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DECISION



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

FILE: B-189798

DATE: December 9, 1977

MATTER OF: Julian A. McDermott Corporation

DIGEST:

1. In order for question concerning small business size status of bidder to be timely, it must be filed with and delivered to contracting officer prior to close of business on fifth day after bid opening. Small business size status is not for review by GAO, since conclusive authority to determine size status is vested by statute in SBA.
2. Contracting officer's determination that company's experience and performance history under different corporate name justified waiver of first article testing will not be disturbed in absence of clear showing of arbitrary and capricious action.

Julian A. McDermott Corporation (McDermott) protests the award to Altek Systems, Inc. (Altek), under Marine Corps Logistics Support Base, Atlantic, Albany, Georgia (Corps), invitation for bids (IFB) No. M67004-77-B-0079 for 455 hand-held spotlights. The basis for McDermott's protest is two-fold: (1) Altek is not a small business and (2) waiver of first article testing concerning Altek was improper.

The IFB, a 100-percent small business set-aside, was issued on April 30, 1977, and required bids to be submitted on June 7, 1977. It contained a section (B-5) that required first article testing and provided:

"For items from suppliers which are identical or similar to items previously furnished to the Government. which were acceptable in all respects, First Article may * * * be waived by the Government."

In addition, the IFB, after modification (No. 0001; May 6, 1977), required two sets of prices be submitted--the first to include and the second to exclude first article testing.

The bids were opened as scheduled. It was determined, after deducting the prompt payment discounts for evaluation purposes, that with first article testing McDermott was low bidder and that if there was a waiver Altek was low bidder. Subsequently, preaward surveys were requested and conducted on both companies. The results of both surveys were favorable and confirmed what both companies had represented in their bids; both manufactured the items set forth in the IFB (McDermott under contract to the Marine Corps Supply Activity, Philadelphia, and Altek (under the name of Anixter Wiring Systems Division, Anixter Bros., Inc.) as a subcontractor of F.M.C.). Accordingly, the Corps waived first article testing and on July 6, 1977, award was made to Altek.

McDermott contends that the award was based on the past performance of a "large and independent business," Anixter Wiring Systems Division, Anixter Bros., Inc., disqualified by size from bidding on the IFB, not on Altek, the new corporation. McDermott questions Altek's alleged complete independence from Anixter Bros., Inc., since a portion of Altek's long-term debt is held by Anixter Bros., Inc., and argues that, if there is this independence, the production record of Anixter Bros., Inc., should not have been used as a basis for waiving first article testing for Altek.


Regarding McDermott's allegation that Altek is not a small business, under Armed Services Procurement Regulation (ASPR) § 1-703(b) (1976 ed.), the contracting officer has authority to accept a small business size self-certification, unless he receives a timely protest or questions the bidder's status himself. Evergreen Funeral Home, B-184149, November 6, 1975, 75-2 CPD 282. In order to be timely and apply to a protested procurement, a size protest must be filed with and delivered to the contracting officer prior to the close of business on the fifth day after bid opening. ASPR § 1-703(b)(1) (1976 ed.). McDermott's protest concerning the size status of Altek filed with our Office on August 4, 1977, almost 2 months after the bid opening, does not comply with the requirements of ASPR. In addition, our Office does not review a bidder's small business status, since the Small Business Administration has been granted conclusive authority under 15 U.S.C. § 637(b)(6) (1970) to determine the size status of small business concerns for procurement purposes. Joe Silva, B-188149, January 25, 1977, 77-1 CPD 56. Therefore, that portion of McDermott's protest concerning the size of Altek is dismissed.

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With respect to the second issue of McDermott's protest, improper waiver of first article testing, the IFB permitted waiver under certain circumstances. See section B-5, supra. Altek's predecessor was Anixter Wiring Systems, Inc. On June 1, 1977, a management group, consisting of employees of Anixter Wiring involved in its management, acquired Anixter Wiring in total, including building, test equipment gauges, production tooling and procedures, from Anixter Bros., Inc. The group continued to manage Altek and all employees previously employed with Anixter Wiring remained with Altek. Additionally, the contracts and orders in effect on June 1 were transferred to Altek pursuant to novation agreements.

These facts were reviewed during the preaward survey which provided favorable findings in the areas of production, quality assurance and financial capability. The survey included the experience and performance history of Anixter Wiring since the only apparent change that resulted from Altek's purchase was a change in ownership and name. The quality assurance survey personnel recommended waiver of first article testing for both Altek and McDermott. Based on the foregoing, the contracting officer decided to waive first article testing which resulted in the award to Altek as the low responsive, responsible bidder.

A contracting officer's determination that a company's quality history under different corporate names than the name used in a bid under consideration for award justifies a waiver of first article testing will not be disturbed in the absence of a clear showing of arbitrary or capricious action. Kan-Du Tool & Instrument Corporation, B-183730, February 23, 1976, 76-1 CPD 121. McDermott has not shown that there is any substantive difference in either products manufactured, production and quality control processes, management or plant location between Anixter Wiring and Altek. Accordingly, we are unable to conclude that the contracting officer acted arbitrarily in waiving the first article testing requirement for Altek based on the experience and performance history of Anixter Wiring. See generally, 53 Comp. Gen. 249, 251 (1973), dealing with qualified products; and Dero Industries, Inc., B-179730, April 3, 1974, 74-1 CPD 166, wherein we upheld a contracting officer's refusal to waive first article testing for a bidder based in part on the poor performance record of a company whose assets were taken over by that bidder. Therefore, the protest on the second issue is denied.


Deputy Comptroller General
of the United States