DECISION

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

FILE: B-221183 DATE: February 24, 1986

MATTER OF: The Latta Co.

DIGEST:

1. GAO will not consider whether a bidder satisfies the requirements of the Walsh-Healey Act since such matters, by law, are for the contracting agency's determination, subject to final review by the Small Business Administration (where a small business is involved) and the Department of Labor.

2. Post-bid opening protest that the Davis-Bacon Act, rather than the Walsh-Healey Act, should have applied to the solicitation is dismissed as untimely filed where the solicitation contained only the clauses mandated by the Federal Acquisition Regulation for referencing the requirements of the Walsh-Healey Act and made no reference to any other labor statute.

3. Where solicitation permitted multiple awards on the line items in the bid schedule and did not prohibit bids which restricted award to combinations of line items, award properly was made to bidder submitting low total bid even though bid was conditioned on award of certain combination of line items.

The Latta Co. protests the award of a contract to Niedermeyer-Martin Co. under invitation for bids (IFB) No. DACA85-85-B-0060, issued by the Alaska District of the United States Army Corps of Engineers for the supply of six pre-engineered, prefabricated buildings and connecting corridor structures to be utilized as National Guard armories in Alaskan rural communities. We dismiss the protest in part and deny it in part.

The IFB provided for bidding on the basis of three alternates. Alternate No. 1, which contained twelve line items, called for prices on the buildings, the destination shipping costs to each of the six communities where the buildings were to be constructed, and construction work at the sites. Alternate Nos. 2 and 3 were the same with the exception that Alternate No. 2 called for pricing for destination shipping of the buildings to certain specified

staging areas instead of the six communities, and Alternate No. 3 called for pricing for shipping of the buildings to Seattle, Washington. The Corps of Engineers received bids from four bidders. The joint venture of Latta and The Olday Company was the apparent low total bidder on all three alternatives, but the agency eliminated the joint venture from consideration for award based on its determination that Latta was neither a regular dealer nor a manufacturer under the Walsh-Healey Act, 41 U.S.C. §§ 35-45 (1982). Award was made instead to Niedermeyer-Martin, the second low bidder, for its total bid on Alternate No. 3.

The Corps of Engineers explains that it rejected the Olday-Latta bid as provided under the Federal Acquisition Regulation (FAR), 48 C.F.R. § 22.608-2(e) (1984), which permits rejection of bids from bidders whose Walsh-Healey Act representations indicate they are not manufacturers or regular dealers of the supplies they offer. The agency states that Olday-Latta, in its bid package, checked the portion of the IFB's Walsh-Healey Act self-certification clause that provided that the bidder was not a regular dealer of the supplies covered by the solicitation. The Corps of Engineers further states that while Olday-Latta did not indicate in the IFB's self-certification provision whether or not it was a manufacturer, the joint venture did represent that it was neither a regular dealer nor manufacturer in a bid package on a prior canceled solicitation for the same prefabricated buildings.

Latta does not dispute the Corps' determination that Latta is not a regular dealer or manufacturer. Rather, Latta contends that the Walsh-Healey Act was inapplicable to the contract work to be performed; according to Latta, only 15 percent of this work involves actual manufacturing. It is Latta's view that if the act applies at all, it should cover only the portion of the contract relating to manufacturing, leaving Latta's bid to be considered for the nonmanufacturing portion of the contract. Latta finally argues that, even if the Walsh-Healey Act is deemed applicable to the entire contract, because the purpose of the act is to ensure payment of minimum wages, the act's purpose is fulfilled by a construction contractor such as Olday-Latta, which pays union scale and employee benefits in accordance with the Davis-Bacon Act, 40 U.S.C. § 276a (1982).

Latta's protest as to the applicability of the Walsh-Healey Act to this contract is untimely. Our Bid

Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1985), require that protests based on alleged improprieties in a solicitation which are apparent prior to the bid opening date be filed before that time. The IFB contained only the clauses, mandated by the FAR, referencing the requirements of the Walsh-Healey Act, and made no mention of the Davis-Bacon Act. The IFB also did not indicate that the Walsh-Healey Act requirements applied only to certain portions of the work under the IFB. Consequently, Latta's protest against the applicability of the Walsh-Healey Act to all or part of the procurement, filed after bid opening, will not be considered on the merits. See generally Gunnison County Communication Inc., B-219748, Sept. 19, 1985, 85-2 C.P.D. ¶ 310.

