



The Comptroller General  
of the United States

Washington, D.C. 20548

Shanks

## Decision

**Matter of:** Contech Construction Products Inc.  
**File:** B-234700  
**Date:** March 24, 1989

### DIGEST

A bid on a total small business set-aside solicitation that contains no binding commitment on the part of the bidder that it will furnish end products manufactured by a small business is nonresponsive, notwithstanding that the bidder is a small business manufacturer of the products called for by the solicitation.

### DECISION

Contech Construction Products Inc. protests the rejection of its bid under invitation for bids No. 8-677, a total small business set-aside, issued by the Bureau of Indian Affairs, Department of the Interior, for corrugated steel arch culverts for use in Kasaan, Alaska. Contech's bid was rejected as nonresponsive because the protester did not certify in its bid that all supplies (end products) to be furnished under the solicitation would be manufactured by a small business.

We dismiss the protest without obtaining an agency report since it is clear from the record that the protest is without legal merit. 4 C.F.R. § 21.3(m) (1988). Contech states that it erroneously represented in its bid that it was a large business and that not all end products which it would furnish under the solicitation would be manufactured by a small business. Upon notification of the reason for the rejection of its bid, the protester sought to cure these bid defects by explaining that it is, in fact, a small business concern and would, itself, manufacture all supplies provided under the contract. Contech further explained that it had mistakenly checked the wrong responses on the bid form.

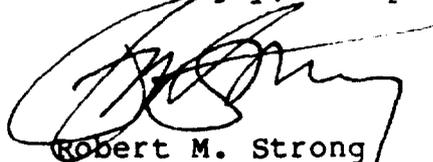
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As the contracting agency stated in response to Contech's agency-level protest, although a bidder's error in certifying its size status may in certain instances be corrected after bid opening, the same is not true of an erroneous end product certification. Because the bidder's certification of its obligation to furnish products manufactured by a small business concern constitutes a performance commitment, it is a matter of responsiveness, concerning which the bidder's intention must be established at the time of bid opening. The W. H. Smith Hardware Co., B-221087, Dec. 4, 1985, 85-2 CPD ¶ 627; aff'd., B-221087.2, Apr. 7, 1986, 86-1 CPD ¶ 336.

Contech indicates it understands that to permit a bidder to change its end product certification would, as we have said previously, allow such a bidder an unfair competitive opportunity to arrange to obtain the products from either a small or a large business manufacturer as its own interests might dictate and, thereby, defeat the intent of the small business set-aside program. (See Teco, Inc., 65 Comp. Gen. 33 (1985), 85-2 CPD ¶ 442). It is the protester's view, however, that this rationale should not be applied here since Contech is a manufacturer of the end products called for in the subject solicitation.

Notwithstanding the fact that the protester is a small business concern and a manufacturer of the products required by the solicitation, as we stated in The W. H. Smith Hardware Co., supra, 85-2 CPD ¶ 627 at 2, the bidder has not legally obligated itself to manufacture the offered supplies and is not prohibited from subcontracting. Thus, the fact that Contech is a small business manufacturer of the products required does not obviate its responsibility to make a binding commitment to meet the small business set-aside requirement. Stellar Industries, Inc.--Request for Reconsideration, 64 Comp. Gen. 748 (1985), 85-2 CPD ¶ 127.

Accordingly, the protest is dismissed.



Robert M. Strong  
Associate General Counsel