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

FILE: B-218287.2 **DATE:** August 5, 1985

MATTER OF: Stellar Industries, Inc.--
Request for Reconsideration

DIGEST:

Prior decision, which held that a small business bidder's representation of itself as a manufacturer of the offered supplies for purposes of the Walsh-Healey Public Contracts Act created a binding obligation to furnish supplies manufactured or produced by a small business concern, is reversed, and other decisions to the same effect are expressly modified. The Department of Labor interprets the Walsh-Healey Act as not prohibiting a qualified manufacturer from subcontracting the manufacture of the offered supplies. Therefore, a representation by a small business bidder that it is a manufacturer of the supplies being procured is not equivalent to a certification that all supplies to be furnished will be manufactured or produced by a small business concern.

The Defense Logistics Agency (DLA) requests reconsideration of our decision in Stellar Industries, Inc., B-218287, May 30, 1985, 85-1 CPD ¶ 616. In that decision, we sustained Stellar Industries' protest against the agency's rejection of its low bid as nonresponsive under invitation for bids (IFB) No. DLA13H-85-B-8145, a total small business set-aside. The agency had rejected the bid because Stellar Industries had not certified that all supplies to be furnished would be manufactured or produced by a small business concern. We held that the rejection was improper because it was clear from representations made by Stellar Industries in the IFB's place of performance and Walsh-Healey Public Contracts Act clauses that the firm had legally bound itself to manufacture the offered supplies. Therefore, we recommended that the awarded contracts be terminated and Stellar Industries awarded the balance of the requirement.

DLA asserts that our May 30 decision is inconsistent with prior holdings of this Office. DLA further contends that our decision is in error because it disregards a significant interpretation of the Walsh-Healey Public Contracts Act by the Department of Labor.

Upon reconsideration, we reverse our prior decision.

It is well-settled that 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. Automatics Limited, B-214997, Nov. 15, 1984, 84-2 CPD ¶ 535; Mechanical Mirror Works, Inc., B-210750.2, Oct. 20, 1983, 83-2 ¶ 467. Otherwise, a small business contractor would be free to provide the supplies from either small or large business manufacturers as its private business interests might dictate, thus defeating the intent of the set-aside program. DuHadaway Tool and Die Shop, Inc., B-216082, Aug. 29, 1984, 84-2 CPD ¶ 239.

Accordingly, where a small business bidder fails to complete the small business certification clause, the bid must be rejected as nonresponsive unless it is clear from the bid, when read as a whole, that the bidder otherwise has legally bound itself to furnish supplies manufactured or produced by a small business concern. We have applied this rule in two recent decisions that DLA cites in support of its request for reconsideration: Automatics Limited, B-214997, supra and ASC Industries, B-216293, Dec. 21, 1984, 84-2 CPD ¶ 684.

In Automatics Limited, we held that a bid which failed to indicate that the small business bidder was a manufacturer of the offered supplies, and did not certify that the supplies would be manufactured or produced by a small business concern, was nonresponsive. The bidder's failure to assume the obligation to furnish supplies of small business manufacture or production was not obviated by the firm's completion of the IFB's place of performance and shipping point clause, indicating its own address as the performance and shipping point, because that clause only expressed a present intent to provide the principal production facility. We noted that the purpose of the

clause was informational in nature and thus related to bidder responsibility rather than to bid responsiveness. Therefore, the firm was not necessarily precluded from altering its designated place of performance after bid opening.

In contrast, in ASC Industries, we held that a bid, which failed to contain the requisite certification that all supplies to be furnished would be manufactured or produced by a small business concern, was improperly rejected as nonresponsive where the bidder had bound itself to use a specific supplier under the place of performance clause, and the agency had information on file indicating the listed supplier's status as a small business. We reached a different result from that reached in Automatics Limited because the subject IFB specifically advised bidders that failure to list the place of performance could be cause to reject the bid, and further provided that the performance of work at other than the indicated location was prohibited unless approved in writing in advance by the contracting officer. Therefore, we concluded that since the bidder was bound to use the supplier listed in the place of performance clause, and the agency had information available to it from its own records to indicate that the listed supplier was small, the bidder had legally obligated itself to furnish supplies of small business manufacture or production, and the bid was accordingly responsive.

