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Comptroller General
of the United States

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Washington, D.C. 20548

Decision

Matter of: ADPI Enterprises, Inc.

File: B-257460.2

Date: November 29, 1994

DECISION

ADPI Enterprises, Inc. protests the rejection of its bid as nonresponsive and the award of a contract to Engineering & Construction Products (ECP) 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 protester argues that the contracting officer improperly rejected its bid and improperly awarded the contract to ECP.

We dismiss the protest.

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, and responsible bidders.

Nine firms, including ADPI, submitted bids by the bid opening time on April 25. ADPI was the apparent low bidder for line item No. 0001.¹ 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 line item No. 0001 because in its Buy American Act certification, which requires a bidder to certify that each end item, except those listed, is a domestic end item, ADPI's bid with regard to line item No. 0001 was silent concerning the country of origin, while its bid for line item No. 0002 (for which ADPI's bid was not low) stated that the country of origin was France. As part of the pre-award survey conducted after bid opening, the contracting officer afforded ADPI an opportunity to clarify 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.

Agency counsel requested an advance decision from our Office concerning the responsiveness of ADPI's bid.² While ADPI maintained 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--and that it was properly afforded an opportunity after bid opening to clarify its small business end item certification to reflect its intention, agency counsel argued otherwise. Specifically, agency counsel maintained that because ADPI 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, ADPI's bid should be rejected as nonresponsive. Agency counsel further asserted that the contracting officer improperly afforded ADPI an opportunity after bid opening to clarify its certification, thus allowing the firm to make its nonresponsive bid responsive after bid opening.

¹ADPI became the apparent low bidder for this line item after the rejection of the bid of New Zealand Fence Systems as nonresponsive for failing to certify that all end items to be furnished would be manufactured or produced by a United States-based small business concern.

²ADPI received a copy of the agency's administrative report and filed comments on the report.

In New Zealand Fence Sys.; Dep't of the Interior--Request for Advance Decision, B-257460, Sept. 12, 1994, 94-2 CPD ¶ ____, we agreed with agency counsel that the failure of ADPI to clearly obligate itself in its bid to furnish small business end items required the rejection of ADPI's bid as nonresponsive, and that the contracting officer should not have afforded ADPI an opportunity after bid opening to clarify its certification. We explained that 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. Propper Mfg. Co., Inc.; Columbia Diagnostics, Inc., B-233321; B-233321.2, Jan. 23, 1989, 89-1 CPD ¶ 58. 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. Since responsiveness is determined from the face of the bid itself at bid opening, a bidder cannot make its nonresponsive bid responsive after bid opening since this would be tantamount to permitting the firm to submit a new bid. Propper Mfg. Co., Inc.; Columbia Diagnostics, Inc., supra.

Accordingly, we recommended that the contracting officer reject ADPI's bid as nonresponsive on the basis of its defective small business end item certification. The contracting officer followed our recommendation. ADPI now protests the rejection of its bid as nonresponsive, reiterating its previous arguments and expressing disagreement with our prior recommendation.

To the extent ADPI requests that our Office reconsider the recommendation which resulted in the rejection of its bid as nonresponsive, its request fails to meet the standard for reconsideration. Under our Bid Protest Regulations, 4 C.F.R. § 21.12(a) (1994), to obtain reconsideration, the requesting party must show that our prior decision may contain either errors of fact or law or present information not previously considered (i.e., information that was not available when the initial protest was filed) that warrants reversal or modification of our decision. Norfolk Dredging Co.--Recon., B-236259.2, Oct. 31, 1989, 89-2 CPD ¶ 405. ADPI's repetition of arguments made during our consideration of the original matter and its mere disagreement with our recommendation that the contracting officer reject its bid

as nonresponsive due to its defective small business end item certification does not meet the standard for reconsideration. R.E. Scherrer, Inc.--Recon., B-231101.3, Sept. 21, 1988, 88-2 CPD ¶ 274.³

Moreover, since the agency properly rejected ADPI's bid as nonresponsive, ADPI is not an interested party for purposes of challenging the award to ECP since, even if ADPI's protest were sustained, it would not be in line for award. ECS Composites, Inc., B-235849.2, Jan. 3, 1990, 90-1 CPD ¶ 7.

The protest is dismissed.



Michael R. Golden
Assistant General Counsel

³To the extent ADPI contends that its bid was rejected only after it acted upon the opportunity afforded it by the contracting officer to clarify its small business end item certification, we note that even based on its initial certification--that "not all end items to be furnished [would] be manufactured or produced by a [United States-based] small business concern"--its bid still would have been properly rejected as nonresponsive.