Latta's argument that its compliance with the Davis-Bacon Act should be viewed as satisfying the purpose of the Walsh-Healey Act also is not for consideration here. Our Office does not consider issues as to whether a bidder meets the requirements of the Walsh-Healey Act. Such matters, by law, are for the contracting agency's determination, subject, in appropriate cases, to final review by the Small Business Administration (SBA) (if a small business is involved) and the Department of Labor. Churchill Corp., B-217377, Jan. 24, 1985, 85-1 C.P.D. ¶ 96. Although Latta apparently is a small business, FAR, 48 C.F.R. § 22.608-2(e) (1984), does not require SBA review of a rejected offer where the offeror's representation indicates it is not a manufacturer or regular dealer.1/ Considering Latta's prior certification that it was not a manufacturer or regular dealer; Latta's failure to certify in its bid here that it is a manufacturer; and the fact that Latta does not now dispute the Corps' finding that it is not a manufacturer, the Corps properly did not refer the matter to SBA.

We do note that Latta states in its protest that it intended to subcontract the portion of the contract covering manufacture of the prefabricated buildings. We have stated that the clear intent of the manufacturer or regular dealer requirement in the Walsh-Healey Act is to eliminate bid brokering, the practice whereby a person who is not a legitimate dealer or manufacturer of the supplies submits a bid so low that established firms cannot successfully compete for

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1/ Under FAR, 48 C.F.R. § 22.608-2(f), referral to SBA is required where the contracting officer's determination of Walsh-Healey Act ineligibility contradicts the offeror's certification.

the contract. The broker then could subcontract the work to substandard factories, thus overriding the federal government's desire to promote fair and safe labor conditions. Stellar Industries, Inc.--Request for Reconsideration, B-218287.2, Aug. 5, 1985, 64 Comp. Gen. ___, 85-2 C.P.D. ¶ 127. Thus, Latta's payment of benefits in accordance with the Davis-Bacon Act for the work it would perform under the contract would not satisfy the purpose of the Walsh-Healey Act with regard to insuring that the actual manufacturer or dealer of the prefabricated buildings has fair and safe labor conditions.

Latta further contends that the bid package of Niedermeyer-Martin should have been found nonresponsive because the cover letter the company submitted with its bids clearly shows that they improperly were made conditional. It is Latta's position that any conditioning of a bid is impermissible and renders the bid nonresponsive. We disagree.

Latta is correct that Niedermeyer-Martin qualified its bid; the company indicated in the cover letter accompanying its bid package that it would accept the award of the line items in all three bid alternatives for shipping and site construction of the prefabricated buildings only if it also received the award for the supply of the buildings themselves. Niedermeyer-Martin also indicated that it would accept an award for the supply of the buildings even if it were not awarded the line items for the shipping and site construction. Such conditions by bidders on the acceptance of line items in a bid schedule are not unusual, however. We consistently have held that limitations in a bid to various combinations of line items are effective in the absence of a specific provision in the solicitation to the contrary. See Walsky Construction Co., B-216737, Jan. 29, 1985, 85-1 C.P.D. ¶ 117. In all such cases where award on a restricted combination of schedule items is provided for by the bidder, it is the low overall cost to the government that is the relevant award criterion, as is required under the procurement statutes. See 10 U.S.C.A. § 2305(b) (West Supp. 1985).

Here, the IFB permitted multiple awards and contained no prohibition against a bidder limiting its award to certain line item combinations. Niedermeyer-Martin thus did not render its bid nonresponsive by conditioning it in this manner. Because award based on Niedermeyer-Martin's total bid resulted in the lowest overall cost to the government, the award was proper.

The protest is dismissed in part and denied in part.

for Seymour Efros
Harry R. Van Cleve
General Counsel