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**DECISION**



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

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**FILE:** B-219382 **DATE:** July 16, 1985  
**MATTER OF:** Kurz & Root Company, Inc.

**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 must be rejected unless the bidder's intent to supply items manufactured by a small business concern is clearly ascertainable from the face of the bid.
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 cannot be corrected by post-bid-opening explanations.
3. A procuring agency's decision not to extend bid opening after issuing an amendment clarifying the Small Business Concern Representation clause in an invitation for bids was reasonable when protester received amendment at least 4 business days before bid opening, the amendment was not of a material nature, and the amendment allowed bidders to submit by telegram any modifications to their bids.
4. Prior improper contract actions do not prevent an agency from applying correct procedures in later procurements.

Kurz & Root Company, Inc. (Kurz), protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. DAAJ10-85-B-A248 issued by the United States Army Troop Support Command (TROSCOM), St. Louis, Missouri. The solicitation, for alternating generators, was issued as a total small business set-aside. Kurz's bid was rejected by the procuring agency because it had indicated that not

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all supplies to be furnished would be the product of a small business concern in the United States, its possessions, or Puerto Rico.

We dismiss the protest without obtaining a report from the contracting agency since it is clear from the information provided by Kurz that the protest is without legal merit and, therefore, does not state a valid basis for protest. See Hauser Products Inc., B-218140, Feb. 22, 1985, 85-1 CPD ¶ 227; ATD-American Co., B-217290, Jan. 23, 1985, 85-1 CPD ¶ 19; 4 C.F.R. § 21.3(f) (1985).

Section K.7 of IFB-A248 contained the usual Small Business Concern Representation clause as provided for in Federal Acquisition Regulation (FAR), 48 C.F.R. § 52.219-1 (1984). In pertinent part, the clause reads as follows:

"The offeror represents and certifies as part of its offer that it \_\_\_ is, \_\_\_ is not a small business concern and that \_\_\_ all, \_\_\_ 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 . . ."

Kurz submitted its bid and checked the boxes indicating that it was a small business concern and 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." On April 30, 1985, the same day Kurz mailed its bid, TROSCOM issued amendment No. 0001 to the solicitation. The sole purpose of the amendment was to clarify the Small Business Concern Representation clause through the insertion of a "Note" which stated:

"In accordance with the terms of the Notice of Total Small Business Set-Aside, FAR 52-219.6 a check in the box for all supplies in the above clause represents that all end items to be furnished will be manufactured or produced by a small business concern. As such, a check in the box for not all supplies will result in the offer being rejected as NONRESPONSIVE." (Emphasis in original.)

The amendment did not extend the May 9 bid opening date.

The amendment was received by Kurz on May 3, 1985. Due to the absence of its contract administrator, the amendment was left unrecognized in his office for 6.5 days, 4.5 of which were business days. It was not until after bids had been opened on May 9, 1985, that the amendment was recognized as such by Kurz. Kurz received official notification on May 20 that its bid had been rejected as nonresponsive; Kurz protested to the procuring agency on May 24. Kurz subsequently filed this protest with our Office prior to receiving any response to its protest to the agency.

The protest essentially concerns two aspects of the solicitation--(1) the Small Business Concern Representation clause itself, and (2) TROSCOM's failure to extend the bid opening date upon issuance of amendment No. 0001. The protester seeks a ruling from our Office which would permit it to change the entry it made in the Small Business Concern Representation clause without jeopardizing its standing as the low bidder or, in the alternative, a resolicitation of the procurement. For the reasons discussed below, none of the protester's arguments present a ground upon which to grant the requested relief.

Kurz first argues that the meaning of the Small Business Concern Representation clause is unclear, as a result of which Kurz confused the raw material and component parts used in the manufacture of an item with the supplies being furnished under the contract, causing it to incorrectly fill in the clause.

We have considered the identical allegation in a number of recent decisions, in which we have pointed out that the relevant section of the Small Business Concern Representation clause is an essential element of a small business set-aside contract because it creates an obligation for the bidder to provide supplies manufactured by a small business concern. If a bid on a small business set-aside fails to establish this 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 CPD ¶ 505, and cases cited therein. Otherwise, the government's acceptance of the bid would not legally obligate the contractor to furnish small business products consistent with the set-aside. Automatics Ltd., B-214997, Nov. 15, 1984, 84-2 CPD ¶ 535. In addition, postopening explanations by a bidder cannot be used to waive the objectionable certification, or otherwise correct a

nonresponsive bid, even if the government could obtain a lower price by accepting the correct 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 Kurz'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.

