

DECISION



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

FILE:

B-218720.2

DATE: May 30, 1985

MATTER OF:

Polan Industries

DIGEST:

1. Bid on total small business set-aside which indicates in the appropriate block that not all supplies to be furnished will be the product of a small business concern is not responsive and may not be considered for award, even though the bidder can demonstrate that it is small and lists its own plant as the place of performance, because bidder would be free to furnish supplies from a large business and thus defeat the purpose of the set-aside.
2. Bid on total small business set-aside rejected as nonresponsive because bidder indicated that not all supplies to be furnished will be the product of a small business concern may not be cured or defect waived as a minor informality since responsiveness must be determined from material available at bid opening and postopening explanations cannot be considered to correct a nonresponsive bid.

Polan Industries (Polan), a small business concern, protests the rejection of its low bid under invitation for bids (IFB) No. DAAB07-85-B-0065 issued by the United States Army Communications Electronics Command, Fort Monmouth, New Jersey (Army), as a total small business set-aside. The Army rejected Polan's bid as nonresponsive because it indicated that not all supplies to be furnished would be manufactured by a small business.

We deny the protest.

The IFB contained the standard Small Business Concern Representation set forth in the Federal Acquisition Regulation (FAR), 48 C.F.R. § 52.219-1 (1984). Polan indicated in that representation that it was a small business concern, but that "not all supplies to be furnished will 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 bid as nonresponsive because it was unable to determine from the face of the bid that Polan was agreeing to furnish products manufactured by a small business.

Polan argues that it bid as a manufacturer and indicated in its bid that its own plant in West Virginia would be the place of performance; thus, Polan contends that its bid contained sufficient information, as submitted, to establish that it intended to furnish supplies manufactured by a small business. Polan also contends that the Small Business Concern Representation clause is ambiguous and its misinterpretation in responding to the representation should be waived or corrected pursuant to FAR, 48 C.F.R. § 14.405.

While we have held that the failure to complete the small business size status portion of the representation is a waivable minor informality, Extinguisher Service, Inc., B-214354, June 14, 1984, 84-1 C.P.D. ¶ 629, we have distinguished this from the second portion of the representation which concerns a matter of responsiveness because it involves an obligation to provide supplies manufactured by a small business concern, a key element of a small business set-aside for supplies. If a bid on a small business set-aside fails to establish the legal obligation of the bidder to furnish supplies manufactured or produced by a small business, the bid is nonresponsive and must be rejected. See Mountaineer Leathers, Inc., B-218453, May 6, 1985, 85-1 C.P.D. ¶ _____, and decisions cited therein. Here, even though Polan indicated in its bid that it was a small business manufacturer and that work would be performed in its West Virginia plant, it also represented that not all the supplies it furnished would be the products of a small business concern. As such, Polan's bid does not legally obligate the contractor to furnish small business products consistent with the set-aside, but rather creates an ambiguity which requires rejection of the bid. See Automatics Ltd., B-214997, Nov. 15, 1984, 84-2 C.P.D. ¶ 535; Wippette International Inc., B-216304, Sept. 18, 1984, 84-2 C.P.D. ¶ 322; and Mechanical Mirror Works, Inc., B-210750.2 Oct. 20, 1983, 83-2 C.P.D. ¶ 467.

Further, postopening explanations cannot be used to waive the objectionable certification, or otherwise to correct a nonresponsive bid, even where the government could obtain a lower price by accepting the corrected bid. See Basic Marine Inc., B-215236, June 5, 1984, 84-1 C.P.D. ¶ 603; Mechanical Mirror Works, Inc., B-210750.2, supra.

Accordingly, since Polan's intent to supply items manufactured by a small business concern was not clearly ascertainable from the face of the bid, the contracting officer properly rejected the bid as nonresponsive.

Polan's assertion that it misinterpreted the Small Business Concern Representation clause used in the solicitation due to the ambiguity of that clause does not provide a basis for accepting Polan's bid. This same assertion was considered and rejected as a basis for protest in Mountaineer Leathers, Inc., B-218453, supra, where we stated as follows:

"Although the law in this situation is well-settled and does not provide a basis for accepting Mountaineer's bid, there have been a number of recent cases--such as those cited throughout this decision--in which bidders have alleged that they submitted nonresponsive bids through misinterpreting the Small Business Concern Representation clause (Federal Acquisition Regulation (FAR), 48 C.F.R. § 52.219-1 (1984)). We are, therefore, by letters of today, expressing our concern to the FAR Secretariat and to the Administrator, Small Business Administration, that this may be an appropriate matter for review and consideration of clarifying changes to the wording of the Small Business Concern Representation clause."

The protest is denied.

Harry R. Van Cleve
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General Counsel