



Comptroller General
of the United States

751239

Washington, D.C. 20548

Decision

Matter of: New Zealand Fence Systems; Department of the Interior--Request for Advance Decision

File: B-257460

Date: September 12, 1994

William F. McCannan for the protester.
Garrett R. Miller for ADPI Enterprises, Inc., an interested party.
Sherry Kinland Kaswell, Esq., and Justin P. Patterson, Esq., Department of the Interior, for the agency.
Linda S. Lebowitz, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Under a total small business set-aside for supply items, bids must be rejected as nonresponsive where they fail to certify that all end items to be furnished will be manufactured or produced by small business concerns.

DECISION

New Zealand Fence Systems protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. N651-IFB4-3021, issued as a total small business set-aside by the Bureau of Land Management, Department of the Interior, for two types of plastic fencing. The contracting officer rejected New Zealand's bid as nonresponsive because the firm failed to certify in its bid that all end items to be furnished would be manufactured or produced by a United States-based small business concern. In addition, the Agency requests an advance decision concerning the responsiveness of the bid of ADPI Enterprises, Inc., the bidder next in line for award for one of the line items. Agency counsel believes that for the same reason the contracting officer rejected New Zealand's bid as nonresponsive, the contracting officer also should reject ADPI's bid as nonresponsive.

We deny New Zealand's protest and recommend that the contracting officer reject ADPI's bid as nonresponsive.

¹ADPI received a copy of the agency's administrative report and filed comments on the report.

The IFB was issued as a total small business set-aside on March 25, 1994. The IFB incorporated the clause at Federal Acquisition Regulation (FAR) § 52.219-6, captioned "Notice of Total Small Business Set-Aside," which provides that in performing the contract, a manufacturer or regular dealer submitting an offer for supplies in its own name agrees to furnish only end items manufactured or produced by small business concerns inside the United States, its territories and possessions, the Commonwealth of Puerto Rico, the Trust Territory of the Pacific Islands, or the District of Columbia. Accordingly, pursuant to the small business concern representation at FAR § 52.219-1, the IFB required a bidder to certify that it was a small business concern and that "all end items to be furnished [would] be manufactured or produced by a small business concern in the United States, its territories or possessions, Puerto Rico, or the Trust Territory of the Pacific Islands." The IFB included two line items and authorized multiple awards to the low-priced, responsive, responsible bidders.

Nine firms, including New Zealand and ADPI, submitted bids by the bid opening time on April 26. New Zealand was the apparent low bidder for both line items. However, in its bid, while it certified that it was a small business concern, it also certified that "not all end items to be furnished [would] be manufactured or produced by a [United States-based] small business concern." In addition, immediately after its small business end item certification, New Zealand made the following notation: "Note: U.S./Canadian Free Trade Act of 1989."

On April 28, the contracting officer rejected New Zealand's bid under this total small business set-aside as nonresponsive since the firm failed to certify in its bid that all end items to be furnished would be manufactured or produced by a United States-based small business concern. By letter dated May 4, New Zealand filed an agency-level protest challenging the contracting officer's rejection of its bid and requesting an opportunity to correct its certification. By letter dated May 13, the contracting officer denied the agency-level protest, explaining that New Zealand's bid was rejected as nonresponsive because, based on its certification, the firm had not obligated itself to furnish end items of a United States-based small business concern. The contracting officer also declined New Zealand's request to correct its certification.

In its protest filed with our Office on May 27, New Zealand, which states that it will furnish end items manufactured by a small business concern in Canada, challenges the contracting officer's rejection of its bid as nonresponsive because of a defective small business end item certification. New Zealand basically contends that by its

reference in its certification to a trade agreement between the United States and Canada, it intended to show that it was seeking a waiver from the requirement under this total small business set-aside for end items from United States-based small business concerns. New Zealand believes that Canadian small business end items should satisfy the terms of the IFB.