Kurz also protests the agency's refusal to extend the bid opening date after issuing the amendment as provided for by FAR, 48 C.F.R. § 14.208. This section provides for the extension of the bid opening date to allow all prospective bidders time to consider the information contained in an amendment before submitting or modifying their bids. Kurz argues that the failure to extend the bid opening was particularly unfair to it because it was the only bidder whose bid had already been dispatched prior to its receipt of the amendment.

First, we note that this argument is untimely under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1985), since it involves an alleged impropriety in a solicitation which was not protested prior to bid opening. In any event, the determination by an agency whether or not to extend the period remaining until bid opening as provided by FAR, 48 C.F.R. § 14.208, is a matter to be determined on a case-by-case basis. Thus, the protester's enumeration of other solicitations in which bid openings were extended upon the issuance of an amendment is not dispositive of the question of whether an extension should have been made in this instance.

In determining whether contracting officials acted reasonably and allowed bidders sufficient time to consider an amendment, we have considered a number of factors:

1. the length of time allowed for consideration of the amendment and submission of a bid;
2. the proximity of the bidder to the procuring activity;
3. the significance and complexity of the amendment;

4. the degree to which any requirement was imposed by the amendment was a surprise to the protester;
5. whether the protester had requested an extension prior to closing date; and
6. whether other bidders submitted late bids or complained of insufficient time in which to consider the amendment.

See Tom Walsh and Associates, 63 Comp. Gen. 175 (1984), 84-1 CPD ¶ 78, and the cases cited therein.

Here, the sole subject of the amendment was a clarification of the Small Business Concern Representation clause and was not regarded by TROSCOM as material, as evidenced by the fact that Kurz's bid was not rejected for its failure to acknowledge receipt of the amendment, but because of the entry it made in the Small Business Concern Representation clause. If a bidder wished to modify its bid in light of this clarifying amendment, it need only have designated a change in which box should be check-marked in the latter portion of the Small Business Concern Representation clause. Kurz argues that since it had already submitted its bid, such a modification would have required it to retrieve the bid from the Army, physically correct it, and then return it to TROSCOM within 4.5 business days. Kurz argues that such a burden is unfair to it. This assertion, however, is factually incorrect. The amendment provided that:

"If by virtue of this amendment you desire to change an offer already submitted, such change may be made by telegram or letter, provided each telegram or letter makes reference to the solicitation and the amendment, and is received prior to the opening hour and date specified." (Emphasis added.)

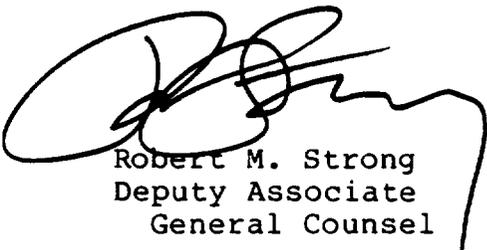
Kurz received the amendment almost 5 business days before bids were to be opened. It did not react to the amendment prior to bid opening because its contract administrator was out of town and the company had not arranged for any other employee to act in his absence. This is a circumstance for which the Army should not be

held responsible and, in the absence of any indication that almost 5 business days was not adequate time in which to consider the clarifying amendment and to modify the bid by telegram, if necessary, we conclude that TROSCOM's decision not to extend the bid opening date was reasonable.

Finally, Kurz contends that it should be entitled to rely on its past conduct concerning the proper manner in which to complete the Small Business Concern Representation clause. Kurz alleges that it was awarded two prior contracts despite marking the "not all supplies" box in the Small Business Concern Representation clause. Thus, Kurz argues that since the Small Business Concern Representation clause is ambiguous, these past contract awards led it to rely on its past dealings as being correct, and that it should be entitled to rely on these past dealings in subsequent bids.

This argument is without merit. We have specifically held that prior improper contract actions do not prevent an agency from applying correct procedures in later procurements. Fry Communications, Inc., 62 Comp. Gen. 164 (1983), 83-1 CPD ¶ 109. Therefore, the agency's decision to follow the proper procedure in this case presents no grounds for protest.

The protest is dismissed.



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General Counsel