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Ruppert

DECISION



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

FILE: B-218723; B-218724; **DATE:** May 9, 1985
B-218725; B-218726
MATTER OF: Hanson Industrial Products

DIGEST:

1. Bid on a total small business set-aside from a small business concern that does not indicate that all supplies to be furnished will be the product of a small business concern must be rejected as nonresponsive, because the bidder would be free to furnish supplies from a large business and thus defeat the purpose of the set-aside. The bidder's failure to assume the obligation to provide a product manufactured by a small business is not overcome by completion of the place of performance clause, because a contractor is not necessarily precluded from changing performance location in order to enhance its ability to perform.
2. A nonresponsive bid cannot be corrected after bid opening to make it responsive, even if the government would obtain a lower price by waiving the deficiency or otherwise permitting the bidder to cure it.

Hanson Industrial Products protests the rejection of its bids as nonresponsive to invitation for bids (IFB) Nos. DAAAO9-85-B-0246, DAAAO9-85-B-0351, DAAAO9-85-B-0140, and DAAAO9-85-B-0124, issued by the U.S. Army Armament Materiel Readiness Command, Rock Island, Illinois. The solicitations were issued as total small business set-asides, and Hanson submitted the apparent low bid on each.

We dismiss the protests. We do so without obtaining a report from the contracting agency since it is clear from the information provided by Hanson that the protests are without legal merit. See Hauser Products Inc., B-218140, Feb. 22, 1985, 85-1 CPD ¶ 227.

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The IFBs contained the standard Small Business Concern Representations and Certifications set forth in the Federal Acquisition Regulation, 48 C.F.R. § 52.214 (1984). In each instance, for clause K-7, which requires two responses, Hanson checked the box that indicated that it was a small business concern, but failed to complete the portion that indicated whether all the products to be furnished would be manufactured or produced by a small business concern in the United States, its possessions, or Puerto Rico. As a result, the Army rejected the bids because it was unable to determine from the face of them that Hanson was agreeing to furnish products manufactured by a small business.

Hanson states that its omission was inadvertent, but argues that since it did certify that it was small, woman-owned, and that its small business facility was the place of performance, the composite of the representations makes it clear that all supplies (end items) will be furnished by Hanson, a small business. Hanson voluntarily offered an amended certification in letter form in accord with the second part of clause K-7. Hanson contends that its initial failure to complete this clause is a minor informality that can be waived or cured in accord with 48 C.F.R. § 14.405.

We have held that a small business' failure to certify as to its size status is a waivable minor informality, since it does not affect the responsiveness of the bid. Extinguisher Service, Inc., B-214354, June 14, 1984, 84-1 CPD ¶ 629. However, the certification concerning the bidder's obligation to furnish products manufactured by a small business concern is a matter of bid responsiveness because it involves a performance commitment, *i.e.*, to furnish products manufactured by a small business. Thus, the bidder's intention to furnish such products must be established at the time of bid opening. See J-MAR Metal Fabricating Co., B-217224, Mar. 21, 1985, 85-1 CPD ¶ 329; Mactek Industries Corp., B-211675, June 1, 1983, 83-1 CPD ¶ 592. Otherwise, the small business contractor could defeat the purpose of the set-aside program by furnishing products from either small or large business firms as its own interests might dictate. Automatics Limited, B-214997, Nov. 15, 1984, 84-2 CPD ¶ 535; DuHadaway Tool and Die Shop, Inc., B-216082, Aug. 29, 1984, 84-2 CPD ¶ 239.

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It is sometimes possible for a bidder to make the necessary commitment in its bid even though the clause K-7 box is left blank. See ASC Industries, B-216293, Dec. 21, 1984, 84-2 CPD ¶ 684.

We do not agree with the protester that it has done that here. The place of performance clause in its bids only expresses a present intent to provide the principal producing facility. The purpose of the clause is informational and relates to bidder responsibility rather than to a performance location commitment. Automatics Limited, supra; Keco Industries, Inc., B-199934, Sept. 22, 1980, 80-2 CPD ¶ 219. As the Keco case suggests, a firm is not necessarily precluded from changing its designated place of performance after bid opening. Hanson therefore cannot be said to have assumed an obligation to furnish a product manufactured by small business merely by virtue of the place of performance clause.

Postopening explanations or bid modifications cannot be used to make a nonresponsive bid responsive even if, as here, the government could obtain a lower price by accepting the corrected bid. Basic Marine Inc., B-215236, June 5, 1984, 84-1 CPD ¶ 603; Mechanical Mirror Works, Inc., B-210750.2, Oct. 20, 1983, 83-2 CPD ¶ 467. Therefore, since Hanson's bid was nonresponsive on its face, Hanson's letter certifying in accord with the second part of clause K-7 may not be considered.

The protests are dismissed.


Ronald Berger
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General Counsel