DLA contends that our reliance on the place of performance clause in our May 30 decision is in error because the IFB did not specify that failure to complete the clause might be cause for rejecting the bid, nor did it state that prior approval from the contracting officer was needed before the listed location could be changed. Thus, the agency contends that Stellar Industries' completion of the clause, indicating its own plants as the place of performance, was not sufficient to bind the firm to use its own facilities. DLA urges that our decision, therefore, is inconsistent with our holdings in ASC Industries and Automatics Limited.

DLA also asserts that our conclusion that Stellar Industries' representation of itself as a manufacturer under the Walsh-Healey Public Contracts Act clause was sufficient to establish the firm's intent to furnish

supplies of its own manufacture ignores a 1969 Department of Labor interpretation of the Walsh-Healey Act which concluded that the Act did not prohibit qualified manufacturers from subcontracting. Therefore, DLA urges that even if a small business bidder represented itself as a manufacturer of the offered supplies, this would not be sufficient to bind it to furnish only supplies of small business manufacture or production, since it could always subcontract the work to a large business firm.

We do not agree with DLA that our prior decision in this matter is inconsistent with our holdings in ASC Industries and Automatics Limited. It is true that the IFB in this case did not indicate that completion of the place of performance clause was a matter of bid responsiveness, and did not state that the listed location could not be changed absent prior approval by the contracting officer (so that completion of the clause in fact was insufficient to bind Stellar Industries to use only its own facilities in performance of the contract); however, our decision did not turn on the firm's completion of that clause. While we did note that Stellar Industries listed its own plants as the place of performance, we did so only in conjunction with our conclusion that Stellar Industries' representation of itself as a manufacturer of the goods being procured was sufficient to show the firm's intent to furnish supplies manufactured by a small business concern. That conclusion was the primary basis for our decision, and we believe it is consistent with our prior decisions in this area. See Automatics Limited, B-214997, supra; Jack Young Associates, Inc., B-195531, Sept. 20, 1979, 79-2 CPD ¶ 207 (where we indicated that a small business bidder's representation of itself as a manufacturer for Walsh-Healey purposes would be sufficient to establish its obligation to furnish supplies manufactured by a small business).

Upon reconsideration, however, we now agree that a small business bidder's representation in the IFB that it is a manufacturer of the supplies offered does not in fact legally obligate the firm to furnish supplies manufactured or produced by a small business concern. As previously indicated, the subject clause implements the Walsh-Healey Public Contracts Act, 41 U.S.C. §§ 35-45 (1982), which, with certain limited exceptions, permits the award of

contracts for materials, supplies, articles, or equipment to be made only to the manufacturer of, or a regular dealer in, the items to be furnished under the contract. The Act also requires bidders to represent or stipulate that they are either the manufacturer or a regular dealer. 41 U.S.C. § 35(a).[1]/

The clear intent of this requirement was to eliminate bid brokering, the practice whereby a person who was not a legitimate dealer or manufacturer submitted a bid so low that established firms could not successfully compete for the contract. The broker would then subcontract to substandard factories and "sweatshops," thus overriding the federal government's desire to promote fair and safe labor conditions.[2]/

As authorized by the Act, the Secretary of Labor has made certain interpretations of the Act, which appear at 41 C.F.R. pt. 50-206 (1984). Applicable here is 41 C.F.R. § 50-206.51(a)(1), which defines a manufacturer as a:

> "person who owns, operates, or maintains a factory or establishment that produces on the premises the materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications."

This definition is also set forth in the Federal Acquisition Regulation (FAR), 48 C.F.R. § 22.601 (1984).

