering a foreign product. SICOA then protested to this Office.

In its administrative report, the VA concedes that the contracting officer's action here was unreasonable. The VA states that the contracting officer should not have required SICOA to furnish a written confirmation as to the origin of the forgings when the firm had already provided a sufficient verbal notification to that effect, and that it was therefore improper for her to reject the bid as nonresponsive when the written confirmation had not been timely received. More importantly, the VA is of the view that the contracting officer exceeded her authority in determining at that time that SICOA was ineligible for the award merely because the forgings were of foreign origin.

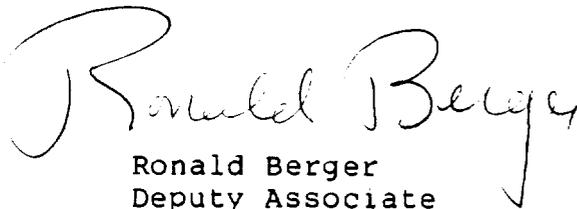
We have previously considered protests involving surgical instruments in which it was argued that, in a small business set-aside, the government should not consider bids in which foreign material or labor was offered. Our holding has been, however, that an indication that a small business will furnish a foreign product does not automatically negate its status as a small

business concern. Rather, a firm may qualify as a small business even though the item it offers is not completely of domestic origin if it makes a significant contribution to its manufacture or production. Therefore, if a bidder indicates that foreign components will be used, the contracting agency will resolve the question of the extent of foreign involvement, and, if appropriate, will refer the matter to the Small Business Administration (SBA) for a decision. Michigan Instruments Corp., 60 Comp. Gen. 397 (1981), 81-1 CPD ¶ 302.

The VA concedes that the contracting officer acted improperly in view of our holding in such matters, and informs us that it will seek to suspend any contract performance and will request SICOA to provide additional information concerning its contribution to the end manufacture of the offered scissors. The VA also states that it will ask the SBA for a decision in the matter if appropriate.

Since the VA has agreed with SICOA's protest position and has initiated corrective action, the protest is therefore academic. See, e.g., Eastern Trans-Waste Corp., B-213455, July 31, 1984, 84-2 CPD ¶ 135. In any event, as indicated, the ultimate question of whether SICOA is eligible for an award as a small business concern under this set-aside is not for resolution by this Office. Michigan Instruments Corp., supra, 60 Comp. Gen. at 398.

Accordingly, the protest is dismissed.



Ronald Berger
Deputy Associate
General Counsel