

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

B-176383

JAN 3 1973

Fried, Frank, Harris, Shriver & Kampelman  
Suite 1000, The Watergate 600  
600 New Hampshire Avenue, N.W.  
Washington, D.C. 20037

Attention: Joel R. Feidelman, Esq.  
Kenneth S. Kramer, Esq.

Gentlemen:

By correspondence dated August 31, 1972, you requested as counsel for Acme Industries, Inc., that our Office recommend that the contract awarded to Keco Industries, Inc. (Keco), for 150 mobile air conditioners under Defense General Supply Center invitation for bids (IFB) DSA400-72-B-6211, either be cancelled or terminated for the convenience of the Government on the basis that Keco's bid was nonresponsive because it qualified the Government's award options.

The focal point of the protest is the second sentence of the letter submitted with Keco's bid, which reads in toto as follows:

"This letter is intended as a part of our bid-response to subject solicitation.

"The bid of Keco Industries, Inc. is for the set-aside portion, or both the set-aside and non-set-aside portions of this procurement.

"1. Set-Aside Portion The bid for this portion is for Keco's plant at

17335 Daimler Street  
Santa Ana, Orange County, California

and the company's Certificate of Eligibility for this facility is attached to this letter.

"2. Set-Aside, Performance/Administration In the event Keco is awarded the set-aside portion only, contract administration as well as performance would be at the Santa Ana, California facility.

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- "3. Set-Aside and Non-Set-Aside Portions Should Keco be awarded both portions of this procurement, the set-aside portion will be performed at Santa Ana, California, the non-set-aside portion will be performed at Cincinnati, Ohio and the entire contract will be administered at Cincinnati."

It is your contention that the foregoing effectively reserved to Keco the option to refuse award for the non-set-aside portion alone, thereby rendering the bid nonresponsive. You urge that irrespective of the fact that the Government cancelled the set-aside portion and awarded the entire 150 units to Keco under the non-set-aside portion in order to realize the significant savings over the contemplated split awards, the initial nonresponsiveness of Keco's bid precluded its acceptance from ripening into a valid contract.

In our determination whether a bid is responsive to the material requirements of the Government's advertised needs, we do not feel constrained to consider all bid statements in a vacuum, but rather, we view the bid as an integrated response to the requirements and format of the particular invitation. In this instance, Keco indicated that it was bidding, in part, on the set-aside portion. However, within the confines of a procurement containing a labor surplus set-aside, it is not possible to bid on the set-aside portion per se. A bidder achieves eligibility for negotiation of the set-aside portion by virtue of having submitted, at a minimum, a responsive bid on the non-set-aside portion. See invitation paragraph C-35, quoting from Armed Services Procurement Regulation (ASPR) 1-804.2(b)(1). Since Keco submitted prices in the bid schedule as called for, as well as the necessary ancillary information for consideration of the bid on the basis required by the IFB, i.e., on the non-set-aside, it is only reasonable to conclude that Keco submitted its bid on the non-set-aside portion in accordance with the requirements of the invitation. Any other result ignores the reality of the situation by urging the anomalous conclusion that Keco bid on every possible award alternative, except that necessary for consideration of its bid.

Moreover, in view of the fact that Keco represented itself as a small business concern and submitted a certificate of eligibility entitling it to first priority in the negotiation of the set-aside portion, we view the whole letter as anticipatory of the consequences flowing from its priority status. In this vein, the "bid for the set-aside" recognizes the possibility of award on that basis even if it were not low on the non-set-aside portion. If it were low on the non-set-aside portion, Keco realized that it would automatically be first in line for negotiation of

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the set-aside portion. We believe it significant that Keco did not specifically preclude award on the non-set-aside portion only, while at the same time providing a shipping point for the non-set-aside in the Production Facilities and Transportation Sheet without qualifications.

In essence, you argue that the exclusion of a statement in the letter that Keco was bidding on the non-set-aside alone, prompts the conclusion that it was excluding award on that basis. However, we believe that in the context of the bid as a whole, it is unreasonable to view the transmittal letter in any other light than that it was predicated on the assumption that Keco bid on that non-set-aside basis as required by bid documents themselves, and that the letter was written as a supplement thereto to provide information emphasis as to its eligibility for award.

Concerning your contention that the invitation is defective in that it is impossible for any bidder to manufacture a unit weighing less than 4,500 pounds as required, section 20.2(a) of the Interim Bid Protest Procedures and Standards of our Office published in Title 4, Code of Federal Regulations, requires that a protest based on alleged improprieties in an IFB which are apparent prior to bid opening be filed prior to bid opening. Since Acme failed to protest the alleged impropriety in the invitation prior to bid opening, this aspect of the protest is untimely and will not be considered here. See B-175698, August 7, 1972.

Accordingly, your protest is denied.

Very truly yours,

R.F.KELLER

[Deputy] Comptroller General  
of the United States