We have reasoned from this definition and the language and history of the Act that when a small business bidder represents itself in its bid as a manufacturer of the offered supplies, it necessarily commits itself to manufacture those supplies. See Jack Young Associates, Inc., B-195531, supra, and Automatics Limited, B-214997, supra. In the present matter, since Stellar Industries, undeniably a small business, in fact had represented itself as a manufacturer of the required supplies for Walsh-Healey purposes, we concluded that the firm had obligated itself to manufacture those supplies.

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[1]/ We note that while the Act refers to "the" manufacturer, the contract clause uses the terminology "a" manufacturer.

[2]/ See H.R. Rep. No. 2946, 74th Cong., 2nd Sess. 4 (1936).

However, DLA has submitted a 1969 interpretation 3/ of the Walsh-Healey Public Contracts Act by the Department of Labor, which follows in pertinent part:

> "You are correct in your assumption that the Act does not prohibit qualified manufacturers from subcontracting. Thus, for example, an eligible manufacturer . . . may purchase all the components which are made part of [the product] he assembles. Likewise, he may subcontract the manufacture of the entire [product] should he wish. However, this presupposes that the firm does own, operate or maintain an establishment that produces [the product]. So long as the firm is eligible for the receipt of the contract, the amount of subcontracting is immaterial. . . ." (Emphasis supplied.)

Although this particular interpretation is nowhere indicated in the various interpretations of the Act provided at 41 C.F.R. pt. 50-206, supra, the Department of Labor has advised this Office during our reconsideration of this case that such an interpretation is correct. According to the Department, it is only necessary that a firm qualify, i.e., be eligible in its own right as a manufacturer of the supplies offered, and nothing in the Act precludes the firm from later subcontracting the work. (We note that this view is consistent with an earlier case in which we stated that there is nothing in the Act which prohibits an award to a company which contemplates subcontracting. 34 Comp. Gen. 595 (1955).)

Upon first impression, the Department of Labor's interpretation seems inconsistent with the Act's overall purpose, since a firm obtaining the contract as a manufacturer apparently would be able to shift part or all of the manufacturing to firms operating under unfair or unsafe labor conditions. The Department of Labor has administratively ruled, however, that if a contractor is awarded a contract subject to the Act as a manufacturer, it assumes an obligation to manufacture the supplies under the labor standards of the Act, and may not relieve itself of

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3/ Letter of June 16, 1969, from the Administrator, Wage and Hour and Public Contracts Divisions, Department of Labor, to the President of Tyco, Inc.

this obligation merely by shifting the manufacturing to another firm. The contractor is jointly liable with the "substitute manufacturer" for any acts or omissions on the latter's part which would have constituted violations of the Act if the prime contractor had performed the contract in its own facilities. This administrative ruling has been expressly upheld by the Fourth Circuit. United States v. Davison Fuel and Dock Co., 371 F.2d 705 (4th Cir. 1967); cf. United States v. New England Coal and Coke Co., 318 F.2d 138 (1st Cir. 1963) (contractor who entered into a contract to furnish supplies to the government as a regular dealer and operated as such in performing the contract was not liable under the Department of Labor's "substitute manufacturer" ruling for the labor standards of its suppliers).

Thus, a small business bidder which represents itself as a manufacturer for Walsh-Healey purposes is not prohibited from subcontracting and therefore has not in fact legally obligated itself to manufacture the offered supplies. Rather, the firm could subcontract the entire work to a large business manufacturer if its business interests so dictated. In light of this, we now agree with DLA that Stellar Industries' representation that it was a manufacturer of the supplies offered for Walsh-Healey purposes was not legally equivalent to a binding obligation to furnish supplies manufactured or produced by a small business.

Accordingly, we reverse our May 30 decision. To the extent that other decisions have indicated that a bidder's representation of itself as a manufacturer of the supplies offered would have rendered the bid responsive despite the bidder's failure to complete the small business certification clause, those decisions are hereby modified.

for Shelton J. Dolan
Comptroller General
of the United States