



United States  
General Accounting Office  
Washington, D.C. 20548

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Office of the General Counsel

**Matter of:** Vanderbilt Shirt Company

**File:** B-236016

**Date:** October 10, 1989

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**DIGEST**

1. Requirement that bidder under a small business set-aside procurement for supplies perform at least 50 percent of the cost of manufacturing the supplies is a material term of the solicitation and bid which took exception to that requirement by indicating that 100 percent of manufacturing would be subcontracted thus properly was rejected as nonresponsive.

2. To the extent that protester contends that Small Business Administration (SBA) regulation in effect superseded provision in invitation for bids (IFB) requiring that bidder perform at least 50 percent of the cost of manufacturing the supplies called for by the IFB, protester was required to raise the issue before bid opening, since inconsistency between SBA regulation and IFB provision was apparent from the IFB.

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**DECISION**

Vanderbilt Shirt Company protests the rejection of its bid and the subsequent award of a contract to Tennier Industries, Inc., under invitation for bids (IFB) No. DLA100-89-B-0212, issued by the Defense Logistics Agency for snow parkas.

We deny the protest.

The IFB was issued on March 10, 1989 as a total small business set-aside. The solicitation contained Federal Acquisition Regulation § 52.219-14, entitled "Limitations on Subcontracting," a clause which implements the Small Business Act, 15 U.S.C. § 644(o) (1988). Specifically, the "Limitations on Subcontracting" clause provides, as required by the Small Business Act, that the company awarded a supply contract under a small business set-aside is to perform at least 50 percent of the cost of manufacturing the supplies in-house, if it is not a regular dealer of those supplies.

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Although Vanderbilt certified itself as a manufacturer in the IFB's Walsh-Healey Act representation clause, Vanderbilt nevertheless took exception to the "Limitations on Subcontracting" clause by noting elsewhere in its bid that it intended to subcontract 100 percent of the manufacturing to another small business. As a result, the contracting officer rejected Vanderbilt's bid as nonresponsive on the basis that it did not comply with the IFB's subcontracting limitation.

To be responsive, a bid as submitted must comply in all respects with the material terms of the IFB. Systron Donner, B-230945, July 5, 1988, 88-2 CPD ¶ 7. Here, since Vanderbilt clearly took exception to the subcontracting limitation in the IFB by stating that it would subcontract 100 percent of the manufacturing of the items to another firm, DLA properly rejected its bid as nonresponsive. See Propper Mfg. Co., Inc., et al., B-233321 et al., Jan. 23, 1989, 89-1 CPD ¶ 58.

Vanderbilt contends, however, that its bid was rejected improperly because a Small Business Administration (SBA) regulation, 13 C.F.R. § 121.5(b)(2) (1988), allows a nonmanufacturer to subcontract 100 percent of the manufacturing operations in a total small business set-aside procurement for supplies.

In pertinent part, that regulation provides as follows:

"Any concern which submits a bid or offer in its own name, other than on a construction or service contract, but which proposes to furnish a product which it did not itself manufacture, is deemed to be a small business when:

(i) In the case of Government procurement reserved (i.e., set aside) for small businesses, such non-manufacturer must furnish, in the performance of the contract, the product of a small business manufacturer or producer, which end product must be manufactured or produced in the United States. The term "nonmanufacturer" includes a concern which can manufacture or produce the product referred to in the specific procurement but does not do so in connection with that procurement."

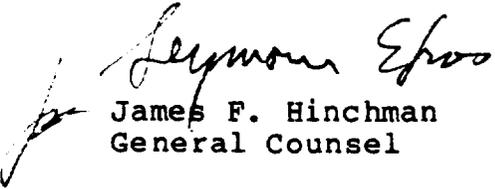
In effect, Vanderbilt argues that the SBA regulation, to the extent that it permits a small business bidder who is normally a manufacturer of the item being procured to subcontract for production of the item from another small

business, superseded the requirement in the IFB's "Limitations on Subcontracting" clause that the bidder perform at least 50 percent of the cost of manufacturing the supplies. However, SBA, whose views were solicited by DLA in connection with the protest, states that its regulation should not be interpreted in any manner inconsistent with the statutory requirement that a bidder-manufacturer perform at least 50 percent of the cost of manufacturing supplies.

Notwithstanding its belief that the SBA regulation permitted it to submit a bid proposing to subcontract 100 percent of the manufacturing, Vanderbilt was on notice that the IFB contained a provision which, by requiring performance of at least 50 percent of the manufacturing by the bidder itself, clearly was inconsistent with its position. It was not reasonable for Vanderbilt simply to assume that DLA would adopt its interpretation of the SBA regulation and effectively waive application of the "Limitations on Subcontracting" clause in the IFB, particularly given that the clause in the IFB implements a statutory limitation on subcontracting in the Small Business Act. Rather, since the inconsistency was apparent from examination of the IFB, Vanderbilt should have raised the issue with the contracting agency or our Office before bid opening. See Bid Protest Regulations, 4 C.F.R. § 21.1(a)(1) (1989). Doing so would have allowed consideration of the issue and the opportunity to recommend corrective action, if warranted--for example, clarification of the agency's position in light of the SBA regulation--when most practicable, before bids were submitted. By failing to raise the issue before bid opening, Vanderbilt assumed the risk that its bid would be rejected for taking exception to the subcontracting limitation in the IFB.

Vanderbilt also questions whether the awardee intends to perform 100 percent of the manufacturing itself. The record shows that, unlike Vanderbilt, the awardee, Tennier Industries, took no exception to the subcontracting limitation in the IFB and in fact stated in its bid that all manufacturing would take place at its Huntsville, Tennessee facility. Accordingly, we see no basis to object to the award to Tennier.

The protest is denied.

  
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General Counsel