A responsive bid is one that, if accepted by the government as submitted, will obligate the contractor to perform the exact thing called for in the solicitation. See FAR § 14.301; Propper Mfg. Co., Inc.; Columbia Diagnostics, Inc., B-233321; B-233321.2, Jan. 23, 1989, 89-1 CPD ¶ 58. The certification concerning a bidder's obligation to furnish products manufactured or produced by a small business concern is a matter of bid responsiveness because it involves a performance commitment by the bidder. Id. Where a bid on a total small business set-aside fails to establish the bidder's legal obligation to furnish end items manufactured or produced by a domestic small business concern, the bid is nonresponsive and must be rejected; otherwise, a small business contractor would be free to provide end items from either small, large, or foreign businesses as its own business interests might dictate, thus defeating the purpose of the set-aside program. See Rocco Indus., Inc., B-227636, July 24, 1987, 87-2 CPD ¶ 87.

Here, since New Zealand failed to certify that all end items to be furnished would be manufactured or produced by a small business concern, the contracting officer properly rejected the firm's bid as nonresponsive because acceptance of its bid would not legally obligate the firm to furnish small business end items. Thus, whatever meaning New Zealand intended to convey by the note made after its small business end item certification has no legal effect. In any case, as indicated by the IFB, the supply of Canadian end products--which New Zealand asserts it intended to supply--would not satisfy its obligation to supply the products of United

²New Zealand argues that the small business end item certification is confusing because it combines a business size requirement and a country of origin requirement. However, its argument, based on an alleged solicitation impropriety apparent prior to bid opening, is untimely since it was not raised prior to bid opening. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1994). Further, to the extent New Zealand believes that the contracting officer somehow orally misinformed the firm concerning completion of the certification, we point out that oral advice from a contracting officer does not bind the government and a bidder relies on such advice at its own risk. Guernilargo Elec. Supply, B-240249, Nov. 2, 1990, 91-1 CPD ¶ 68.

States-based small businesses as required by the IFB. Thus, New Zealand's bid was properly rejected as nonresponsive.

The contracting officer also properly determined not to afford New Zealand an opportunity after bid opening to correct its small business end item certification or explain the meaning of the note in its bid. Since responsiveness is determined from the face of the bid itself at bid opening, to have allowed New Zealand to make its nonresponsive bid responsive after bid opening by correcting the certification would have been tantamount to permitting the firm to submit a new bid. Propper Mfg. Co., Inc.; Columbia Diagnostics, Inc., supra.

Concerning the agency's request for an advance decision on the responsiveness of ADPI's bid, the record shows that once New Zealand's bid is rejected, ADPI is the apparent low bidder for line item No. 0001. In its bid, ADPI certified that it was a small business concern, but that "not all end items to be furnished [would] be manufactured or produced by a [United States-based] small business concern." The contracting officer believed that despite ADPI's small business end item certification, ADPI intended to furnish an end item manufactured or produced by a United States-based small business concern for item No. 0001 because in its Buy American Act certification the bid with regard to line item No. 0001 was silent concerning the country of origin, while it stated for line item No. 0002 (for which its bid was not low) that the country of origin was France.³ As part of the pre-award survey, the contracting officer afforded ADPI an opportunity to correct its certification for line item No. 0001 by recertifying that "all end items to be furnished [would] be manufactured or produced by a [United States-based] small business concern," which ADPI did.

ADPI contends that the contracting officer properly interpreted its bid for line item No. 0001 that it would furnish an end item from a United States-based small business concern. ADPI also believes that the contracting officer properly afforded it an opportunity after bid opening to correct its small business end item certification to reflect its intention.

On the other hand, the agency counsel maintains that for the same reason the contracting officer rejected New Zealand's bid as nonresponsive--because it failed to certify that all end items to be furnished would be manufactured or produced by a United States-based small business concern--ADPI's bid

³The Buy American Act certification requires a bidder to certify that each end item, except those listed, is a domestic end item.

also should be rejected as nonresponsive. Agency counsel asserts that the contracting officer should not have afforded ADPI with an opportunity after bid opening to correct its certification because this allowed the firm to make its nonresponsive bid responsive after bid opening.

We agree with agency counsel that for the same reason the contracting officer properly rejected New Zealand's bid as nonresponsive--the failure of the bidder to clearly obligate itself to furnish small business end items--ADPI's bid also should be rejected as nonresponsive, and that ADPI should not have been permitted to correct its certification after bid opening.

Accordingly, we recommend that the contracting officer reject ADPI's bid as nonresponsive on the basis of its defective certification and deny New Zealand's protest against the rejection of its bid.

/s/ James A. Spangenberg
for Robert P. Murphy
Acting General Counsel